

THE PROTECTION OF THE RIGHT TO REFUSE UNSAFE WORK:
HUMAN RIGHTS AND THE FAILURE OF
GLOBAL WORKER HEALTH AND SAFETY POLICY

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This dissertation is an in-depth case study of the right to refuse unsafe work under global labor and human rights standards. Using historical and legal research methods, it documents a false consensus surrounding the protection of the right to refuse unsafe work under ILO Convention No. 155, a key international labor convention on occupational safety and health. After introducing the topic, outlining a conceptual framework for the study of human rights in labor and employment relations, and placing the emergence of the right to refuse unsafe work as a global human rights issue in historical context, the study examines the jurisprudence and effectiveness of the dominant refusal rights model as advanced in current global worker health and safety policy. It chronicles how the political efforts of governments and employers counter-mobilized against stronger anti-discrimination protections for workers protesting their working conditions and how employer political activity resulted in the adoption and global diffusion of a restricted and inherently ineffective right to refuse labor protection. The dissertation presents implications for the international jurisprudence on workers' freedom of association, the labor activist debates about workers' rights as human rights, and the scholarly narrative regarding the rise of an individual employment rights era in contemporary labor and employment relations.

Biographical Sketch

Jeffrey Hilgert grew up in Renville County, Minnesota. After high school, he attended the University of Minnesota Duluth and graduated in 1996 with *magna cum laude* honors and a Bachelor of Arts in Political Science. He attended graduate school at the University of Massachusetts Amherst Labor Relations and Research Center and received a Master of Science in Labor Studies in 1999. He returned to Minnesota and worked for five years with a number of anti-poverty and workers' rights organizations, including the Damiano Center, the Workers' Rights Network of Northeast Minnesota, and Local 1116 of the United Food and Commercial Workers. Hilgert was awarded a fellowship for community leadership to continue his education by the Archibald Bush Foundation of St. Paul, Minnesota. In 2005, he started doctoral studies at the School of Industrial and Labor Relations at Cornell University. He received a Canada U.S. Fulbright Fellowship for 2009-2010 and did dissertation research as a visiting graduate research scholar at McGill University in Montréal. He joined the faculty of the École de relations industrielles at the Université de Montréal in 2011 as an assistant professor of santé et sécurité de travail. He is married to Gioconda Lopez Ayestas of Matagalpa, Nicaragua and they are the parents of two children, Arthur and Elena.

I dedicate this dissertation to Gioconda, Arthur and Elena.

Without your support and understanding this would not have been possible.

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CHAPTER I

INTRODUCTION

The right to refuse unsafe work as a labor and employment relations problem

1.1. Studying conflict in the working environment

This is a study of social conflict in the working environment. Workers who consider refusing work they deem unsafe often find themselves engrossed in conflict. This type of conflict pits not just employee against supervisor. All work refusals are clashes between the taken-for-granted liberal market contours of modern day labor and employment relations versus society's desire for the protection of safety and health in the working environment. This dissertation is a study of this social conflict. It focuses on how contemporary society has decided to resolve these social conflicts through the setting of international labor standards to protect basic workplace health and safety.

This is an in-depth case study of the protection of the right of workers to refuse unsafe work under international labor and human rights standards. Workplace safety and health is not simply a basic labor policy question. It is a question of fundamental human rights. Analyzing social conflict in the working environment and its resolution is a critical case study in mapping the boundaries of a workers' human right to a safe and healthy workplace. This study examines the degree to which refusals to work are protected and examines the jurisprudence protecting refusal rights through the lens of a fundamental human rights worldview. As a result of this analysis, it by consequence examines how the protection of the right to refuse unsafe work conflicts with *laissez-faire* employment relations policies that provide for limited dismissal protections vis-à-vis robust termination rights for employers. Moreover, as human rights principles are said to require the *effective* protection of rights, the long running debate in labor

and employment relations regarding individual versus collective rights is relevant to this study. This in-depth case study therefore affords an opportunity to build-out and elaborate what it means to pursue a human rights institutional analysis on a topic that is both a human rights concern and a traditional industrial and labor relations concern.

In this chapter, I introduce the right to refuse unsafe work as a contemporary form of social conflict, as a labor policy concern, and as a human rights question in labor and employment relations. This first chapter, therefore, provides background of a general nature on the subject. Readers interested in a summary of the conclusions and findings of this case study of the right to refuse as a human right are encouraged to turn directly to the conclusion. This chapter ends by describing the dissertation plan, giving a brief overview of the primary goals and objectives of each chapter to follow.

Both safety and health in the working environment have continued to be major social and environmental concerns. The sheer scope of the underlying problem alone makes the working environment a critical issue. The ILO estimates about 2.2 million workers are killed by work-related injuries and illnesses annually¹ and this figure has been rising.² Worldwide, 270 million non-fatal work-related accidents occur annually, in addition to about 160 million new cases of work-related diseases each year.³ The human toll at work exacts costs on society estimated in some regions to be between 2 to 11 percent of gross domestic product, stark figures that if halved would in some countries eliminate all foreign debt.⁴ Work illnesses and injuries are leading causes of

¹ Takala, Jukka. (2005). *Decent Work - Safe Work: Introductory report to the XVIIth World Congress on Safety and Health at Work*. Geneva: International Labour Office. Page 5.

² International Labour Office. (2008). *My Life, My Work, My Safe Work: Managing Risk in the Work Environment*. International Labor Organization and the International Social Security Association. Geneva. Page 4.

³ Ibid.

⁴ Pan American Health Organization. (1999). *Workers' Health in the Region of the Americas*.

adult morbidity in many countries worldwide.⁵ Working conditions remain a widespread social concern after a generation of rapid economic globalization. The once “old” occupational health problems such as cotton dust and brown lung, known for decades, have resurfaced in unregulated geographies. Around the world, workers are being “forced to replay history, despite the availability of information and knowledge transfer unthinkable just a generation ago.”⁶ Economic globalization emerged at the same time as what amounted to an explosion of new synthetic organic chemicals and their global trade. Whereas hazards such as asbestos, lead, and white phosphorus were once the cause for alarm outside safety hazards, now 1,000+ new synthetic chemicals—two to three per day—are introduced into the global marketplace every year, bringing the number of synthetic chemicals in use throughout the economy to over 100,000 and growing. The absence of adequate social regulation and dispute resolution system to ensure social justice results in this ongoing social conflict.

In the United States, the official line is that fatal work injuries declined by six percent between 2006 and 2007 to 5,488, the lowest number since on-the-job mortality record-keeping began.⁷ This decline was attributed to creative regulatory strategies.

This is continued evidence that the initiatives and programs to protect workers’ safety and health, designed by and implemented in this administration, are indeed working. In addition to a decline in the overall number of fatalities, the rate for 2007 declined to 3.7 fatalities per 100,000 workers. This is the lowest

Washington D.C.: Pan American Health Organization. Page 244. See also Giuffrida, Antonio, Roberto F. Iunes, & William D. Savedoff. (2002). Occupational risks in Latin America and the Caribbean: economic and health dimensions. *Health Policy and Planning*, 17(3), 235-246.

⁵ Giuffrida, Antonio, Roberto F. Iunes, & William D. Savedoff. (2001). *Economic and Health Effects of Occupational Hazards in Latin America and the Caribbean*. Washington, D.C.: Inter-American Development Bank.

⁶ Rosenstock, Lisa, Mark Cullen, & Marilyn Fingerhut. (2006). Occupational Health. In Dean T. Jamison, Joel G. Breman, Anthony R. Measham, George Alleyne, Mariam Claeson, David B. Evans, Prabhat Jha, Anne Mills & Philip Musgrove (Eds.), *Disease Control Priorities in Developing Countries* (2nd ed., pp. 1127-1145). New York: Oxford University Press. Page 1128.

⁷ Bureau of Labor Statistics. (2008). *National Census of Fatal Occupational Injuries in 2007*. Washington, D.C.: U.S. Department of Labor.

fatality rate in recorded OSHA history”⁸.

Non-fatal illnesses and injuries are also reported as declining. Employer-maintained injury and illness logs have reported a decline of illnesses and injuries of 35.8 percent from 1992 to 2003.⁹ This was also reported as being the result of regulatory success.

Workplace injury and illness rates declined in 1999 for the seventh straight year—nearly a 30 percent drop since 1992. This steady trend downward shows that employers and workers are making occupational safety and health a high priority. That’s good news for business, workers, and all Americans. Injuries and illnesses dropped 4 percent in 1999 even though employment rose 2 percent. That means 200,000 more workers went home to their families without a job related injury or illness than in 1998.¹⁰

These figures are incorrect and misleading as notably these statistics ignore fatalities from work-related diseases. Academic studies, public health reports, media exposés, and human rights groups have reported the inaccuracy of the injury and illness data.¹¹

The count of non-fatal injuries and illnesses is said to miss up to 61 percent of illnesses and injuries.¹² Federal surveys as of early 2010 do not include various broad categories of workers and occupational diseases. Those excluded are work-related

⁸ Occupational Safety and Health Administration. (2008). *U.S. Labor Secretary Elaine L. Chao applauds Census of Fatal Occupational Injuries report showing decline in worker fatalities*. Press release 08/20/2008. Washington, D.C.: Occupational Safety and Health Administration.

⁹ Friedman, Lee S., & Linda Forst. (2007). The impact of OSHA recordkeeping regulation changes on occupational injury and illness trends in the US: A time-series analysis. *British Medical Journal*, 64(7), 454-460.

¹⁰ Ibid.

¹¹ Examples include Committee on Education and Labor of the U.S. House of Representatives. (2008). *Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses*. Washington, D.C.: Committee on Education and Labor. Human Rights Watch. (2004). *Blood, Sweat, and Fear: Workers' rights in U.S. meat and poultry plants*. New York: Human Rights Watch. Leigh, J. Paul, James P. Marcin, & Ted R. Miller. (2004). An Estimate of the United States Government's Undercount of Nonfatal Occupational Injuries. *Journal of Occupational and Environmental Medicine*, 46(1), 10-18. Moyers, Bill & Bill Moyers (Director). (2008). Worker Safety [Video], *Bill Moyers Journal, Expose: America's Investigative Reports*: PBS.

¹² Rosenman, Kenneth D., Alice Kalush, Mary Jo Reilly, Joseph C. Gardiner, Mathew Reeves, & Zhewui Luo. (2006). How Much Work-Related Injury and Illness is Missed By the Current National Surveillance System? *Journal of Occupational and Environmental Medicine*, 48(4), 357-365.

illnesses with long latency periods and illnesses and injuries suffered by out-of-scope workers such as public employees, the self-employed and independent contractors. Some injuries and illnesses are simply not counted in the statistics even if work-related.¹³ Friedman and Forst studied changes in record-keeping regulations that employers must maintain on workers' illnesses and injuries.¹⁴ They looked at the 1995 and the 2001 record-keeping changes and found that 83 percent of the reported decline in illness and injury between 1992 and 2003 was due to the changes in record-keeping requirements. The U.S. government has loosened employer record-keeping requirements while making claims of major regulatory progress. Some estimates indicate non-fatal work-related illness and injury may be as high as 12.3 million workers each year.¹⁵ Despite the human toll, this represents a cost estimated annually at around \$170 billion, a figure "five times the cost of HIV/AIDS and three times the cost of Alzheimer's disease."¹⁶ The breadth of the problem has been documented, including in the report entitled *Hidden Tragedy* made to the House labor committee.¹⁷

The ratio of Occupational Safety and Health Administration inspectors to each worker is a fraction called for under basic international labor standards. There is one

¹³ Ruser, John W. (2008). Examining evidence on whether BLS undercounts workplace injuries and illnesses. *Monthly Labor Review*, 131(8), 20-32. Page 20.

¹⁴ Friedman, Lee S., & Linda Forst. (2007). The impact of OSHA recordkeeping regulation changes on occupational injury and illness trends in the US: A time-series analysis. *British Medical Journal*, 64(7), 454-460.

¹⁵ American Federation of Labor-Congress of Industrial Organizations. (2008). *Death On The Job: The toll of neglect, a national and state-by-state profile of health and safety in the United States* (17th ed.). Washington, D.C. : AFL-CIO.

¹⁶ Leigh, J. Paul, James P. Marcin, & Ted R. Miller. (2004). An Estimate of the United States Government's Undercount of Nonfatal Occupational Injuries. *Journal of Occupational and Environmental Medicine*, 46(1), 10-18. Rosenman, Kenneth D. (2008). Testimony to the Full Committee Hearing "Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses". *Committee on Education and Labor of the U.S. House of Representatives, June 19*.

¹⁷ Committee on Education and Labor of the U.S. House of Representatives. (2008). *Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses*. Washington, D.C.: Committee on Education and Labor.

health and safety inspector for every 63,913 workers in the U.S. The global standard calls for one inspector for every 10,000 workers in the industrialized economies.¹⁸ At OSHA's current rate, an inspection of each workplace will occur from once every 24 years in Oregon to every 228 years in Florida.¹⁹ OSHA can be refused entry into a workplace without a court order.²⁰ Workplace safety and health standards-setting has been bottlenecked by a business-dominated OSHA lawyers' bar serving management interests by protecting the due process rights of corporations.²¹ When OSHA acts via inspections and citations, an elaborate appeals process routinely lowers these fines and consolidates citations. The top twenty-five OSHA fines of all time have been reduced on average 57 percent through appeals.²² OSHA mandates no worker participation in health and safety decision-making. This potent mix of labor policies results in what Jordan Barab has called "the invisibility of workplace death" in the United States.²³

The magnitude of death from work-related causes in the U.S. is estimated to be as high as 49,000 deaths annually from occupational disease alone.²⁴ With the official traumatic death figures, workplace deaths annually rise to 55,200. Others have argued this estimate is conservative.²⁵ Inaccuracies in the official traumatic fatality figure are

¹⁸ International Labour Office. (2006b). General Survey of Labour Inspection. International Labour Conference, 95th Session, Report III, Part 1B. Page 66 note 19.

¹⁹ American Federation of Labor-Congress of Industrial Organizations. (2008). *Death On The Job: The toll of neglect, a national and state-by-state profile of health and safety in the United States* (17th ed.). Washington, D.C. : AFL-CIO.

²⁰ Lofgren, Don J. (1989). *Dangerous Premises: A insider's view of OSHA enforcement*. Ithaca: ILR Press.

²¹ Schmidt, Patrick. (2005). *Lawyers and Regulation: The Politics of the Administrative Process*. Cambridge: Cambridge University Press. Page 31.

²² Lewis, Robert, & Krista Kjellman. (2008). Top OSHA Issued Penalties, *ProPublica*. September 17th. Retrieved from <http://www.propublica.org/special/osha-fines>

²³ Barab, Jordan. (2006). Acts of God, Acts of Man: The Invisibility of Workplace Death. In Vernon Mogensen (Ed.), *Worker safety under siege : labor, capital, and the politics of workplace safety in a deregulated world*. Armonk, N.Y.: M.E. Sharpe.

²⁴ Steenland, Kyle, Carol Burnett, Nina Lalich, Elizabeth Ward, & Joseph Hurrell. (2003). Dying for Work: The magnitude of US mortality from selected causes of death associated with occupation. *American Journal of Industrial Medicine*, 43(5), 461-482.

²⁵ Schulte, Paul. (2005). Characterizing the Burden of Occupational Injury and Disease.

also suspected.²⁶ The combined workplace death toll may be over 60,000 annually, a remarkable figure that rivals the 58,195 names on the Vietnam Veterans Memorial in Washington, D.C. (although those deaths span twenty years). Work in the U.S. is the eighth leading cause of death. Workers are more likely to die from work than from being killed in a motor vehicle accident²⁷ or killed by another person's firearm.²⁸ These figures add to the global estimate of over 2 million deaths annually, making social conflict about the working environment a central characteristic of globalization.

1.2. The right to refuse unsafe work

How workers are empowered (or not empowered) to protect health and safety is a central concern in workplace environmental conflict. Labor union advocates have believed for generations that health and safety can be protected only when workers are empowered. "The question becomes one of power," noted Tony Mazzocchi, the renowned worker health and safety activist, remarking on the need for labor rights.

You cannot solve occupational safety and health problems while those who produce are given the responsibility to regulate themselves. That system does not work, and we ought to examine a new option. We ought to separate our responsibilities. . . . Those workers who are the potential victims ought to regulate. . . . It should be the worker who carries out the mandate of the law, the right to inspect, the right to cite, the right to bring about change based on what is known, the right to be notified, the right to know. When we think about the subject in terms of empowerment, we will truly make a difference.²⁹

Journal of Occupational and Environmental Medicine, 47(6), 607-622. Page 608.

²⁶ Staff reporter. (2008). OSHA Fiddles While Workers Die. *Hazards Magazine*, August 30 (No. 371).

²⁷ Steenland, Kyle, Carol Burnett, Nina Lalich, Elizabeth Ward, & Joseph Hurrell. (2003). Dying for Work: The magnitude of US mortality from selected causes of death associated with occupation. *American Journal of Industrial Medicine*, 43(5), 461-482.

²⁸ Bureau of Justics Statistics. (2004). Firearm deaths by intent, 1991-2001. *Key Facts at a Glance* Retrieved September 15 2008, from <http://www.ojp.usdoj.gov/bjs/glance/tables/frmdth.htm>

²⁹ Mazzocchi, Anthony. (1989). The Workers' Place in Enforcing OSHA. [Article]. *Annals of the New York Academy of Sciences*, 572, 155-156.

Empowerment is a critical element in the labor policy on workers' health and safety. A survey conducted in 2006 by a group of U.S. business lawyers found workplace health and safety to be the number one reason workers elect to form a union and seek collective bargaining protections, ranking it higher than either benefits or wages.³⁰

The right to refuse unsafe work is the most empowering way that workers can protect and represent themselves on the question of health and safety in the working environment. How labor rights policies respond to work refusals defines not only the degree of workers' rights protections, it defines the termination and dismissal rights of employers. Common law countries generally have granted a very robust authority to employers to terminate the employment relationship. Societies at times have limited employer termination rights on important issues of social concern such as racial, gender, or ethnic discrimination. Whereas these moral imperatives trump employer termination rights, the right to refuse unsafe work, where protected, forms a similar moral imperative when considering that workplace health and safety is a fundamental human right. Labor rights policy is the vehicle whereby such a moral imperative is recognized and respected within society. Where society has elected to draw the line between employer termination rights and the protection of the right to refuse is ultimately a moral question about how society has decided to resolve these workplace conflicts. These questions as moral questions have only increased in importance with the rise in the quantity and complexity of workplace hazards around the world. The idea that health and safety at the workplace is a human right is a critical part of this moral debate. Human rights theory argues that rights are to be made effective. It also argues that human rights are the first responsibility of governments. Overall, human

³⁰ Daily Labor Report. (2005). Workplace Safety Is Key Issue In Union Organizing, Poll Finds, *Daily Labor Report*, pp. A-3. Wednesday, October 26, 2005.

rights theory affords a particular critique of policies protecting human rights concerns.

The right to refuse unsafe work is a ubiquitous question in industrial relations. Market-based societies give to employers alone the power to terminate workers from the employment relationship. They do not give similar powers to workers to terminate their employers from the employment relationship. Industrial relations, the system of labor policy and workers' representation, defines the right to refuse in the face of this unequal relationship. The question is a central one in labor and employment relations.

Because of the direct conflict with the liberal market employment relationship, the right to refuse can be a very difficult right to exercise and enjoy. The modern day structure of employment relations makes the right to refuse simultaneously a case of employee disloyalty and insubordination. Globally-competitive workplaces add to the tension, as does the general increase in employment precarity found worldwide. Work refusal cases do, therefore, unfold in environments of highly-charged social conflict.

Duane Carlson was a cement pump truck operator employed by Arrowhead Concrete Works, a major concrete supplier in northeast Minnesota. When his safety concerns about the truck he was driving were verified by a mechanic and the company safety director, he refused to drive the truck until repairs were made. Court documents filed in his wrongful dismissal lawsuit attest to the kind of pressure workers can face when they decide to refuse unsafe work. The owner of the company instructed him to "keep your mouth shut and do what you are told" because "you don't get to dictate demands to me. I tell you what to do or you get the hell out of here." When his work refusal continued despite the threats from management, the employer's commands escalated into full-throttled verbal assault. "Listen you little cocksucker," the owner screamed at him, "get in that truck right fucking now and get it ready. I am sick of your whining. Some fuckers are going down the road and getting laid off. You're

going to be the first one you son of a bitch.” The sheer verbal violence endured in this refusal is not an uncommon occurrence where a worker elects to refuse unsafe work.³¹

Another characteristic of the right to refuse is that it has been stigmatized as a concern of only the most high-profile dangerous occupations. It is not considered on the radar screen in new or emerging occupations or industries. As workplace hazards grow in both quantity and complexity, however, the right to refuse has become just as relevant to registered nurses and biotech lab workers as it is coal miners and seafarers. The right to refuse is not the exclusive domain of the traditionally dangerous jobs. It is a right claimed by healthcare workers, reporters, truck drivers, high school teachers, prison guards, agriculture workers, retail clerks, and front line social workers. Recent legislation from the Canadian province of Ontario extending worker protections of the right to refuse in situations of workplace harassment and violence is a case in point as these hazards rank high in importance for many front-line human service employees.³²

Illustrating how common, everyday safety hazards can also be the subject of work refusals is Randy Dishman, a licensed optician who managed the vision center at a Wal-Mart store in Cooksville, Tennessee. Dishmon was terminated after refusing to remain silent about Wal-Mart’s company policy that allowed unlicensed employees to dispense optical products without a licensed optician present, an illegal act under Tennessee law. Dishman considered refusing work, but feared losing his job. He telephoned the Tennessee Board of Dispensing Opticians to report the illegal policy. A state court allowed his wrongful dismissal suit in part under state common law.³³

³¹ *Duane Carlson, Plaintiff, v. Arrowhead Concrete Works, Inc., Defendant*, 375 F. Supp. 2d 835, D. Minn.2005.

³² Legislative Assembly of Ontario. (2009). Bill 168, Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), S.O. 2009 C.23

³³ Daily Labor Report. (2009). Optician Was Fired After Reporting Unlicensed Sales May Proceed, Court Says., *Daily Labor Report*, pp. A-3. 36, February 26.

All variety of workers may face the prospect of having to refuse unsafe work. Richard Gizbert was an ABC News correspondent based in London at the start of the U.S.-led Iraq War in 2003. Despite the media organization's "voluntary war zone policy" Gizbert was fired after turning down three war zone assignments, including two in Iraq. Despite seeking £1.5 million for lost compensation, the Central London Employment Tribunal awarded Gizbert £98,781 in compensation after finding that his dismissal was unfair and based on his refusal to go to Iraq. ABC News successfully appealed the decision, reducing the fine and establishing jurisprudence under U.K. health and safety law that no refusal right existed. "His place of work was London," said the appeals tribunal, "He chose not to visit the war zones. He was thus in no danger, let alone imminent danger, nor could he, in the circumstances, reasonably believe otherwise." Gizbert is now employed by the al-Jazeera news network.³⁴

Another case illustrates how refusal rights cannot be limited to only the traditionally dangerous occupations. Deborah Scott protested her work assignment to a dialysis unit of the Miller-Dwan Medical Center in Duluth, Minnesota. She had been working with the chemical sterilant Renalin as a dialysis assistant. Told by the sales representatives of the company producing the chemical that it was so safe "you could practically drink it," she learned from an employee at another facility that exposure to the chemical should be avoided by pregnant women. Scott was six months pregnant and experiencing pre-term labor. According to state court documents in her retaliation case, three other dialysis technicians also reported problems with their pregnancies while working with Renalin. After her obstetrician ordered her to avoid exposure, she refused to return. Miller-Dwan placed her on an unpaid leave.³⁵

³⁴ Holmwood, Leigh. (2006). ABC wins Gizbert appeal, *The Guardian*. Monday 21 August.

³⁵ *Maglich v. Miller-Dwan Medical Center*, Minnesota Department of Labor and Industry, State of Minnesota Office of Administrative Hearings 1-1901-11970-2. 1999.

The right to refuse unsafe work as a protection of the working environment is also a protection of the general environment. The right to refuse is thus a question of workers' ecology that connects to questions of environmental destruction and human survival. As global and domestic human rights jurisprudence develops in response to environmental decline, human displacement and ecologic collapse, the protection of the right to refuse unsafe work is a critical topic to any "greening" of labor rights.

Testifying before a House committee investigating the BP oil rig explosion in the Gulf of Mexico, Lamar McKay, chairman and president of BP America argued that any of his employees "anywhere at any level" has the ability "and, in fact, the responsibility to raise their hand and try to get the operations stopped..." Transocean president and CEO Steve Newman reiterated his claim, arguing all its employees had "stop work authority" to call "a time out for safety."³⁶ Despite this authority however, about ten hours before the fateful explosion, an argument unfolded among the workers about safety. "The company man was basically saying, 'well, this is how it's going to be'" one mechanic on the rig, Douglas Brown, told a federal investigatory panel.³⁷

The right to refuse unsafe work has not only been at the epicenter of major environmental catastrophes like the BP disaster and Union Carbide disaster in Bhopal, India, it has also been an issue in smaller-scale environmental concerns, from guarding urban water treatment facilities to ensuring the proper disposal of industrial wastes. In the individual employment rights era that has swept across many of the developed market economies over the last generation, individual protections of the right to refuse have been established based on particular hazards or particular industries of concern.

³⁶ Censky, Annalyn. (2010). Gulf Rig Workers Could Have Called 'Time-Out', *CNNMoney.com*. May 27.

³⁷ Urbina, Ian. (2010). In Gulf, It Was Unclear Who Was In Charge of Rig, *New York Times*. June 5.

Refusal rights extend beyond traditional environmental hazards to all variety of emerging safety concerns where people work. Governor Kathleen Blanco called in hundreds of National Guard troops “fresh back from Iraq” and granted them shoot to kill authority to “restore order” to New Orleans in the wake of Hurricane Katrina³⁸ as tensions rose and people came to realize the magnitude of the disaster which displaced 300,000 residents and caused damages in excess of \$100 billion.³⁹ A crew of private security guards relocated from Texas reported for duty at a 51-story office building in downtown New Orleans. The crew was ordered to take SWAT-style measures and clear the building of vandals said to be taking advantage of the electrical blackout. The guards refused to work without bulletproof vests and ballistics training, and were terminated on-the-spot for insubordination. Their wrongful discharge case was investigated by occupational health and safety authorities and was quickly dismissed.⁴⁰

Even emerging medical issues have become the subject of work refusals for workers in the public service. Day campers from the Autism Society of Nova Scotia, Canada encountered a transportation problem when Izaak Croft, an 8-year-old boy and member of the group had an episode of “sensory overload” and began screaming uncontrollably on the city bus. After a few stops the bus driver refused to continue for fear of safely being able to handle the large vehicle on the busy streets of Halifax.⁴¹

³⁸ ABC News Online. (2005). Troops told “shoot to kill” in New Orleans. September 2, 2005 accessed October 10, 2009, from <http://www.abc.net.au/news/newsitems/200509/s1451906.htm> . Blanco said “They have landed in New Orleans. These troops are fresh back from Iraq, well trained, experienced, battle-tested and under my orders to restore order in the streets. They have M-16s and they are locked and loaded. These troops know how to shoot and kill and they are more than willing to do so if necessary and I expect they will.”

³⁹ United States Congress. (2006). A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina. Washington, DC: Government Printing Office.

⁴⁰ Occupational Health and Safety Administration, Region 6 (Dallas). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed May 15, 2007. On file with author as Case No. 281.

⁴¹ Moore, Oliver. (2009). Autistic Boy Kicked Off Bus, Father Says, *The Globe and Mail*.

Whether it is prison guards refusing work due to inadequate equipment, nurses refusing to work with unsafe staffing levels, nuclear workers concerned about toxic releases of radiation due to production speed-up, or an inventory accountant reporting the financial irregularities of his company, similarities exist across all work refusals. When workers face a hazard, they face a decision. The decision is often high-stakes. It may be so high-stakes at the personal level that there appears to be no decision at all. Continue working. Be quiet. Keep your head down. Don't get fired. Loss of income. Unemployment. Ruin. The decision may be high-stakes to the community or a city, or even an important issue that may affect an entire nation and a society.

The right to refuse is a critical labor policy concern and an international labor and human rights issue. It is deserving of much more attention than it has received to date. The moral imperative that underlies our labor policy decisions, and the number and complexity of hazards in an unending globally competitive economy requires a reexamination of how society protects health and safety in the working environment. From labor inspectorates to collective bargaining to works councils and to individual employment rights, each of these avenues has varying degrees of efficacy; each serves the interests of workers, employers and society in differing and conflicting ways. To understand the social conflict surrounding the right to refuse means recognizing those excluded voices and recognizing that workers have little freedom, voice, participation, or liberty to confront the hazards they perceive throughout the working environment.

August 28.

1.3. Human rights in labor and employment relations

The notion that workers' rights are human rights has emerged as an important question facing labor relations scholars and activists in the last decade. International labor and human rights standards include the right to refuse unsafe work. Although worker health and safety is defined in international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights, the right to refuse is mentioned specifically only by international labor standards. Refusal rights are found in the ILO's primary convention on workplace health and safety, Convention No. 155 concerning occupational health and safety and the working environment. The right to refuse unsafe work is therefore not only an important question in defining workers' rights in industrial relations; it is also a part of international human rights standards.⁴²

Because the right to refuse is an important issue in industrial relations and is an important international labor and human rights issue, studying refusal rights protection is an opportunity for labor scholarship to explore how human rights ideas can be made into a deeper set of theoretical organizing principles around which to study labor rights problems. This dissertation makes a conceptual contribution in this regard. Because labor and employment rights are exercised in the context of power inequalities, linking the study of power with the study of human rights is critical. Power relations impact the effectiveness of rights protections and thus rights effectiveness *and* power are key concerns in modern human rights philosophy. It is by studying effectiveness that we can in part define what it means to protect the human right to worker safety and health.

This dissertation documents how the right to refuse unsafe work has become a weak and ineffective protection under international labor and human rights standards.

⁴² *Convention (No. 155) concerning occupational safety and health and the working environment*, 1331 UNTS 22345. 1981.

Studying power means studying policymaking in a way that incorporates a critical analysis about the protection of human rights. To study the boundaries of legal rights (and human rights) in the employment relationship is not merely an abstract exercise. Studying the boundaries of rights is the study of economics in modern society. The economist Ha-Joon Chang has written against the market primacy assumption, where we conceptualize “the market” as a natural and stateless institution. Quoting Karl Polanyi and others, Chang argues for stronger institutional analyses of market systems, as all markets (including labor markets) have some state regulations on who can participate and what rights and obligations surround market systems. That states only act on markets through periodic “interventions” is thus a false vision of the state-market system relationship. Chang argues “markets” are but political constructs and thus the real study of economics is the study of “rights-obligation structures.”⁴³ This dissertation thus follows this understanding and studies the protection of the right to refuse unsafe work as a labor market rights-obligation structure as advocated in the dominant policy discourse in current international labor and human rights standards.

Traditionally, standard visions of market economics have dominated the study of labor and industrial relations. Much industrial relations scholarship still sees labor through a labor market equilibrium prism where unions and employers negotiate the price of labor from a choice of alternative market efficiencies. This market paradigm confounds a human rights analysis because it limits the study of market institutions whereas a human rights view would approach the study of the labor market seeking to understand what institutional mechanisms are needed to protect particular labor rights.

⁴³ Chang, Ha-Joon. (2003). The Market, the State, and Institutions in Economic Development. In Ha-Joon Chang (Ed.), *Rethinking Development Economics*: Anthem Press. Page 49-51.

Understanding power is important to human rights because underlying policy biases can impede enforcement and respect for human rights. Human rights theory argues that human rights must not only be codified in law and policy, they must be made *effective*. Only when human rights are *effectively* realized and remedied are human rights respected in practice. Effectiveness has been a component of modern human rights discourse since the Universal Declaration of Human Rights in 1948. The UDHR states in Article 8 that “Everyone has the right to an effective remedy by the component national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” This connection with effectiveness illustrates one way a human rights analysis is more than a prescription of justiciable legal claims. The mix of rights-obligation structures is an important element of evaluating effectiveness. Human rights theory is more than simply global legal positivism. It forms a broader philosophy of governance in a way that challenges how institutions constitute markets, especially labor markets. Effectiveness is one principle in human rights theory that helps to build this institutional analysis. It is not the only principle, however. Where relevant, other human rights ideas will be documented throughout this dissertation.

Effectiveness has been a question in the philosophy of rights for more than a century. Eric Foner in *The Story of American Freedom*⁴⁴ writes that the question of an *effective freedom* underlying rights was debated by Progressives. Effective freedom, he notes, connected rights with power and provided the Progressive-era politicians an ideological basis from which to argue for a powerful government as they envisioned.

the British philosopher T.H. Green had argued that freedom was a positive concept, a matter, ultimately of “power.” Green’s call for a new definition of freedom was taken up throughout progressive America. “Effective freedom” wrote John Dewey, who pondered the question from the 1890s until his death

⁴⁴ Foner, Eric. (1998). *The Story of American Freedom* (1st ed.). New York: W.W. Norton.

in 1952, was far different from the “highly formal and limited concept of liberty” as a preexisting possession of autonomous individuals that needed to be protected from outside restraint. It meant “effective power to do things,” and as such was a function of “the *distribution* of powers that exists at a given time.” Thus, freedom was “always a *social* question” and inevitably also a political issue. Freedom – and the individual endowments, powers, and desires it embodied – was constructed by and enjoyed through social institutions and democratic citizenship. “Freedom,” wrote Dewey’s brilliant young admirer Randolph Bourne, “means a democratic cooperation in determining the ideals and purposes of the industrial and social institutions of a country.”⁴⁵

While this concept of *effective* freedom was championed by Progressives and even at times cast as synonymous with their vision of the public good, the idea of an *effective* freedom was held by groups of workers and was not exclusively Progressive thought.

James Grey Pope in *Labor’s Constitution of Freedom*⁴⁶ studied the conflict of effective freedom and workers’ rights in early 20th century American labor history. A movement of “constitutional insurgency” existed where workers had unique ideas about what their rights should be, distinct from paid union legal counsel, Progressive leaders, and the business community. Workers struggled to secure rights according to their vision of effective freedom. In the case of Pope’s study, this was a militant strike against the Kansas Industrial Court Act between 1920 and 1926, one of the early experiments with industrial relations law in the United States. The Act prohibited the right to strike in most industries. Mine workers clashed with progressive middle-class reformers who said “constitutional rights in the economic sphere blocked adaptation to change” and strikes “amounted to ‘industrial warfare’ that should give way to peaceful administration” as fundamental principles “interfered with pragmatic bargaining”.⁴⁷ Quoting Carter Goodrich’s *The Miner’s Freedom*, the workers were self-advocates:

⁴⁵ Ibid. Page 153.

⁴⁶ Pope, James Gray. (2004). *Labor’s Constitution of Freedom, 1920-1958*. Ph.D. Diss. Ph.D. Dissertation. Princeton University.

⁴⁷ Ibid. Page 52.

They develop informal rules governing such matters as the distribution of coal cars, the ‘proprietary’ rights of the miner to his own space on the seam, and the principle that a man ‘ought to know when he is tired’ and therefore decide for himself when the working day is done.... Violations of the code were adjudicated and punished by co-workers, applying sanctions ranging from sour comments to ostracism and, occasionally, physical assault. At the core of the most successful, pioneering industrial unions were groups of workers with especially strong traditions of informal jurisgenerative practice: deep shaft miners in the United Mine Workers, tire builders in the United Rubber Workers, and the skilled metal trades in the United Automobile Workers.⁴⁸

[Workers possessed] a vision centered on the idea of ‘effective freedom,’ which encompassed the ability not only to influence the conditions of working life, but to do so consciously and in combination with one’s co-workers.⁴⁹

This vision of effective freedom originated from what Pope called a “popular rights consciousness” that was distinct from both the prevailing legal norms and even labor’s professional legal representation. Workers held a rights consciousness bound with the notion of effective freedom similar to but distinguishable from the rights discourses of the Progressives who sought to use this vision of power to advance their own politics.

A defining characteristic of liberal market economics is that management has freedom to hire, fire and exert control over workers. The Organization for Economic Cooperation and Development (OECD) has summarized the employment dismissal protections for OECD states and the U.S. ranks last in dismissal protection.⁵⁰ Canada and the U.K. are in second and third as “flexible” with their highly fluid labor market policies. There is no dispute that Anglo-American society is at the forefront in labor market discipline, especially on the topic of employment termination rights. This makes evaluating human rights *effectiveness* in these countries all the more important.

⁴⁸ Ibid. Page 52.

⁴⁹ Ibid. Page i.

⁵⁰ Venn, Danielle. (2009). *Legislation, collective bargaining and enforcement: Updating the OECD employment protection indicators*. Paris: Organisation for Economic Co-operation and Development. Page 9.

Todd Landman has noted an “infinite supply of human rights problems to be addressed using the theories, methods, and tools of contemporary social science.”⁵¹ Despite this infinite supply, however, the various theories, methods, and tools of social science can also silence basic human rights concerns. What is needed is an approach that remains open to excluded voices. To be consistent with a human rights analysis, such an approach should recognize the universal moral dignity logic these voices may bring without closing off debate regarding what this logic is and thereby perpetuating another form of exclusion. What is needed is a model for the study of interests in the context of power and power’s exclusions from any human and labor rights protections.

Two problems in human rights scholarship have in particular excluded voices and in turn limited understanding the effectiveness of human rights. The first of these is a social science of human rights that does not accept the fundamental moral dignity claims underlying human rights. The second is an elite legal scholarship on human rights that recognizes moral dignity claims but marginalizes economic and social human rights in that framework. Both groups project their own elite values upon the universal dignity claims of what are often powerless and voiceless groups struggling against difficult circumstances. By ignoring either the authenticity or the category of particular human rights claims, we limit our institutional critique and the analysis of rights-obligation structures that construct the liberal contours of employment relations.

The study of human rights in social science has been limited because the idea of human rights is viewed as nothing more than a social construction. “Universality is itself a human construction” thus philosophical deliberation is set aside.⁵² This causes problems for analyzing the effectiveness of human rights because any attempt at the

⁵¹ Landman, Todd. (2006). *Studying Human Rights*. London: Routledge. Page 17.

⁵² Morris, Lydia. (2006). *Rights: Sociological perspectives*. London and New York: Routledge. Page 242.

study of exclusion from rights-obligation structures is simply conjectural bias on the part of the social researcher projecting perceived interests upon alleged rights-holders.

Ideas and practices in respect of human rights are created, re-created, and instantiated by human actors in particular social settings and conditions. It is a way of understanding human rights which does not require them to have any metaphysical existence (for example, through nature or God).⁵³

In this approach, fundamental dignity “one simply has by the fact that they are human” is untenable as “such positions simply cannot be connected with accounts of actual socio-historical developments because such understandings of human rights are constituted so as to be entirely independent of social context.”⁵⁴ Thus interests cannot be extrapolated from circumstance because they cannot be scientifically observed. Social constructions extend even to morality itself which in this view is relegated to just another social actor’s cognitive frame. Studying human rights and an institutional analysis of rights-obligation structures thus must make some argument about interests in a way that moves past at least the strictest interpretations of social constructionism.

Investigating rights effectiveness requires a qualitative in-depth analysis of excluded voices that can deduce how the interests of those excluded actors in a given social setting are served by a particular rights-obligation structure. If rights claims are nothing but social constructions and fungible frames there is no real method by which to examine effectiveness. A better sociology of human rights must make an explicit normative assessment of political interests. To judge human rights *effectiveness* is in part to consider the political interests served by rights-obligation structures. Political

⁵³ Stammers, Neil. (1999). Social Movements and the Social Construction of Human Rights. *Human Rights Quarterly*, 21, 980-1009. Stammers has offered another unique analysis in Stammers, Neil. (2009). *Human rights and social movements*. New York: Palgrave Macmillan.

⁵⁴ Stammers, Neil. (1999). Social Movements and the Social Construction of Human Rights. *Human Rights Quarterly*, 21, 980-1009.

dynamics may silence the just claims of human rights-holders and therefore studying political interests allows for one to capture any silenced human rights claims.

The legal-political scholarship on human rights presents a different problem to the study of the effectuation of human rights. Here, economic and social dimensions of human rights are always marginalized in importance. The moral universal dignity dimension of human rights is recognized, but only for the “real” rights, which are in turn typically civil and political rights.⁵⁵ These conjectures weaken the study of the effectiveness of human rights because they strike at the heart of the interdependent, interrelated, and universal dimensions of the human rights worldview and in turn weaken the institutional analysis needed to study rights-obligation structures in labor markets. If some rights are second class rights, then their effectuation is second class. Only some avenues of government action will be available to make them effective as “first order” rights are prioritized and it no longer becomes, as human rights theory argues, the first responsibility of governments to protect all human rights. These are similar to the problems posed by human rights sociology in that this view silences excluded voices by creating classes of rights, and therefore classes of rights-obligation structures / labor-related policy institutions that become off-limits to serious attention.

The health and safety activist confronting a hazardous work environment thus faces all the right enemies. Workers in the unenviable position of facing illness and injury in their immediate work life have no standing on a conceptual level in broader society to make claims against the political and economic governance decisions that have been made. In this regard, labor scholarship has historically provided little help.

To develop a viable human rights-based analysis, social science should not shy

⁵⁵ There are numerous writers that make these arguments. One example is Dworkin, Ronald. (2005). *Taking Rights Seriously: New impression with a reply to critics*. London: Duckworth. Another is Lukes, Steven. (2003). *Liberals and Cannibals: The implications of diversity*. London: Verso.

away from grasping the universal dignity logic of human rights. It should be done, however, in a way that does not default into elite conjecture about what the “real” human rights are. There should be an open analysis and attention paid to sub-altern interests, while also recognizing that rights claims exist in a social context that can require different strategies for effectuation depending on the context. In our case, this is the highly unequal employment relationship. This is a critical formula for the study of human rights. It is more than the study of legal compliance with established norms. It is the investigation of how certain moral principles enshrined in human rights laws, declarations and conventions play out and are limited in divergent social contexts.

Human rights has had an uneasy relationship with a social science fearful of bringing unwanted normative values into what they perceive as values-free research. A human rights orientation can help maintain basic objectivity in the study of claims, standards, principles, and interests, however. A human rights analysis avoids biases that have historically surrounded conceptions of the state and the labor market. It thus challenges directly the market primacy assumption with a broad institutional analysis. Recognizing universal moral dignity logics does not mean projecting one version of that logic onto others. The approach means simply a more grounded social science.

The logic of human rights theory extends further. A human rights analysis strives to understand social context. It is not restricted to a narrow definition of labor institutionalism under market primacy assumptions. It requires understanding all of society’s complexity. This means studying all dimensions of the policy environment that impact worker health and safety, from corporate business decisions to decisions that have become part of the unspoken operation of society. This includes choices such as injured-worker legal exemptions from civil torts and maintaining the due process rights of business corporations in the regulatory environment, in addition to

broader questions about sweeping grants of state authority to corporations and the impact of these decisions on the protection of workers' rights. Here, all is data.

Human rights embody a different political understanding than the traditional legal rights. Internationally-recognized human rights declarations state that it is the first responsibility of governments to effectively protect all human rights. These also argue that governments may only limit human rights where required to respect the human rights and freedoms of others. Article 29 indicates these rights are not a “mere offshoot of the eighteenth-century tree of rights,” which its drafters wanted to avoid.⁵⁶

Article 29. (1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others.

These were not, in the words of Simone Weil, the rights pronounced by “the men of 1789”.⁵⁷ Article 29 explains that human rights exist in social context. This moves universal human rights to the center of the discourse on collective social obligations. That human rights are merely isolated individual rights confounding social context and the need for collective protections misinterprets the modern human rights philosophy of rights rooted in the social world. As Simone Weil argued at the time the Universal Declaration of Human Rights was negotiated, collectivities are due the respect and protection of government and society based on how they satisfy social obligations.

We owe our respect to a collectivity, of whatever kind—country, family or any other—not for itself, but because it is food for a certain number of human souls. The degree of respect owing to human collectivities is a very high one. . . . The first thing to be investigated is what are those needs which are for the

⁵⁶ Morsink, Johannes. (1999). *The Universal Declaration of Human Rights: Origins, drafting and intent*. Philadelphia: University of Pennsylvania Press. Page 245.

⁵⁷ Weil, Simone. (1952). *The need for roots; prelude to a declaration of duties toward mankind*. New York: Putnam. Page 4.

life of the soul what the needs in the way of food, sleep and warmth are for the life of the body. We must try to enumerate and define them. . . . The lack of any such investigation forces governments, even when their intentions are honest, to act sporadically and at random.⁵⁸

A human rights analysis recognizes this social contextualization and reclaims human rights philosophy so that the effectuation of human rights becomes realized in practice.

Despite claims of a new era of business social responsibility, union-avoidance has grown into a multi-billion dollar industry.⁵⁹ Dismantled over the last generation was a de facto system of worker-based occupational health and safety enforcement centered on trade union collective bargaining over working conditions. Individual employment protections claim to fill this void as workers more and more pursue rights via individualist employment protections, not through collective labor protections. Developing a human rights-based institutional analysis in the context of employment relations necessitates the study of this dichotomy between collective and individual.

Industrial relations has been historically rooted in ideas from institutional labor economics.⁶⁰ These ideas originated from labor economists in dissent against neo-classical economics. It describes itself as problem-focused and concerned about social justice. Today, institutional labor economists distinguish their field by asserting that a human rights view does not provide a deeply rooted critique of orthodox neoclassical economics and are thus inadequate replacements as the primary voice of opposition to the known ravages of free market economics.⁶¹ The negotiation of efficient market

⁵⁸ Ibid. Page 8.

⁵⁹ Logan, J. (2006). The Union Avoidance Industry in the United States. *British Journal of Industrial Relations*, 44(4), 651-675.

⁶⁰ An earlier version of this critique of early the industrial relations scholars appeared in Hilgert, Jeffrey. (2009). A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right. In Lance Compa & James A. Gross (Eds.), *Human Rights in Labor and Employment Relations*: Labor and Employment Relations Association.

⁶¹ McIntyre, Richard P. (2008). *Are Worker Rights Human Rights?* Ann Arbor: University of Michigan Press.

conditions between market actors such as unions and employers is the best framework to achieve social justice. Social justice is defined narrowly in terms only achievable in alternative market efficiency frameworks. John R. Commons advocated this approach in *Theory of Reasonable Value* and suggested voluntarist union organizing protections to open the door for groups of workers to band together to negotiate labor accords.⁶²

As a result of this recognition of collective bargaining, union leaders were not generally hostile to the institutional labor economists (ILE) because these labor economists recognized unions as a market institution, albeit in a weak framework of *laissez-faire* voluntarism and economics. This market-based voluntarist view became reflected in Anglo-American labor policy. The private sector labor law in the U.S., for example, gives the National Labor Relations Board no authority to enforce provisions of any collective bargaining agreements, even when an employer commits an illegal unfair labor practice. Confusion about this authority has been settled by the Supreme Court in favor of labor market voluntarism and thus employer property rights.⁶³

The disposition of labor economists is explained by their “high theory” and the way it structures their normative judgments. Michael Piore described this theory well:

The high theory is structured around the notion of Pareto optimality, which defines normative criteria in a very precise way. Applied economic research is directed at the solution of a set of specific, and in the end well-specified, social problems. The theory itself is built around the idea of rational individuals pursuing their self-interest in a competitive market, where they interact indirectly with each other through price signals. The theory seeks to produce as its outcome a stable equilibrium; normative judgments are derived by comparing alternative equilibrium.⁶⁴

⁶² Commons, John Rogers. (1913). *Labor and administration*. New York: Macmillan.

⁶³ Gross, James A. (1995). *Broken Promise: The subversion of U.S. labor relations policy, 1947-1994*. Philadelphia: Temple University Press. *H. K. Porter Co. v. NLRB*, 397 U.S. 99. 1970.

⁶⁴ Piore, Michael J. (2006). Qualitative Research: Does It Fit in Economics? In Ellen Perelman & Sara R. Curran (Eds.), *A Handbook for Social Science Field Research*. Thousand Oaks: Sage Publications.

Achieving a more humane market equilibrium in employment relations is a “balancing imperative” between enterprise efficiency and employment equity.⁶⁵ This preexisting theory framework impacts how ILE scholars advocate legal enforcement strategies.

Institutional labor economists view health and safety in a way that has made it difficult to see new enforcement paradigms that empower workers beyond this simple market voluntarism. One can find evidence for this claim in how working conditions have been viewed historically by the major industrial relations scholars. The work of Sidney and Beatrice Webb and John R. Commons illustrate these points precisely.

Sidney and Beatrice Webb “effectively laid the foundation for the new field of industrial relations” before it became institutionalized in the U.S. with the work of John R. Commons, a labor economist and well-known advocate of worker injury compensation systems.⁶⁶ The foundations of industrial relations developed early in the life of the field and have impacted the regulatory approach of labor scholars since. Industrial relations has especially influenced occupational health and safety policy.

Investigating occupational sanitation and safety, Sidney and Beatrice Webb questioned the role of government in the regulation of English industrial hazards. The Webbs’ in *Industrial Democracy* had noted the effectiveness of social regulations to prevent worker death.⁶⁷ Despite union protections granted by Parliament, wrote the Webbs, “neither Mutual Insurance nor Collective Bargaining availed to put down the evil among the worst employers” and as a result “the union then turned to the law” which the Webbs called the Method of Legal Enactment.⁶⁸ Regulation of the labor

⁶⁵ Budd, John W. (2004). *Employment with a human face : balancing efficiency, equity, and voice*. Ithaca: Cornell University Press.

⁶⁶ Kaufman, Bruce. (2004). *The global evolution of industrial relations: Events, ideas and the IIRA*. Geneva: International Labor Organization.

⁶⁷ Webb, Sidney, & Beatrice Potter Webb. (1897). *Industrial democracy*. London: Longmans Green and Company.

⁶⁸ *Ibid.* That the Webbs considered collective bargaining as existing outside of the Method of

market was, pragmatically speaking, the line of least political resistance given the broad-based cross-class coalitions that had often supported worker health and safety.

Scarcely a session of Parliament now passes without new . . . protection of the health or safety of one or another class of operatives being, amid general public approval, added to our Labor Code. We attribute the rapid development of this side of Trade Unionism to the discovery by the Trade Union leaders that it is the line of least resistance. Middle-class public opinion . . . cordially approves any proposal for preventing accidents or improving the sanitation of workplaces. . . . Something, we think, is to be attributed to the general fear of infectious disease. Along with this fear of infection there goes a real sympathy for the sufferers, ill-health and accidents being calamities common to rich and poor. More, perhaps, is due to the half conscious admission that, as regards Sanitation and Safety at any rate, the Trade Union argument is borne out by facts, and that it is impracticable for the individual operative to bargain about the conditions of his labor.⁶⁹

Upon admission of the effectiveness of the legal enactment, however, the Webbs changed heart. After recognizing the strength of policing employment relations with social regulations, they turned against such labor policies as the mass of work injuries and illnesses were more so unforeseen “acts of God” and not any employer’s fault.

An accident is as likely as not to be nobody’s fault. It is necessary to emphasize this, because most accidents are, to use the traditional phrase of the bill landing, ‘the act of God.’ In the great majority of industrial casualties—probably in three cases out of four—it is impossible to prove that the calamity has been due to neglect on any one’s part. A flash of lightning or a storm at sea, a flood or a tornado, irresponsibility claim their victims. The greatest possible care in buying materials or plant will leave undiscovered hidden flaws which one day result in a calamity. In other cases, the accident itself destroys all trace of its own cause. In many, perhaps in most, of the casualties of the ocean or the mine, the shunting yard or the mill, the difficulties in the way of bringing home actual negligence to any particular person are insuperable.⁷⁰

Thus the foundation of labor policy from an ILE approach has always been voluntarist

Legal Enactment is a testament to their market-based voluntarist ideological perspective.

⁶⁹ Ibid. Page 359-362.

⁷⁰ Ibid. Page 380.

negotiation, not strong legal enforcement of basic standards and human rights. One explanation for the Webbs mysterious religious awakening is that if worker death were deemed preventable by legal enactment, common law tort liability would immediately follow. The Webbs understood the magnitude of the tort liability facing employers and argued against holding any employers liable, even in cases deemed avoidable.

A new formula was needed to remedy these inconsistencies between human rights and employer control. Scholarship responded: Full employer protection from liability for workplace safety and health violations. Workers are barred from remedy at common law and are channeled into an alternative dispute resolution system. Despite the efficacy of the law in protecting against dangerous hazards, the Webbs then offered what can only be described as their most reprehensible prescription, the outright restriction of effective state action through strong preventive inspectorates.

[T]he necessary regimentation of employers and their control by rigid rules would be extremely distasteful to English capitalists, whilst there would be real difficulty in adapting any such organization to the remarkable variety, complexity, and mobility of English industry. . . . compensation avoids all these difficulties, and requires no more regimentation or registration than is already submitted to by every mine or factory owner. . . . compensation might count on the powerful support of the great capitalists in the coal, iron, and railway industries, who would find themselves relieved of the special and exceptional burden now cast upon them.⁷¹

To say nothing of the “special and exceptional burden” placed upon the orphans of the dead or the misery to avail the survivors of industrial hazards. The Webbs’ solution was payment upon injury or death and a weak preventive labor inspectorate. Anything otherwise would be “distasteful to English capitalists” and must be avoided. This was written when the frequency of workplace death was remarkable. “Between 1868 and

⁷¹ Ibid. Page 391.

1919 a miner was killed every six hours, seriously injured every two hours and injured badly...every two or three minutes.” English and Welsh laborers from 1900 to 1902 were reported as facing mortality rates nearly three times the rate of coal miners.⁷²

Early U.S. industrial relations scholars preferred the protection of capital to protecting a workers’ human right not to be killed on the job. Thus from the earliest foundations, human rights were marginalized as ideas and took a backseat to the constructed vision of the labor market and its acceptable regulation. The consolation prize for workers was blood money upon injury and death. This perspective would not improve as industrial relations scholarship developed with John R. Commons and the popular Wisconsin School of institutional labor economics in North America.

The institutional labor economists were “the principal architects of the policy response to neoclassical rejection of labor standards legislation during the Progressive Era and the Great Depression.” Their diagnoses were “imperfections” in the market:

Their empirical study and observation led them to support regulatory laws on grounds widespread employment and poverty wages resulted from market imperfections and externalities originating in social institutions rather than as the inevitable price of overall progress. Such socially determined conditions included too little or too much competition in labor markets, either of which could be devastating in the absence of institutional protections. Market imperfections generated market externalities absorbed by individual workers, working-class households and industrial communities in the form of low wages, bad working conditions, and social welfare experiments.⁷³

Commons railed against “the menace of competition” while constructing rationales that, like the Webbs, allowed state power to back industrial negligence on health and

⁷² Benson, John. (1980). *British coalminers in the nineteenth century : a social history*. Dublin: Gill and Macmillan. Church, Roy. (1986). *The History of the British Coal Industry, Volume 3, 1830-1913: Victorian Pre-eminence*. Oxford: Clarendon Press. Page 584.

⁷³ Craypo, Charles. (1997). *Alternative Perspectives on the Purpose and Effects of Labor Standards Legislation Government regulation of the employment relationship* (1st ed., pp. viii, 557 p.). Madison, WI: Industrial Relations Research Association. Page 232.

safety. The state thus had an integral role in reinforcing the capitalist labor market despite the market being cast by both neoclassical and institutional labor economists as a stateless, naturalistic social institution. These positions were developed at the exact time as U.S. states were moving to hold employers responsible for hazards.

Many states passed statutory modifications of the common law. These statutes, known as employer's liability laws, frequently modified or completely abolished the fellow-servant rule and other employer defenses. The laws also frequently made an employer's failure to comply with government safety codes a basis for negligence.⁷⁴

As employers were facing increasing tort liability for workplace deaths and injuries, Commons argued that the proper and most efficient regulation of occupational safety and health was not making the state subject to a basic human rights enforcement standard but to what he enthusiastically called the business "reasonableness" standard.

The doctrine which the court applies to this function of [health and safety] investigation is both the noblest and the most practical of legal doctrines—"reasonableness." By this doctrine the court applies its philosophy to the particular facts, but requires that all of the facts be taken into account. . . . When the commission began its work of selecting its staff, it had entertained the idea that it should place at the head of its safety and sanitation work engineering and medical experts. But after interviewing a number of these experts it was discovered that they considered their problem to be that of drawing up ideal or standard specifications, which the commission, going out then with a "big stick," should compel employers to adopt. . . . [B]ut a democratic country would not consent to be ruled by those whose ideal standards might be removed from the everyday conditions of business. This decision of the [Wisconsin Industrial Commission] also conforms to the doctrine of reasonableness, which requires practicability adapted to existing conditions.⁷⁵

Strong workplace health and safety enforcement was for John R. Commons an

⁷⁴ Chelius, James Robert. (1977). *Workplace safety and health : the role of workers' compensation*. Washington: American Enterprise Institute for Public Policy Research. Page 20.

⁷⁵ Commons, John Rogers. (1913). *Labor and administration*. New York: Macmillan.

impractical affront to “the everyday condition of business.” Despite evidence that strong social enactments were the best policy strategy to protect against illness and injury, workplace health and safety was to be the sacrificial lamb of industrial relations scholarship, courtesy of strong state protection of business in what became perhaps the queerest lexical juxtaposition of all labor policy—a system known as “voluntarist” labor relations. Enforcement to protect against worker deaths and injuries would occur only where output and “the everyday condition of business” was first safeguarded by the state. The state would provide employers immunity from torts when brought by aggrieved workers and instead pay a fraction of their profits upon employee injury or death. Workers’ compensation was not at first deduced from a concern about hazard prevention. It derived from the fear the state was challenging property rights, business production, and the constructed, fictitious vision of the labor market as a natural, stateless social institution that operates in a realm removed from government regulation. ILE scholarship justified this market-centric policy regime.

Workers’ safety and health highlights a contradiction of the institutional labor economists. On the one hand their criticism of neoclassical economics characterized them as progressive social reformers; on the other hand, their constructed vision of the labor market existed alongside a ceaseless justification of state protection of capital’s right to kill and maim workers in those labor markets. Despite the expressed need for better labor institutions, government’s role was highly proscribed to prevent only those tragedies capable of protection within a framework of alternative labor market efficiencies. Enforcing workers’ health and safety as a fundamental human right was a secondary concern to justifying state safeguards on business property rights.

The trajectory set early by industrial relations scholars would be unchanged through the 20th century. Bruce Kaufman, in his impressive historical account of the

industrial relations field, identified the “core ethical and ideological premises” in early U.S. industrial relations scholarship. To these scholars labor was not a commodity and “human rights should have precedence over property rights in the employment relationship.”⁷⁶ Yet if human rights include the right to health and safety, as the global community has long agreed, this human rights claim lacks evidence. The constructed vision of the labor market by industrial relations pluralists made them endorse policy strategies not for their effectiveness at protecting workers but for their management of the state, business output and capitalist property rights. These predetermined theories marginalized strong protections for workers’ health and safety. The priority became the labor market, uninterrupted business production, and employer property rights, even as the state was called on to make this possible. This critical history disqualifies institutional labor economics from claiming the banner of human rights advocacy and illustrates the need for a distinct human rights analysis in labor relations scholarship.

The result of this history on the design and enforcement of labor policy has been profound. The main avenues that were made available to fight workplace health and safety hazards were weak unions that negotiated without adequate collective bargaining protections and labor inspectorates that are structurally weak and timid in their enforcement paradigm. The right to refuse unsafe work departs from this history of labor policy on key points. Refusal rights are empowering enforcement paradigms for what has become a much more hazardous world. Workers struggling to protect themselves from health and safety hazards in the working environment face unique and significant obstacles compared to other human rights-holders. Often the working environment and associated rights-obligation structures foster strategic workers’

⁷⁶ Kaufman, Bruce. (2004). *The global evolution of industrial relations: Events, ideas and the IIRA*. Geneva: International Labor Organization. Page 128.

disempowerment including employee intimidation, supervisor abuse, harassment, and discrimination for even the slightest move to report injury and illness. Using market-centric metaphors such as “market incentives” suggests supernatural market forces are responsible for consciously formulated business policy decisions. These decisions are made within rights-obligation structures that have impeded the basic right to refuse.

One final point to make on the topic of human rights in labor and employment relations is the question of political power in shaping particular policy frameworks and rights-obligation structures that govern work and employment relations. This research argues that the right to refuse unsafe work under international labor and human rights standards is not only ineffective, but it has been shaped directly by employer political activity counter-mobilized against labor. This entailed the use of cultural strategies by employers and governments in attempt to shape values, beliefs, ideas and logics that in turn helped to reshape international labor rights at a time when trade liberalization was threatened by increasing calls for social protection and new rights-obligations. This dissertation therefore chronicles this history of employer political activity and counter-mobilization in labor and employment relations on human rights. It encompasses the examination of the rights-obligation structures that impede the effectuation of human rights, as well as the political power dynamics that serve to maintain and reproduce rights-obligation structures that threaten the exercise and enjoyment of human rights.

1.4. Overall plan for the dissertation

This chapter has introduced the idea of social conflict in the work environment, the right to refuse unsafe work as a labor policy issue, and offered a basic definition of what a human rights analysis and approach means to labor and employment relations.

Chapter II details a conceptual approach to the study of human rights in labor and employment relations. Chapter III is an historical background chapter about the struggle for workplace health and safety in the same era that witnessed the adoption of international labor standards incorporating the right to refuse unsafe work. Chapter IV is a study of the jurisprudence of the right to refuse unsafe work as an international labor and human rights issue. It documents the varieties of labor rights protections of the right to refuse and examines the question of individual versus associational rights protections in this context. Chapter V studies the effectiveness of the right to refuse for workers that have filed discrimination complaints under an individual employment protection policy model that has come to dominate the current human rights standards. Chapter VI chronicles the policymaking that gave rise to and framed the current global worker health and safety policy on the right to refuse unsafe work. Chapter VII summarizes the conclusions and draws out the consequences of this study for labor and employment relations scholarship, alternative dispute resolution, workplace conflict studies, ILO supervision and standard-setting and global human rights policy.

One final note on methodology: This is a qualitative in-depth case study using legal and documentary evidence and key informant interviews. The reader should not confuse the recurring focus on the United States and Canada with a traditional national comparative study. Canada is an important focus because it played an important role internationally in the adoption of the model right to refuse under international labor standards in ILO Convention No. 155. Canada pointed to its domestic labor practices

on the right to refuse as a model on the global stage at a time when Canada assumed a leadership role in ILO standard-setting. At the same time, U.S. dominance globally in the second half of the twentieth century forced a re-conceptualization of ILO standards on occupational health and safety in a way that located these key ILO labor standards firmly within self-regulatory, *laissez-faire* logics. The reader will find that rather than a comparative study of national labor policy, it is an in-depth qualitative case study dominated by the era of Anglo-American influence and liberal market labor policies.

CHAPTER II

THEORETICAL AND CONCEPTUAL FRAMEWORK

Analyzing power, exclusion and influence under labor and human rights standards

2.1. Understanding labor rights policy in a market society

This chapter outlines a conceptual framework for the study of labor policy and industrial relations systems in a way that encompasses the view that worker and labor rights are human rights. Labor and employment is often studied through the lens of market-based beliefs and understandings. Labor policy choices in Anglo-American market societies are typically confined to alternative market efficiency frameworks regardless of how these ideas comport with the needs and everyday experiences of workers, communities, and the broader society. Bias accompanies the study of society through market frameworks because these visions marginalize and silence alternative conceptualizations that better understand and explain basic labor market relationships.

Increasingly, the political or *non-market* dimensions of labor and employment are being recognized as important objects of study. Returning to a grounded study of labor relations can broaden the field's focus beyond those exclusively market-based frameworks to include the study of contested power, social exclusion and influence-seeking in labor policy. These topics are important aspects of the real life experience of workers and are important factors in the study of human rights. It is necessary to understand power, exclusion and influence to understand the many *non-market* political strategies that shape the working environment. These forces shape labor's institutional environment according to principles most amenable to employer business interests, regardless of how effectively they protect the human rights of workers.

Classic industrial relations theorists, despite their ungrounded focus on market efficiency frameworks, can be commended for focusing on the power relations within the employment relationship. The study of power is a core element within industrial relations. John Kelly⁷⁷ in *Rethinking Industrial Relations* notes that how workers “come to define their interests in collective or individual terms” has been a central and enduring problem in labor and employment relations. “Since workers” Kelly writes, “occupy a subordinate position in the employment relationship, their collective definitions of interest are subject to repeated challenges by employers as they try to redefine and realign worker interests with corporate goals.”⁷⁸ Power endures as a key problem in labor and employment relations. This extends to global labor rights policy.

The distinction between individual and collective rights in employment has not always been a bright line. This is especially the case from the perspective of a factory floor or farm field. Even the most basic collective protections such as those found in the National Labor Relations Act have at times been rooted in individual employment rights. How workers define their interests is influenced in great part by how the state crafts the distinctions between individual and collective rights. Employer groups have a vested interest in the outcome of these policy choices and advocate the perspectives, values and ideologies that are consistent with their own goals and objectives. The basic ideological and philosophical arguments and the cultural orientations, values and belief systems that shape the overall direction and movement of policy debates and choices are relevant to understanding who benefits from the ultimate policy outcomes. They also determine who bears the burden of environmental work risks and hazards.

⁷⁷ Kelly, John E. (1998). *Rethinking Industrial Relations: Mobilization, Collectivism, and Long Waves*. London; New York: Routledge.

⁷⁸ Ibid. Page 4.

Protecting workers from unsafe work remains one of the paramount tasks of any industrial relations system. With the large-scale decollectivization of labor rights over the last fifty years, statutory “individual” employment rights have emerged as the main alternative to labor policies based on collective bargaining. Individual statutory employment protections have been buttressed by liberal market beliefs and values. The right to refuse unsafe work has been swept up in this trend. Underlying the trend are the politics of the powerful, from the corporate interests and trade group lobbies to business regulatory influence and anti-union human resource management strategies. Understanding how employer political strategies have impacted workers’ self-help law and workers’ freedom of association constitutes a critical case study of the dynamics that shape the protection of workers’ human rights in labor and employment relations.

Liberal market economies have been described as systems that rely “heavily on the market relationship between individual worker and employer to organize relations with the labor force.”⁷⁹ It is important, however, to note the role of policy institutions in constructing the landscape of employment relations, even where employment is said to follow liberal market *laissez faire* principles. The market relation is maintained by many *non-market* institutions of the state and state labor policy.⁸⁰ An analysis of the labor market relationship between a worker and an employer can be more accurately described as a largely *non-market* relationship rather than a real “market” relationship. Shaping labor’s institutional environment is important to maintaining power relations and global social inequality. Ignoring political forces and these *non-market* business strategies promotes the incorrect assumption that markets, especially the labor market,

⁷⁹ Hall, Peter A., & David W. Soskice. (2001). An Introduction to Varieties of Capitalism. In Peter A. Hall & David W. Soskice (Eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford [England]; New York: Oxford University Press. Page 29.

⁸⁰ Evans, Peter. (1997). The Eclipse of the State? Reflections on Stateness in an Era of Globalization. *World Politics*, 50(1), 62-87.

are natural, stateless social phenomena. These questions are central to an economic sociology that examines the institutional environment of markets and the ways labor markets are embedded in various social relations, including basic labor relations.

Employers have, both nationally and internationally, promoted and advocated values in the non-market arena to influence the politics regulating labor rights. Their actions have shaped the administration of labor policy, legal philosophies, managerial prerogatives, and status assumptions that preserve historic legal inequalities. These values and beliefs ultimately shape the form labor policy takes such as, for example, individualizing employment policy in a way that avoids sharing workplace governance and decision-making via collective bargaining. Any model for analyzing labor policy-making must assess the range of influence mechanisms that are available to employers including the promotion of values and beliefs that support their desired policy choices and exclude threatening alternatives. Building a conceptual model to study the range of employer influence-seeking mechanisms, including the study of cultural factors that shape values and beliefs, is an important task. This chapter tackles this critical task.

Given the *non-market* strategies pursued by employers to maintain privileges and powers, the labor policy process is a central element in market economies. The study of labor policy, including the variety of political forces and employer strategies in labor relations, requires a method that can analyze power dynamics in a way that recognizes excluded voices and excluded choices. All faces of the power relationship in the policy process must be analyzed. Any conceptual framework should consider the barriers that powerless groups and ideas face in attempting to realize human rights. Social exclusion is a factor interconnected with the many *non-market* policy influence-seeking strategies of the powerful. The relationship between the excluded issues and the excluded people in a political process and the subsequent dominant labor policy

choices can, taken together, form a method for studying influence in a power process. Studying exclusion is the key to studying the full range of influence mechanisms that are available to employers in the shaping and making of labor and employment policy.

Non-market business strategies have shaped employee rights on the issue of workers' health and safety. Employer strategies have advocated a constitution of rights that reinforces power inequalities and unilateral management control. In the face of the popular social movements of the 1960s and 1970s and calls for a more systemic regulation of the economy, business interests could not altogether eliminate the idea of rights due to their popular acceptance in society and the role they played in the construction of the liberal market orthodox master narrative that defines the role of government in the economy. Employer groups advocated a particular cultural system that served to *make rights safe* for managerial prerogatives and a decision-making unhindered by popular controls such as public regulation or collective bargaining.

This is the story of the right to refuse unsafe work. Although there has never been a golden era of human rights protection, global worker health and safety policy has undergone a major shift since the 1970s. The right of workers to refuse unsafe or otherwise hazardous work has been at the center of these changes. Once viewed as a workers' freedom of association right, the right to refuse has now become *sui generis* employment policy with specific – and debilitating – legal restrictions. This shift is a consequence of the *non-market* dynamics in the labor policy process both nationally and in the struggle for global labor rights. Studying the protection of workplace health and safety protest illustrates how *non-market* strategies work to create socio-political barriers that impede social justice. Examining the full range of obstacles confronted in policymaking is the key to understanding these dynamics. This chapter outlines a conceptual model to accomplish this goal and thus better analyze global labor rights.

In Anglophone North America, maintaining common law status assumptions in employment is how employers have maintained unequal labor “market” power via *non-market* means. Status assumptions keep employees permanently entrenched in precarious legal limbo and can be used to abrogate labor protections. Labor scholars have rightfully questioned how workers’ rights can ever be protected in a market-based society. The basic question exists even in the discourse of popular media, how can social justice be achieved at work without protecting collective labor rights?⁸¹

Enacting statutes protecting workers has been contentious in the U.S. political system. Employers oppose labor rights and promote business values with the aim of preventing the manifestation of conflict altogether. James Atleson in his study of the judicial interpretations of the National Labor Relations Act found that the common law was used repeatedly by the courts to alter the protective labor law statute.⁸² This process maintained the status assumptions of workers as legally disposable, allowing employers to abrogate labor rights. The courts fused the labor statute with the more restrictive “traditional master-servant notions” thus “giving a legal basis for the power employers desired.” No expectations were negotiated in any employment contract, but these status assumptions were read as legally implicit in the employment relationship.

On the limited status of employees in the management of the enterprise... an analysis of American labor law would have to recognize the presence of status assumptions. Employees, clearly the junior partners in the labor-management partnership, owe a measure of respect and deference to their employers.... These status or class assumptions are derived from classical master-servant law, in which the servant’s deference or respect need not be earned but, rather, was implicit in the employment relationship. Employer freedom of action, however, has generally not been circumscribed on the theory that the “common-enterprise” notion involves corresponding obligations of employer

⁸¹ Fletcher, Bill, & Michael Zweig. (2009). *State of the Unions*. Interview by Bill Moyers [Video]. In Public Affairs Television (Producer), *Bill Moyers Journal*: Thirteen/WNET New York.

⁸² Atleson, James B. (1983). *Values and Assumptions in American Labor Law*. Amherst: University of Massachusetts Press.

to their employees.⁸³

Common law status assumptions shaped employment rights frameworks through the courts, which utilized and applied liberal market management values and business class assumptions in their common law dominated decisions. Where employers have not been able to prevent the passage of protective statutes, judicial decisions preserve employer rights and promote inequality in the face of clear and explicit legislative statutes to the contrary. Status assumptions in employment as institutional policy choices grant employers another forceful method to abrogate various labor rights obligations and thus maintain the liberal market character of employment relations.

Despite these denials of rights, the U.S. labor movement maintained itself as an institution in the post-war years. With the popular unrest of the 1960s and '70s, labor movement participation in these struggles, and the emergence of the environmental movement, leading employers were troubled by “an excess of democracy” in labor and management relations.⁸⁴ Workers’ health and safety policy in the U.S. and Canada, and internationally through ILO global labor standards, would be challenged by new cultural paradigms consistent with this worldview. New employer political values would emerge and hold conceptual influence in global labor rights standard-setting. Labor policy change is thus a story of exclusion and influence. Issues and people have been excluded as obstacles are erected and labor policies advanced not to effectuate freedom but to solidify a liberal market discipline and management power and control. Anglo-American style labor policy has *made rights safe* for employer interests and

⁸³ Ibid. Page 8.

⁸⁴ Crozier, Michael J., Samuel P. Huntington, & Joji Watanuki. (1975). *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission*. New York: Trilateral Commission. See also the text of and the history behind the Powell memo. Lewis F. Powell, Jr. (1971). *Confidential Memorandum: Attack of American Free Enterprise System*. August 23, 1971, to Mr. Eugene B. Sydnor, Jr., Chairman, Education Committee, U. S. Chamber of Commerce.

managerial prerogatives. This interpretation is different than current explanations of labor rights policy change that see the move toward an “individual” rights era as a democratic reflection of popular will, not the consequence of a more disciplinary neo-liberalism. It is this body of scholarship to which I now turn and review. I critique a group of these theories and in so doing clarify a model for the study power, exclusion and influence in labor and human rights policy capable of recognizing the complexity of market societies and the full range of employer political strategies in policymaking.

2.2. Contemporary theories of labor rights policy change

Like the classic industrial relations economists that view labor policy through the lens of alternative market efficiencies and thus silence the real life experiences and human rights claims their models fail to address, there is a similar defect found in pluralist political analysis. Pluralist political philosophy portrays established decision-making arenas as representative of the full range of choices desired within society as if responsive to social competition from all participants in a democratic marketplace. As in a high school civics textbook, decision-making reflects the popular will of society.

Recent explanations of the labor rights policy process have followed pluralist worldviews, much like the classic institutional economists view labor policy through the eyes of competing market actors in a rationalist, democratic marketplace. Because this perspective sees political conflict occurring only within the formal, established institutions of decision-making, silence is taken as consensus and decision-making is seen as the result of efficient and rational individuals competing in the democratic marketplace. Where decisions are made contradicting workers’ interests, as in a movement away from collective bargaining, this political confusion is explained-away

as a kind of backwardness in the “circumstance or culture” of the affected groups.⁸⁵

Pluralist labor scholars have offered a number of explanations for the shift away from collective labor rights. Among the arguments are the claims that individual rights consciousness pushed labor rights policy towards individual protections, that identity politics replaced class analysis within general society, and the belief collective bargaining was an historical anomaly in U.S. political culture which has now returned to reflect a more long-standing set of values. Taken together, these arguments each reflect the classic pluralist belief that the labor policy-making process is a democratic reflection of social beliefs and values. I now address each one of these theories and offer a critique. From my critique emerges a better conceptual model for the analysis of labor and human rights policy in light of more complex social dynamics in society.

a. Individual rights consciousness

Recent debate on the individual employment rights era has focused on how identity and rights discourse have shaped the formation of labor rights policy. This has led to a philosophical debate over the impact of “rights consciousness” on the decollectivization of labor rights and the rise of an individual employment rights era. These arguments have even gone so far as to suggest that individual rights discourse has been top among the factors causing the decline of the organized labor movement.⁸⁶

Nelson Lichtenstein⁸⁷ reinvigorated this charge by arguing against rights-based models of regulation that advocate “state protection as opposed to collective action.” American liberals implicitly endorsed the idea of rights discourse, but took the view “long associated with anti-union conservatism, that the labor movement could not be

⁸⁵Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press. Page 7.

⁸⁶Lichtenstein, Nelson. (2003). The Rights Revolution. *New Labor Forum*, 12(1), 61-73.

⁸⁷Lichtenstein, Nelson. (2002). *State of the Union: A Century of American Labor*. Princeton: Princeton University Press.

trusted to protect the individual rights of its members or of workers in general.”⁸⁸

A great paradox embodies the relationship between human rights and labor rights in the world today. Institutional trade unionism is not doing so well. This is most obvious in Anglo-America, where union density has declined dramatically during the last quarter century.... This eclipse of trade unionism is not just one of declining numbers, bargaining leverage, and political clout. It has had a moral and ideological dimension as well. The effort to find some international mechanism that will defend trade unionism in a globalized economy has proven painfully slow and difficult, but this is not simply a question of capitalist power and prerogative. In addition, it reflects a decline in the legitimacy and authority of unionism as an institution capable of defending the interests of ordinary people around the globe.

All this may well be contrasted, even causally related, to the remarkable growth that has taken place during the last quarter century in the moral authority and sheer political potency of the movement for international human rights. This worldwide endorsement of the human rights idea has become the charter for a new kind of statecraft, even a new kind of globalized civil society.

As deployed in American law and political culture, a discourse of rights has also subverted the very idea and the institutional expression of union solidarity. This is because solidarity is not just a song or a sentiment, but requires a measure of coercion which can enforce the social bond when not all members of the organization—or the picket line—are in full agreement. Unions are combat organizations, and solidarity is not just another word for majority rule, especially when their existence is at stake.⁸⁹

According to Lichtenstein, rights discourse and rights-based organizing strategies, and this encompasses the rise of the employment rights era in the 1960s and 1970s, have resulted in a series of problems for workers: Ineffective legal enforcement removed from the shop floor concerns of workers, a dependency on legal and technical experts, an incapacity to respond to and deal with broad structural economic and social crises, and a failure to challenge or temper managerial prerogatives and authorities at work.⁹⁰

⁸⁸ Ibid. Page 171.

⁸⁹ Lichtenstein, Nelson. (2003). The Rights Revolution. *New Labor Forum*, 12(1), 61-73.

⁹⁰ Ibid.

Lichtenstein's arguments have been re-interpreted by other historians as well as labor economists who argue with less nuance that workers' rights as human rights is an individualist paradigm in statutory employment rights. Richard McIntyre is one of the labor economists in this camp. In a book devoted to this argument, *Are Workers' Rights Human Rights?*⁹¹ he argues that any human rights approach applied to labor and industrial relations promotes individualism and connections with individualism discredits the idea of human rights in employment relations given the importance of the collective legal regulation of labor relations to the protection of workers' rights.

Lichtenstein and others see rights claims per se (as opposed to notions of collective solidarity) as a tragic and unforeseen strategic weakness for labor unions. He cites the public employee movement and its successful use of rights discourses as exceptions to the rule, although this history could be interpreted as evidence against his own thesis. In one sense, all worker activism is in essence a rights claim at its very foundation, even where workers say collective solidarity is the aim. Movements for workers' rights seek change, not an abstract brotherhood and sisterhood for its own sake. Simple company bowling leagues would have otherwise prevented the rise of the American labor movement. How rights claims are manifest in institutional structures is presented as if unfolding by a seamless democratic process from social activism to public policy, with no analysis of the critical power dynamics of statecraft and the idea that the content of laws (if any) is filtered before it becomes policy by political elites and their professional representatives. Social movement activism impacts policy, but to infer that policy is shaped by political choices in a textbook democratic pluralist competition fails to recognize the contested power that influences labor policy change.

⁹¹ McIntyre, Richard P. (2008). *Are Worker Rights Human Rights?* Ann Arbor: University of Michigan Press.

The questions raised here require a more complex understanding and model of the political influence that actors and ideas exert upon institutions. The tragedy of the argument against rights consciousness is that it targets one of labor's most strategic assets – a rights organizing discourse based in universal, fundamental claims to human dignity at work. As a recent debate in the *New Labor Forum* showed, rights for some American trade union activists are still an unsettling idea. Jay Youngdahl, in a debate with Lance Compa, author of the Human Rights Watch report⁹² on workers' freedom of association in the United States, quoted Lichtenstein's arguments against a rights consciousness strategy. Pointing to "right to work" laws as examples of the abuse of rights, Youngdahl writes "unions are all about obligations to our fellow workers" and that "the replacement of solidarity as the anchor for labour justice with 'individual human rights' will mean the end of the union movement as we know it." Human rights for Youngdahl and Lichtenstein are movements toward basic social atomism:

Philosophically, the human rights approach is part of a move to 'atomism,' which the Canadian philosopher Charles Taylor describes as the theory of advocating 'a vision of society as in some sense constituted by individuals for the fulfillment of ends which were primarily individual.' Atomism implies 'the priority of the individual and his rights over society,' which is the fundamental flaw of current human rights ideology and practice.⁹³

The argument against human rights consciousness is based in a belief of the strategic weakness and miscalculation of human rights. Yet without a human rights focus what labor scholars and activists sacrifice by an all-out rejection of any rights consciousness is the total rejection of social claims on power. Ironically, it is the unionists' worry

⁹² Human Rights Watch. (2000). *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*. New York: Human Rights Watch.

⁹³ Youngdahl, Jay. (2009). Solidarity First: Labor Rights Are Not the Same as Human Rights. *New Labor Forum*, 18(1), 31-37. Youngdahl cites Canadian philosopher Charles Taylor and his work in Taylor, Charles. (1985). Philosophy and the Human Sciences. *Philosophical Paper 2*, 187-210.

about a power weakness that has led them to a rejection of rights discourse. Clearly, a better power analysis model is needed to accompany rights-claims-making as these debates occur at cross purposes otherwise. A key point raised by Lance Compa is that workers do have a basic human right to be treated with dignity and respect according to legal standards that are specific and concrete. Specificity and being concrete would seem to be consistent with the desire for more effective strategic claims against power.

How these concrete human rights claims are constituted is a critical question. This dissertation proposes a better power analysis in response, and develops a way forward in this debate that both incorporates the real concerns about power by labor activists while not throwing the baby out with the bathwater regarding worker claims to a concrete, fundamental universal dignity relevant to workers. This protects what has been for many workers a very powerful interpretive lens around which to organize and protest employer violations of dignity, without returning to what is Lichtenstein's neo-voluntarism where the non-state phenomenon of labor solidarity replaces worker claims against a state-backed social order in what is ironically a *laissez-faire* fashion.

The lesson learned from this debate is thus the importance of understanding the political dynamics of how human rights are constituted. If workers did promote rights frameworks that atomized them and destroyed their organized movements, then this is a problem for the workers' rights as human rights paradigm. But if workers advocated rights protections and these protections were shaped and influenced by employers via political activity and counter-mobilization, then we must have another set of concerns entirely regarding the claim that workers' rights are human rights. The critical task of designing a research framework must be to include a method to study the full range of employer influence-seeking mechanisms in labor policy, from overt metrics such as policy demands and political contributions to the more insidious advocacy of values,

beliefs and cultural assumptions that can create obstacles to human rights effectuation.

b. Shifting axes of social mobilization

Attempting to explain why individual employment rights eclipsed collective bargaining, Michael Piore and Sean Stafford⁹⁴ give life to the idea that the shifting axes of policy was the result of society's will manifesting itself in the law. These public interests were reflected in the now dominant labor policies of the "individual" employment rights era. The rise of employment rights regimes have been driven by what Piore and Stafford say are shifts in the locus of social and political mobilization. Collective bargaining emerged under political pressures generated by the mobilization of industrial workers, with unions organized around a set of identities rooted in craft, profession, industry, and enterprise. Employment laws (from the '60s and '70s) were generated by political protest and mobilization around social identities linked to race, ethnicity, and personal characteristics associated with specific social stigmas.⁹⁵

We start from the accepted view that the New Deal collective bargaining system has collapsed. But our argument, laid out in the next section Changing Regimes of Workplace Governance, departs from that view in three critical respects. First we argue that the regime that has replaced collective bargaining is not a market regime at all but rather a regime of substantive employment rights specified in law, judicial opinions, and administrative rulings, supplemented by mechanisms at the enterprise level that are responsive to these rules and regulations but also susceptible to employee pressures. Second, we argue that the emergence of the new regime has been driven, not by neoliberal ideology, but rather by a shift in the axes of social mobilization from mobilization around economic identities associated with class, industry, occupation, and enterprise to mobilization around identities rooted outside the workplace: sex, race, ethnicity, age, disability, and sexual orientation. Third, the shift in the axes of social mobilization reflects the collapse of the underlying model of social and economic organization upon which the New Deal collective bargaining regime was based. Indeed, the collapse of the New

⁹⁴ Piore, Michael J., & Sean Safford. (2006). Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization and the Challenge to Industrial Relations Theory. *Industrial Relations*, 45(3), 299-325.

⁹⁵ Ibid. Page 304.

Deal model reflects an even more fundamental shift in our understanding of the nature of industrial society and its direction of evolution in history.⁹⁶

This shift in mobilization for Piore and Safford “reflects the collapse of the underlying model of social and economic organization upon which the collective bargaining regime was built.” This analysis, like Nelson Lichtenstein’s, presents a democratic idealism in policy formation. Labor policy is reflective of individual worker identity and consciousness as if institutions were shaped by a liberal pluralism of interests.

While no one could deny what is widely acknowledged as an era of social and political activism for social change in the ‘60s and ‘70s, questions remain unanswered about how this history represents labor policy-making. How did labor policy written, administered and interpreted by legislative and judicial elites respond to these social changes? Was there basic democratic competition in decision-making to support their claims? Seeing labor institutions as promoting individualism and then assigning their attributes to general society in a reverse historical order does not give a full accounting of how labor rights have made their turn to an individualist rights era in seemingly harmonious existence with a neo-liberal market society. Lichtenstein in part but more so Piore and Stafford represent individual employment rights as somehow distinct from collective institutions, as if a mutual reinforcement and shared political agenda between the individual and collective is impossible for the rational homo economicus.

Again, this critique helps us further develop the conceptual model needed to study employer influence seeking strategies in global labor rights policymaking. Any model must include an analysis of exclusion in decision-making and an analysis of the obstacles in this exclusion so as to deduce false consensus in policy decision-making.

⁹⁶ Ibid. Page 300.

c. *A long exception from individualism*

Following these general sentiments, Nick Salvatore and Jefferson Cowie write in *The Long Exception: Rethinking the Place of the New Deal in American History*⁹⁷ about what they interpret as “a deep and abiding individualism” in U.S. culture. The conclusions they reach are consistent with Lichtenstein and Piore and Safford. They argue that the rise of collective bargaining was an anomaly in American society and history. With the rise of the employment rights era, the nation has returned to the natural disposition of American society as individualist, untainted by collective hues:

The most salient feature of the history of American working class politics and union representation has been fragmentation.... Yet in the midst of the Great Depression, workers emerged from their separate enclaves into a coalition that drove the single great breakthrough in collective working class politics and organization. It was an extraordinary moment, a singular period in U.S. history, in which all the key factors fell into place to create the New Deal order.... In the face of the stern economic challenges of the seventies, the absence of a viable collective vision that had briefly animated the New Deal liberal policy left few alternatives, while the rising politics of individual rights proved a weak set of protections against the perfect economic storm of the seventies. Despite the collective-sounding left rhetoric that often accompanied demands in the post-1965 civil rights and feminist movements, at the core of these and many other actions was a concern with expanding the rights and freedoms of individuals and social – but not economic – groups. The result would eventually be called “rights consciousness” or “identity politics,” a political outlook that contrasted with the economic liberalism of the New Deal.... The draw of individual and group rights over collective material well being actually speaks to more profound issues: the historical fragility of class identity in American politics, the exceptional nature of the New Deal order, and the powerful allure of individual rights in American Culture.⁹⁸

Together, as a body of labor scholarship these authors share common understandings. Lichtenstein, Piore and Stafford, Salvatore and Cowie and others span disciplines but

⁹⁷ Cowie, Jeffreson, & Nick Salvatore. (2008). *The Long Exception: Rethinking the Place of the New Deal in American History*. *International Labor and Working-Class History*, 74(1), 3-32.

⁹⁸ *Ibid.* Pages 6-7, 20-21.

believe there is a responsive democratic politics between workers' social movements / grassroots social activism, generally speaking, and the labor policy-making process.

There are insights to be gained from David Montgomery's brief but perceptive critique of this body of thought. Raising complex questions of a socially-contested institutional politics, Montgomery focuses more on the power dynamics of exclusion, arguing that "descriptions of the limitations of the New Deal and later the Great Society leave unclear what is to be attributed to counter-mobilizations by business, what to the limited vision of liberal policymakers, and what to the aspirations and fears of workers."⁹⁹ This is in keeping with Montgomery's model of the four sources of employers' control: Ownership of the means of production, company power over employees, the integration of the educational establishment with corporate power, and the coercive authority of government which backs a variety of corporate rights.¹⁰⁰

Pluralist theories of labor policy change rest upon a view of individual rights derived from democratic competition and decision-making. Labor policies are not always changed, however, by workers' consciousness re-cast as if through a mirror reflected into the policy apparatus of the state in textbook democratic fashion. At times more complex contested politics of one variety or another, as alluded to by David Montgomery, have shaped the legal framework independent of social activism.

Any conceptual model analyzing labor policy must be able to capture the counter-mobilizing elements of employer activity as a way to see if these pluralist claims of labor policy change hold water. Where counter-mobilization and employer political activity is documented as influencing labor rights policy, the human rights

⁹⁹ Montgomery, David. (2008). The Mythical Man. *International Labor and Working-Class History*, 74(1), 56-62.

¹⁰⁰ Montgomery, David. (1979). *Workers' control in America: Studies in the history of work, technology, and labor struggles*. Cambridge; New York: Cambridge University Press. Pages 156-158.

antagonism at the center of these pluralist arguments falls apart because weak rights frameworks would not have derived from grassroots labor rights claims-making but rather the more complex, dynamic factor of employer political counter-mobilization.

Labor rights in a market society exist in a tangled web of status assumptions. The dominant explanations by labor scholars about the rise of the individual rights era ignore great complexity in labor policy making. There are reasons to raise questions. In the Anglophone North America context, the legal fusion of protective statutes with common law status assumptions complicates any democratic pluralism argument. If society's decision-making structures respond to emerging beliefs and values in some true democratic way, how do we explain both the administrative and judicial realms of labor and employment policy that deny statutory reconstitutions of a liberal market labor system? The logic underlying a human rights analysis requires understanding the complex questions of power and those socially-contested institutional politics that accompany labor and human rights. How political power impacts labor rights frameworks and their effective protection must be clarified. This includes how labor markets are embedded in society and reinforced and recreated by different *non-market* political forces that exert their influence and ultimately exclude. Industrial relations in the John Dunlop tradition has ignored these more complex *non-market* political forces. A reassessment of this approach begins my detailed description of a better conceptual model for analyzing power, exclusion and influence in human and labor rights policy

2.3. *Employer political activity in labor and employment relations*

Business has played an active role shaping the nature of labor rights and labor protections. Employers preserved managerial prerogatives by advocating workers' rights that do not challenge managerial decision-making and business operations. Negotiating the constitution, scope and function of the "safest" labor rights has allowed business to mute alternative visions that threaten a market society and, in turn, employer power. In the United States and Canada, corporate and political elites defend notions of a self-regulating labor market as second nature. This involves the holding of nuanced postures on labor rights in order to guard against rights that are threatening to management prerogatives. It also involves promoting a jaundiced view of the *non-market* institutional environment that is responsible for setting the "rules of the game" in labor relations. As market hegemony advances in increasing complexity and force, market values and cultural factors mix with traditional coercive influences in labor policy to form recurring themes in the politics of labor and human rights.

In his analysis of industrial relations systems, John Dunlop¹⁰¹ described the relationship between public policy and social actors. He described the power and status of the actors in an industrial relations system as "the product of public policy" and "largely within the explicit decision of the larger society by political processes."¹⁰² Dunlop also distinguished between workers and employers organizations by arguing "worker organizations in respect to management in many industrial relations systems are formulated in terms of the rights of management."¹⁰³ Dunlop noted that the status of management, in contrast to workers, can take a great variety of forms, depending

¹⁰¹ Dunlop, John T. (1958, 1993). *Industrial Relations Systems* (Revised ed.). Boston: Harvard Business School Press.

¹⁰² Ibid. Page 109.

¹⁰³ Ibid. Page 113.

upon the relationship that exists between management, or business, to the government.

When managers are more or less directly responsible or susceptible to pressure from governmental authorities, additional avenues of influencing managers are opened to workers' organizations. The status of managers and their enterprises in the industrial relations system may depend upon their standing with bureaucrats, ministers, legislators, or party leaders and their relative influence compared to leaders of workers' organizations.¹⁰⁴

Dunlop argued, moreover, that there may well be "a variety of very subtle relations among the actors in a national industrial relations system and thus it is most significant for students of industrial relations systems to see through such veils of government rulemaking" because "the actors in the system seldom confuse form with reality."¹⁰⁵

Yet while Dunlop recognized these interrelations and called for "sensitivity to the complex status of the actors and their interrelations" his focus of attention turned to the formal rules of the system reflected by these politics and not how "at one time these statuses and relations are given by the power context of the larger society."¹⁰⁶

Dunlop recognized the politics behind industrial relations yet at the same time depoliticized the study of industrial relations by focusing on "the rules". His focus shifted the gaze of the scholarly field away from those political processes that establish the allocation of rights and privileges in employment. Employers and their political associates, however, continued their efforts to shape and reshape the rules of the game to their advantage. Dunlop's focus on "the rules" thus allowed the field's explanation of labor rights policy change to default to a simple democratic pluralism.

Why employer political activity is not a central topic in industrial relations is in part a consequence of pluralist institutionalism. This absence also extends to business

¹⁰⁴ Ibid. Page 125.

¹⁰⁵ Ibid. Page 127.

¹⁰⁶ Ibid. Page 129.

strategy where one would expect the study of how firms have sought to shape, in the words of John Dunlop, “their standing with bureaucrats, ministers, legislators, or party leaders.” This is explained as the strategy field’s “strategy concepts” being influenced by political forces. The field’s concepts “emerge from a time and context. They are neither values-free nor neutral observations but rather ideologically bound.”¹⁰⁷

Carter, Clegg and Kornberger¹⁰⁸ describe how the study of business strategy has been ideologically driven by free market values and a jaundiced view of the role of the state. They criticize Michael Porter’s work¹⁰⁹ – which continues to be among the most influential in the business strategy field – for relegating the role of government to a secondary factor and thus downplaying the importance of any institutional politics.

It is noteworthy that Porter had relegated the role of government to a secondary factor as it betrays a deep ideological aversion to the role the state.... In Porter’s accounts of strategy, the state is often placed on the periphery, neatly reflecting the “small government” sentiments of the time in which his ideas became fashionable – the period of Reagonomics and Thatcherism. Of course, such thinking has now become ‘the received wisdom’ but, as we shall see, it ignores certain realities.... Porter’s free market ideological position is quite clear. It goes a long way to explaining the downplaying of the role of the state.... We disagree with Porter and regard the state as important in any attempt to understand the economic performance of a sector in a region. Stefano Harvey has also picked up on this point, arguing that strategy lacks any sophisticated theory of the state, seeing it through few terms other than those of ‘red tape’ and ‘bureaucracy’, which corresponds more to certain business prejudices than to a realistic analysis of the role of the state. It is an important omission that strategy scholarship needs to redress to try to gain a more accurate understanding of how strategy works today.¹¹⁰

¹⁰⁷ Carter, Chris, Stewart Clegg, & Martin Kornberger. (2008). *A very short, fairly interesting and reasonably cheap book about studying strategy*. Thousand Oaks: Sage Publications. Page 47.

¹⁰⁸ Ibid.

¹⁰⁹ Porter, Michael E. (1998). *Competitive strategy: Techniques for analyzing industries and competitors, with a new introduction* (First Free Press ed.). New York: Free Press.

¹¹⁰ Carter, Chris, Stewart Clegg, & Martin Kornberger. (2008). *A very short, fairly interesting and reasonably cheap book about studying strategy*. Thousand Oaks: Sage Publications. Page 46-47. Carter, Clegg, et.al cite Harvey, Stefano. (2007). Strategy = management + Mao. [Presentation]. In Aston Business School (Producer), *Twenty-four hours on strategy workshop*.

Carter, Clegg and Kornberger provide the example of the role of the Mexican state in the passage of NAFTA as evidence of the importance of the role of government in the construction and maintenance of private interests. They cite Malcolm Fairbrother's 2007 study on the politics of NAFTA's passage. The study found "three instruments that the Mexican state used to construct politically crucial support for NAFTA on the part of domestic business." Strategies included "control over political representation, material concessions to potential critics, and careful strategic framing."¹¹¹

In response to these limits in their analysis, some business scholars of strategic organization and business strategy are exploring what they have termed "non-market strategy." Henisz and Zelner call for relevant knowledge beyond the much-studied focus on how firms compete in the market against traditional market competitors.¹¹² They recognize how the study of active corporate "efforts in the political arena to manipulate regulations, laws and other institutions that govern the marketplace" have occurred only within the academic domain of the political economists, even as the evidence shows the important role of the state to all types of business activity.

The importance of firms' efforts to manage opportunities and risks in the political arena is evident from the level of resources that such organizations deploy for such efforts and the strength of the relationship between the policy environment and business behavior and performance. Recent estimates of total corporate spending on political lobbying activity in the United States exceeds \$30 billion per year.... Sixteen thousand full-time lobbyists are employed in Washington, DC and another 10,000 now roam the halls of the European Union in Brussels.¹¹³

According to Henisz and Zelner "opportunity lies in the analysis of firms influence-

¹¹¹ Fairbrother, Malcolm. (2007). Making neoliberalism possible: The state's organization of business support for NAFTA in Mexico. *Politics and Society*, 35(2), 265-300.

¹¹² Henisz, Witold J. (2003). The Strategic Organization of Political Risks and Opportunities. *Strategic Organization*, 1(2), 451-460.

¹¹³ Ibid. Page 452.

seeking strategies” beyond the study of “financially-oriented lobbying that constitutes influence-seeking in the traditional model....” Influence-seeking can also involve “the development of political arguments whose persuasiveness derives from their linkages to pre-existing cultural beliefs and biases” or arguments that “ascribe legitimacy to a policy outcome and thereby generate support for or mitigate opposition to the policy.”¹¹⁴ These depictions of influence-seeking paint a more complex picture of the institutional politics at play than simplistic notions found within pluralist accounts.

Employer influence-seeking strategies in labor rights policy and the shaping of labor institutions has not been a focus in Dunlop’s industrial relations. The father of Anglo-American industrial relations failed to follow his own advice and develop a sensitivity to the real world political influences he deemed necessary to understand how labor rights policy works. Employer influence-seeking and the power dynamics of *non-market* strategies are central questions to understand labor institutions and global labor rights, forces that are not external to liberal markets but rather serve as ongoing components of a market society. State politics and the patchwork of policies play a central role in the functioning of labor markets and the regulation of workers.

Karl Polanyi¹¹⁵ observed that labor was a *fictitious* commodity and strong institutions were needed to enforce this unnatural commodification. Labor “markets” are thus the creatures of the state. The political economy of their development and the forces surrounding their design, although neglected, are as much a part of industrial relations as other more traditional questions of labor relations. These factors do not always follow traditional means of influence, as suggested by Dunlop’s ideas about political pressure. Other means of influence, such as advocating certain values and

¹¹⁴ Ibid. Page 455.

¹¹⁵ Polanyi, Karl. (1957). *The Great Transformation: The political and economic origins of our time* (1st Beacon paperback ed.). Boston: Beacon Press.

beliefs that may exclude viable policy alternatives, may also be used to maintain power relations. This requires a different conceptual framework to analyze the kinds of power processes and mechanisms that can bias and exclude in decision-making.

The questions raised by Carter, Clegg, and Kornberger and others follow a movement toward reexamining the state and its politics in labor relations. The state is again becoming a question of concern to labor scholars. This trend must extend to workers' rights as human rights scholarship. Where the focus is narrowly aimed at only an employers' aggressive anti-unionism, for example, or the strategies of a social movement campaign, the role of the state is often silenced by leaving labor rights policies and the ongoing biases of the policy landscape removed from the analysis.

Ignoring the role of the state and its biases repeats the false assumptions that the liberal labor market is a free-standing, stateless, natural social institution. It also is a strategic misstep in the advancement of union activist strategy. Chris Howell, for example, studied the role of the state in the de-collectivization of industrial relations in the United Kingdom. His evidence contradicts the representation of labor policy as a voluntary phenomenon. He found underlying power dynamics were being buttressed by advocacy of a wider system of values that shaped basic policy options.¹¹⁶ David Weil has recognized the business-state dynamic in labor policymaking by focusing on business influence and encourages campaigning for policy change where business interests diverge so as to split the opposition to policy change.¹¹⁷ Gay Seidman in *Beyond the Boycott* questioned whether private NGOs can alone reverse the “race to

¹¹⁶ Howell, Chris. (2007). *Trade unions and the state : the construction of industrial relations institutions in Britain, 1890-2000*. Princeton, N.J. ; Woodstock: Princeton University Press.

¹¹⁷ Weil, David. (2008). Mighty Monolith or Fractured Federation? Business Opposition and Enactment of Workplace Legislation. In Annette Bernhardt, Heather Boushey, Laura Dresser & Chris Tilly (Eds.), *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market* (pp. 287-316). Urbana-Champaign: Labor and Employment Relations Association.

the bottom” in global labor standards.¹¹⁸ Labor rights policy needs analysis in all its faces of power. This involves both the structural barriers in a political system and the dominant cultural practices that can create obstacles and barriers in decision-making.

2.4. The mobilization of bias and the institutional environment

Studies of industrial relations have taken many forms, both philosophically and methodologically. The rise of management thinking and human resource management has eclipsed the study of labor institutions once the bedrock of the field. With a new institutional focus emerging across the social sciences in recent decades¹¹⁹ some in the field of industrial and labor relations have encouraged returning the field’s focus to institutional politics. Among the calls in this direction is John Godard’s revitalizing of IR through a new institutionalism “from a broad, economy and society perspective.”¹²⁰

John Godard’s institutional environments idea moves away from management theory and behavioral research methods that have shifted industrial relations “further away from its institutional tradition and closer to the fields of organizational behavior and human resource management, both of which had come to be dominated by an ahistorical and institutionally blind, managerial orientation.”¹²¹ This has watered down the word “institutions” – if used at all – so the term was almost interchangeable

¹¹⁸ Seidman, G. (2007). *Beyond the Boycott: Labor rights, human rights, and transnational activism*. New York: Russell Sage Foundation.

¹¹⁹ Examples of the new institutional focus in political science include Peters, B. Guy. (2005). *Institutional Theory in Political Science: The 'New Institutionalism'* (2nd ed.). London; New York: Continuum. Examples from organizational studies include Powell, Walter W., & Paul DiMaggio. (1991). *The New institutionalism in organizational analysis*. Chicago: University of Chicago Press. And also Scott, W. Richard. (2008). *Institutions and Organizations: Ideas and interests* (3rd ed.). Los Angeles: Sage Publications.

¹²⁰ Godard, John. (2008). An institutional environments approach to industrial relations. In Charles J. Whalen (Ed.), *New Directions in the Study of Work and Employment: Revitalizing industrial relations as an academic enterprise* (pp. 68-86). Cheltenham: Edward Elgar Publishing. Page 69.

¹²¹ Ibid. Page 68.

with “organization,” a move away from the economy and society perspective where political, economic and legal institutions become just another social actor in society.

Godard seeks an institutional analysis that recognizes that no social actors exist within an institutional vacuum but rather sees that social actors and institutions have a mutual influence upon each other, with the state a factor in analysis. This includes the need for the study of history, the mobilization of bias, and issue exclusion in policy-making. An institutional environments perspective critiques the dominant rationalism common in economics and social science where social actors exist outside institutions.

[Social] actors do not behave as isolated entities, rationally pursuing innate needs or interests in an institutional vacuum, but are instead part of a broader community of actors subject to institutionalized rules. Rules are defined broadly, to include norms, understandings, and expectations, as well as laws and formal incentive structures.¹²²

This view is a step beyond John Dunlop’s manifest rules-based labor institutionalism. There is a recognized mutuality of influence between social actors and institutions, and while rules are embedded in institutional environments, they are “produced and reproduced through processes of social action” often times in self-reinforcing ways.

Rules are embedded not just in behavior, but also in the economic, social and political institutions or arrangements that constitute this behavior, including market and financial structures, state agencies, legal structures, education and training systems, and others. These institutions and the rules undergirding them, may be seen to comprise the institutional environment within which workers, their unions, and their employers act. They are produced and reproduced through processes of social action and in fact are what make such action possible.... institutional environments shape (and are shaped by) the orientations and identities of the actors and the relationships between them.¹²³

The mutuality of influence between actors and institutions affords a more complex

¹²² Ibid. Page 70.

¹²³ Ibid. Page 70.

view of the social world beyond the more pluralist de-contextualized view of legalistic rules. Any framework that studies the complexities of the institutional world supports a human rights approach because human rights situations are influenced by diverse power relationships that impact their effective freedom and directly challenge rights.

For Godard, nation-state politics constitute and shape institutional practices and forms; “variants of capitalism” exist with “differences in the logic governing work and employment relations within these variants.” Within an institutional environments approach, “nation state paradigms play an important role in shaping institutional environments and the rules that underpin them.”¹²⁴ This perspective is important to a human rights worldview which places special responsibilities on the state, arguing it is the first responsibility of the state to protect universal human rights.¹²⁵ This view also recognizes how policy paradigms and differences in cultural logics of action are important elements in institutional analysis from an economy and society perspective.

Historical analyses are likewise important to the institutional environments perspective. Policy templates created through history “give rise to deeply embedded ‘institutional norms,’ or beliefs, values, and principles as to the role, rationale for, and legitimacy of established institutions.” These norms, beliefs, values, principles or templates create a *mobilization of bias* that privileges some groups, practices or social actors over others. These biases can be strengthened if a dominant group is able “to effectively control the agenda and achieve an ideological hegemony” that serves their interests. Likewise, it can be weakened if the ideological hegemony is challenged.¹²⁶

¹²⁴ Ibid. Page 71.

¹²⁵ United Nations. (1993). *Vienna Declaration on Human Rights*. Adopted by the General Assembly A/CONF.157/23 - 12 July 1993.

¹²⁶ Godard, John. (2008). An institutional environments approach to industrial relations. In Charles J. Whalen (Ed.), *New Directions in the Study of Work and Employment: Revitalizing industrial relations as an academic enterprise* (pp. 68-86). Cheltenham: Edward Elgar Publishing. Page 71.

Godard's call for an economy and society-based institutionalism and its focus on the mobilization of bias builds upon scholarly debates which have deeper roots in the study of these questions. The institutional labor environments approach, unlike traditional pluralist scholarship, moves industrial relations beyond Dunlop rules-based pluralism to analyze bias mobilization and the impact of values and beliefs on policy, affording a more dynamic analysis of power processes at play in the lives of workers.

The mobilization of bias is at the heart of the study of power, exclusion and influence. It is the process of excluding both issues and actors from participating in decision-making. Studying this mobilization, structurally and culturally, creates a basis for a new framework for the analysis of labor institutions that is consistent with human rights theory and approach. It is to this framework that I now turn to explain, explore and elaborate as a conceptual model for the study of labor and human rights.

2.5. Analyzing power, exclusion and influence

Influence-seeking and exclusion cannot be analyzed with a one-dimensional understanding of power. This problem was central to the work of John Gaventa, an American political sociologist and student of Stephen Lukes in the 1970s. Gaventa's dissertation, published as *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*¹²⁷ in 1982 was noted for its methodology and conceptual work in developing a grounded way to study the multiple dimensions of the power process. Gaventa, like Lukes, recognized three "dimensions" or "faces" of power that affect the process of how society and the polity itself make decisions. Decision-making was a power process affected not just by competing social actors in the market of democracy

¹²⁷ Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press.

but also, at times, was influenced by both a second and third dimension of power.

John Dunlop's industrial relations systems and the assumptions of labor rights policy change implicit in the work of Lichtenstein, Piore and Stafford, and Salvatore and Cowie, are akin to the pluralist dispositions criticized by Gaventa. Gaventa was critical of the work of Robert Dahl who studied community power.¹²⁸ Robert Dahl argued that in the U.S. "the political system is easily penetrated by anyone" and "the political system does not constitute a homogenous class with well-defined class interests."¹²⁹ A second critique was made by Gaventa about the work of Nelson Polsby. Nelson Polsby argued power can be studied by examining decision-making where "grievances are assumed to be recognized and acted upon" in democratic politics.¹³⁰ Gaventa described the work of Dahl and Polsby as approaches to the study of power and interests that were taking a simplistic, one-dimensional view of power:

Within the one-dimensional approach, because a) people act upon recognized grievances, b) in an open system, c) for themselves or through leaders, then *non-participation* or *inaction* is not a political problem.... The pluralists argue that by assuming political action rather than inaction to be the problem to be explained, their methodology avoids the 'inappropriate and arbitrary assignment of upper and middle class values to all actors in the community.' – i.e. the value of participation. Yet, the assumption itself allows class-bound conclusions.... Political silence, or inaction, would have to be taken to reflect 'consensus', despite the extent of the deprivation. Rarely is the methodology thus applied, even by the pluralists themselves. To make plausible inaction among those for whom the status quo is not comfortable, other explanations are provided for what appears 'irrational' or 'inefficient' behavior. And, because the study of non-participation in this approach is sequestered by definition from the study of power, the explanations must generally be placed

¹²⁸ Dahl, Robert A. (1969). The Concept of Power. In Roderick Bell, David V. Edwards & R. Harrison Wagner (Eds.), *Political power; a reader in theory and research* (Reprinted from *Behavioural Science*, 2 (1957), 201-5 ed.). New York: Free Press.

¹²⁹ Dahl, Robert A. (1961). *Who governs? Democracy and power in an American city*. New Haven: Yale University Press.

¹³⁰ Polsby, Nelson W. (1963). *Community power and political theory*. New Haven: Yale University Press. Page 55. Gaventa also cites Polsby, Nelson W. (1959). The Sociology of Community Power; A Reassessment. *Social Forces*, 37. Page 235.

within the circumstance or culture of the non-participants themselves.¹³¹

Policies that do not reflect popular sentiments thus are the result of apathy, cynicism or the alienation of the disparate groups, not bias, or an inequality in influence within the political process itself. The failure of labor rights policy to protect human rights for Lichtenstein is a failure in the rights consciousness of workers. The loss of a class-based analysis by workers in favor of identity politics is Piore and Stafford's claim. The return to some natural individual consciousness, however strategically ineffective for labor rights, is the charge against workers by Salvatore and Cowie. These patterns fit a pluralist model and represent a one-dimensional power analysis in labor studies.

Among the first critics of the one-dimensional approach to power studies was E.E. Schattschneider. Schattschneider coined the phrase "the mobilization of bias" in 1960 with *The Semi-Sovereign People: A Realist's View of Democracy in America*.¹³² Schattschneider noted the pluralist accounts of political exclusion were ungrounded. He reintroduced the concept of suppression to a rigid American political science field:

There is a better explanation: absenteeism reflects the suppression of the options and alternatives that reflect the needs of the nonparticipants. It is not necessarily true that people with the greatest needs participate in politics most actively – whoever decides what the game is about also decides who gets in the game.¹³³

This critique was later elaborated and became known as the second dimension of the exercise of power. We turn again to Gaventa for his concise description of the idea.

Schattschneider introduced a concept later to be developed by Bachrach and Baratz¹³⁴ as power's 'second face', by which power is exercised not just upon

¹³¹ Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press. Page 6-7.

¹³² Schattschneider, E. E. (1960). *The semisovereign people; A realist's view of democracy in America*. New York: Holt, Rinehart and Winston. Page 71.

¹³³ Ibid. Page 105.

¹³⁴ Bachrach, Peter, & Morton S. Baratz. (1962). Two Faces of Power. *The American Political*

participants within the decision-making process but also towards the exclusion of certain participants and issues altogether.¹³⁵ Political organizations, like all organization, develop a ‘mobilization of bias . . . in favour of the exploitation of certain kinds of conflict and the suppression of others . . . Some issues are organized into politics while others are organized out.’¹³⁶ And, if issues are prevented from arising, so too may actors be prevented from acting. The study of politics must focus ‘both on who gets what, when and how and who gets left out and how’ – and how the two are interrelated.¹³⁷

Bachrach and Baratz described the need for a second face of power through critique of the one dimensional view of power. They contrast this second face of power approach with the one dimensional view of power using a concept called “nondecision-making.”

[Investigators] mistakenly assumed that power and its correlatives are activated and can be observed only in decision-making situations. They have overlooked the equally, if not more important area of what might be called ‘non-decision-making’, i.e., the practice of limiting the scope of actual decision-making to ‘safe’ issues by manipulating the dominant community values, myths, and political institutions and procedures. To pass over this is to neglect one whole ‘face’ of power.¹³⁸

The Bachrach and Baratz “nondecision-making” concept was part of the second face of power, where some issues are protected and made “safe” while other issues that may serve to threaten power and privilege are marginalized and/or are excluded.¹³⁹

John Gaventa’s contribution to this debate was in developing a methodology to study not only the first and second faces of power, but taking from political theory a debate on a third dimension of power relations, articulating a model to study this third

Science Review, 56(4), 947-952.

¹³⁵ Bachrach, Peter, & Morton S. Baratz. (1963). Decisions and Nondecisions: An Analytic Framework. *The American Political Science Review*, 57(3), 632-642.

¹³⁶ Schattschneider, E. E. (1960). *The semisovereign people; A realist's view of democracy in America*. New York: Holt, Rinehart and Winston. Page 71.

¹³⁷ Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press. Page 9.

¹³⁸ Bachrach, Peter, & Morton S. Baratz. (1962). Two Faces of Power. *The American Political Science Review*, 56(4), 947-952.

¹³⁹ Bachrach, Peter, & Morton S. Baratz. (1963). Decisions and Nondecisions: An Analytic Framework. *The American Political Science Review*, 57(3), 632-642.

aspect of power relations, and showing how three dimensions can be studied together as interrelated phenomena, at times reinforcing each other and playing off one another.

The weakness of the two dimension model of power was first documented by Stephen Lukes and Gaventa built upon the work of Lukes for his methodology.¹⁴⁰ The two dimension power model failed to recognize power at work where conflict was avoided altogether. The two dimensions model recognized how people and issues are excluded, but this non-decision-making was said to exist only where the individuals and communities so marginalized hold an awareness of their own social exclusion:

For the purpose of analysis, a power struggle exists, overtly or covertly, either when both sets of contestants are aware of its existence *or when only the less powerful party is aware of it*. The latter case is relevant where the domination of status quo defenders is so secure and pervasive that they are oblivious of any persons or groups desirous of challenging their preeminence.¹⁴¹

The second face of power focuses on cognizant exclusion, no matter how difficult that exclusion may be to observe and document. Gaventa and Lukes argued this focus may essentially “lead it to neglect what may be the ‘crucial point’: ‘the most effective and insidious use of power is to prevent such conflict from arising in the first place’”.¹⁴²

Silence and submerged conflict, Gaventa thus argued, required a third analysis of power. In the third dimension of power, influence shapes values and beliefs to “pre-empt manifest conflict” and shape “patterns or conceptions of non-conflict”. The aim for the social researcher in studying the third dimension of power is to uncover

¹⁴⁰ Lukes, Steven. (1974, 2005). *Power: A Radical View* (2nd ed.). New York: Palgrave Macmillan.

¹⁴¹ Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press. Page 11. Quoting Bachrach, Peter, & Morton S. Baratz. (1970). *Power and poverty; theory and practice*. New York,; Oxford University Press. The emphasis is Gaventa's.

¹⁴² Lukes, Steven. (1974, 2005). *Power: A Radical View* (2nd ed.). New York: Palgrave Macmillan. Pages 20-23.

“latent conflict” to “allow ‘for consideration of the many ways in which potential issues are kept out of politics, whether through social forces and institutional practices or through individuals’ decisions’”.¹⁴³ The three dimensions of power each focus on distinct elements of power. As a conceptual framework they connect with each other. The three dimensions of power can interact, be it the functional representation of the first dimension of power, the cognizant social exclusion of the second face of power, or the pre-empting of manifest social conflict entirely in the third dimension of power.

This conceptual model serves as an excellent basis with which to identify the range of employer influence-seeking strategies in global labor rights policy. The main goal of the three dimensions of power framework is to allow identification and study of all forms of conflict, including latent conflict, as a way to document how issues are excluded from politics and in our case, the global labor rights policy-making process. By understanding the full range of influence-exclusion politics, we also work to understand the full range of employer political activity and counter-mobilization.

¹⁴³ Ibid. Page 24.

TABLE 2.1. *Power as defined by Lukes' three-dimensional view of power*¹⁴⁴

VIEW OF POWER	FOCUS
One-dimensional	(a) behavior (b) decision-making (c) (key) issues (d) observable (overt) conflict (e) (subjective) interests, seen as policy preferences revealed by political participation
Two-dimensional	(a) decision-making and nondecision-making (b) issues and potential issues (c) observable (overt or covert) conflict (d) (subjective) interests, seen as policy preferences or grievances
Three-dimensional	(a) decision-making and control over political agenda (not necessarily through decisions) (b) issues and potential issues (c) observable (overt or covert), and latent conflict (d) subjective and real interests

Management scholars immediately grasped the usefulness of the Gaventa-Lukes framework in *Power and Powerlessness*. Cynthia Hardy wrote in the *Journal of Management Studies*¹⁴⁵ about how social actors use power. Describing the third face of power as “unobtrusive power” Hardy observed it is “used by actors to ensure that potential opposition groups do not challenge them...to prevent resistance” and defeat “declared and identified opponents.” This is “the ability to shape values, preferences, cognitions, perceptions so that grievances and issues do not arise or, if they do, they are never articulated or transformed into demands and challenges.”¹⁴⁶ The “ideological hegemony of a wider society” serves as one source of power. The “ability to institutionalize existing power in structures and cultures to protect it from

¹⁴⁴ Ibid. Page 29.

¹⁴⁵ Hardy, Cynthia. (1985). The Nature of Unobtrusive Power. *Journal of Management Studies*, 22(4), 384-399.

¹⁴⁶ Ibid. Pages 384, 387.

change” is another source of power as are the symbols, languages, myths, rituals, ceremonies and settings that are “engineered by the political strategies of others.”¹⁴⁷

Today, organizational studies focuses on these cultural factors, which extend to studies of trade union renewal. Bachrach, Bamberger and Sonnenstuhl¹⁴⁸ focused on the cultural aspects of union renewal following the work of Richard Scott¹⁴⁹ and Roy D’Andrade.¹⁵⁰ Institutions include “a variety of cultural elements from which actors construct reality; these cultural elements include beliefs, language, typifications, rituals, and stories” from which “strategies of action” are constructed that “empower actors” but likewise can mobilize bias and disempower others from taking action.¹⁵¹ While a culture-focus can itself become hegemonic, at times eclipsing any focus on traditional material coercion, cultural factors are critical in institutional analysis.

John Gaventa’s major contribution to the study of “unobtrusive” power was to provide a workable method and conceptual framework that avoids major problems that have surfaced in the study of interests. His dissertation advisor Stephen Lukes faced the challenge of showing how latent social conflict could be studied without the elite researcher’s assumptions about the “real interests” of the dispossessed or powerless group being projected or forced upon the powerless group within a study. Gaventa’s methodological contribution was to argue that the study of “interests” in the power process does not require their specific identification and attribution to any group. The

¹⁴⁷ Ibid. Pages 398, 392.

¹⁴⁸ Bacharach, Samuel B., Peter Bamberger, & William J. Sonnenstuhl. (2001). *Mutual Aid and Union Renewal: Cycles of logics of action*. Ithaca: ILR Press. Page 24. Another example of this approach is Chaison, Gary N., & Barbara Jane Bigelow. (2002). *Unions and Legitimacy*. Ithaca: ILR Press.

¹⁴⁹ Scott, W. Richard. (2008). *Institutions and Organizations: Ideas and interests* (3rd ed.). Los Angeles: Sage Publications.

¹⁵⁰ D’Andrade, Roy. (1984). Cultral Meaning Systems. In Richard A. Shweder & Robert A. LeVine (Eds.), *Cultral Theory* (pp. 88-119). Cambridge: Cambridge University Press.

¹⁵¹ Bacharach, Samuel B., Peter Bamberger, & William J. Sonnenstuhl. (2001). *Mutual Aid and Union Renewal: Cycles of logics of action*. Ithaca: ILR Press. Page 24.

researcher's task was instead to show how particular powerless groups "are prevented from acting upon or conceiving certain posited interests." This alone "is sufficient to show that the interests that are expressed... are probably not the real ones."¹⁵²

Where negative impacts for a certain group are deduced from *the impact* of expressed interests, this is further evidence that the interests that are expressed are likely not the real ones manifest for that group. Where the adverse impact of policy and the prevention of action / the prevention of conceiving certain posited interests coincide, this was strong evidence in favor of what Gaventa called a *false consensus*. The concept of false consensus ultimately affords human rights scholars an important tool. Where rights-obligation structures fail to effectively protect rights-holders as defined by a human rights viewpoint, one can deduce that interests are not adequately represented or expressed in policy decisions and therefore a false consensus exists.

This model is a dynamic approach to power and unlike the pluralist focus that is Dunlop's industrial relations one-dimensional view of labor rights policy change. This model thus solves the problems that have troubled the study of human rights. It helps resolve the interest-definition and researcher objectification problem that has to date proved a problem in developing a workable sociology of human rights. It also builds human rights theory into an institutional analysis in labor scholarship without altering the fundamental dignity logic that underlies the human rights worldview.

The empirical evidence presented in this dissertation demonstrates that a *false consensus* exists in the protection of the right to refuse unsafe work under global labor standards. It chronicles the power dynamics behind this false consensus, highlighting the employer political activity and counter-mobilization behind these power dynamics.

¹⁵² Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press. Page 29.

Methodologically this approach is difficult to accomplish with a variable-centered research design and regression model. An institutional environments approach rejects “methodological individualism in favor of a more nuanced, historically informed analysis.”¹⁵³ A qualitative in-depth case study or a comparative analysis is preferred. This allows for the study of the obstacles in policymaking and the adverse impact of the dominant interests that have won out as a result. Investigating power within this analysis involves [1] the investigation of obstacles in decision-making, structural or cultural, that prevent people or groups from acting upon or even conceiving particular interests, and [2] the study of the actual policy choices made in decision-making and the real-world impact on workers, communities or any other such dispossessed group so that by deduction conclusions can be drawn about the cultural frameworks that led to the creation of and continue to reinforce and support particular policy frameworks.

The remaining chapters follow these key points of investigation on the right to refuse unsafe work under global labor rights standards. As a broad investigation of employer political activity and counter-mobilization, these elements of false consensus are demonstrations of cultural political strategies. This framework thus moves the study of employer political activity and counter-mobilization beyond simple observed metrics and stated business policies into the realm of the manipulation of political and social values, beliefs, and the broad control of cultural factors in counter-mobilization.

If politics mobilizes bias to a constitution of rights that is “safe” to power and privilege at the expense of others, a grounded, extended case study approach is best to examine this process.¹⁵⁴ Gaventa noted this approach – similar to a classic grounded

¹⁵³ Godard, John. (2008). An institutional environments approach to industrial relations. In Charles J. Whalen (Ed.), *New Directions in the Study of Work and Employment: Revitalizing industrial relations as an academic enterprise* (pp. 68-86). Cheltenham: Edward Elgar Publishing. Page 68-70.

¹⁵⁴ The grounded theory method is a social research method that encourages researchers to analyze society and social processes without accepting predetermined concepts drawn from academic

theory method that argues “all is data” – “requires going outside the decision-making arenas and carrying on extensive, time consuming research” about those issues and actors dispossessed by the politics in question. “There,” he notes, “non-actors and non-leaders become important, not as objects of scrutiny in themselves but to discover through their experiences, lives, conditions, and attitudes, whether and by what means power processes may serve to maintain non-conflict” through various mechanisms.¹⁵⁵

By examining exclusion over time in historical perspective, it may even be possible, as Gaventa did in studying Appalachian quiescence and power, to document the disappearing of certain conceptions of rights from political discourse altogether, from second dimension exclusion to, over time, the disappearance of manifest conflict and the removal of certain rights, however critical, from a political discourse entirely.

This analysis also relates to social movement scholarship. Labor rights policy is contested political and social terrain not disconnected from social movements and activism. Yet the discourse of rights has only recently become a focus of scholarship, and questions have been raised about how social actors shape the discourse of rights:

The “discourse of rights has no independent capacity for action, and cannot simply ‘shower meanings on the society below’ ... this discourse can only be effective when attached to social actors and organizations. Social movements, for their part, do not merely perceive or receive rights as symbols, but are active in discovering, shaping, and disseminating these rights.”¹⁵⁶

literature that can shape how an investigator understands social phenomena before any interaction with the real world. Basic social processes are the focus, “all is data” and the “emergence” of concepts is prioritized. This approach was first articulated in Glaser, Barney G. (1965). The Constant Comparative Method of Qualitative Analysis. *Social Problems*, 12(4), 436-445. The most cited articulation is found in Glaser, Barney G., & Anselm L. Strauss. (1967 2006). *The Discovery of Grounded Theory; Strategies for Qualitative Research*. New Brunswick, N.J.: Aldine Transaction (a division of Transaction Publishers). Variations have developed. See Bryant, Anthony, & Kathy Charmaz. (2007). *The SAGE Handbook of Grounded Theory*. Thousand Oaks, CA: Sage Publications Ltd.

¹⁵⁵ Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press. Page 27.

¹⁵⁶ Foweraker, Joe, & Todd Landman. (1997). *Citizenship Rights and Social Movements; A Comparative and Statistical Analysis*. Oxford; New York: Oxford University Press. Page 33.

Studying power, influence and exclusion offers a focus on the ways policy discourse and the mobilization of bias may unknowingly influence social actors by framing and coercing issues and actors toward acceptable choices. This is beyond the “framing” analysis in the tradition of Erving Goffman¹⁵⁷ as it incorporates the third dimension of power where conflict becomes latent. Where frame analysis focuses on the frame of a policy or of a discourse, Lukes and Gaventa focus on the people and the ideas that are altogether excluded and silenced from both policymaking and the political discourse.

As employer political activities influence human rights ideas, developing a grounded conceptual framework to study the labor policy process becomes important. Any method must be able to explain *non-market* strategies beyond the basic metrics of a single firm’s public affairs and lobbying expenditures. It must also encompass the impact of all dimensions of power within an institutional environment. Questions of power by their nature are human rights concerns as they examine the nature of basic human rights and the effectiveness of policies that are said to protect human freedom.

2.6. Effective human rights and the right to refuse unsafe work

Applying this model to the right to refuse unsafe work, I consider why the right to refuse has become an individual employment protection in the United States, in Canada, and under global labor standards. How does the real world experience of exercising this right on-the-ground comport with human rights policy? What issues that are missed or excluded from this form of labor protection? How have key employers’ groups used their power and privilege to shape these rights protections? Is there evidence that this constitution of the right to refuse is the result of employer-led

¹⁵⁷ Goffman, Erving. (1974, 1986). *Frame Analysis: An Essay on the Organization of Experience*. Boston: Northeastern University Press.

political activity, or has even been part of a coordinated employer political strategy?

Analyzing the three dimensions of power adapts well to the study of human rights in labor and industrial relations. As a framework that encompasses the study of interests by focusing on the dominant policy framework and the obstacles faced in the realization of alternatives, this model repositions the study of power within labor and industrial relations in a complex, dynamic power process that recognizes a variety of social forces that can impede human rights and effective freedom. This investigation can be accomplished without forcing researchers to get bogged-down in debates about judgments regarding what rights are universal human rights and what rights are not. The main focus shifts to the impact of institutional decision-making and non-decision-making and from these key points, deductions can be made about interests and rights.

We can see the value of the three faces of power framework in the analysis of a long-standing concern in labor policy: Human resources management union strategy. Bruce Kaufman documented the early years of human resource strategy in America in *Managing the Human Factor*.¹⁵⁸ He explained that The Labor Problem gave birth to the business-friendly HRM strategies of union substitution through welfare capitalism:

... employers took one or a combination of two approaches to union avoidance – union suppression and union substitution.... The “new labor policy” in the form of welfare capitalism, was the strategy and embodiment of union substitution. Employers meant to keep out unions by reducing or eliminating workplace dissatisfaction, by giving workers more than unions could deliver, and by providing an alternative forum for voice and dispute resolution.¹⁵⁹

Kaufman also provides evidence that the three dimensions of power framework would be helpful in understanding how manifest conflict is made into latent conflict. He

¹⁵⁸ Kaufman, Bruce E. (2008). *Managing the Human Factor: The Early Years of Human Resource Management in American Industry*. Ithaca: Cornell University Press.

¹⁵⁹ Ibid. Page 206.

cites Sumner Slichter's account of these management strategies which demonstrates how business activism moved from coerced issue exclusion to making conflict latent:

[HRM] is nothing less than an attempt to control the effect of modern industrial development upon men's minds.... [It] has the ambition, the objective of preventing a class struggle, building up a very difficult kind of psychology, creating content with one's situation and faith and loyalty, faith in employers, a particular employer, and loyalty to a particular employer. It tries to inculcate a faith just as much as a religion tries to inculcate a faith.¹⁶⁰

The three dimensions of power framework recognize these actions as being important strategic concerns. Buttressing coercion with psychological manipulation suppresses manifest conflict which in turn impacts the labor policy outcomes endured by workers, turning matters once the subject of heated conflict into no apparent conflict at all.

The study of the power process in industrial relations is by its very nature an exercise of importance to human rights questions. Groups and issues excluded from the policy making process raise human rights questions beyond the mere legalist focus on human rights that has characterized much human rights scholarship. It opens new lines of inquiry into the range of social obstacles that can barricade policy alternatives.

According to Tony Evans,¹⁶¹ there are three overlapping discourses on human rights, "each with its own language, concepts, and normative framework." These are the philosophical, the legal, and the political. The philosophy of human rights seeks to "discover secure foundations upon which human rights claims might be built" and has included debate over "the existence of a deity, human need, self-evidence, and theories of justice."¹⁶² Evans calls this debate "as much round and round as ever forward"¹⁶³

¹⁶⁰ Ibid. Page 214.

¹⁶¹ Evans, Tony. (2005). International human rights law as power/knowledge. *Human Rights Quarterly*, 27(3), 1046-1068.

¹⁶² Vincent, R. J. (1986). *Human Rights and International Relations*. Cambridge: Cambridge University Press.

¹⁶³ Evans, Tony. (2004). Universal Human Rights: 'As much round and round as ever forward'.

and “a point of ‘arrival’ for liberal cosmopolitanism, rather than a point of ‘departure’ towards new ways of conceptualizing rights and social order and as a conservative rather than a radical project.”¹⁶⁴ This discourse is moral but often abstracted without empirical grounding. It is, however, eclipsed by the legal discourse of human rights.

Human rights legal discourse uses “international human rights law claims to articulate a set of ‘neutral’ values to which all reasonable people should subscribe.”¹⁶⁵ It “focuses upon the internal logic of the law, its elegance, coherence, extent, and meaning, which the application of legal discourse is said to reveal.”¹⁶⁶ Law discourse “plays the dominant role” in human rights today, and “proclaims the triumph of particular truths over all previous heretical doctrines” while failing to understand “the dynamic nature of social formation” necessary to understand human rights violations. Legal discourse “cuts off further debate” about “the project to understand the causes of human rights violations” and fails to include “an account of power and interest” and “obstructs further investigation into human rights within a changing world order.”¹⁶⁷

The political discourse of human rights, in contrast to legal and philosophical discourses, is concerned with “questions of power and interests associated with the dominant conception of human rights and the expression of those interests as legal and philosophical ‘truths’”. This discourse is marginalized as a “value-laden ideological

The International Journal of Human Rights, 7(4), 155-168.

¹⁶⁴ Raphael, D. D. (1966). The Liberal Western Tradition of Human Rights. *Bulletin international des sciences sociales, UNESCO*. Evans also cites Carver, Terrell. (1999). *The Postmodern Marx*. University Park: Pennsylvania State University Press.

¹⁶⁵ Marks, Stephen P. (1998). From the Single Confused Page to the Decalogue for Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution. *Human Rights Quarterly*, 20, 459-514. See also McCorquodale, Robert, & Richard Fairbrother. (1999). Globalization and Human Rights. *Human Rights Quarterly*, 21(3), 735-766.

¹⁶⁶ Vincent, R. J. (1986). *Human Rights and International Relations*. Cambridge: Cambridge University Press.

¹⁶⁷ Evans, Tony. (2005). International human rights law as power/knowledge. *Human Rights Quarterly*, 27(3), 1046-1068. Pages 1052-1053.

project” by the legal and philosophical discourses, yet it is necessary to maintain any institutional critique. Institutional critique is needed to study “the ways in which these claims to truth are achieved, legitimated, and presented as the authoritative guide for action” and “the interests served by the production and maintenance of particular truths, and the processes that enable some forms of knowledge to be accepted as complete and legitimate while other forms are labeled partial and suspect.”¹⁶⁸ Power analysis provides this institutional critique on human rights and is critical because a new system of analysis is needed in industrial relations beyond the one dimensional focus on alternative labor market efficiencies and because the contemporary discourse on human rights, as Tony Evans suggests, can be one of either freedom or domination. The best conceptual approach for the study of workers’ human rights questions in an institutional analysis is to focus on the politics of human and labor rights in a way that encompasses questions of interests in an analysis that studies all dimensions of power.

Human rights are bound with the idea of effective freedom. This idea had been recognized by the drafters of the Universal Declaration of Human Rights in Article 8.

Article 8. Everyone has the right to an *effective* remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. (emphasis added)¹⁶⁹

Article 8 establishes the right to an effective remedy in much the same way popular rights consciousness has demanded effective freedom throughout U.S. labor history.

Effective freedom raises at least two important methodological points for the study of power in industrial and labor relations and the study of the right to refuse unsafe work specifically. The idea of an *effective* freedom bound with the question of

¹⁶⁸ Ibid. Page 1049.

¹⁶⁹ United Nations. (1948). *Universal Declaration of Human Rights*. Adopted at the 183rd meeting of the General Assembly in Paris, 10 December 1948.

human rights implies that rights hold a possibility of being *ineffective*. *Effectiveness* requires studying power's impact and the barriers constructed to policy alternatives. It is an implicitly comparative, qualitative task. Gaventa suggests this involves listening to the sub-altern voices of excluded groups and issues, but where those groups may be silent or absent, *consensus cannot be assumed*. The focus must turn to the dominant discourse and manifest policy choices to examine the obstacles constructed to social change. With this analysis, deductions are made about who benefits from dominant policies and in turn who is burdened, as questions are raised about the impact of labor institutions on the human rights landscape and the *effectiveness* of these human rights.

As labor rights scholars debate both the collective and the individual forms of workers' representation, a human rights focus should assess the effective freedoms of all forms of representation, including other forms of representation that do not fit neatly into what is at times a problematic dichotomy. This involves questioning the ways "human rights are understood, valued, and embedded within society" and the "modalities and scope of the proposed procedure" used to protect human rights.¹⁷⁰

How labor rights policy makes workers represent their claims is an important concern to human rights. "The silencing of the victim may occur . . . [where] the victim is forced to represent their claim in a language that either distorts or denies the substance of their claim"¹⁷¹ if they are allowed to represent their claim at all. If there is issue exclusion and a false consensus, *effective* freedom is undermined. This model for the study of power, exclusion and influence is well-suited for analyzing the power

¹⁷⁰ Langford, Malcolm. (2008). The Justiciability of Social Rights: From Practice to Theory. In Malcolm Langford (Ed.), *Social Rights Jurisprudence: Emerging trends in international and comparative law* (pp. 3-45). Cambridge; New York: Cambridge University Press. Pages 10, 29.

¹⁷¹ Craven, Matthew. (2005). Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights. In John Squires, Malcolm Langford & Bret Thiele (Eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (pp. 27-42). Sydney: University of New South Wales Press. Page 29-30.

dynamics of global labor rights, especially under ILO global standards. With evidence of barriers in labor rights policy-making documented, the task becomes understanding how labor politics, discourses and frameworks have acted to confound, constrain and silence labor's alternative policy choices, making alternative social models invisible.

CHAPTER III

HISTORICAL BACKGROUND

Collective bargaining confronts a new generation of business activism

3.1. Maintaining market discipline in labor rights policy

The right to refuse has been entangled in wider political dynamics for the last generation. Analyzing power, exclusion and influence in global labor rights policy begins with a study of the underlying historical context. Global society had come to realize the emerging crisis of environmental safety and health in the 1960s and 1970s. With that realization was a popular demand for meaningful social change and the emergence of a human rights movement that included economic and social rights that altered the status assumptions of workers. It also moved to expand upon the strong and hopeful standards on workers' freedom of association adopted by the postwar ILO. This chapter examines this historical background. It is a history at the center of which was organized, strategic employer political activity and counter-mobilization. Documented here is how business worked to re-cast political strategies with renewed market-based values as a direct response to broad social dissatisfaction with business and what it considered unacceptable demands within labor-management relations. Given the dominance of Anglo-American values during this time and the eventual role these values would play in the adoption of global labor standards on the right to refuse unsafe work, the focus of this history is the North American context and the general political environment of this business coordination in the United States and Canada.

This reawakened employer counter-mobilization on workers' ecology and the working environment is a socially-contested history that underlies this dissertation's

investigation of false consensus on the right to refuse under global labor standards.¹⁷²

“Bargaining over certain matters,” observed James Atleson, “is qualitatively different from dealing with customary matters such as wages and hours.”¹⁷³ Working conditions strike at the heart of managerial power and control, illuminating underlying power inequalities in labor and employment relations. Workplace health and safety is an internationally-recognized human rights concern, unlike the rights of employers to dismiss employees at-will. The Universal Declaration argues “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”¹⁷⁴ The International Covenant on Economic, Social and Cultural Rights protects “safe and healthy working conditions” as well as “rest, leisure and reasonable limitations of working hours.”¹⁷⁵ As human rights, one might infer that workers hold a protected right to refuse unsafe or hazardous work.

The failure to protect the right to refuse unsafe work is a consequence of the advancement of a politics that promotes a rigid market discipline in labor policy. In the face of global statistics reporting 2.2 million work-related deaths annually, labor and human rights standards have been confounded by institutional political dynamics

¹⁷² For more general background information including an account of deteriorating trade union rights in Canada, see Panitch, Leo, & Donald Swartz. (2003). *From Consent to Coercion: The assault on trade union freedoms* (3rd ed.). Aurora, Ontario: Garamond Press. A good treatment of the early history of the ILO can be found in Van Daele, Jasmien. (2005). Engineering Social Peace: Networks, ideas, and the founding of the International Labour Organization. *International Review of Social History*, 50(3), 435-466. A history, including labor history, of the United States in the run up to the period discussed in this chapter can be found in Patterson, James T. (1996). *Grand Expectations: The United States, 1945-1974*. New York: Oxford University Press. One interesting case study of how the United States has interacted with the inter-governmental organization in the United Nations system is found in Preston, William, Edward S. Herman, & Herbert I. Schiller. (1989). *Hope and Folly: The United States and UNESCO, 1945-1985*. Minneapolis: University of Minnesota Press.

¹⁷³ Atleson, James B. (1983). *Values and Assumptions in American Labor Law*. Amherst: University of Massachusetts Press. Page 143.

¹⁷⁴ United Nations. (1948). *Universal Declaration of Human Rights*. Adopted at the 183rd meeting of the General Assembly in Paris, 10 December 1948.

¹⁷⁵ United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights*. 993 UNTS 3.

that maintain this market discipline in labor policy. Power has silenced alternatives, creating gaps in global labor standards on a workers' right to refuse. As a result, the right to refuse is not adequately protected in global labor standards. Market discipline has *marketized* the right to refuse unsafe work and narrowed the realm of effective policy alternatives, leaving workers vulnerable. Contested institutional politics have resulted in labor standards that limit the freedom of association and reinforce *laissez-faire* self-regulation of the economy. Ours is more an era of disciplined neo-liberalism rather than any new era of rights individualism within labor and employment relations.

The right to refuse unsafe work can be the most immediate and empowering way workers represent themselves at work. The history of the right to refuse is a story of effective freedoms denied. The right to refuse unsafe work is a case study of how market consciousness ultimately acted as an obstacle to human rights effectiveness.

The individual rights culture of the West has been cited as contributing to a social atomization and the decline of the organized labor movement as part of the decline of civil society in general.¹⁷⁶ What is the nature of this “individual rights culture” and how has it impacted labor rights? With a political analysis of human rights, argues Tony Evans, it is “no longer acceptable that we view the human rights discourse as an unproblematic moral program upon which all states and people’s agree.”¹⁷⁷ Ideas about rights must be questioned and the nature of their privileged discourse understood. Evans uses the notion of “disciplines” in political discourse and

¹⁷⁶ One of the early authors arguing that there is a connection between the decline of the labor movement in the United States and the rise of individual rights consciousness was Robert N. Bellah. The argument is discussed in Bellah, Robert Neelly. (1991). *The Good Society* (1st ed.). New York: Knopf, distributed by Random House. The argument is summarized in Bellah, Robert Neelly. (1996). Individualism and the Crisis of Civic Membership. *The Christian Century* (March 20-27), 260-265.

¹⁷⁷ Evans, Tony. (2005). International human rights law as power/knowledge. *Human Rights Quarterly*, 27(3), 1046-1068. Page 1054.

asks “what interests does the privileging [of particular human rights] serve?”¹⁷⁸

Discipline refers to a model of social organization that operates without the need for coercion. It is a form of modernist power that imbues the individual with particular ways of thinking, knowing, and behaving, thus instilling modes of social consciousness that make social action predictable. Discipline is learned and practiced in the day-to-day complex of social life, through institutional training received, for example, in the school, the university, the military, the workplace, the church, and the prison, where notions of correct and incorrect behavior and thought are clearly delimited.¹⁷⁹

Evans continues, explaining how the idea of discipline is important to human rights:

[Disciplines can] be defined as systems of rules, but these are not necessarily the rules articulated within the pages of international law.... [Disciplines] exert collective pressure by legitimating particular customs, modes of thought, and ways of acting, while continuing to avoid the full consequences of formal obligations.... Those who violate the norms of acceptable behavior are identifiable, enabling appropriate sanctions to be applied, while those who conform are rewarded.... From the perspective of disciplinary power, critics of [classic] liberal notions of power have argued that the institutionalization of discourse, which produces and promotes truth-claims, obscures and conceals the process of domination that lie beneath normal social practice.¹⁸⁰

Human rights are confronted by these “disciplinary” powers. Their basis in customs, modes of thought, and ways of acting, as in Luke’s third dimension of power, can act to reinforce other forms of coercion such as excluding alternative issues and groups.

The dominant discipline challenging labor rights is the “market discipline”.¹⁸¹ Market discipline promotes not only traditional *laissez faire* beliefs and values but the construction of all policy alternatives within the framework of labor market efficiency:

‘Market discipline’ stresses economic growth and development, deregulation, the free market, the privatization of public services, and minimum government.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid. Page 1056. Evans cites Gill, Stephan. (1995). Globalization, Market Civilisation and Disciplinary Neoliberalism. *Millennium - Journal of International Studies*, 24, 399-423.

Market discipline describes a set of normative relationships with a global reach, supported by discourses of truth, and widely accepted as ‘common sense’. These relationships are manifest at both the domestic and global levels, for example, in national and international economic planning, market-based solutions for environmental degradation, the move to privatize social welfare provision, and the move to privatize life itself, seen in the scramble to patent the genes of both human and non-human life forms.¹⁸²

Market discipline impacts how human rights are conceptualized. This includes how policy alternatives are conceived and created. The way market discipline shapes the idea of human rights thus impacts the thinking and philosophy of human rights, even if the market discipline is in direct conflict with more traditional human rights thought:

Within the ambit of market discipline... human rights are conceptualized as the freedoms necessary to maintain and legitimate particular forms of production and exchange. These are a set of negative rights associated with liberty, security, and property, which offer a moral and normative foundation for justifying actions within the current global political economy. Although the global legal human rights regime is said to embrace the unity of all rights, including economic, social, and cultural rights, market discipline pursues only those rights necessary to sustain legitimate claims for liberal freedoms.¹⁸³

The ILO serves as an interesting study of this market discipline because it is the global body that is the intermediary between aspirational human rights philosophies and the concrete legal standards promoted to regulate the world of work and workers’ rights.

The ILO is a global organization of technical experts on labor and employment rights. Authoritative expertise has a special role in maintaining this market discipline:

Despite the mechanisms of self-discipline at the center of market discipline, there remains a need for authoritative expert pronouncements and idioms when norms are transgressed. This is a central role of international law, which itself reflects self-discipline through the international legal principle of reciprocity and articulates the ‘neutral’ rules of conduct that describe the ‘natural’ global

¹⁸² Evans, Tony. (2005). International human rights law as power/knowledge. *Human Rights Quarterly*, 27(3), 1046-1068. Page 1056.

¹⁸³ Ibid. Page 1057.

order as presented by market discipline.¹⁸⁴

Understanding market discipline is required for a more complete understanding of the shaping of refusal rights through history. As a result of market discipline, refusal rights as human rights have been lost in a conceptual no man's land, a legal black hole, missing within the deep crevices of a global labor rights policy that has battled the politics, ideas and understandings of a market discipline over the last generation.

The result of market discipline imposed on the question of refusal rights is a history of the re-making of human rights as a function of markets / market metaphors. Evans elaborates what happens when human rights are remade as a market function:

Although today the discourse of human rights, which is a legal discourse, is presented as superior to all other kinds of rules, the predominance of market discipline suggests that human life is valued as a means to an end rather than as an end in itself. This is seen in greater attention given to trade, property, and finance, compared to that concerned with humanitarian issues, for example, poverty, the environment, and socioeconomic rights.¹⁸⁵

Market disciplining of labor rights is a better explanation for what has happened to the decline of organized labor than any simple rights "atomization" thesis that places the responsibility for the decline of organized labor onto the idea of rights themselves. This becomes clear in understanding the protection of the lone worker's right to refuse unsafe work. It is not a case of the rise of an individual rights era. This era is not one of universal protection for individual rights. What is protected are labor and human rights consistent with market discipline. Human rights are remade to be safe for business and private enterprise, regardless of their importance to basic human survival.

This is the general historical context that has impacted the constitution of the right to refuse as a labor protection. The roots of advocacy for expanding collective

¹⁸⁴ Ibid. Page 1057.

¹⁸⁵ Ibid. Page 1058.

bargaining and workers' ecology protections is critical to understanding the history of this modern day market discipline. It is the North American history to which we now turn to examine the origins of this period of coordinated employer political activism.

3.2. The right to refuse in collective bargaining and arbitration

The right to refuse unsafe or hazardous work has been the subject of struggle throughout industrial relations history. John Gaventa in his study of the Appalachian Valley noted how the right to refuse was protected in the Jellico Agreement of 1893, at the time “one of the most advanced agreements of any miners in the country” and covering at least eight mines. This allowed a miner “to refuse to work if he thought the mine was dangerous through failure of the bosses to supply enough support timber.”¹⁸⁶ After the passage of the National Labor Relations Act of 1935 in the U.S. and the introduction of Wagner Act principles into Canadian labor laws in the 1940s, the right to refuse unsafe or dangerous work gained ground as a subject of collective bargaining and negotiation. Collective labor agreements would be the only means for workers to circumvent the common law rules on the termination of employment, rules that today continue to serve as the foundation of labor policy in the U.S. and Canada. Despite some common law jurisprudence in the U.S. and Canada on an employer's paternalistic duty of care, refusal rights were not effective before workers secured collective labor agreements and the labor laws that facilitated unionized workplaces.¹⁸⁷

By the 1960s and early 1970s, collective bargaining had strengthened the right to refuse in the U.S. and Canada. First, some labor arbitrators – although not all – had

¹⁸⁶ Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press. Page 73.

¹⁸⁷ Brion, Arturo Dizon. (1995). *The Right to Refuse Unsafe Work in Ontario*. LL.M. Thesis, York University. Pages 41-55.

stepped back from the “work now, grieve later” standard, often with the aid of explicit contractual language protecting the right to refuse. This trend was most pronounced in the Canadian rather than the U.S. context. Second, the just cause provisions in labor agreements altered the common law rules underlying the termination of employment, affording more protection to the workers that were in a position to refuse unsafe work. Together, these trends did not extend the right to refuse to all workers, but they did protect against liberal use of discharge for millions covered by collective agreements.

How collective bargaining impacted the right to refuse unsafe work is seen in a few numbers attesting to the breadth of these protections. In a survey from the early 1970s of 1,724 labor agreements, each covering more than 1,000 workers, health and safety was addressed in 93 percent of the agreements. Agreements covering over 1.9 million employees recognized “the right to refuse to work under unsafe conditions or to demand being relieved from the job under such circumstances.” A smaller group of agreements gave the union the authority “to remove a person from the job”.¹⁸⁸ Even a generation after this survey, after remarkable union density declines, a sample of 400 collective bargaining agreements in the U.S. each continued to protect against liberal termination, with “discharge and discipline provisions” included in 98 percent of the union contracts, and discharge for “cause” or “just cause” in 97 percent of agreements. Grievance and arbitration were in all agreements, with 97 percent specifying the scope of the procedure, and a step-based procedure indicated in 99 percent of agreements.¹⁸⁹ The explicit contract language protecting the right to refuse unsafe work is in addition to those workplaces where protection was afforded only through just cause provisions.

¹⁸⁸ Gersuny, Carl. (1981). *Work Hazards and Industrial Conflict*. Hanover, New Hampshire: Published for University of Rhode Island by University Press of New England. Page 121.

¹⁸⁹ Collective Bargaining Negotiations and Contracts Editors Group. (1995). *Basic Patterns in Union Contracts, Fourteenth Edition*. Washington, D.C.: The Bureau of National Affairs, Inc. .

In Canada, provincial labor codes began requiring collective agreements to include a clause permitting discipline only for just cause.¹⁹⁰ Canadian labor arbitrators slowly were becoming more and more comfortable with independently using the language available within a labor agreement to protect the right to refuse unsafe work:

A more expansive right to refuse unsafe work has been fashioned by arbitrators from several basic elements of the law of collective bargaining.... Arbitrators are empowered to reinstate an employee who has been wrongfully discharged, to award back pay and to substitute a lesser penalty for the one imposed by management. Shaping this legal raw material into an elementary right to refuse was an easy task. Disobeying an order, even an improper one, is generally cause for discipline. An employee must comply with the maxim “work now, grieve later”, because the grievance and arbitration process, not the shop floor, is the preferred forum for dispute resolution. A refusal to perform unsafe work is recognized as an exception to this rule.¹⁹¹

The first published arbitration decision in Canada to recognize the refusal exception to the work now, grieve later standard was in 1963 in *B.A. Oil Company*.¹⁹² The leading case after this jurisprudence became *Steel Company of Canada* in 1974, a case that was cited favorably throughout the 1970s.¹⁹³ Some Canadian arbitrators at the time adopted an undue imminent hazard standard. More conservative arbitrators used as a yardstick “risks which are normal for a grievor’s workplace” and gave those risks “the arbitrator’s stamp of approval.”¹⁹⁴ As Richard Brown noted with *Steel Company* and other decisions, labor arbitration rulings shifted their course and arbitrators exercised more discretion in protecting workers against health and safety-based discrimination:

¹⁹⁰ Brown, Richard. (1983). The Right To Refuse Unsafe Work. *University of British Columbia Law Review*, 17(1), 1-34.

¹⁹¹ Ibid. Page 14.

¹⁹² Ibid. Page 14.

¹⁹³ Ibid. Page 14. 4 L.A.C. (2d) 315. Brown provides a partial list of cases in note 30: *Re Mueller Ltd.* (1974) 7 L.A.C. (2d) 282; *Re Steel Company of Canada Ltd.* (1975) 8 L.A.C. (2d) 198; *Gibraltar Mines* [1975] W.L.A.C. 788; *Re Great Canadian Oil Sands Ltd* (1980) 22 L.A.C. (2d) 426.

¹⁹⁴ Ibid. Page 15.

Blind acquiescence in risks normally associated with a job is wrong because the production process is largely controlled by management with little input from workers. In addition, the practice of a single employer may fall below industry standards. The *Steel Company* award recognized the danger of relying exclusively upon management's judgment and found that a procedure which had been consistently followed by a foreman was not acceptably safe. The grievor had been instructed to use a poker to dislodge debris overhead, but had refused when a falling brick struck his partner's arm. After the grievor was suspended, the other members of his crew were taken to the roof to complete the task from that location with the aid of extensions on their pokers. The arbitrator's conclusion that a danger existed was supported by evidence that a safer procedure was possible... and that a minor injury had occurred.

Legal standards have rarely been addressed by arbitrators. In two instances, an inspector has ruled that the workplace complied with health and safety regulations, but a refusal to work was found to be justified as harm had occurred... the arbitrators undertook an independent assessment of risk, instead of simply deferring to a judgment made by others....

Arbitrators have been sympathetic to employees who face a higher risk than others doing the same job. Work has been characterized as unsafe on the grounds that an employee lacked experience, was physically incapable, had previously been injured or suffered from either an allergy or eye strain.¹⁹⁵

Such arbitration decisions posed threats to the common law and, therefore, created a threat to management control of the workplace. Labor arbitration moved the right to refuse toward what could be called a basic "status protection" for workers, where the exercise of the right to refuse could be enjoyed based on the class status of being an employee or worker, independent of workplace hazards. Here, the assessment of risk in Canadian arbitration was interpreted based upon an arbitrator's judgment and not some legislator's interpretation of an objective workplace hazard. These arbitrations were imperfect decisions and still focused on the evaluation of the hazard that workers faced before protection against termination was granted, but they did represent a new and important trend, the trend to protect the right to refuse. Arbitral jurisprudence was

¹⁹⁵ Ibid. Page 15.

in one sense becoming a more effective protection of worker refusal rights. This trend was more pronounced in Canada than it was in the U.S. where arbitrator values were continuing to treat refusal to work cases as basic employee insubordination cases.¹⁹⁶

While important, however, arbitration had its limits. As a general rule, arbitral jurisprudence places the burden of establishing the justification for discipline on the management. In cases of the right to refuse unsafe work at arbitration, however, an employer “need only prove disobedience before an employee is called upon to show that a refusal to work was proper in the circumstances.”¹⁹⁷ Rarely was management called upon to demonstrate safety as a justification for an insubordination charge. The charges of disobedience and insubordination thus became matters inherent in any work refusal, shifting the legal burden to the employee to prove with objective evidence that the refusal was justified by some measure of risk. Given the rapid changes facing the modern workplace, objectivity was increasingly subjective. A weakness had thus remained in this system despite its marked advantages for workers in comparison to the traditional common law on termination of employment, which left no recourse.

The larger problem for workers was management control and the concern with worker interference with production as summarized by one U.S. union official in 1974 who pointed to the inherent conflict on the question of the right to refuse unsafe work:

On the one hand, unions cite numerous instances in which workers have been maimed or killed by operations which they had complained were dangerous; on the other, management is fearful that giving workers the right to ‘red tag’ would unduly interfere with production and would give workers another tool to solve unrelated grievances.”¹⁹⁸

¹⁹⁶ Gross, James A., & Patricia Greenfield. (1985). Arbitral Value Judgments in Health and Safety Disputes: Management Rights over Workers' Rights. *Buffalo Law Review*, 34, 645.

¹⁹⁷ Brown, Richard. (1983). The Right To Refuse Unsafe Work. *University of British Columbia Law Review*, 17(1), 1-34. Page 19.

¹⁹⁸ Glassner, Melvin A. (1974). Commentary: Occupational Safety and Health - A Labor View.

Management's fear of undue interference with production placed employers squarely at odds with workers on questions of health and safety. Workers were assumed to be pursuing self-interest and using health and safety to make gains in other areas, like in the winning of more traditional economic benefits. As time passed, worker safety and health and the working environment would become more and more a critical concern in labor management relations. Social movements of renewed labor activism would press for more changes beyond simple strategic positioning for basic economic gains.

3.3. *Workers' ecology and the 1970s "crisis" of the workplace*

Labor organizing and activism for workplace health and safety trended upward in the late 1960s and early 1970s in both the U.S. and Canada. This was manifested as a qualitatively different form of grievance as environmental destruction entered into popular consciousness. Nicholas Ashford and the MIT Center for Policy Alternatives were commissioned by the Ford Foundation in 1972 to study occupational health and safety to "identify the important problems and actors in the field and to recommend what action, if any, private philanthropy should take in the area."¹⁹⁹ The commission resulted in a 588-page report *Crisis in the Workplace*. The report, initially conceived to be a quick study of the problem, was published as a sweeping and detailed two-year review of the issue of worker health and safety focused on the United States but with an international perspective. Professor Ashford traveled abroad in his field research to follow the major trends and social movements influencing public policy at the time.

Nicholas Ashford's *Crisis in the Workplace* identified five factors contributing to the "modest rebirth in interest in occupational health and safety". First, the reported

Wayne State Law Review, 20(4), 987-998. Page 992.

¹⁹⁹ Ashford, Nicholas Askounes. (1976). *Crisis in the Workplace: Occupational Disease and Injury, A Report to the Ford Foundation*. Cambridge: MIT Press. Preface.

injury rate had grown 29 percent from 1961 to 1970 to an estimated 14,000 deaths due to traumatic accidents with 2.2 million workers faced with disabling injuries annually. Second, a “potentially more important factor” was the occupational disease faced by workers. Occupational disease was considered “more far-reaching” than the well-publicized maladies like “coal miners’ pneumoconiosis, asbestos-caused cancer, beryllium disease, and the recently discovered vinyl chloride-caused liver cancer...”. Third, technological change was a factor including “new chemicals, new productive processes, and new forms of stress associated with heat, vibration, and noise.”

Fourth was “the rise of the environmental movement with its concern for the effect of toxins on ecological systems.” This movement had “raised the consciousness of millions of citizens to the dangers of industrial pollution to the *general* environment.” It was from there “only a step to an increased awareness that pollution almost always begins in a workplace and that exposures of people to toxic substances is often many times more serious in *workplace* environments than elsewhere.”²⁰⁰

The final factor cited by the report as contributing to the interest in worker health and safety was the changing character of the workforce, specifically increased education among workers and the rising manufacturing sector wages that shifted demands to make “job safety and health higher in the priorities of workers and their representatives.” Together, these trends caused conflict and were characterized by Ashford’s report to the Ford Foundation as amounting to a *Crisis in the Workplace*.²⁰¹

This *Crisis in the Workplace* took a particular form, however. The Crisis, as described by the political actors interviewed by Ashford, was not exclusively how best to ameliorate and remove the emerging environmental health and safety hazards. The

²⁰⁰ Ibid. Page 4. Emphasis in original.

²⁰¹ Ibid. Pages 3-4.

crisis in the workplace for business and political elites was instead a problem of ameliorating workplace labor conflict. The report identified the types of conflict and explained that this conflict must be addressed *before* any changes could be achieved:

There is no philosophical reason why a society should not choose to be as protective of people in their working environment as it is with regard to the food they eat or the non-work environment to which they are exposed. But the goals of the new OSHA cannot be attained—indeed the Act cannot even be adequately implemented—without concurrent attention to the fundamental conflicts that exist between people who play various roles in the institutions of the society.²⁰²

The social conflicts identified by the report included what was called “the clashing of different self-interests” in labor management relations. The report did not make clear why labor conflict was cited as an impediment to change when new labor activism had been credited with bringing many of these problems to public light. The message was that managerial control was threatened. Despite the degree of environmental health and safety danger looming, the crisis of labor management conflict was paramount:

The first type of conflict is the clashing of different self-interests that is characteristic of management-labor relations on many issues. In unionized situations, this often adversarial process occurs in the form of discussions, negotiations, grievance procedures, collective bargaining, and strikes. Fundamentally, the basic conflict of self-interests stems from management’s desire to keep costs down and to maintain control of the workplace versus workers’ desire to gain the largest possible package of wages and benefits, job security, and control.... Until recently, health and safety were not central issues in collective bargaining. Even when health and safety were at issue, the worker was traditionally aware that improvements could be attained only by trading off some portion of his wage and benefit demands for them. In extreme cases, employers could maintain that costly health and safety improvements would render the facility unprofitable and cause it to be closed, depriving workers of their jobs.... Employers dislike ‘internalizing’ costs whose benefits—the possible absence of diseases at some future time when employees may be working elsewhere or retired—do not appear to accrue

²⁰² Ibid. Page 4.

sufficiently to the employer.²⁰³

The competing “self-interest” mantra would continue, even in the face of evidence that workers’ concern for health and safety was not always exclusively self-interested.

Labor conflict over health and safety was on the rise. Between 1966 and 1975 safety related work stoppages increased by 385 percent in the U.S. while the overall rate grew slowly between 14 to 38 percent from the base year of 1966 (Table 3.1). Labor actions became an outlet for environmental health and safety concerns. These figures do not tell the entire story, yet they do provide an important glimpse into a broader trend in labor relations at that time. Labor action over health and safety at the time cannot be so easily characterized as being simply self-interested economic actors struggling for a bigger piece of the pie within a world of competing market interests.

²⁰³ Ibid. Page 5.

TABLE 3.1. *U.S. safety-related work stoppages, 1966—1975* ²⁰⁴

Year	Total	% Change from 1966	Safety-Related	% Change from 1966
1966	4,405	---	34	---
1967	4,595	4.3	45	32.4
1968	5,045	14.5	52	52.9
1969	5,700	29.4	78	129.4
1970	5,716	29.8	92	170.6
1971	5,138	16.6	75	120.6
1972	5,010	13.7	120	252.9
1973	5,353	21.5	155	355.9
1974	6,074	37.9	153	350.0
1975	5,031	14.2	165	385.3

The collective bargaining history of the late 1960s and early 1970s provides a better interpretation of these new labor conflicts. Throughout the U.S. and Canada, a focus on the health and safety of the working environment was emerging in collective bargaining. The new centralized labor inspectorates being created at the time initially failed in their mission to protect workers from safety and health hazards. Unions routinely chided OSHA for an “attitude that shows a priority compassion for the problems and inconveniences of management.”²⁰⁵ Organized labor seemed almost unanimous in their initial assessment of OSHA; most unions were very dissatisfied. The UAW’s Leonard Woodcock pondered what had become of human rights at work:

²⁰⁴ Figures for this table were compiled from the Bureau of Labor Statistics. The 1966 figures are from Bureau of Labor Statistics. (1971). *Handbook of Labor Statistics*. Washington, D.C.: United States Department of Labor. Page 314. The figures for 1967-1974 are from Bureau of Labor Statistics. (1976). *Handbook of Labor Statistics*. Washington, D.C.: United States Department of Labor. Page 301-8. The figures from 1975 are from Bureau of Labor Statistics. (1975). *Work Stoppages, Summary* 76-7. Washington, D.C.: United States Department of Labor. Page 7.

²⁰⁵ Scott, Rachel. (1974). *Muscle and Blood* (1st ed.). New York: Dutton Publishers. Page 287.

‘OSHA constituted an official commitment that the millions of American working men and women who are on the cutting, poisoning and killing edge of our industrial society would for the first time enjoy the simple but human right to a workplace free of hazards. But the government has reneged on its promise to protect its working citizens.’ The reasons given for this negative assessment included inadequate funding, efforts to turn over enforcement to state agencies, excessive delays in inspections, inadequate standards, and a greater concern for economic feasibility than human lives.²⁰⁶

OSHA in its first five years assumed a preference for a strong market discipline in enforcement. One OSHA official responded to displeasure from both labor and management by envisioning the role of the federal agency through the prism of the balancing of market forces between labor and management as labor market actors.

“Since the criticism of the OSHA program is about equal from all sides,” he said, “we are probably steering a right course toward accomplishing the objectives of the act.”²⁰⁷

A team of labor researchers observed that this odd reaction from the early OSHA implied “the [OSHA] mission is to find a middle ground in an area of class conflict, rather than to achieve a working environment free from recognized hazards.”²⁰⁸

Even as OSHA came into force in the United States in 1971, union collective bargaining provided the only effective means by which workers could improve their working environment. It was thought that OSHA would protect workers better than decentralized collective bargaining, but while the new agency did raise the profile of safety and health at times helpful in bargaining, it was quickly disappointing for labor. It would take no longer than the first OSHA labor complaint to shatter any illusions.

²⁰⁶ Woodcock, Leonard. (1975). *The Unfulfilled Promise of OSHA*. United Auto Workers. Detroit. Cited on page 136 in Gersuny, Carl. (1981). *Work Hazards and Industrial Conflict*. Hanover, New Hampshire: Published for University of Rhode Island by University Press of New England.

²⁰⁷ Page, Joseph A., & Peter N. Munsing. (1974). Occupational Health and the Federal Government: The Wages are Still Bitter. *Law and Contemporary Problems*, 38, 651-668.

²⁰⁸ Gersuny, Carl. (1981). *Work Hazards and Industrial Conflict*. Hanover, New Hampshire: Published for University of Rhode Island by University Press of New England. Page 136. See also Health Research Group. (Undated). *Job Safety and Health: Inadequate Enforcement and Stalled Review*. Washington D.C.: Health Research Group.

Allied Chemical employed 200 members of Local Union 3-586 at a plant in Moundsville, West Virginia. Charges of widespread mercury contamination including mercury seeping through the cracked floors were forwarded to state health officials after plant managers refused to meet a union health and safety committee to discuss the problem. Inspectors from the West Virginia Department of Health confirmed the contamination in February 1971 and in March a Walsh-Healy federal contractor health inspection also justified the workers' concerns. Allied Chemical openly contested the findings. One month after OSHA became law, the Oil, Chemical and Atomic Workers acted on behalf of their local affiliate and made history with the first OSHA complaint.

The OSHA inspection failed to order the immediate abatement of the mercury contamination. The Labor Department ruled health hazards were not to be considered "imminent dangers" under the Act, despite a clear legislative intention otherwise and evidence from a survey collected at the time of the OSHA inspection that revealed 67 percent of workers were experiencing signs of mercury poisoning. Two weeks later, OSHA issued its first citation in history to the Allied Chemical Company: \$1,000 with a lengthy, non-binding clean-up order. The company paid the fine to OSHA and made no legal appeal. The lessons from the first OSHA citation were later chronicled as an historic 'first' in several ways, revealing "how the government would respond to complaints about health hazards . . . and how it defined "imminent danger".²⁰⁹

That OSHA was to take a stand-back approach to regulation was evident when Nicolas Ashford interviewed the first leaders of OSHA and NIOSH, the new federal agencies established by the U.S. Congress. Marcus Key, director of NIOSH, and George Guenther, the first Assistant Secretary of Labor for Occupational Safety and Health, voiced their strong agreement with the sweeping new findings of the Robens

²⁰⁹ Mazzocchi, Tony. *Unpublished labor education papers*. On file with author. Page 28.

Commission. The Robens Commission's high-profile parliamentary inquiry into worker health and safety policy in Britain had argued for less legal restrictions on business and advocated partial voluntary self-regulation on matters of worker health and safety. Key made a summary of the principles of the Robens Report in a speech to the American Public Health Association in 1972: "Not all problems can be solved 'by the strict language of a standard'" he noted curtly before he then continued on with a recommendation for flexibility in developing worker health and safety standards.²¹⁰

George Guenther was enthusiastic in his interpretation of the Robens Report. In remarks made at the Kennedy School of Government that would foreshadow later debates on worker health and safety at the ILO, Guenther said the new OSHA should follow the underlying values embodied in the Robens Report. Ashford reported:

George Guenther, former Assistant Secretary of Labor for Occupational Safety and Health, agreed with the appropriateness for the United States of the following Robens Report conclusions: (1) there is too much law; (2) the law is not relevant to the workers' situation; (3) the various administrative agencies are unnecessarily fragmented. It should be remembered, though, that it is the British system that is characterized by fragmented legislation; this is not the case in the United States. Guenther was misusing the Robens Committee's observation that 'there is too much law' to justify *not* developing regulations.

The Robens Report recommends self-regulation as a total operating philosophy.... Any attempt to use a consultative or warning approach, or nonspecific standards, *without* (1) a sufficient number of highly qualified, uncorruptible inspectors and (2) a set of strict backup sanctions to support the inspector in the use of his discretionary powers, would of necessity doom the program to failure. Unfortunately, OSHA meets neither prerequisite.... Those in OSHA and NIOSH who believe that they can adopt only the consultative or flexible-standard portions of self-regulation would, in fact, weaken the power of the OSH Act and render its enforcement function ineffective.²¹¹

²¹⁰ Ashford, Nicholas Askounes. (1976). *Crisis in the Workplace: Occupational Disease and Injury, A Report to the Ford Foundation*. Cambridge: MIT Press. Page 514.

²¹¹ Ibid. Pages 514-515.

Guenther's position was taken less than two years after OSHA's enactment, giving little credibility to his argument criticizing OSHA's work as the agency was barely up and running when he had voiced his views. Voluntary compliance was the mantra from day one of the OSHA. The values and belief system behind the "total operating philosophy" was likely lost on the people showing signs of mercury poisoning who were working at the Allied Chemical Company's plant in Moundsville, West Virginia.

Would it be correct to characterize the Moundsville workers as acting out of pure self-interest? What was transpiring was certainly a Crisis in the Workplace, but not the same Crisis in the Workplace being characterized by Ford Foundation reports. Two distinct versions of The Crisis in occupational health, safety, and the working environment had emerged. The first version was the actual danger of environmental safety and health hazards endured at work and struggled against by workers at risk. The second version was managerialist; the real crisis was the new labor conflict posed to corporations, managerial control and the freedom to control the business enterprise.

A simple clash of self-interests was incapable of explaining these new labor conflicts, however. They embodied a qualitatively different challenge to managerial control in comparison to traditional bargaining matters such as the setting of wages and hours. These new labor conflicts challenged the method of management in a way that did not fit the ungrounded economic self-interest thesis. Advocacy of improving the working environment was noteworthy in the collective bargaining campaigns of the early 1970s. Collective bargaining was central to the environmentalism of workers as health and safety at work was often similar to community environmental concerns. Workplace hazards and out-of-plant ecological damage often overlapped. What is more, submitting organized labor's actions where they did sacrifice health and safety in negotiations as evidence of a narrow self-interested rationality is questionable given

the steep inequality of power faced by workers and their unions across various labor relations systems in North America. Workers and unions in the U.S. and Canada do not act as *personas grata* on a great wide-open *tabla rasa* of labor policy choices. Attributing forced strategic choices to deeply held moral dispositions is indefensible.

3.4. *Movements to strengthen labor's environmental advocacy*

As with the seeping of mercury in Moundsville, workers were endangered along with the general public. Nearly all unions were called upon to become stronger advocates. *Business Week* reported that unions through the 1970s were increasingly concerned about the working environment, especially hazards that caused disease. "Unions heretofore never dreamt that such situations might exist," noted George Taylor, director of occupational health and safety for the AFL-CIO.²¹² "Everybody is being forced into looking at this question," said Tony Mazzocchi of the Oil, Chemical & Atomic Workers. "If you critically examine what each union does, you see that people are at different places. But they are in motion, whether it is a hard run or a walk."²¹³ Likewise, a number of collective agreement gains in the 1970s addressed the working environment and out-of-plant environmental damage. These efforts placed workers and their unions in a position of contesting the nature of production with an increasingly sympathetic public willing to legitimize labor rights claims.²¹⁴

General safety and health inside the working environment in the 1970s became more important to the collective bargaining of a number of major unions; the United Auto Workers, the Oil, Chemical and Atomic Workers, the United Farm Workers, the

²¹² Staff reporter. (1978). The New Activism On Job Health: A challenge to business from industrial hygienists on unions' payrolls, *Business Week*, p. 146. September 18.

²¹³ Ibid.

²¹⁴ Oldham, James C. (1974). Organized Labor, The Environment, and the Taft-Hartley Act. *Environment Law Review*, 1974, 936-1026. See footnote 9.

United Mine Workers and to a degree the United Steelworkers of America. These workers' movements were debated in each union but their force and sway remained.

After holding union conferences around the country entitled "Hazards in the Industrial Environment" in 1969 and 1970, the OCAW union surveyed 508 local unions on safety, health and environmental concerns. The UAW followed with an "Environmental, Occupational Health & Safety Questionnaire" sent to over 400 local unions. Fifty-nine percent of the locals knew their workplace was contributing to air, water and land pollution; 79 percent in locals with over 1,000 members. Thirty-seven percent of locals reported their members were assigned job tasks by managers that resulted in air or water pollution. Nearly half of the locals with 1,000 or more members reported the assignment of jobs by managers that resulted in air or water pollution.²¹⁵ These concerns — more than self-interest — would be prominent in the labor campaigns of the early 1970's and demonstrated how effective an in-plant local system of collective bargaining was to identify hazards and advocate for change.

The first conference organized between labor and environmental groups, the Urban Environment Conference of 1971, allowed urban reform groups, environmental groups and advocates, and organized labor to meet and work together to protect on-the-job and community health.²¹⁶ This was part of a broad-based movement with labor union activism at center stage. Unions, however, would find themselves in the unfavorable position of leading a budding social movement while ensconced within a weak collective bargaining and labor law system that provided little strategic leverage for what were becoming the major structural challenges of economic globalization.

Collective bargaining, despite passage of OSHA in 1970, continued to be the

²¹⁵ Ibid. Page 953.

²¹⁶ Urban Environment Conference. (1971-1984). *Papers*. Walter P. Reuther Library of Labor and Urban Affairs Archives. Wayne State University.

vehicle affording workers the most protection when shop floor resistance to worksite environmental damage occurred. A good example is the refusal of Gilbert Pugliese at the Jones and Laughlin Steel facility in Cleveland. Pugliese “refused to push a button” to rush hundreds of gallons of oil into the Cuyahoga River. He was suspended for five days while his supervisors considered permanent suspension but decided against it in consideration of a revolt of the workers. Two years later, with OSHA on-the-books, a company foreman again insisted Pugliese push the button. Local media embarrassed the USWA into fighting his impending discharge for insubordination. Pugliese kept the job he worked for 18 years and the Jones and Laughlin Steel Company was forced to find alternative means to dispose of the Cleveland plant’s waste oil apart from their practice of dumping it into the Cuyahoga River and the Lake Erie watershed.²¹⁷

While the right to refuse dangerous or damaging work was a natural control mechanism for employees faced with such choices, it was only collective bargaining agreements that would afford any protection against insubordination charges. OSHA had ignored the right to refuse. Protections against “imminent dangers” were left in the statute, but did not explicitly enable the right to refuse. This would be attempted later through federal rulemaking. The best protection of the right to refuse would be the protection from at-will employment through a collectively bargained just clause contract provision. As with Gilbert Pugliese, for many there was but a little difference between the legal right to refuse unsafe hazards at work versus some unsafe hazard at work that would later manifest itself in damage to the local community’s environment.

While self-interest of a sort could characterize such claims, the actions of many workers at the time also represented a much broader set of values that could not fully

²¹⁷ Ehrenreich, Barbara, & Tom Ehrenreich. (1971). Conscience of a Steelworker, *The Nation*. September 27. Gilbert Pugliese’s case was also documented in local newspapers. Staff reporter. (1971). Average guy takes a poke at pollution - he’s winning, *Cleveland Press*. September 23.

be described as simply self-interested; at times, they held a stronger moral dimension. Political expedience at a time of growing ecological consciousness may have been the case in some bargaining relationships, but this does not by itself disqualify entirely the underlying moral dimension of this labor activism, actions that had multiple motives, especially in campaigns on the part of people in more precarious economic situations.

On January 8, 1970, the United Auto Workers held a press conference to discuss their agenda for the upcoming round of labor negotiations with the nation's major auto companies. Walter Reuther provided his overall assessment of priorities.

[T]he environmental crisis has reached such catastrophic proportions that I think the labor movement is now obligated to raise this question at the bargaining table in any industry that is in a measurable way contributing to man's deteriorating living environment. And I believe the UAW is obligated to raise this matter at the bargaining table in 1970.²¹⁸

During the sixty-seven day strike against General Motors in 1970, health and safety protections figured prominently in the dispute. Irving Bluestone, director of the GM Department of the UAW, reported that the management at 40 of the 155 plants included in negotiations agreed to nearly 2,000 worker demands on worker health and safety, with over one-third of those demands being to ameliorate "onerous, dangerous" and "uncomfortable" conditions for "improvement in the plant environment." Ventilation upgrades, noise pollution improvements and the removal of oil, water and debris from the factory floors were among the improvements. While they did not force changes to the polluting automobile itself (a change advocated at the bargaining table), they were nonetheless ideas brought by workers and agreed to by management resulting in immediate environmental improvements through collective bargaining.²¹⁹

²¹⁸ Oldham, James C. (1974). Organized Labor, The Environment, and the Taft-Hartley Act. *Environment Law Review*, 1974, 936-1026. Page 936. Quoting Reuther.

²¹⁹ Ibid.

The OCAW prepared to make a prolonged confrontation for health and safety committees in the 1972 negotiations with the nation's leading oil producers. Labor's demand was "the right of workers to control, at least as decisively as their employer, the health and safety conditions in the factories and shops."²²⁰ A nationwide industrial confrontation was averted when the American Oil Company agreed to the demands. By January of 1973 twelve of fourteen major oil companies accepted similar terms. The campaign then turned to the Shell Oil Company, a holdout. Shell workers would walk off the job in a national boycott of Shell Oil in what newspapers called "the first time in American labor history a major strike has started over the potential health hazards of an industry."²²¹ Nearly every major environmental group supported the strike, including the conservative Sierra Club. Environmentalists began to study labor relations, with detailed strike news appearing in scientific journals such as *Science*.

The strike is about a health and safety clause in a new, 2-year contract covering some 5,000 OCAW workers; it has already been accepted by more than 15 other oil companies. The clause would establish a joint labor management committee, with each side equally represented, to approve outside surveys of health and safety conditions in the plant, make public reports, recommend medical examinations where necessary, and determine what changes should be made if hazards are found to exist. Should disputes arise within the committee, normal grievance and arbitration procedures can be followed. Barry Commoner, of Washington University in St. Louis, regards the clause as highly significant. 'By working for environmental quality at the workplace, and developing new ways to improve it, these joint committees will help control environmental pollution at its source,' Commoner has said.²²²

²²⁰ Gordon, Robert. (1998). Shell no! OCAW and the Labor Environmental Alliance. *Environmental History*, 3(4), 460-487. Page 469.

²²¹ Staff reporter. (1973). The First Strike Over Potential Hazards to Health, *San Francisco Examiner*, p. 21. March 4.

²²² Shapely, Deborah. (1973). Shell Strike: Ecologists Refine Relations With Labor. *Science*, 13 April, 166.

What was happening was the development of a broad-based coalition where workers' freedom of association and collective bargaining were paired with and at the center of a cross-class movement to regulate the unilateral corporate management of production. In some ways labor was on the cusp of what had proven strategically effective in both the women's and civil rights movements, the convergence of a downtrodden, socially-excluded class and a more established, gentrified social class that began to see value in the aims of the mass movement. Labor law would be at the center of this movement.

As labor law reform returned to the agenda with the Carter Administration in the late 1970s, *Business Week* described the argument made by some labor advocates.

Anthony Mazzocchi, vice-president of the Oil, Chemical and Atomic Workers, says that he will try to enlist environmental support in the effort to reform labor law. Because workers are exposed first to substances that eventually reach the environment, they are the 'first line of awareness on environmental issues,' he says. Unorganized workers will not have the courage to complain about harmful work conditions. So labor-law reform, he summarizes, is an environmental issue after all.²²³

Strengthening national labor policy would be a logical place to start for workers, labor unions and other environmental health and safety advocates seeking concrete change.

The union was striking for not only establishment of a joint labor-management health and safety committee, but also the right to call independent health and safety inspectors, access to all company information on death and disease rates, and annual medical examinations to be paid for at the company's expense, in addition to payment for lost wages while workers were participating in health and safety matters. Shell ultimately settled for a compromised health and safety provision in the contract.²²⁴

²²³ Staff reporter. (1977). Environmentalists try to win labor over: Using workplace safety and a promise of new jobs to entice labor's support, *Business Week*, p. 104. October 3.

²²⁴ Erlandson, Douglas W. (Undated). The Shell Strike of 1973, *OCAW 1-591 History Series; Segment 3*. Accessed March 15, 2011 at <http://www.usw12-591.org/strike1973.html>.

While the OCAW Shell Oil strike was among the most prominent efforts for ecology by any trade union in the 1970s, other unions brought forward similar claims in collective bargaining negotiations and contributed to this general social movement to varying degrees of success. The UFW leader Cesar Chavez in 1969 argued “We have come to realize...that the issue of pesticide poisoning is more important today than even wages.”²²⁵ The UFW, while fighting sweetheart agreements between the growers and the Teamsters union throughout the early 1970s, had negotiated contracts restricting the most dangerous pesticides. The UFW allied with environmental groups even without the unified backing of key national labor leaders like George Meany.

UFW alliances with environmental groups were strained when growers moved from hydrocarbon to organophosphate pesticides, a change in chemistry favored by environmentalists for its ability to break-down more quickly after application, despite being more deadly for the predominantly Latino farm workers. By 1973 Teamsters president Frank Fitzsimmons led an IBT raid on the UFW’s 150 grape contracts and ignored pesticide control at the bargaining table in favor of a policy of “strict compliance with all federal and state laws...for the health and safety of employees.”²²⁶ Regardless of setbacks like this, the movement did exist as a central concern of the UFW and a dialog unfolded with other unions such as the OCAW. Ongoing financial difficulties exacerbated efforts at coalition building, however, leading the UFW to send no delegates to key health and safety conferences and thus establishing one of the many roadblocks faced by the United Farm Workers in their work ecology activism.²²⁷

The Steelworkers were also strong advocates of environmental protections in

²²⁵ Gordon, Robert. (1999). Poisons in the Fields: The United Farm Workers, Pesticides, and Environmental Politics. *The Pacific Historical Review*, 68(1), 51-77. Page 51.

²²⁶ Ibid. Page 64.

²²⁷ Ibid. Page 70.

collective bargaining, most aggressively in Canada. The USWA signed the 1970-1972 agreement with the Cominco mining company which included giving workers a voice on environmental policy. The contract clause with Cominco was used as a model for other Steelworker locals. The union, still grappling with the memory of the 1948 steel zinc smelter disaster in Donora, Pennsylvania, had held a U.S. legislative conference on air pollution in 1969, reportedly the first in the nation. Laurie Mercier's *Anaconda* details what was an equally important priority for the post-war USWA, aggressive red-baiting against unions purged from the CIO in 1950.²²⁸ A campaign against the Mine, Mill and Smelter Workers, most organized in Montana, ran from 1950 to 1967 despite strong local community resistance. This distracted from health and safety advocacy and efforts to attain stronger collective agreements. Both the Mine-Mill and USWA advocated environmental health and safety in smelter work through major grievances and contract negotiations, including control of sulfur dioxide and arsenic discharges into the surrounding environment that in one case bleached chlorophyll on tree needles and leaves, leaving little vegetation between Anaconda and Butte. It also led to a lung cancer rate in Anaconda above the national average. The struggle for environmental health and safety had become a priority despite debilitating cold war labor politics.

Labor's efforts were varied and not restricted to old mill towns, however. The Communications Workers encouraged AT&T to pressure automakers to invest in low-emission transport for its nationwide fleet of 128,000 vehicles; Glass Bottle Blowers organized recycling campaigns; the American Federation of Teachers commissioned lesson plans on environmental problems for use in the classroom; Newspaper Guild leaders urged the printing industry "to adopt a policy of using recycled paper in its

²²⁸ Mercier, Laurie. (2001). *Anaconda: Labor, community, and culture in Montana's smelter city*. Urbana: University of Illinois Press.

operations in order to prevent the depletion of our ever-diminishing forest reserves”; the Air Line Pilots Association organized against “the dumping of kerosene from the pressurization and drain cans of jet aircraft” which amounted to “millions of pounds of jet fuel each year” dumped into the skies; the International Ladies’ Garment Workers’ Union resolved at its 1971 convention advocacy of “laws so that our children and their children should inherit a world which is not only fit to live in, but a world which retains those natural beauties and other attributes essential not only to the physical but also the intellectual and spiritual well-being of mankind”; the Pulp, Sulphite and Paper Mill Workers had a “detailed environmental program for its local unions” including joint environmental controls committees to “consider, investigate and make proposals to the company with respect to the environmental problems arising from the operation of the plant” and in collective bargaining to make “unfair environmental practice” as frequently and easily roll off the workers’ tongues as does “unfair labor practice”.²²⁹

The collective bargaining histories of a number of unions at the time reveals an increasing theme of environmental concern that manifest itself in a way that on many issues were inseparable with general advocacy of workplace health and safety hazards and were far from labor acting in pure economic self-interest. These efforts were broad moral claims as much in the general collective interest of society as individual.

Highlighting these high-profile collective bargaining campaigns for a healthy and safe working environment shows that the pursuit of collective bargaining cannot alone be characterized as economic self-interest. As Nicholas Ashford submitted his report to the Ford Foundation detailing *The Crisis in the Workplace*, the key issue of importance that finally emerged was not the increasing number of unknown hazards

²²⁹ Oldham, James C. (1974). Organized Labor, The Environment, and the Taft-Hartley Act. *Environment Law Review*, 1974, 936-1026. Pages 951-979.

causing alarm to workers and communities. The more serious crisis was the emerging “crisis” within labor management relations caused by this new labor activism for the working environment. Business risked losing the moral high ground. Employers needed to reorient public consciousness so business was viewed as acting in the public interest and not perceived as the real self-interested impediment to change. It was of no importance to the business community that collective bargaining was becoming an effective mechanism for the control of dangerous industrial hazards. What mattered more was a reorienting of public values in order to protect managerial control and the liberty of free enterprise, regardless of its ecological and humanitarian consequences.

Five years into the new OSHA regime a U.S. House committee hearing report on the chemical dangers remaining in the workplace had estimated that 390,000 new cases of occupational disease were occurring each year, with a death rate of 100,000 annually. The report chided OSHA for not promulgating needed standards beyond the 400 national consensus standards the statute adopted from industry. A survey made by NIOSH at the time attempted to understand this exposure to specific post-OSHA health hazards by studying a cross section of the economy in 5,200 industrial plants.²³⁰

Forty-five percent [of chemicals] used by 126,000 workers, were found to contain one or more chemicals now regulated by the OSHA because of their toxic nature. In addition, 5,600 employees were exposed to 427 different trade-name products that contained one of the fifteen carcinogens regulated by OSHA.... NIOSH has concluded that neither the employer nor the employee knew what chemicals were involved in 90 percent of exposures to trade-name products.... A striking revelation of this survey was the widespread practice of identifying chemical products by trade names without further designation of their contents.... [T]he survey identified approximately 85,000 individual trade-name products.... If an employee was exposed to a trade name product ... the surveyors attempted to determine the makeup from material safety data sheets or other sources available at the plant. This proved fruitless in about 90

²³⁰ Committee on Government Operations. (1976). *Chemical Dangers in the Workplace*. Washington, D.C.: U.S. House of Representatives.

percent of the cases....²³¹

The poisoned workplace, ineffectively regulated, was characterized by what Tony Mazzocchi called “the body in the morgue” approach.²³² Weaknesses in the OSHA federal labor inspection service and its treatment in the courts would mount through the 1970s, as collective bargaining, organized labor’s primary front in the struggle for environmental health and safety, would experience its own troubles. These problems would surface as business re-organized in response to The New Labor Problem: The active synthesis of labor rights and the health and safety of the working environment.

3.5. *Employer political activity and counter-mobilization*

Coordinated business political activity has always been an important feature of industrial relations in the U.S. and Canadian liberal market economies.²³³ With the connection building between union collective bargaining and the safety and health of the working environment in the ‘60s and ‘70s, this activity opened a new chapter in labor history. Business counter-mobilized as a political force and was on the march.

Standard economic fare consistently emphasizes the impact of the market on business decision-making while consistently downplaying the political activity of business. Robert Reich’s book *Supercapitalism*²³⁴ offers an insightful interpretation of the origins of economic globalization since the 1970s. He argues the power of large

²³¹ Ibid. Page 10.

²³² Michaels, David. (2008). *Doubt Is Their Product: How industry's assault on science threatens your health*. Oxford; New York: Oxford University Press. Page 113.

²³³ See Fones-Wolf, Elizabeth A. (1994). *Selling Free Enterprise: The business assault on labor and liberalism, 1945-60*. Urbana-Champaign: University of Illinois Press. Fones-Wolf documented how “building company consciousness” was a process where business extended their strategy beyond the national political arena and into educational institutions, communities, and religious groups. Despite the business community’s active involvement in many intellectual and cultural arenas in post-war America, these efforts did not stop the growing social demands of the 1960s and 1970s.

²³⁴ Reich, Robert B. (2007). *Supercapitalism: The transformation of business, democracy, and everyday life* (1st ed.). New York: Alfred A. Knopf.

U.S. corporations to set prices declined dramatically as the result of new technologies, “most of them originating in the Pentagon” and large cargo ships and containers that were returning empty from Vietnam having supplied the U.S. military in the jungles of Southeast Asia. From 1967, when “no commercial container service linked Japan to America” the trend skyrocketed to 15 million containers by 2005.²³⁵ This account is insightful as it documents the role of the state in shaping markets. Where Reich fails to depart from the standard economic bias, however, is his assessment of the business political activity that unfolded at the time of these dramatic economic changes.

Reich notes these forces impacted “the old system of large-scale production” and what he calls stable oligopolies and a more democratic capitalism. The changes, Reich notes, also “created profitable opportunities for entrepreneurs to knock down regulatory barriers in telecommunications, airlines, trucking, shipping and financial services.”²³⁶ Private business is cast without political agency, responding rationally to market forces. Yet in Reich’s analysis, in case after case business is found pushing the envelope with *non-market* strategy. In the 1970s, he writes “investors turned active” as business “pressured the commissions, lobbied Congress and state legislatures, hired professors to do studies showing the benefits of deregulation to consumers.”²³⁷ Then, “the regulatory dams broke” not because of business influence, but “technologies empowered consumers and investors to get better and better deals” which “sucked relative equality and stability, as well as other social values, out of the system.”²³⁸

Business activism is a function of economic change in Reich’s analysis and not an independent cause of socio-economic problems. This is standard economic

²³⁵ Ibid. Page 61.

²³⁶ Ibid. Page 87.

²³⁷ Ibid. Page 66

²³⁸ Ibid. Page 51.

treatment of business in the liberal market paradigm. What this vision does not do, however, is analyze business as a political force, even when the evidence suggests business political activism / *non-market* strategies have been much more important than any market economist's approach would lead an innocent observer to believe.

The casting of business actors as mechanistic and apolitical victims of market forces lets them off too easy, especially on human rights questions. It creates business impunity where impersonal "market" forces assume the responsibility for basic social transgressions. Regardless of the market forces shaping economic globalization, the political activity of business and financial elites actively shaped the political, legal and regulatory landscape, influencing the constitutions of labor and employment rights. Business leaders faced with a competitive marketplace could always have elected to return smaller margins or even go out of business entirely versus making the decision to pursue operations in a climate of decrepit labor standards and environmental degradation. Would society have permitted a return to chattel slavery if economically beneficial for the bottom line of a business corporation? Standards of human decency that exist and define which practices society permits and those it does not are ignored. Shifting the blame to *market forces* and casting business as an apolitical dependent variable fails to tell the whole story. This includes the story of how businesses have influenced the state in the direction of increasingly instable economic choices in favor of short-term greed, unquestioned unilateral control, and the abrogation of labor rights.

The late Australian political sociologist Alex Carey in his book *Taking the Risk out of Democracy*²³⁹ identified three political developments of great importance in the advanced industrialized democracies through the twentieth century. The first political

²³⁹ Carey, Alex, & Andrew Lohrey. (1997). *Taking the Risk out of Democracy: Corporate propaganda versus freedom and liberty*. Urbana-Champaign: University of Illinois Press.

development of importance was the growth of democratic participation. This included universal suffrage and the rights of workers to organize and collectively bargain at the workplace. The second development was the power of multinational corporations and their growing influence upon the political process. Third was “the growth of corporate propaganda as a means of protecting corporate power against democracy.”²⁴⁰

As a result of these competing forces, the objective of business communication became “communications where the form and content is selected with the single-minded purpose of bringing some target audience to adopt attitudes and beliefs chosen in advance by the sponsors of the communications.”²⁴¹ Despite this key strategy, there remained a complicating factor on issues of working conditions and workers’ rights in pursuit of a healthy and safe working environment. The social and economic rights within the body of universal human rights enjoyed strong support and generally were considered by society to be good and worthy objectives of government policies. The strategy businesses would need to pursue would require a more complex approach.

Business-backed conservatives cannot claim outright that people shouldn’t have these rights. They would be dismissed out of hand if they did. They can’t say that the poor are shiftless and lazy and don’t deserve a penny of taxpayers’ money – let them starve! Instead... [they] endorse the change...²⁴²

This strategy became what economist Albert Hirschman called “the thesis of perverse effect” as businesses endorsed various social and economic policy changes “sincerely or otherwise, but then attempt to demonstrate that the action proposed or undertaken [by activists] is ill conceived” leaving “a chain of unintended consequences” that

²⁴⁰ Ibid. Page 18.

²⁴¹ Ibid. Page 20.

²⁴² Gutstein, Donald. (2009). *Not a Conspiracy Theory: How business propaganda is hijacking democracy*. Toronto: Key Porter Books. Page 80.

would result in “the exact contrary of the objective being proclaimed and pursued.”²⁴³

One year before Nicholas Ashford’s *Crisis in the Workplace* was published by the Ford Foundation, a similar report with a broader scope was published by the Trilateral Commission, a policy organization of elite financial and industrial leaders organized in 1972 by David Rockefeller, Sr., a banker and only surviving grandchild of Standard Oil tycoon John D. Rockefeller. *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* was co-authored by three academics including Samuel P. Huntington of Harvard University.²⁴⁴ The report said society faced a “crisis of democracy” and major challenges needed to be addressed.

The crisis of democracy, said the report, originated in part from activists and academics critiquing “monopoly capitalism” and the “development of an ‘adversary culture’ among intellectuals” that affected “students, scholars and the media.”

The advanced industrial societies have spawned a stratum of value-oriented intellectuals who often devote themselves to the derogation of leadership, the challenging of authority, and the unmasking and delegitimation of established institutions, their behavior contrasting with that of the also increasing numbers of technocratic and policy-oriented intellectuals. In an age of widespread secondary school and university education, the pervasiveness of the mass media, and the displacement of manual labor by clerical and professional employees, this development constitutes a challenge to democratic government which is, potentially at least, as serious as those posed in the past by the aristocratic cliques, fascist movements, and communist parties.²⁴⁵

²⁴³ Hirschman, Albert O. (1991). *The Rhetoric of Reaction: Perversity, futility, jeopardy*. Cambridge: Belknap Press. Page 11.

²⁴⁴ Crozier, Michael J., Samuel P. Huntington, & Joji Watanuki. (1975). *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission*. New York: Trilateral Commission. An interesting footnote on Huntington was that he was twice rejected from the National Academy of Science for questionable research on 1960s South Africa. Serge Lang called Huntington’s scholarship “political opinions masquerading as science”. For more information regarding Lang’s challenge see Lang, Serge. (1998). *Challenges*. New York: Springer.

²⁴⁵ Crozier, Michael J., Samuel P. Huntington, & Joji Watanuki. (1975). *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission*. New York: Trilateral Commission. Page 6-7.

A parallel and related trend threatened “the viability of democracy” said the authors:

In addition to the emergence of the adversary intellectuals and their culture, a parallel and possibly related trend affecting the viability of democracy concerns broader changes in social values.... A shift in values is taking place away from the materialistic work-oriented, public-spirited values toward those which stress private satisfaction, leisure, and the need for “belonging and intellectual and esthetic self-fulfillment.”... The new values may not survive recession and resource shortages. But if they do, they pose an additional new problem for democratic government in terms of its ability to mobilize its citizens for the achievement of social and political goals and to impose discipline and sacrifice upon its citizens in order to achieve those goals.²⁴⁶

After a wide recitation of these challenges, the report detailed seven key “Arenas” for immediate action. Among these “Arenas for Action” was “More Active Innovation in the Area of Work” which identified concerns about workers’ freedom of association, collective bargaining rights, worker “health, hazard and security coverage” and “the right to strike” by employees. The full description in the report, how these problems were characterized as a major social concern by economic elites, and the prescriptions offered, together illustrate the type of political discourse being advanced at the time:

Two basic new problems have arisen, however, which take on more and more prominence as older ones recede. They are the problems of, first, the working structure of the enterprise, and, second, of the content of the job itself. Both of these problems call for a new kind of active intervention which is of great importance for society’s internal equilibrium and governability. These problems unfortunately are not amenable to easy legislative fiat or executive intervention. They require a painful transformation of social relations, of cultural and authority patterns, and even of modes of reasoning.

Up to now the dominant social democratic or even liberal schools of thought have focused on proposals for industrial democracy modeled on patterns of political democracy. They have rarely succeeded, and when they did the proposals did not appear very effective, basically because they were running against the industrial culture and the constraints of business organization. This movement has found a new impetus, especially in Western Europe, with strong

²⁴⁶ Ibid. Page 7.

popular pressure for self-management and the rediscovery by the left of nationalization as a key argument in the political arena.

Many people advocate the more moderate course of participation by labor in crucial decisions affecting output, productivity, and working conditions, such as developed in Germany under the name of codetermination. They would, they think, provide a strong incentive for unions to act responsibly. In some circumstances this could indeed be the result. On the other hand, however, codetermination has been only partially successful in Germany, and it would raise impossible problems in many Western democracies, either because leftist trade unionists would oppose it and utilize it without becoming any more moderate, or because employers would manage to defeat its purposes.

A quite different, more promising, and more fundamental strategy is to focus on the second set of problems, those of the job, working conditions and work organization. This is a much more concrete field where deep resentment and frustrations have developed, feeding back into the more conventional aspects of labor-management bargaining. This is a problem area where basic change is becoming possible. New thinking and experimentation has occurred, which should be widely encouraged and subsidized. Industry should be given all possible incentives to move ahead and implement gradually new modes of organization. This is the only way now to alleviate the new tensions that tend to mark post-industrial society in this area and which otherwise nourish irresponsible blackmailing tactics and new inflationary pressures....²⁴⁷

The crisis in democracy was a crisis in labor relations, with the working environment at the center of why workers and their labor unions were failing to act “responsibly”.

The same year the David Rockefellers of the world were turning to focus on the reorganization of workplace relations, the city of Stockholm was preparing to host the United Nation’s first world environmental conference in 1972, The Conference on the Human Environment. The Oil, Chemical and Atomic Workers union health and safety advocate Tony Mazzocchi attended as part of the Scientists Institute for Public Information team, a group delegation he joined as director of the OCAW Citizenship-Legislative Department. As a union delegate, Mazzocchi advocated the connection

²⁴⁷ Ibid. Page 185-187.

between workers' control, labor policy, the working environment and environmental protection. He described the conference's impact on OCAW trade union campaigns.

This conference...had an incredible impact. The [Scientists Institute for Public Information] was the only group that reached out for representatives of the working class. That association was unique.... It was a group of scientists who said, many of them, that they didn't quite know much about trade unions but they understood the relationship between toxic exposure and worker exposure. As a result ... we had a large press conference and got a front page article in *The Washington Post* and an editorial in *The New York Times*. That was what really brought [Shell Oil] to their knees. They weren't worried about us as a union. What they worried about was the publicity and articulation by members of the science community who were tapping public consciousness.²⁴⁸

Among the final recommendations coming out of the 1972 UN Conference, in contrast to elite finance and business concern over worker influence and participation, was the recommendation that governments must provide means for people to take matters into their own hands: "It is recommended (a) That governments..." said the 1972 Declaration, "provide equal possibilities for everybody, both by training, and by ensuring access to relevant means and information to influence their own environment themselves."²⁴⁹ The recommendation also pointed to "the working environment" and included a special reference to the International Labor Organization. That the ILO would begin its glacial standards-setting process in response was a logical expectation.

Workers' standing up for healthy working environments, becoming articulate advocates, gaining moral suasion, tapping public consciousness, and making demands on business became important to corporate strategists and philanthropic grant making. The *Harvard Business Review* complained about how companies were "finding it very

²⁴⁸ Mazzocchi, Tony. (1998). Crossing Paths: Science and the Working Class. *New Solutions*, 8(1), 27-32. Page 32.

²⁴⁹ United Nations. (1972). *Declaration of the United Nations Conference on the Human Environment*. Stockholm.

difficult” to make the necessary adjustments in response to these new social demands. “As concerns of society like clean air, fair employment, and honesty in packaging are thrust on U.S. business with growing intensity and frequency,” the *HBR* reported, “corporations are finding it very difficult to integrate responses to these demands into regular operating procedures.”²⁵⁰ Business writers noted how most corporations had no more than a “superficial familiarity” with the environmental and health and safety debates. “All the talk of the ‘energy crisis,’ zero population growth, the need for a new ‘steady-state economy,’ [and] the ecological limits to growth,” wrote one author, “...signals a growing debate between ecologists and economists.” Businesses “will need more than a superficial familiarity with this debate,” it was argued, because “it not only raises issues that question some very fundamental economic assumptions but also generate serious criticisms of corporations as allocators of resources.”²⁵¹

This “superficial familiarity” of business about the working environment created an opportunity for academic business research. Traditional academics like John G. Welles, who served as a staff consultant to the 1972 U.N. Conference on the Human Environment, argued that business corporations must go on the intellectual and cultural offensive and quickly adopt “New Environmental Strategies” in response. “The growing concerns of citizens and politicians over degradation of the environment in industrialized countries are raising fundamental problems for industry...” Professor Welles argued in an article in the *Columbia Journal of World Business*: “International companies are already late in developing new strategies to protect their interests...”²⁵²

²⁵⁰ Ackerman, Robert W. (1973). How companies respond to social demands. *Harvard Business Review*, 51(4), 88-98.

²⁵¹ Henderson, Hazel. (1973). Ecologists versus Economists. *Harvard Business Review*, 51(July-August), 28-36, 152-157.

²⁵² Welles, John G. (1973). Multinationals Need New Environmental Strategies. *Columbia Journal of World Business*, Summer.

An example of the scholarship that would emerge from this concern is found in the “Environmental Conflict Project” funded by the Rockefeller Foundation and led by faculty at the Graduate School of Business Administration at New York University. The project aimed to understand the “patterns of environmental conflict” in the United States and to “provide empirical and theoretical generalizations of relevance to policy and practice in regard to the constructive management of environmental disputes.”

By pinpointing patterns and trends in the nature of environmental conflict... we can gain useful insights regarding the possible future paths of the environmental movement, particularly as it may find expression and perform on the ‘firing line.’²⁵³

The project studied three hundred sixty-six environmental-related disputes and found “environmental conflict is continuing – the amount of reported conflict over industrial facilities [existing and proposed] has not diminished... despite energy crises and recessionary conditions.” The study found “human health and safety (disease, noise, radio-activity, accidents, genetic and reproductive effects)” was a primary issue of conflict and noted “third parties” had “greatly influenced the course of many battles, entering into many environmental conflicts in several broad categories... [including] expert assistants.” Environmental conflict “is shifting from ‘regulatory’ to ‘social’ in general character – as the ‘environmental movement’ is assuming an ever more central role in the process.” New *non-market* business strategies were needed to rectify what the public rightfully considered to be private industry’s “superficial understanding” of the problem.²⁵⁴ New business activism emerged to reestablish business legitimacy.

²⁵³ Gladwin, T. N. (1980). Patterns of environmental conflict over industrial facilities in the United States, 1970-78. *Natural Resources Journal*, 20, 243-274.

²⁵⁴ Ibid. Pages 250, 256, 273.

One movement, the “industrial ecology” movement, was born. The term had been coined in a 1973 article in the ILO *International Labour Review* that argued for corporations to adopt “a systematic analysis of the various factors affecting industrial activity.” The industrial ecologists took the high ground from workers by arguing that the improvement of the working environment “involves more than the protection of workers’ health and safety” and recognized “the working environment” had become viewed as “an essential element of the human condition in general.”²⁵⁵ IE would develop not as a dialog with workers and communities about rights but instead as a technocratic “study of flows of materials and energy in industrial and consumer activities” and in time be a component of business corporate social responsibility.²⁵⁶

On environmental conflict, “the primary task for MNCs” one scholar wrote in the mid-1970s “will probably rest in managing whole systems of relationships.”²⁵⁷ This would be the dawn of corporate social responsibility. What was constructed was a trickle-down theory of environmental consciousness where business took the high ground and visions of workers and unions as the more self-interested individual actors undermined the nascent activism of a budding global workers’ ecology movement.

Despite their superficial understanding of environmental problems, private industry movements at the time were essentially novel reinterpretations of Andrew Carnegie’s charity principle, where the industry executives of yesteryear would claim for themselves, frequently during contentious labor strikes, the label of “Christian men to whom God in his infinite wisdom has given control of the property interests of the

²⁵⁵ Evan, Harry Zvi. (1974). Socio-Economic and Labour Aspects of Pollution Control in the Chemicals Industries. *International Labour Review*. Page 232.

²⁵⁶ Fet, Annick Magerholm. (2006). Environmental management and corporate social responsibility. *Clean Technologies and Environmental Policy*, 8(4), 217-218.

²⁵⁷ Gladwin, Thomas N. (1977). Environmental Policy Trends Facing Multinationals. *California Management Review*, 20(2), 81-93. See Page 91.

country.”²⁵⁸ Eradication of social and environmental troubles should rest in the hands of enlightened business leaders, not shop floor workers’ rights. Fifty-six percent of major corporations had corporate social responsibility (CSR) officers by 1971 (only half provided a budget for work in the area) and seventy-eight percent listed ecology as a CSR activity at the time.²⁵⁹ In a generation every corporation would claim CSR involvement, an effective “method of self-presentation and impression management” pursued “to insure various stakeholders are satisfied with their public behaviors.”²⁶⁰

As the ideological growth of CSR continued through the 1970s and 1980s, the traditional lobbying efforts to forestall labor policy reform would continue unabated. One new association of business executives counting 200 leading CEOs in its ranks formed the Business Roundtable in 1972. Their goals included both defeating U.S. labor law reform but also moving beyond traditional concerns about trade unions and collective bargaining to the “lack of public support and understanding for business.”

Mistaken notions led to ... “unwise” laws and regulations involving tax, trade and tariff policy as well as environment, energy and labor. It was a “new crises in capitalism” that required the direct involvement of corporate chief executive officers to resolve. ... [and they] formed ... to develop a “mature public understanding of how the business system operates” rather than simply react after business was “hit” by its critics.²⁶¹

²⁵⁸ Canfield, Leon H., Howard Baker Wilder, Frederic L. Paxson, E. Merton Coulter, & Nelson Prentiss Mead. (1940). *The United States in the Making*. New York: Houghton Mifflin Co. as cited in Eilbert, Henry, & I. Robert Parket. (1973). The practice of business: The current status of corporate social responsibility. *Business Horizons*, 16(4), 5-14.

²⁵⁹ Eilbert, Henry, & I. Robert Parket. (1973). The practice of business: The current status of corporate social responsibility. *Business Horizons*, 16(4), 5-14.

²⁶⁰ Snider, Jamie, Ron Paul Hill, & Diane Martin. (2003). Corporate Social Responsibility in the 21st Century: A View from the World's Most Successful Firms. *Journal of Business Ethics*, 48(2), 175-187. Page 176 citing Hooghiemstra, Reggy. (2000). Corporate Communication and Impression Management—New Perspectives Why Companies Engage in Corporate Social Reporting. *Journal of Business Ethics*, 27(1), 55-68. See also Patten, Dennis M. (2002). Give or Take on the Internet: An Examination of the Disclosure Practices of Insurance Firm Web Innovators. *Journal of Business Ethics*, 36(3), 247-259.

²⁶¹ Gross, James A. (1995). *Broken Promise: The subversion of U.S. labor relations policy*,

The business community led by the Business Roundtable organized to defeat labor law reform in 1977 – a bill remarkably similar to the Employee Free Choice Act of today:

The Business Roundtable became an exclusive fraternity of the nation's most powerful and prestigious business leaders. These CEOs represented approximately two hundred of the largest corporations in the country from each sector of the economy, including the top ten of the 1978 Fortune 500. The Roundtable was the voice of business in Washington. The BRT had great political power, wealth, organization, and influence with the mass media, with its strength centered in and exercised by the CEOs who were personally and actively involved in the organization's lobbying efforts. As columnist Victor Riesel put it, 'there has been nothing like this inside the worlds of commerce and industry.'²⁶²

While the Business Roundtable's Fortune 100 companies "provided most of the funding and Roundtable CEOs walked the halls of Congress" the "owners of small business, coordinated by their small business associations, did most of the 'legwork'" needed to stop labor law reform.²⁶³ These efforts all unfolded amid the rise of CSR.

Without strong state protection of collective bargaining rights which were in the U.S. being whittled away by the courts and congressional enactments, workers' ecology and advocacy for health and safety in the working environment would be at risk if not impossible as workers would lose shop floor clout and be forced back into the expedient concern for their immediate material situations. The UAW president Leonard Woodcock described the challenges workers faced in advocating for safety and health in the working environment. Material insecurity confounded activism:

Those who sit below the salt, and that still includes most wage-earners and their families, are not in a position to take a bold, intransigent stand against pollution and the employers who are its major perpetrators. Even though they have traditionally been and remain the chief victims of pollution, working people are obliged by the insecurity of their jobs and lives, by their families

1947-1994. Philadelphia: Temple University Press. Page 235.

²⁶² Ibid.

²⁶³ Ibid.

needs and by their loyalties to wives and children, to give, ‘the smell of the paycheck’ priority over a wholesome working and living environment....²⁶⁴

Despite the tensions between ecology rights claims and concerns for their material well-being in the face of weakening labor laws and collective bargaining, workers continued to use their institutions to press for change. The UAW Convention in Atlantic City in 1970 passed a complex statement with two diverging sentiments, illustrating the complexity of the predicament workers faced in struggling for their own economic survival and at the same time the survival of their safety and health.

Unchecked pollution by the automobile and related industries is of direct concern to auto workers not only because they are citizens concerned for their environment but because there is a direct threat to their jobs and their job security. The worker’s stake in resolving this problem for society and the nation is compounded by the stake in his own job. We shall raise this issue sharply in 1970 negotiations in discussions with the companies.²⁶⁵

The job loss concern on the part of labor’s health and safety activists would become the “job blackmail” strategy by corporations. In response, unions advocated for a “Workers’ Superfund” in those situations where environmental controls resulted in job loss. The group Environmentalists for Full Employment formed and pushed for the Humphrey Hawkins Full Employment Bill on the legislative front. Organized labor, however, was losing ground in the logic of their political argumentation. Economic globalization of the economy helped CEOs use the new options available to them through capital flight to argue against regulations of any variety, regardless of cause.

Conservative politicians and unions raised job loss fears despite a U.S. Council on Environmental Quality study by the Department of Commerce stating that “the impact of those pollution control costs that were estimated and examined would not be

²⁶⁴ Oldham, James C. (1974). Organized Labor, The Environment, and the Taft-Hartley Act. *Environment Law Review*, 1974, 936-1026. See Page 941, footnote 15.

²⁶⁵ Ibid. Page 937.

severe in that they would not seriously threaten the long-run economic viability of the industrial activities examined.”²⁶⁶ Ronald Reagan, Governor of California from 1967 to 1975, promoted “business pragmatism” with the California AFL-CIO construction trades unions. A \$7 million fund was established in California for the construction trades to lead anti-environmental movements. Business funded this type of political and social advocacy, despite their efforts at public image improvement. As with labor law reform, U.S. business found no ethical conflict with their emerging CSR agenda.

Manufactured uncertainty would come of age in health and safety conflicts, again seemingly without contradiction for business leaders. The corporation defended itself increasingly against known occupational hazards by challenging the scientific evidence. This was the case with cotton dust in the textile industry.²⁶⁷ While used as a legal and regulatory strategy most infamously by big tobacco, the lead, asbestos, and chemical industries also used this strategy to prevent regulation. Within thirty years, manufacturing uncertainty would be “so common that it is unusual for the science behind a public health or environmental regulation proposed in the U.S. not to be challenged by a corporation facing regulation.”²⁶⁸ The strategy required “questioning the validity of scientific evidence” upon which regulations and legal evidence were based, an easy proposition given how the philosophy of the scientific method always leaves room for a degree of uncertainty. Lobbying groups such as The Advancement of Sound Science Coalition would support the most aggressive corporations before in-

²⁶⁶ United States Council on Environmental Quality. (1972). *The Economic Impact of Pollution Control: A Summary of Recent Studies*. Washington, D.C.: U.S. Department of Commerce.

²⁶⁷ Levenstein, Charles, Gregory F. DeLaurier, & Mary Lee Dunn. (2001). *The Cotton Dust Papers: Science, Politics, and Power in the "Discovery" of Byssinosis in the U.S.* Amityville: Baywood Publishing.

²⁶⁸ Michaels, David, & Celeste Monforton. (2005). Manufacturing Uncertainty: Contested Science and the Protection of the Public's Health and Environment. *American Journal of Public Health*, 95(1), 39-48. Page 39.

house legal departments would eventually adopt these legal, political and regulatory strategies as routine, common practice in their own legal and public affairs portfolios.

As business organized in the *non-market* environment, by 1980 there were in excess of 3,200 business trade associations lobbying in Washington, D.C.²⁶⁹ Private industry in time successfully transformed their “superficial understanding” of healthy working environments into a public image of social and environmental responsibility. These were the larger *non-market* forces at play in North American labor relations as occupational safety and health policy emerged in the U.S. and Canada. Documenting this entire history is not the objective here. This chapter simply provides a necessary background for understanding the dynamics of exclusion in labor and human rights policy, the obstacles to constructing alternatives, and the real impact of influence and power that has shaped the right to refuse unsafe work in national labor policy and in key ILO standards now ratified by the largest of the world’s developing economies.

Employer political activity on the working environment has most dramatically shaped the constitution of labor rights. Hirschman’s thesis of perverse effect had become a strategy in the argument against workers’ ecology. As global society came to realize the emerging crisis of environmental health and safety, business and political elites reimagined and repackaged the *laissez-faire* market discipline. As managerial decision-making and entrepreneurial control was threatened by new social demands and by economic globalization, business counter-attacked against what it saw as an excesses of democracy in order to mitigate public regulation and the loss of control.

The focus of this dissertation is the right to refuse unsafe work as a form of employee health and safety protest and its protection under human rights standards.

²⁶⁹ Wilensky, Harold L. (2002). *Rich Democracies: Political Economy, Public Policy, and Performance*. Berkeley: University of California Press. Page 92.

This is a socially-contested question that was for a time at the center of concern and business opposition. Work refusal rights illustrate the manipulation of values and beliefs and how the renewal of a particular cultural system can confound alternative policy choices rooted in other opposing beliefs and values. Effective policy alternatives can be blocked and disappeared from decision-making processes in favor of what becomes ineffective labor rights policy scarred by a market discipline safe for employers and managerial prerogatives while hazardous for human health and safety.

Alternative voices challenged the market discipline that was eventually to be imposed upon the right to refuse. Policy alternatives were being advocated in both the United States and Canada by workers and legal experts with an intimate knowledge of what from their perspective was the failure of any kind of market-based approach to labor policy. Despite criticism from the domestic labor advocates in the two countries that ILO drafters would cite as models in workers' safety and health policy, business and political elites worked to expand and consolidate their powers with new mantras of market discipline that neutralized any alternative visions of business regulation for social protection. This involved opposing the expansion of collective bargaining, as one might expect, but it also included at times creating and promoting rights consistent with the logic of market discipline. *Marketized* rights were made policy even as the demonstration of their effectiveness for workers remained completely ineffective.

Co-opted by these cultural visions were the strong and hopeful freedoms of association rights adopted by the postwar ILO, irrespective of the social and ecologic impact. Canadian labor policy played a central role in synthesizing a re-packaged market values system with a specific *marketized* employment rights regime on worker safety and health policy. Ultimately, the right to refuse became what can be ironically called a "safe" right – a right of limited affect as a social protection but "safe" for

business, managerial control and the general vision of *laissez-faire* market economics.

Business leaders generally opposed labor protections, but at times the support for “safe” rights made the denial of stronger labor rights more palatable. On the right to refuse, the repackaged market discipline, culture and values system would co-opt the challenges posed by competing policy alternatives with a new system of logic that said workers health and safety was a topic too important to be left to the “adversarial labor-management relations” that characterized workers’ freedom of association and collective bargaining. Where this values system took hold, the realm of the possible shifted. Even labor supporters left the notion of strengthening workers’ freedom of association protections behind, focusing their labor advocacy instead on a new set of ineffective “safe” rights under ILO global labor standards. This process originated in the Anglo-American market societies before moving to ILO standards in Convention No. 155 concerning occupational safety and health and the working environment.

CHAPTER IV

LABOR JURISPRUDENCE

The right to refuse under international labor and human rights standards

4.1. Drawing the boundaries of international labor rights policy

This chapter is an analysis of the right to refuse unsafe work under global labor and human rights standards. It makes a critical analysis of the jurisprudence of the International Labor Organization from a human rights perspective that endeavors to analyze the effectiveness of the right to refuse unsafe work. This chapter includes not only documenting ILO jurisprudence but also the various alternative policy models on the right to refuse unsafe work that have not been incorporated into ILO jurisprudence.

That human rights are individual rights at the expense of collective rights has been an argument against adoption of human rights frameworks in labor relations law, labor policy and workers' rights advocacy. The right to refuse unsafe or unhealthy work is, however, a story that is more complex. Outside its legal protection through the enforcement of collective bargaining agreements, there are different schools of thought regarding how to protect the right to refuse. Considered employment rights, generally, each policy approach protects refusal rights in markedly different ways.

As workers' freedom of association rights are often viewed as only those rights dealing with the establishment of trade unions, it is often forgotten that the freedom of association also entails certain individual rights. The most basic example is a worker reserving the individual prerogative to support a trade union without discrimination or retaliation. There is a history of the right to refuse as an individual right based in the broad status protection of workers' freedom of association. The right to act for the improvement of working conditions has been an element of workers' freedom of

association. This right is a status-based protection because workers hold the right as a class of people facing inequalities being in another's employ. Under this model of labor protection, workers have the right to act to improve their working conditions because they hold this basic legal status as employees. Latitude is thus extended to workers to decide what a grievance is, and state protections are afforded to pursue the resolution of grievances as the workers have defined. The policy logic of these rights is not made contingent upon a particular hazard or a working environment. This logic is rooted in the protection of workers as a class or a status deserving unique protection.

When status-based assumptions are removed as a philosophic foundation for individual rights, other rationales are needed to justify legal protections. This is the case under global labor standards. Objectivist definitions are used by policy-makers to define unacceptable work hazards. Workers in this policy model need to demonstrate a hazard in a working environment, which must meet a predetermined and recognized standard. This also is an individualistic rights framework, but is not at its base a status protection of an employee at its foundation. It does not create status-like assumptions but instead depends on the "objective" hazard as defined by a legislative, judicial or administrative authority. This form of labor protection is a *safer* right for employers.

ILO labor standards on the right to refuse unsafe work have followed the more limited model and have created what can be described as an implicit qualification on workers' freedom of association rights. This right to refuse is a protection carved out of the broader nature of pre-organizational activity as workers' freedom of association. The underlying policy logic of the objectivized right thus requires the policy architect to decide and construct a series of important decisions. A typology of the "refusable" hazards must be created and then justified; the level of risk decided. A worker's psychology or "belief" may be judged when a hazard is deemed not a hazard so as to

determine if the act of refusing is still worthy of legal protection. Finally, there must be a resolution of the legal boundary dispute that creates policy dissonance within national labor policy on workers' freedom of association so as to eliminate the perception and existence of any conflicting status-based protection for workers.

Richard Brown described these required policy-making tasks shortly after Canada moved towards what has been called the *Internal Responsibility System*:

A legal architect who sets out to design a model right to refuse law must perform several tasks. The first is to determine what type of hazard justifies a refusal to work. Second, a mechanism should be established for investigating the level of risk when a refusal occurs. Next, the architect must adopt a standard for reviewing an employee's perception of a danger which is not real. The fourth concern is an employer's response to a refusal, which could include disciplining an employee, withholding pay and assuming a second worker as a replacement. Finally, the blueprint must sketch the legal boundaries of concerted refusals to work.²⁷⁰

Key distinctions are highlighted in these tasks. The most important of these is a basic judgment of the merit of a hazard. With no judgment of the merit of a hazard, as is the case in the protection of the right to refuse as concerted activity under a workers' freedom of association framework, the worker has more latitude in exercising the individual right. There is also much less of a focus on the workers' psychology as the worker's "belief" is not open to judicial review since the merit of the hazard itself is immaterial. Thus the "good faith belief" held by a worker regarding the danger of a hazard is never judged. The only grounds upon which to judge a worker would be a simple "good faith" standard and not both simple "good faith" and the more complex "good faith belief" that a hazard meets a previously legislated objectified threshold.

Drawing out these divergent policy models protecting the right to refuse is not

²⁷⁰ Brown, Richard. (1983). The Right To Refuse Unsafe Work. *University of British Columbia Law Review*, 17(1), 1-34. Page 3.

just an abstract debate. They are each based in sharp philosophical differences on the role of workers as human beings, the dominance of markets in society, and the state's legal support for the prerogatives of private enterprise. They also raise critical moral questions about business, workers' control and each person's life and death. These issues complicate the scholarly debate about workers' rights as human rights being largely the promotion of individualism to the detriment of collective protections. One model of protection is associational, yet it is a stronger protection of individual rights. The other provides no status protection and constructs restrictions in the exercise of the individual right. Both are individual rights but are markedly different for workers. The more restricted individual right has come to dominate in the new so-called era of individual employment rights. A new vocabulary is very much needed if we are to move beyond the totalizing and misleading characterizations of rights individualism and understand the inherently dual individual-collective nature of all workers' rights.

In this chapter I begin by documenting the failure of ILO jurisprudence to give adequate protection of the right to refuse unsafe work. I recount a comparative history of the right to refuse unsafe work with U.S. national labor policy to provide a contrast with the more restrictive ILO standard. I use the U.S. case in part because it is a clear example to illustrate the divergent models of legal protection but also it illustrates how a belief in an "individual rights era" was not the governing principle in U.S. labor and employment relations as is often suggested. The U.S. jurisprudence is an alternative refusal protection model, but it ended with the rise of the neo-liberal policy era and is no longer U.S. law. Recounting this hidden history for comparative value illuminates a chapter in U.S. national labor policy that conflicts with the current policy standard adopted nationally and internationally in global labor standards under ILO Convention No. 155, the convention on occupational safety, health and the working environment.

Alternatives did exist at the time and were advocated and made national labor policy in the U.S., an ironic twist in the history of national labor policy in the one country that became the strongest global advocate for adopting market-based policy solutions.

With the right to refuse unsafe work and the ongoing problem of health and safety hazards globally, ILO labor policy falls short in protecting workers' human rights. As an agency that predated the Universal Declaration of Human Rights by a generation, the ILO has struggled to develop a cohesive human rights policy. The ILO's approach to social justice has been critiqued from a human rights perspective.²⁷¹ The right to refuse is not adequately protected by either the global labor standards on workers' freedom of association or ILO labor standards on occupational safety, health and the working environment. Worker protest of the work environment receives limited protection under ILO standards on workers' freedom of association. Likewise, the right to refuse faces a very high objectivist hazard threshold for securing protection under occupational safety and health standards. On the protection of the right to refuse unsafe work, the ILO standards as a body of worker protection serve as a political flank to the precarious liberal market contours of the modern employment relationship. Unquestioned is a world of undignified but mandatory employer loyalty obligations and arbitrary management charges of insubordination and disloyalty.

In the world of labor and employment relations where employers exercise the right to hire and fire employees, it often is said that any legal protection is better than none; that some rights, however weak and limiting, are better than nothing at all. The problem with this view in the context of employment relations is that labor relations

²⁷¹ Two examples are MacNaughton and Frey (2010) and Alston (2004). MacNaughton, Gillian, & Diane F. Frey. (2010). *Decent Work for All: A Holistic Human Rights Approach*. SSRN *eLibrary*. Alston, Philip. (2004). 'Core labour standards' and the transformation of the international labour rights regime. *European Journal of International Law*, 15(3), 457.

do not come before the law upon a *tabula rasa* or as an environment untouched like a mythical tropical island paradise. The employment relationship is a relationship shaped by the law from the beginning; it is not an organic life system that emerges from the earthy soil of a neighborhood garden. Rights frameworks lay down boundary lines between management rights and workers' rights, shaping the degree of power to terminate employment. Any limited labor rights framework for workers by default, therefore, draws a broader scope of protection for managerial prerogatives. On the right to refuse unsafe work, this is the history of the jurisprudence that has now over the last generation become dominant. What has unfolded is not the establishment of a limited but basic set of legal rights for employees from which they can leapfrog to stronger protections. What has happened is the limiting and restriction of a workers' right to the freedom of association and by consequence worker freedom in society.

4.2. The right to refuse under ILO workers' freedom of association

The ILO Constitution as annexed by the Declaration of Philadelphia in 1944 reads "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity." This goal of freedom was the "central aim of national and international policy" and that achieving freedom and dignity was the ILO's constitutional goal. "It is a responsibility of the ILO" it states, "to examine and consider all relevant economic and financial policies and measures in light of this fundamental objective." The vision of freedom and dignity in the ILO's Declaration of Philadelphia included the explicit view that "labor is not a commodity" and that to achieve social justice in society "the freedom of expression and of association are essential to sustained progress."²⁷²

²⁷² International Labour Organization. (1919). The Constitution of the International Labour

The ILO Constitution is the main organizing document and constitutes a treaty between nations under international law. ILO member-states have an obligation to respect the freedom of association, regardless of whether or not they have ratified the ILO-adopted labor conventions on the freedom of association. As a result of this obligation, member-states of the ILO have agreed to have their domestic labor policies supervised by the ILO. A special supervisory body on the freedom of association has been created by the Governing Body to monitor domestic national labor policies in the ILO member-states. This work is done by the ILO Governing Body's Committee on Freedom of Association. The CFA receives complaints from employers' and workers' groups made against governments, irrespective of whether or not the country has ratified the labor conventions on workers' freedom of association. If a nation has ratified a labor convention, they also fall under the supervision of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR).

Together, the CFA and the CEACR have developed a detailed jurisprudence on workers' freedom of association under international law. Although the freedom of association is a subject matter in other human rights treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, no similar jurisprudence exists on workers' freedom of association under international law. Taken together, the ILO Committee of Experts and the ILO Governing Body's Committee on Freedom of Association have formed an important body of jurisprudence regarding workers' freedom of association.

Organization: 15 UNTS 40. Established in 1919, modified by the amendment of 1922 which entered into force on 4 June 1934; the Instrument of Amendment of 1945 which entered into force on 26 September 1946; the Instrument of Amendment of 1946 which entered into force on 20 April 1948; the Instrument of Amendment of 1953 which entered into force on 20 May 1954; the Instrument of Amendment of 1962 which entered into force on 22 May 1963; and the Instrument of Amendment of 1972 which entered into force on 1 November 1974.

Outside the context of a collective bargaining agreement, labor law scholars consider the right to refuse unsafe work to be a form of “pre-organizational” worker activity. The term “pre-organizational” comes from the view that workers have not yet organized for collective bargaining, but still are undertaking actions that are an important component of basic organizing and thus workers’ freedom of association. This is a broader legal classification than formal union membership and organizing activity.²⁷³ As later sections of this chapter explain, pre-organizational activity has at times been an important element of national labor policy protecting workers’ freedom of association. Under these particular labor policy standards, any discrimination or retaliation against workers’ who have engaged in this form of pre-organizational freedom of association activity is illegal and considered an unfair labor practice. Workers cannot be terminated from their job for engaging in this protected activity.

Discrimination against workers for exercising the freedom of association is evaluated by the ILO according to a standard of “full freedom”. This full freedom jurisprudence is the right “to establish and join organizations of their own choosing” free from discrimination in a manner “fully established and respected in law and in fact.”²⁷⁴ This form of discrimination “is one of the most serious violations of freedom of association” as it risks jeopardizing “the very existence of trade unions.”²⁷⁵

How the ILO supervisory bodies constitute discrimination under the freedom of association conventions is important to the right to refuse unsafe work.²⁷⁶ Because

²⁷³ Morris, Charles J. (1989). NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct. *University of Pennsylvania Law Review*, 137(5), 1673-1754. Page 1677.

²⁷⁴ International Labour Office. (2006a). *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th [rev.] ed.). 5th ed. [rev.] Geneva: International Labour Office.

²⁷⁵ Ibid. Paragraph 769.

²⁷⁶ This includes Conventions 87 and 98. *Convention (No. 87) concerning freedom of association and protection of the right to organise*, 68 U.N.T.S. 17 (1950). 1948. *Convention (No. 98)*

the right to refuse unsafe work has generally been viewed as organizational activity, national labor policies have a track record of affording protection of the right to refuse unsafe work in a workers' freedom of association framework through domestic labor laws. An important caveat for workers exists in the ILO's definition of retaliation and discrimination, however. ILO freedom of association rights extend only to employees "dismissed or prejudiced in employment *by reason of trade union membership or legitimate trade union activities*"²⁷⁷ (author's emphasis added). The ILO through its supervisory decisions argues that "anti-union discrimination is one of the most serious violations of freedom of association"²⁷⁸ but the caveat is found in what constitutes a protected act under the freedom of association conventions. The rub for workers under ILO standards is that the freedom of association jurisprudence fails to protect "pre-organizational activity" on the part of individual workers. The right to refuse unsafe work as pre-organizational activity undertaken by unorganized workers in their own defense against employers is not protected under the ILO freedom of association conventions as interpreted under ILO supervision. This nuanced legal distinction is important as more workers become vulnerable in the face of declining union density worldwide and the rise of precarious work and disguised employment arrangements.

The ILO is forthright in its legal definitions, stating that the ILO Governing Body's Committee on Freedom of Association "is not called upon to pronounce upon the question of the breaking of a contract of employment by dismissal except in cases in which the provisions on dismissal imply anti-union discrimination."²⁷⁹ While anti-

concerning the application of the principles of the right to organise and to bargain collectively, 96 U.N.T.S. 258 (1951). 1949.

²⁷⁷ International Labour Office. (2006a). *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th [rev.] ed.). 5th ed. [rev.] Geneva: International Labour Office. Paragraph 771.

²⁷⁸ *Ibid.* Paragraph 769.

²⁷⁹ *Ibid.* Paragraph 779.

union discrimination covers a variety of employer retaliation such as hiring, dismissals and “transfers, downgrading and other acts that are prejudicial to the worker,”²⁸⁰ this coverage applies only to the discrimination of workers for “union membership” or “union activities” and not for pre-organizational activity that exists before and extends beyond formal union membership activity and official unionization efforts. Workers that question their supervisor and dare refuse to perform unsafe work that they see as unsafe receive no recognition of engaging in the freedom of association. In this regard, ILO association rights are oriented toward institutional affiliation rather than to protecting pre-organizational freedoms that would also encompass the right to refuse.

International labor standards dealing directly with dismissal protections fail to protect workers’ pre-organizational freedom of association rights. The Termination of Employment Convention, No. 158 of 1982 says “a worker shall not be terminated” in such situations as “union membership or participation in union activities” or “seeking office, or having acted in the capacity of a workers’ representative” or “filing a complaint” for alleged violation of laws or for “race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.” Convention No. 158 does not define any pre-organizational freedom of association activities as being a protection against termination. The convention even qualifies those limited protections it defines with “unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”²⁸¹

The right to strike under ILO standards on workers’ freedom of association is an alternative way of thinking about protection for the right to refuse unsafe work as a

²⁸⁰ Ibid. Paragraphs 780-781.

²⁸¹ *Convention (No. 158) concerning termination of employment at the initiative of the employer*, 1412 U.N.T.S. 23645. 1982.

freedom of association protection. Here, too, however, the ILO jurisprudence falls far short of affording workers protection. The right to strike is not set out in the text of any ILO conventions or recommendations. It is derived from ILO jurisprudence and the decisions of the supervisory bodies. The right to strike is a right that workers are entitled to enjoy under the freedom of association standards. The supervisory bodies have accepted national labor legislation, however, that makes the exercise of the right to strike subject to the agreement of a certain percentage of workers, regardless of any union membership.²⁸² Conversely, the ILO has determined that “any work stoppage, however, brief and limited, may generally be considered a strike” and the supervisory bodies agree that “restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful.”²⁸³ National governments can remain in compliance with the freedom of association under international labor standards by regulating strike actions by requiring a certain percentage of workers to agree by voting. This does not afford the individual worker or small group of two or three workers the right to refuse as a labor strike, even if peaceful, because governments are allowed under freedom of association standards to regulate labor strikes by requiring a larger workplace vote.

The question this ILO jurisprudence leaves unanswered is whether the right to strike or any other work stoppage for workplace health and safety is to be afforded to a small group of workers, or even a single individual refusing work, regardless of the particular merit of the hazard. Is the right to strike purely an institution-based right or is it an individual right under international labor and human rights standards? Laws requiring a quorum and a majority are acceptable under ILO labor standards, so long

²⁸² Gernigon, B., H. Guido, & A. Odero. (2000). *ILO Principles Concerning the Right to Strike*. International Labour Organization. Page 11, note 5.

²⁸³ International Labor Organization. (1994). *General Survey: Freedom of association and collective bargaining. Report III, Part 4B*. Geneva: International Labour Office. Paragraph 173.

as it is fixed at a reasonable level as defined by ILO supervisory bodies. Under the ILO international labor standards on workers' freedom of association, therefore, states are not obligated to protect the right to strike as an individual right to strike, even in situations where common sense might dictate otherwise, as in a refusal to work.²⁸⁴

Apart from the quorum issue, another issue that arises from the protection of the right to refuse unsafe work as a component of the right to strike is the view that the right to strike is not a right to be viewed as an end in and of itself. "It is true that it is a basic right" argues the supervisory bodies, "but it is not an end in itself."²⁸⁵ The right is therefore not protected as an organic, universal human right in itself, but rather as an enforcement corollary to the industrial relations system of a nation. A "strike action cannot be seen in isolation from industrial relations as a whole" and thus exhaustion of a conciliation / mediation process in an industrial relations system may be required:²⁸⁶

"In a large number of countries, legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is compatible with Article 4 of Convention 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements."²⁸⁷

This makes the protection of the right to refuse in the context of the right to strike as subject to exhaustion of mediation and conciliation procedures first. This would make the stop work protection meaningless for workers concerned about safety and health. Even if an individual worker was granted the protection, this poses an obstacle in the

²⁸⁴ Ibid. Paragraph 170. See also Novitz, Tonia. (2003). *International and European protection of the right to strike: A comparative study of standards set by the International Labour Organization, the Council of Europe and the European Union*. Oxford and New York: Oxford University Press.

²⁸⁵ International Labor Organization. (1994). *General Survey: Freedom of association and collective bargaining. Report III, Part 4B*. Geneva: International Labour Office. Paragraph 137.

²⁸⁶ Ibid.

²⁸⁷ Ibid. Paragraph 171.

context of the right to refuse, especially in common law countries where refusals are job abandonment and job abandonment is grounds for the termination of employment. Thus the right to strike jurisprudence also fails, as do ILO standards protecting against pre-organizational discrimination that might protect the right to refuse as a component of the freedom of association. Under this jurisprudence, the argument could be made that the current U.S. labor law protections for worker health and safety wildcat strikes, *Washington Aluminum*, may be legitimately restricted by these ILO labor standards.²⁸⁸

For the ILO supervisory bodies, protection of the right to refuse unsafe work as a component of workers' freedom of association commits the sin of omission. It is not recognized as pre-organizational activity under discrimination protections on the right to organize, nor is it viewed as an extension of the right to strike under the freedom of association jurisprudence. Given the ILO view of collective bargaining as voluntary negotiation, the collective bargaining jurisprudence as a component of the freedom of association also falls silent on protecting the right to refuse in collective agreements. Overall, the ILO supervisory bodies have found that the right to refuse unsafe work is not a sufficiently worthwhile element of national labor policy to warrant protection as an element of the freedom of association under these international labor conventions. The right to refuse unsafe work as defined by ILO standards on workers' freedom of association would not follow what labor law scholars have considered to be logical labor jurisprudence, namely protecting refusal rights as basic freedom of association.

²⁸⁸ *NLRB v. Washington Aluminum Company*, 370 U.S. 9. 1962.

4.3. *The right to refuse under ILO occupational health and safety*

The right to refuse unsafe work was not a *sui generis* topic under international labor standards until the adoption of ILO Convention No. 155 in 1981. For more than sixty years worker health and safety focused on adopting labor conventions identifying specific hazards or working conditions of global concern significant to warrant an international treaty. This practice ended in 1981 when the ILO adopted a “policy-oriented approach” to worker safety and health, a new practice in standard-setting on the issue. The rights of workers’ to act had been addressed by workers’ freedom of association standards, however limited those rights were. The historical development of this change is addressed in more detail in subsequent chapters of this dissertation.

Under ILO Convention No. 155 of 1981, the right of workers to refuse unsafe work faces a high legal bar in affording protection under international labor standards. The International Labor Office is quick to explain how the right to refuse unsafe work is not an absolute right. To dissect these limitations, we begin with Convention 155 and the two recommendations that also include the right of removal in their text.²⁸⁹ According to a recent ILO General Survey on safety and health, there are very clear conditions that have been established to govern the exercise of the right to refuse:

[Under Convention No. 155] no disciplinary action can be taken against workers who remove themselves from work if the following conditions are met: (a) the workers concerned have a reasonable justification to believe that there is an imminent and serious danger to their life or health; (b) they comply with the workplace arrangements contemplated in Article 19(f); and (c) the

²⁸⁹ In addition to Convention 155, two recommendations identify the right to refuse unsafe work, No. 172, the Asbestos Recommendation of 1986 and No. 177, the Chemicals Recommendation of 1990. Although these recommendations include the right to refuse and have been adopted by the ILO and are subject to regular ILO supervision by the Committee of Experts, they are not subject to national ratification. They do not, therefore, have the same legal standing in international law as conventions. While both of these recommendations were adopted after Convention No. 155 and follow a like mold in regard to the protective language of the right to refuse, only Convention 155 has international treaty status. It is the only legally binding international labor convention that addresses the right to refuse.

actions by the workers have been properly taken in conformity with the national policy....²⁹⁰

Each of these obstacles – the adjudication of the merit of a hazard, the compliance with certain workplace arrangements, and the taking of actions in conformity with national policy – pose unique obstacles for workers. Before we visit each of these obstacles and the implications of these points as critical labor policy questions, a brief review of the language protecting the right to refuse within these standards is required.

Four provisions of the text of Convention 155 are relevant to the study of the right to refuse unsafe work. The first of these is Article 4, which outlines in the very broadest of terms what is meant by a national policy. The definition of national policy laid down in Convention 155 is important because the right to refuse unsafe work is protected only where it is “in conformity with the national policy.” Article 4 reads:

Article 4. (1) Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. (2) The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.²⁹¹

Article 5 continues reference to this national policy requirement. It requires national policies on occupational safety and health to take into account a basic list of “spheres of action” that affect occupational safety and health and the working environment.

²⁹⁰ International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Report III (Part 1B) to the 98th Session of the International Labor Conference. A report of the Committee of Experts on the Application of Conventions and Recommendations (under articles 19, 22 and 35 of the Constitution). Geneva: International Labour Office. Paragraph 145.

²⁹¹ *Convention (No. 155) concerning occupational safety and health and the working environment*, 1331 UNTS 22345. 1981.

The right to refuse is therefore listed in Article 5 under the letter “E” sub-section.

Article 5 (e) the protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with the policy referred to in Article 4 of this Convention.²⁹²

Although vague, Article 5(e) is an employee protection against employer retaliation.

The right to refuse is detailed in Article 13. Under Article 13, a worker must be protected where there is a reasonable justification of imminent and serious danger to life or health. It further limits this protection in accordance with national policies:

Article 13. A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.²⁹³

The final article to discuss refusal rights in Convention No. 155 is Article 19. Article 19 gives more detail about what shape national labor policy should take on the right to refuse unsafe work. It describes how the right must be exercised “at the level of the undertaking” and what a worker has to do to receive the protection, as well as stating that when properly exercised, a supervisor cannot make workers continue working.

Article 19. There shall be arrangements at the level of the undertaking ...
(f). a worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health.²⁹⁴

This collection of articles, Article 4, 5(e), 13 and 19(f), jointly define the right to refuse unsafe work under Convention No. 155. Despite the identification of workers’

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

health and safety in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, no international treaty defines in as much detail the precise boundaries and definition of the right to refuse unsafe work.

International labor standards include both conventions and recommendations. Two non-binding recommendations adopted by the ILO also identify refusal rights and are worth mentioning here. Recommendation No. 173, the Asbestos Recommendation and Recommendation No. 177, the Chemicals Recommendation, address the right to refuse unsafe work. These standards follow the major points outlined in Convention No. 155. The protection of the right to refuse unsafe work here covers situations of “serious danger to his [sic] life or health” and “imminent and serious risk to their safety or health” respectively. The following is the text of each relevant section.

Recommendation 172 (Asbestos)

Article 9 (1) A worker who has removed himself from a work situation which he has reasonable justification to believe presents serious danger to his life or health should – (a) alert his immediate supervisor; (b) be protected from retaliatory or disciplinary measures, in accordance with national conditions and practice.²⁹⁵

Recommendation 177 (Chemicals)

Article 25 (1) Workers should have the right: . . . (b) to remove themselves from danger resulting from the use of chemicals when they have reasonable justification to believe there is an imminent and serious risk to their safety or health, and should inform their supervisor immediately; . . .

(2) Workers who remove themselves from danger in accordance with the provisions of subparagraph (1) (b) or who exercise any of their rights under this Recommendation should be protected against undue consequences.

(3) Where workers have removed themselves from danger in accordance with subparagraph (1) (b), the employer, in co-operation with workers and their representatives, should immediately investigate the risk and take any corrective steps necessary.²⁹⁶

²⁹⁵ Recommendation (No. 172) concerning safety in the use of asbestos (1986).

²⁹⁶ Recommendation (No. 177) concerning safety in the use of chemicals at work (1990).

The recommendation on chemicals affords workers a slightly wider degree of latitude by the phrase “imminent and serious risk to their safety and health” versus “life or health” as is found in the asbestos recommendation. Nonetheless, the basic text in each is similar and creates a high bar to the exercise of the right to refuse unsafe work. ILO recommendations are also not considered to be binding treaties between nation-states under international law as are ratified labor conventions adopted by the ILC.

Three obstacles in particular are created by these standards. Considering these legal obstacles one-by-one is an important task if we are to contrast this model of the protection of the right to refuse with other models, including the exercise of the right to refuse as pre-organizational activity under workers’ freedom of association. First is the case-by-case adjudication of hazards. Second is the requirement that managerial or supervisory procedures be followed. Third is the qualification of the exercise of the right to refuse by any number of wide-ranging national policies and national practices.

a. Adjudicating hazards

The individual merit of the hazard in question is considered before extending protection to workers who refuse to perform work they consider unsafe. Merit is defined within Convention No. 155 as a hazard that can pose “imminent and serious danger” to workers’ “life and health”. Workers may refuse unsafe work only when they believe it poses an “imminent and serious danger” or a “serious danger to life or health” or an “imminent and serious risk” to themselves, depending upon the global labor standard. Workers cannot refuse work and be protected against retaliation if they reasonably believe a hazard falls one degree below the “imminent and serious” mark. Refusing a working condition unhealthy but not “imminent and serious” to life and health means insubordination and termination. The labor standard language and policy itself thus protects employer termination rights outside this narrow language.

Global labor rights require a case-by-case assessment of the hazard, which also means a case-by-case assessment of the merit of a workers' reasonableness in refusing a hazard. Under these standards some authority must adjudicate an employee's belief claims about each workplace hazard where employees assert the right to refuse. This places the legal protection on unstable ground. The labor protection rests only with a narrow scope of hazards, assuming other conditions do not first derail protection of these workers' rights. Workers who protest hazards one degree below this objectivist threshold are unprotected under ILO global labor standards and are subject to having the nature of their psychological belief in the decision-making process be evaluated.

Global labor standards on occupational health and safety charge the state with the responsibility for adjudicating complex belief claims even when no evidence may exist anywhere about the impact of the hazard at issue. Simply put, humanity does not know the danger of some hazards given the growing magnitude of hazards faced by workers. Asking the government to ascertain what is imminent and serious may be easy in some cases, but in other cases it is an impossible task that is often socially determined rather than scientific. The standard affords no protection to workers who refuse new or emerging workplace hazards or hazards of an as yet unknown danger.

There is also the problem of evaluating the danger of a hazard in respect to an individual worker refusing a work assignment. Some workers have greater sensitivity to particular hazards than other workers. Workers may have less training which can also place them at greater risk for illness or injury. How are these claims adjudicated? The hazard threshold of an individual rights-holder is assessed on a fictitious notion of a model human being. Only the occupational / environmental work hazard is assessed and not the position of the individual employee rights-holder in relation to that hazard.

Illustrating the complex task behind making rights contingent upon identifying the degree of danger of any workplace hazard, the ILO acknowledges the challenge:

Precise and reliable data on the number of existing natural or synthetic chemical substances, the quantities used and produced and hazard assessment data is difficult to find, often outdated and contradictory. Thirty-two million organic and inorganic, natural and synthetic substances have been identified and registered worldwide. Out of the 110,000 synthetic chemicals that are produced in industrial quantities, adequate hazard assessment data is available only for about 6,000 substances, and occupational exposure limits (OELs) have been set for only 500-600 single hazardous chemicals. Very little assessment data is available for mixtures of chemicals.²⁹⁷

Workers need only a “reasonable” justification for their concern, but there is no available evidence about so many hazards. Reasonableness is a subjective concept.

Introducing hazard questions into the formula for protecting workers’ rights to refuse unsafe work sets the legal protection on unstable ground. The standard can in no way be objectively enforced. There are simply too many unknowns. Thus what happens is global labor standards default to protecting only the most severe traumatic injury risks or similar known chemical or radiation hazards, leaving unprotected those workers faced with emerging or undocumented hazards. The logic of the *sui generis* employment right removes any hope that global labor rights will protect workers in a way capable of guarding against emerging hazards before environmental harm is done. Evaluations of merit standards also generally marginalize people exposed to hazards with longer latency periods and leave off the radar social-based hazards like psychosocial hazards that can be just as debilitating and damaging to workers health.

²⁹⁷ International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Report III (Part 1B) to the 98th Session of the International Labor Conference. A report of the Committee of Experts on the Application of Conventions and Recommendations (under articles 19. 22 and 35 of the Constitution). Geneva: International Labour Office. Page 44.

The case-by-case qualification of hazards restricts the merit of worker's claims and places upon workers an almost unattainably high burden of proof for protection of their refusal to perform unsafe work. These kinds of workers' rights amount to what can only be described as a restrictive limit placed on workers' rights or, from another perspective, they protect the business rights afforded employers to terminate workers.

b. Mandating managerial procedures

Presuming a worker successfully jumps the hurdle of establishing a legal claim with merit for a particular hazard, global labor standards require that workers follow a prescribed process in their work refusal. Individual workers are obligated under Convention No. 155 to "report 'forthwith' to their 'immediate supervisor' any such situations representing imminent and serious dangers"²⁹⁸ for evaluation of the refusal.

Perhaps most troubling is the labor standard's failure to recognize the great social inequalities at play in workplaces worldwide. Establishing managerial-based procedures as a step in the exercise of human rights ignores the power dynamics in the employment context and assumes that managers and supervisors are somehow neutral adjudicating agents. This is far from the case, especially on occupational safety and health issues. Employers may be conspirators in criminality for their perpetuation of known occupational hazards. The rights that are protected by the convention are the rights of corporate managers to have a say in the exercise of the right to refuse before a worker pursues any legal claim that may result in an adverse decision for employers.

²⁹⁸ Ibid. Page 49.

c. *Qualification by national policies and practices*

The shift to “policy-based approaches” by the ILO in worker health and safety standards allows the ILO to accept a very wide-range of labor policies under the rubric of national practice. “National policy” says the ILO “connotes a cyclical process with different stages to be implemented at recurring levels.” The national health and safety policy may be established “in light of national conditions and practice.” “National conditions and practice” the ILO explains, “indicates, first of all, that there is no ‘one-size-fits-all’ model and that national policy has to be developed based on an assessment of particular national needs and conditions.”²⁹⁹ Worker health and safety, according to the supervisory bodies, is pursued “so far as is reasonably practicable.”³⁰⁰

Permitting a wide range of “national conditions and practice” and focusing on what is “reasonably practicable” for each country with no assertion of any universal protections was for the ILO a major paradigm shift in worker health and safety under international labor standards. Convention No. 155 on Occupational Safety and Health, adopted in 1981, started this trend. The ILO recognized, for the first time ever within the text of an international labor standard, no fixed standard. A global labor standard with no fixed standard was a major paradigm shift for the ILO. This shift away from fixed standards, while implicit in Convention No. 155, would eventually become the ongoing practice in future health and safety labor standards. The best example of this being Convention No. 187 which explicitly states the aim of the convention is to be a “Promotional Framework” for occupational health and safety. The ILO abandoned adoption of international labor standards on specific workplace hazards, standards that made up roughly half of all global labor standards that were adopted by the ILO.³⁰¹

²⁹⁹ Ibid. Page 18.

³⁰⁰ Ibid. Page 19.

³⁰¹ *Convention (No. 187) concerning the Promotional Framework for Occupational Safety and*

The consequences of this paradigm shift were enormous for employee health and safety protests. The failure of the ILO to establish concrete legal obligations in global labor standards meant employee protections would fall through the cracks of internationally-recognized labor and human rights standards. The failure of this shift in paradigm is demonstrated most clearly in Article 5 of Convention No. 155. Article 5 outlines the general “spheres of action” that “must be taken into account” by member states in their national occupational safety and health policies.³⁰² These include issues like training, communication, and control of material elements at work. Among this list, however, is protecting workers from discrimination.³⁰³ There is no explicit definition of what constitutes discrimination against workers by employers. This is a matter left to “national policy” as defined by individual governments. The ILO has clarified the broad scope of this “national policy” blanket on discrimination:

Article 5(e) does not itself seek to prescribe protection of workers and their representatives from disciplinary measures. It prescribes only that a national policy must provide for such protection. In other words, it is for the [ILO] Member to determine the extent and conditions of the protection. . . .”³⁰⁴

The underlying objective of the ILO in moving toward this new paradigm of “policy-based” versus “fixed rule” global labor standards is best summarized by the ILO itself:

Health, Registration No. 57553 UNTS 45739. 2006.

³⁰² International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Report III (Part 1B) to the 98th Session of the International Labor Conference. A report of the Committee of Experts on the Application of Conventions and Recommendations (under articles 19. 22 and 35 of the Constitution). Geneva: International Labour Office. Page 21.

³⁰³ *Convention (No. 155) concerning occupational safety and health and the working environment*, 1331 UNTS 22345. 1981. Article 5(e).

³⁰⁴ International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Report III (Part 1B) to the 98th Session of the International Labor Conference. A report of the Committee of Experts on the Application of Conventions and Recommendations (under articles 19. 22 and 35 of the Constitution). Geneva: International Labour Office. Page 25.

Article 5(e) provides considerable flexibility in the manner in which this protection is to be applied and represents a careful balance between the interest of employers to manage the enterprise, on the one hand, and the protection of life and health at work, on the other hand.³⁰⁵

This fixation on balancing the interests of employers with workers' human rights is an open acceptance of a stringent market discipline in global labor standards where the preferred method of communication is discourse about the need to maintain labor market efficiency, improve the "functioning" of the labor market, and otherwise abide by the rules of the market metaphor in labor policy, regardless of human rights impact.

Worker health and safety standards subject to vague notions of national policy means that the right to refuse unsafe work is not treated as a human right but is subjected to "flexibility" in implementation. This "flexibility" in policy development means that countries apply "any other method consistent with national conditions and practice" to implement their policy. Given these nebulous discrimination boundaries within ILO standards on employee health and safety, the ILO has even accepted even the most highly restrictive and limited protections of the right to refuse unsafe work:

The nature of the work at issue may also have an influence on the exercise of the right to cease work. In New Zealand (as in Canada and Poland) this right cannot be exercised if the danger is a normal condition of employment (as, for example, for firefighters); in such cases, workers may only refuse such work if the understood risk of serious harm has materially increased in a given situation, that is, the risk of harm has become significantly more likely.³⁰⁶

What is missing under global labor standards is a strong definition of discrimination that outlines the legal obligations of the state to protect the right to refuse unsafe work. Workers are left with global labor standards that define zero employer discrimination and at the same time place restrictions on the legal protection of the right to refuse.

³⁰⁵ Ibid. Page 24.

³⁰⁶ Ibid. Paragraph 149.

4.4. The right to refuse as pre-organizational freedom of association

Considering the limited protection of the right to refuse as a labor protection under international labor and human rights standards, it is instructive to outline how the right to refuse would be protected under a broad workers' freedom of association protection. Despite the claim that U.S. labor policy has ushered in an era of individual employment rights over the last generation, the strongest protection of the individual right to refuse was eliminated early in the so-called individual employment rights era. This history gives us a clear understanding of what the right to refuse unsafe work would look like as an element of workers' freedom of association pre-organizational activity. It also shows the fallacy of the individual employment rights era narrative.

The jurisprudence of the National Labor Relations Board has at times protected the right to refuse as a workers' freedom of association right. This jurisprudence was based in doctrines of protected concerted activity under Section 7 of the basic law on labor relations, the National Labor Relations Act. Section 7 outlines the rights of workers to self-organization and concerted activities for mutual aid and protection:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...³⁰⁷

How the right to refuse was protected by the NLRB is one example of how the refusal rights of workers are protected in a workers' freedom of association rights framework.

Jack Henley was a maintenance man for the Alleluia Cushion Company in the cities of Carson and Commerce, California. Shortly after starting his new job in 1974, Henley observed a pattern of neglect for workplace health and safety. There were no

³⁰⁷ Labor Management Relations Act. (1947). 29 U.S.C. §§ 141 et seq.

protective guards on the machines, no safety instructions for the chemicals they used in production, and the factory lacked eyewash stations, much less any safety program. Unlike Henley, the majority of employees in the Carson factory did not speak English, and safety instructions were not communicated to the workers in their native Spanish.

Jack Henley complained to management and was subsequently transferred to the company's facility in Commerce. Once there, he encountered similar conditions of work. Without speaking a word to co-workers, Henley drafted and sent a letter to the California OSHA office. The company, shortly after learning that he had drafted a letter complaining about working conditions, terminated Jack Henley's employment.

Seeking protection against his discharge, Henley contacted the NLRB which held a hearing on his termination. The administrative judge at the hearing found that Henley "was acting merely on the basis of his individual concern for safety" and cited "the total absence of any evidence that Henley was acting in conjunction with other employees" or that "other employees even shared Henley's concern for safety." The decision found that "if placed in the context of group action," Henley's complaint to OSHA "would be protected activity" but that his actions did not constitute concerted action. He was acting as an individual. Henley was not afforded Section 7 protection.

Upon review, a majority of the NLRB disagreed and overturned this decision. The majority argued that safe working conditions were "a matter of such obvious mutual concern" that "verbal communication or other outward manifestation of mutual interest was unnecessary." Further, Henley was advocating compliance with existing health and safety laws the company "was already under a legal obligation to comply." According to the reasoning adopted by the National Labor Relations Board, Henley's firing "would indicate to the other employees the danger of seeking assistance from Federal or state agencies in order to obtain their statutorily agreed working conditions,

and would thus frustrate the purposes of such protective legislation.”³⁰⁸

Safe working conditions are matters of great and continuing concern for all within the work force. Indeed, occupational safety is one of the most important conditions of employment. Recent years have witnessed the recognition of this vital interest by Congress through enactment of the Occupational Safety and Health Act, 29 U.S.C. Sec. 651-678, and by state and local governments through the passage of similar legislation. The National Labor Relations Board cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme.³⁰⁹

The Board continued.

It would be incongruous with the public policy enunciated in such occupational safety legislation to presume that, absent an outward manifestation of support, Henley’s fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on the Company for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.³¹⁰

The Board supported Jack Henley and ruled against the Alleluia Cushion Company.

The NLRB would protect workers invoking statutory rights and would also grant individual Section 7 rights based on an “obvious mutual concern” legal standard.

The jurisprudence that followed the NLRB’s decision in the *Alleluia Cushion Company* case followed two lines of argument. First, protection was granted to individual employees seeking law enforcement. In one case, a lone female employee refused assignment to a job where all women in the positions were paid less than men

³⁰⁸ *Alleluia Cushion Co., Inc. and Jack G. Henley*, 221 NLRB 162. 1975.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

in violation of an equal pay for equal work statute.³¹¹ In another case, the NLRB protected an employee that tried to enforce state banking regulations related to the late payment of wages that were due to employees.³¹² The NLRB in these cases extended the definition of “obvious mutual concern” to general law enforcement, leveraging the authority of Section 7 and the right of workers to protest to secure law enforcement.

A second group of post-*Alleluia* decisions dealt directly with the right of the lone individual employee to exercise refusal rights. In one case, the Board protected a single employee’s walkout to protest terms and conditions of employment for all the employees, even where other employees refused to join the walkout.³¹³ This case was important because it recognized that individual workers need not rely exclusively on a pre-existing statute to invoke the “obvious mutual concern” standard, the terms and conditions of employment at issue were alone enough to invoke Section 7 rights. In another case, the NLRB reinstated an employee after she individually walked off her job at an upstate New York knife manufacturing plant over a dispute about scheduling the night shift for the most dirty production work on a recurring basis.³¹⁴ In both these Section 7 cases, an individual employee walkout was protected as a workers’ freedom of association right not because enforcement of a statute was at issue but because the nature of the individual dispute was defined as being of obvious mutual concern.

In yet another *Alleluia* progeny case, an employee for a contract hauler of the U.S. Postal Service in Detroit had refused to drive a truck with defective brakes. The employee was found to be protected under Section 7 because “to drive a motor vehicle with malfunctioning brakes would clearly violate traffic regulations” and because the

³¹¹ *Dawson Cabinet Company, Inc. and Lois Gastineau*, 228 NLRB 47. 1977.

³¹² *Air Surrey Corporation and Randy Patton*, 229 NLRB 155. 1977.

³¹³ *Steere Dairy, Inc. and David L. Watkins*, 237 NLRB 219. 1978.

³¹⁴ *Ontario Knife Company and Angel L. Cobado*, 247 NLRB 168. 1980.

employee's "refusal to drive such an unsafe vehicle would inure to the benefit of all Respondent's drivers" and was thus of obvious mutual concern. In this case, all three justifications for protection were documented: The enforcement of a statute by an individual worker, action by an individual worker of obvious mutual concern, and the employee had consulted with other drivers providing a justification of united action.³¹⁵

The policy debate post-*Alleluia* shows the basic nature of worker freedom of association as a status protection not based in some perceived severity of a danger or hazard. The Board jurisprudence from the *Alleluia* era recognized that the merit of a workers' health and safety grievance (so long as the topic at issue was a mandatory subject of bargaining) is otherwise irrelevant in determining the protected status. In a case from Pittsburgh where retail workers refused to stand and sell products in an unheated area of a shopping mall in cold weather, the Board unanimously agreed that the merits of such complaints "would not affect the employees' statutory right to seek what they regarded as a more desirable management response."³¹⁶ NLRB decisions followed this sentiment in judging the merits of the dispute. Among these decisions where Section 7 protections were extended include a case where the Board refused to judge the merit of worker complaints about working conditions, wages, as well as "racism, sexism and favoritism" when a worker wrote an individual protest letter.³¹⁷

The Board also ruled that a grievance that qualifies as a workers' freedom of association right did not require a focus on the merit of a hazard so long as the general issue fell under the rubric of protected concerted activity. "We have recently held in *Alleluia Cushion Co., Inc.*," wrote a majority for the Board, that considering merit "is

³¹⁵ *Pink Moody, Inc. and Reynaldo Salinas*, 237 NLRB 7. 1978.

³¹⁶ *General Nutrition Center, Inc. and Patricia Roach*, 221 NLRB 130. 1975.

³¹⁷ *Diagnostic Center Hospital Corp. of Texas and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 988 and Yolanda Garza de Birdwell*, 228 NLRB 143. 1977.

not necessary so long as there is evidence that fellow employees share the acting employee's concern and interest in common complaints."³¹⁸ That a safety statute existed was one element of common concern. The terms and conditions of work were also evidence of such "obvious mutual concern" and thus afforded workers protection.

The *Alleluia* Board also went a step further to protect the rights of workers in Section 7. The Board majority correctly speculated that in those cases where working conditions alone were cited as a basis for obvious mutual concern, direct evidence that the dispute pursued by the individual grievant was of mutual concern might be lacking because other employees were fearful to speak. The board developed a policy of an assumption of mutual concern on all health and safety questions. The majority wrote "in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."³¹⁹ It was on this point that employer control was threatened the most. On all matters of health and safety, the NLRB had granted employees a great individual authority. They were to be protected in their employment as individual advocates for health and safety, deputized as rights-holding citizen-workers on questions of the working environment. This decision constituted refusal rights as altering the liberal market employee status assumptions and in turn protecting effectively a key individual component of workers' freedom of association, the right to refuse unsafe work as basic organizational action.

Even before *Alleluia* was overturned by the Reagan-appointed Dotson NLRB, however, the ability of the decision to impact working environments became limited not because of any jurisprudential weakness but because of other factors within the surrounding institutional environment. A special case-handling agreement had been

³¹⁸ Ibid. Page 1217.

³¹⁹ *Alleluia Cushion Co., Inc. and Jack G. Henley*, 221 NLRB 162. 1975. Page 1000.

signed a few months before *Alleluia* was decided. The Solicitor for the Department of Labor at the time, William J. Kilberg, as counsel to the new Occupational Safety and Health Administration, had been contacted by the office of the General Counsel of the National Labor Relations Board. The NLRB General Counsel at the time was Peter Nash and according to Kilberg, “there was concern raised by the NLRB General Counsel's office that they were getting filings that really went more to the question of discrimination for raising safety and health issues than to collective action under Section 7 of the NLRA.” The General Counsel sought a way to clear these problematic discrimination cases from NLRB responsibility. Nash’s proposal was to pass the unfair labor practice charge to the new Occupational Safety and Health Administration. On April 16, 1975, Nash and Kilberg signed the *Memorandum of Understanding Between Occupational Safety and Health Administration, U.S. Department of Labor, and General Counsel of the National Labor Relations Board on discrimination cases*.³²⁰ “[The GC] wanted to be able to defer these [discrimination cases] to OSHA,” wrote Kilberg “and this gave them a basis on which to do so.”³²¹

Peter Nash, ironically, presented himself as a staunch defender of individual rights. Nominated by Richard Nixon, Nash was the youngest NLRB General Counsel in a generation and was to replace Arnold Ordman from the McCulloch era who many employers were keen to see leave. “At his nomination hearing,” noted James Gross in *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994*, Nash testified to the Senate Labor Committee “consistent with his Republican-appointed predecessors on the Board and in the general counsel’s office... the protection of

³²⁰ Government Printing Office. (1975). Memorandum of Understanding Between Occupational Safety and Health Administration, U.S. Department of Labor, and General Counsel of the National Labor Relations Board. *Federal Register*, 40(120), 26083-26084.

³²¹ Kilberg, William J. (16 October 2009). [Personal correspondence to the author].

individual rights was the paramount purpose of the Act.” After his term ended in 1975 Nash became a partner in Kammholz & Day, a management law firm in New York.³²²

The employee anti-discrimination provision of the Occupational Safety and Health Act of 1970 which Nash and Kilberg had agreed to rely upon for protecting individual rights is Section 11(c) of the OSH Act. Their joint case agreement defined “a procedure for coordinating 11(c) litigation under the Occupational Safety and Health Act and litigation under section 8 of the National Labor Relations Act”. The goal of the Memorandum of Understanding was to “(1) obviate duplicate litigation and (2) Insure that employee rights in the area or safety and health will be protected.”

Although there may be some safety and health activities which may be protected solely under the OSH Act, it appears that many employee safety activities may be protected under both Acts. However, since an employee's right to engage in safety and health activity is specifically protected by the OSH Act and is only generally included in the broader right to engage in concerted activities under the NLRA it is appropriate that enforcement actions to protect such safety and health activities should primarily be taken under the OSH Act rather than the NLRA.³²³

The memorandum created a four-step discrimination case handling procedure to coordinate NLRB and OSHA case handling of employee discrimination complaints.

B. Procedural agreement.

[1]. Where a charge involving issues covered by Section 11(c) of the OSH Act has been filed with the General Counsel and a complaint has also been filed with OSHA as to the same factual matters, the General Counsel will, absent withdrawal of the matter, defer or dismiss the charge. The General Counsel will inform the charging party of its action and will send a copy of such letter to OSHA.

[2]. Where a charge involving issues covered by section 11(c) of the

³²² Gross, James A. (1995). *Broken Promise: The subversion of U.S. labor relations policy, 1947-1994*. Philadelphia: Temple University Press. Page 222.

³²³ Government Printing Office. (1975). Memorandum of Understanding Between Occupational Safety and Health Administration, U.S. Department of Labor, and General Counsel of the National Labor Relations Board. *Federal Register*, 40(120), 26083-26084. Page 26083.

OSH Act has been filed with the General Counsel, but no complaint has been filed with OSHA, the General Counsel will notify the employee of his right to file a complaint under section 11(c), which right should be exercised within 30 days. If the employee notifies the General Counsel of the filing of an OSHA complaint, or if the General Counsel is so informed by OSHA pursuant to consultations at the end of the 30-day period, then the General Counsel will proceed in accordance with paragraph B-1 above.

[3]. The General Counsel will process under the NLRA those charges involving issues covered by section 11(c) of the OSH Act where, after notice pursuant to paragraph B-2 above, the charging party has not filed or, having filed, has withdrawn a complaint with OSHA.

[4]. Where a charge has been filed with the General Counsel which includes both issues covered by section 11(c) of the OSH Act and matters within the exclusive jurisdiction of the General Counsel, the General Counsel and the Office of the Solicitor of Labor will consult in order to determine the appropriate handling of the matter.³²⁴

While it is unclear how effectively this memo was administered, the memorandum of understanding, either intentionally or unintentionally, did not recognize the divergent protections afforded to workers in each of the two statutes. Workers pursuing the right to refuse under OSHA 11(c) were held to a much different standard in the exercise of their individual rights compared to the NLRB's *Alleluia* standard. The nature of the individual right would change and the merit of the work hazard would now be judged.

4.5. The harsh consequences of denying pre-organizational activity

Section 11(c) of the Occupational Safety and Health Act did not grant workers the explicit right to refuse unsafe work. Instead, it afforded workers protection from discrimination because of the exercise "on behalf of himself or others of any right afforded by this Act." Although the OSH Act requires that employers provide places of employment "free from recognized hazards" this vague legal language was looked upon as problematic from the start of OSHA. As a result, federal rulemaking was used

³²⁴ Ibid. Page 26084.

to establish a regulatory standard defining the statutory rights of employees under the OSH Act. This regulatory standard – 29 CFR 1977 – became law January 29, 1973.

Part 1977.18 of the new regulation protected the rights of employees who filed complaints under both Section 11(c) as well as other forums. “An employee who files a complaint under section 11(c) of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements” it said. “Complainant[s] may concurrently resort to other agencies for relief, such as the NLRB.” The federal rule outlined the different legal avenues. “The Secretary’s jurisdiction to entertain section 11(c) complaints, to investigate, and to determine whether discrimination has occurred,” it said, “is independent of the jurisdiction of other agencies or bodies.”

The right to protest safety and health hazards in the working environment was set forth in federal rule Part 1977.12 (b). Two key paragraphs identified the right of employees to refuse unsafe work. The rule is listed here with author’s emphasis. It was a much more limited employment right than the NLRB *Alleluia*-related standard.

1977.12(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, *as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.* Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, *an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.*

1977.12(b)(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, *with no reasonable alternative, refuses in good*

faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The Supreme Court reviewed OSHA's authority to promulgate this standard after conflicts developed across three appeals courts about the Secretary of Labor's authority to create the rule.³²⁵ The Supreme Court in *Whirlpool Corp.*³²⁶ upheld the regulation and the limited nature of the rule's protective language. The unanimous *Whirlpool* court cited the first paragraph of the rule which proclaimed "as a general matter, there is no right afforded by the [OSH] Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace."³²⁷

Section 11(c) rights are afforded when workers meet a two part test. First, the employee "is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury." Second, the employee "has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger." Thus a great burden was established regarding what constituted a reasonable hazard under Section 11(c), in addition to the requirement to seek managerial redress first.

Contrast this labor policy with the right to refuse through workers' freedom of association standards as was the case with the NLRB's *Alleluia* jurisprudence. OSHA

³²⁵ The first of these cases was *Marshall v. Daniel Construction Co.*, 563 F. 2d 707 (CA5). 1977. The second case was *Marshall v. Certified Welding Corp.*, No. 77-2048 (CA10). 1978. The case that was decided by the Supreme Court was *Whirlpool Corp. v. Marshall*, 445 U.S. 1. 1980.

³²⁶ *Whirlpool Corp. v. Marshall*, 445 U.S. 1. 1980.

³²⁷ *Ibid.* Page 10.

Section 11(c) limited the rights of workers to refuse by accepting the proposition that the merit of a worker's complaint must be judged. Section 11(c) requires adjudicating merit in all cases. *Alleluia Cushion*, in contrast, affords a status protection that does not entertain evaluation of the disputed hazard. Section 11(c), a limited standard, constructs what for many workers are insurmountable hurdles. Not only must workers speculate as to how the federal judge will interpret the hazard they face, they must also weigh the possibility that if the law finds no imminent danger, the courts may find that the worker acted in an "unreasonable" way. "Moreover," explained the *Whirlpool* court, "any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith." The court can simply find that the employee did not have a reasonable belief and in turn subject the worker to discharge. The unanimous court knew exactly what kind of protection it was affording workers. "The employees have no power under the regulation," Justice Stewart wrote in *Whirlpool*, "to order their employer to correct the hazardous condition or to clear the dangerous workplace of others."³²⁸

At this point, it is necessary to stop and consider the validity of the claim that the modern era of "individual rights" in employment relations has actually been an era of expanding "individual rights" at all. In the case of the right to refuse unsafe work, the so-called "individual rights" framework has been more a restriction on individual rights for workers because the right to refuse was extracted from the more expansive notion of the right to refuse within the framework of workers' freedom of association. The so-called era of individual rights is more so an era of disciplinary neo-liberalism in employment in a market economy and society than it is any individual rights era.

³²⁸ Ibid. Page 21.

Kenneth Smuckler noted the dreadful impact of *Whirlpool* once Reagan-era appointees assumed control of the NLRB and replaced the *Alleluia*'s "obvious mutual concern" with a much more restrictive "united concert" standard.³²⁹ This was accomplished in a series of decisions beginning with *Meyers Industries* in 1984. The results were "harsh consequences" for workers electing to protest their work hazards.

The standards developed by the *Whirlpool* court for triggering section 11(c) protection restrict workers' self-help in safety disputes in a manner not found in the NLRA cases before *Meyers Industries*. The trilogy of cases culminating in *Alleluia Cushion* had accepted the proposition that the merit of an employee safety complaint had no bearing upon the determination of an existing unfair labor practice. The court also considered the degree of danger perceived by the employee to be irrelevant. The sole prerequisites for the establishment of a prima facie section 8(a)(1) violation were that the worker make a safety protest in good faith and that the complaint caused the employer's retaliatory action; thus, section 8(a)(1) could protect safety protests in which the danger was neither immediate nor grievous.

By contrast, the Court in *Whirlpool* narrowed section 11(c) to encompass only those safety protests which were "reasonable" in light of the totality of circumstances. *Whirlpool* further distinguished section 11(c) protection from that afforded by section 8(a)(1) by requiring that the perceived danger pose "an imminent risk of death or serious bodily injury." Although the Court did not expand upon these two criteria, a few lower court decisions in this area have hammered out their meaning.... these cases show harsh consequences which the *Whirlpool* limitations have upon the protection of individual safety protests The courts have demonstrated tight rein on the concept of 'reasonableness' and 'imminent danger of serious injury or death'.³³⁰

These "harsh consequences" may at first appear counter-intuitive amid all the claims within labor scholarship recognizing an era of individual rights in employment.

Upon inspection, however, the era of so-called "individual rights" in labor relations

³²⁹ See *Meyers Industries, Inc. and Kenneth P. Prill*, 268 NLRB 73. 1984. In 1985 the U.S. Court of Appeals for the District of Columbia Circuit remanded the case for erroneously assuming the statute mandated the Board's interpretation of concerted activities. The case was clarified by the NLRB in *Meyers Industries, Inc. and Kenneth P. Prill*, 281 NLRB 118. 1986.

³³⁰ Smukler, Kenneth Lasch. (1984-1985). Individual Safety Protests in the Nonunion Workplace: Hazardous Decisions Under Hazardous Conditions. *Dickinson Law Review*, 89, 207-231.

resembles nothing of the sort. What was more accurately unfolding was that critical individual rights were being restricted and eliminated by ideologues forcing market cultural values and beliefs about individuality and the labor market upon labor policy.

Whether it was the rejection of the NLRB's *Alleluia* doctrine by Courts of Appeals, restrictions on workers' protected concerted activity under the conservative Reagan appointees to the National Labor Relations Board, or the unanimous U.S. Supreme Court justices in *Whirlpool* and the "tight rein" of its judicial progeny, the rights of individual employees to protest health and safety conditions through this era were harshly restricted. On the right to refuse unsafe work, if there was an era of individual rights in employment and labor relations, the state through this labor policy quickly dispelled workers of the notion that any status protection of the right to refuse would ever be allowed to infringe upon the state-backed "*laissez-faire*" labor market.

The majority of the Dotson Board in the *Meyers Industries* decision overturned the *Alleluia* standards with an individualism that required the state to block protection of individual activity that did not conform to the most formulaic of concerted actions. This protection was state protection of management, not individual employee rights.

The dissent in the Board's *Meyers I* decision, the first attack by the new NLRB on the *Alleluia Cushion* doctrine, rejected the turn to the protection of rational *homo economicus* from any status-based protection of concerted activity in labor policy.

The dissent as expressed by member Zimmerman argued for the *Alleluia* standard.

My colleagues report today that the Board is not God. If only their expectations of employees covered by the Act were equally humble. Protection for such employees, they now announce, will be withheld entirely if in trying to ensure reasonably safe working conditions they happen not to be so omniscient as to rally other employees to their aid in advance. No matter that the conditions complained of are a potential peril to other employees, or that they are the subject of Government safety regulation. This is a distortion of the rights guaranteed employees by the Act. The historical roots of "concerted

activity” lie in the movement to shield organized labor from the criminal conspiracy laws and the injunctive power of the courts. It goes against the history and spirit of Federal labor laws to use the concept of concerted activity to cut off protection for the individual employee who asserts collective rights. It is my colleagues who use mirrors on Section 7 and not the Board with decided *Alleluia Cushion Co.*³³¹

Employees were left with the narrow employment protection of OSHA Section 11(c) regulating the right to refuse with a case-by-case assessment of contested hazards and a psychological assessment of an employee’s reasonable belief in their refusal. The *Meyers I* dissent also articulated a few of the problems in the logic behind this choice:

A perplexing problem is presented when no legal standard exists and the severity or likelihood of harm cannot be ascertained, but danger clearly exists. How should society respond to this known but immeasurable hazard? The law ought to err on the side of caution: but to what degree?

Legal protection against reprisals for refusing to perform unsafe work should be provided regardless of the identity of the person at risk and source of danger. An employee may stop work in self-defense or to safeguard either a fellow worker or someone else. A person may be threatened by an unguarded machine, a repeated arm motion, a contaminated work environment or a co-worker who drives recklessly. The right to refuse may be properly invoked in all these settings.³³²

That employees would have their individual rights restricted was a question of little concern to the new majority on the NLRB. Labor policy here was not a matter of the state stepping back and allowing individuals to flourish under natural market forces. Instead, a state-led labor policy of repressing individual freedoms made employment rights safe for business, promoted unilateral management rights, and assured that these prerogatives would not be unencumbered by social control. This was a more invasive

³³¹ *Meyers Industries, Inc. and Kenneth P. Prill*, 268 NLRB 73. 1984. Dissenting opinion. Page 499.

³³² Brown, Richard. (1983). The Right To Refuse Unsafe Work. *University of British Columbia Law Review*, 17(1), 1-34. Page 5.

and intrusive state activism on behalf of business. Workers were no longer protected in their work refusals as if a status assumption. Instead, the nature of the hazard, once deemed immaterial by the state, would be examined and held to restricted standards.

In the context of U.S. labor policy, other labor legislation affords protection to private sector work refusals such as Section 502 of the Labor Management Relations Act of 1947, the Taft-Hartley Act. Refusal rights were made *sui generis* employment law for the first time in this anti-labor amendment to the NLRA. It afforded protection to employees in protest against health and safety hazards, making refusal rights for the first time a labor policy protection distinct from workers' freedom of association.³³³

Section 502 was an important element in the Taft-Hartley, even as it afforded a particular set of employment rights to workers. Section 502 provides for an expressed right to refuse under a similar "abnormally dangerous conditions" of work standard:

Section 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions of work at the place of employment of such employee or employees be deemed a strike under this Act.³³⁴

Section 502 was in a bill that aimed to limit union power with anti-union restrictions such as allowing states to prohibit negotiation of union security clauses, codifying the rights of individuals to refrain from union organizing, and restricting union boycotts. While the right to refuse unsafe work was written into the law, self-organization and collective action rights were at the same time being extracted from the same law.

³³³ LeRoy, Michael H. (2004). From Docks to Doctor Offices After 9/11: Refusing to Work Under "Abnormally Dangerous Conditions". *American Law Review*, 56(3), 585-656. Page 594-597.

³³⁴ Labor Management Relations Act. (1947). 29 U.S.C. §§ 141 et seq. Section 502.

The 3rd Circuit Court of Appeals considered the scope of Section 502 in the *Gateway Coal* case. The court was asked to enjoin a work refusal and the refusal to arbitrate the case by coal miners. The court recognized what it called the “special and distinguishing” nature of health and safety as a critical social issue in labor relations.

The present case exemplified the special and distinguishing character of safety disputes.... Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on the impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment.³³⁵

The 3rd Circuit decision was overturned by the Supreme Court. The statute qualified the exercise of the right to refuse with “abnormally dangerous conditions.” The Supreme Court in *Gateway Coal* used this phrase to rule against the miners and limit the right to refuse. The Supreme Court in their definition of the scope of Section 502 refusal rights took their language from the language of the Taft-Hartley statute itself.

The Court of Appeals majority erred, however, in concluding that an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of § 502. ...

Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be. We agree with Judge Rosenn that a union seeking to justify a contractually prohibited work stoppage under Section 502 must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'³³⁶

³³⁵ *Gateway Coal Company v. United Mine Workers of America*, 466 F.2d 1157 3rd. Cir. 1972.

³³⁶ *Ibid.* Page 1162.

The Supreme Court's decision touches on matters of objective evidence and subjective judgment. The question remains why the court would be interested in subjective or objective judgment to begin with. The courts were placed in a position of adjudicating hazards, a task not asked of courts in a freedom of association status-based framework. The high court in *Gateway Coal* held a contract's no-strike clause does not apply to work stoppages under Section 502 for abnormally dangerous conditions. It crafted this exception within the narrow statute's language protecting only certain abnormally dangerous conditions. Section 502 demonstrates a pattern of *marketized* refusal rights tasking the state with protecting the contours of market employment relations and the management prerogatives and termination rights those relations ultimately protect.

This *marketized* right to refuse requires the state's reading of work hazards, making it a qualitatively different protection than the right to refuse as a freedom of association protection. Market-based refusal rights, without status protections for workers, are the state's mobilization of bias against worker's self-organization and freedom of association rights. It thus reinforces employer power to terminate workers who voice concerns for their own health, safety and general working environment.

One appeals court judge has even cited a federal whistleblower right to refuse statute as the primary legal justification for overturning an NLRB order reinstating a truck driver dismissed for refusing to drive what he considered to be an unsafe truck.

Our conclusion that ... [the] discharge was not prohibited under section 7 of the Labor Management Relations Act does not leave drivers having similar safety concerns without a remedy. Congress addressed the scenario before us in the Surface Transportation Assistance Act (STAA), which provides that an employee may not be terminated based upon the employee's 'reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition.' An employee need not join forces with other

employees to invoke the protection of the STAA.³³⁷

The STAA is among an expanding group of refusal to work protection statutes enacted by Congress since 1980 that are now enforced by a special office in OSHA, the Office of the Whistleblower Protection Program. The emergence of these refusal rights as an alternative form of worker protection has not occurred in a policy vacuum. The state has used the market to restrict the protected concerted action of individual workers, moving employee rights from status protection to conditionality, restricting the nature of the individual rights overall and moving society toward disciplinary neo-liberalism.

The NLRA of 1935 included broad protections of workers' organization rights beyond protection for formal collective bargaining. The NLRA is not only a labor relations law, it is also an employment statute that protects individual pre-organization activity as a status-based protection afforded to workers. Unlike the *marketized* right to refuse, these workers' rights hold no requirement of either a subjective or objective test to prove the worthiness of their cause. If an employee seeks to pursue the matter, they may pursue the matter under a freedom of association-based policy framework.

One interpretation of the individuality argument can be found in the dissent in the first *Meyers Industries* case. The dissent argued a "work-related statutory right is not in essence an individual right; instead, it is a right shared by and created for employees as a group through the legislative process at the Federal or state level." Legislation determines that the "establishment of a particular condition of employment is in the public interest" and that "the statute is addressed to the needs of employees as a class or strata within the society at large." Under this view of individual rights in the employment relationship, "an individual employee's assertion of this type of statutory

³³⁷ *National Labor Relations Board v. Portland Airport Limousine Co., Inc., d/b/a PALCO*, 163 F.3d. 662 1st Cir. 1998.

right is fully consistent with the literal group action of employees requesting higher wages for all.” The action concerns “employees as a group constituting an opposing force to the economic power of employers, the very type of action that the earliest uses of the term ‘concerted’ were designed to protect.”³³⁸ *Marketized* refusal rights are thus a kind of restricted interpretation of workers’ rights removed from this social context.

TABLE 4.1. *Comparison of two legal models protecting the right to refuse unsafe work*

	Sui generis employment law	Workers’ freedom of association
Adjudicating work hazards	Based on a predetermined standard such as “serious danger to life / health”	Adjudicating the merit of a hazard is not relevant to the exercise of the right
Behavior litmus tests for workers	Worker must demonstrate a good faith belief the work meets hazard threshold	No assessment of belief as protection is not contingent on a hazard threshold
Preconditions in exercising rights	Must comply with management’s procedures, go through supervisors	Workers may exercise the right on their own and seek dialog afterwards
Other types of conditionalities	Administered according to national practices and as reasonably practicable	Generally considered a basic universal and fundamental human rights issue
Example	ILO Convention No. 155 of 1981	NLRB <i>Alleluia Cushion Co.</i> standard

The perceptive reader will have noticed that Section 11(c) of the OSHA is on many levels identical to the protection of the right to refuse under Convention 155. There is a need to re-evaluate the ILO’s refusal rights standards and the standards on workers’ freedom of association in light of their current market-based disposition if refusal rights are to be effectively protected in the same spirit that workplace safety and health is a universal human right. The immediate result of a limited protection is

³³⁸ *Meyers Industries, Inc. and Kenneth P. Prill*, 268 NLRB 73. 1984. Page 501-502.

the maintenance of insubordination charges, protecting employer termination rights.

The critical distinction for vulnerable workers is *how* each approach protects workers' rights. Status protections like Section 7 implicitly recognize the underlying power inequalities in employment relations. The Board had originally held it to be immaterial if a company is in compliance with the health and safety standards at issue as workers by their status alone hold "a protected right to seek more than compliance."

[Workers have] a protected right to seek more than compliance with minimum standards or to seek redress of conditions which they believed or considered to be violations... whether or not their contentions were correct."³³⁹

The power granted to workers by their status means they hold the latitude to define the merit of their claim. A market-based model, in contrast, is predicated on establishing, in an adversarial process rife with social inequalities, an objective work hazard that no single party, nor anyone for that matter, may be able to determine. The individual faces challenges in overcoming an inequality in power relations; they may lack legal representation, have scarce material resources, little access to information, face bleak emotional support by coworkers, family members, and community leaders, possess feelings of the need to get on with one's life, fear the consequences of being labeled a troublemaker, seek to avoid disrupting career trajectories, the list goes on. Added to these unequal social barriers workers must now defend the merit of their own claim, plus do so following managerial procedures and conditioned upon national practices.

These changes come at a time of increasingly complex workplace hazards in an era that, starting in the 1970s, saw direct attacks on collective bargaining in North America.³⁴⁰ Challenging corporate control with a weak labor relations regime would

³³⁹ *Systems with Reliability, Inc. and Duane L. Albaugh*, 322 NLRB 132. 1996. Page 760. Quotation in this case is from *Eastex, Inc. v. NLRB*, 437 U.S. 556. 1978. Pages 564-567.

³⁴⁰ Craypo, Charles, & Bruce Nissen. (1993). *Grand Designs: The impact of corporate*

prove ultimately too much for the organized labor movement as employer opposition became increasingly aggressive. Even as the Dunlop Commission tried to reform labor law for the 1990s, a market-based right to refuse was again resurrected. There the issue was a Dunlop Commission proposal to weaken Section 8(a)(2) protections regulating employer dominated labor organizations in exchange for the right to refuse unsafe work, a move that would have violated workers' freedom of association under ILO standards. This history, along with Section 502 of the NLRA, illustrates what is a clear historical pattern. The restricted right to refuse has followed an historical pattern of being promoted while restricting workers' freedom of association. Because the two models discussed in this chapter advance two opposing philosophies and policy logics, the argument that the limited refusal rights protection acts as a simple "floor" of basic rights is incorrect. While in theory the two divergent policies could stay on the books of a particular national legal system simultaneously, their different policy logics are in conflict and create a legal and institutional incoherence, confusion and contradiction. This restricted right to refuse policy inherently limits workers' freedom of association.

4.6. Individual employment rights or disciplinary neo-liberalism?

Protected concerted activity holds a strong and at times exclusively individual component. It is for many the only guard against charges of "insubordination" and the loss of basic livelihood in a market society. It is the first fragile flower of unionism. As the jurisprudence of the right to refuse suggests, governments in market societies place barriers on individual rights. Rights are granted to employers while workers are provided rights protections that do not violate this managerialist market discipline. Individual actions that do not conform to market consciousness are thus not protected.

strategies on workers, unions, and communities. Ithaca: ILR Press.

The process of protecting employer power can at times afford certain rights to workers. The rights afforded to workers, however, are rights that do not interfere with business management prerogatives and the set authorities of private enterprise. This authority is a market-centric authority. Labor and employment rights in neoliberal societies are constituted around the contours of market authorities. This social process of *marketizing* human rights has been used often in labor relations as a tool to placate social challenges in employment relations and maintain private power and privilege.

The *sui generis* right to refuse is a inherently a *marketized* right. This is the market era in human rights, and it is the major obstacle to the protection of human rights for workers today, a conformity of rights to basic market values and principles.

Political elites have often led business elites in this story. Reagan “imposed upon the NLRB a brand of radical anti-unionism that business leaders did not demand and, in fact, had long resisted...” observed one reporter. Eventually, “business leaders began to realize over time that the reality of an anti-union NLRB was not to be feared at all – that it proved quite consistent with their own, more confrontational approaches to unions.”³⁴¹ Over the last generation, the trend of business political engagement has been part of a broader political movement across the spectrum of political affairs:

A hard-driving, high-earning, big-spending nation pushed the enlightenment legacies of emancipation and individualism to their logical – and often illogical – extremes. The twentieth century was a centrifugal century. Urbanization, individuation, automation, media penetration, mobility, prosperity, consumerism, and the rights revolution developed over decades. The resulting

³⁴¹ Gould, William B. (2000). *Labored relations: Law, politics, and the NLRB--a memoir*. Cambridge, Mass.: MIT Press. Page 21. Quoting Moe, Terry M. (1987). Interests, Institutions and Positive Theory: The Politics of the NLRB. *Studies in American Political Development*, 2, 273. See also Don Dotson info. Federal Regulatory Directory, 5th Ed. (1986) page 388 and Gross, James A. (1995). *Broken Promise: The subversion of U.S. labor relations policy, 1947-1994*. Philadelphia: Temple University Press. See also Daily Labor Report. (1985). Address by NLRB Chairman Donald L. Dotson “Recent Developments at the NLRB” delivered to the South Carolina Textile Manufacturers Association on August 16, 1985, *Daily Labor Report*. August 23.

‘radical individualism,’ the sociologist Robert Bellah explained, created a largely ‘negative’ process of ‘giving birth to oneself’ by ‘breaking free from family, community, and inherited ideas.’ A nation of disconnected searchers, divorced from traditional ‘sources of authority, duty and moral example,’ hoped to ‘find themselves.’³⁴²

This political movement, however, was not radical individualism. Individuality had conformed to market principles which at times meant harsh restrictions on individual rights. In the closing decades of the twentieth century, as economic globalization was altering communities and entire societies, the Anglophone North American practice of restricted, marketized individual employment rights would move from provincial and national labor policy in the United States and Canada into ILO global labor standards. This was the global export of neoliberal marketized employment rights, both in ILO global standards ratified by developing nations and elsewhere such as those nations following the European Framework Directive on Occupational Safety and Health.³⁴³

The right to refuse has been taken up by the ILO in standards on occupational safety and health. This is notable because the trend since the 1970s has been to move toward a managerial focus within global labor standards on worker health and safety:

In the early years, the ILO focused on increasing safety in factories and providing protection against industrial hazards caused by individual, particularly hazardous, substances.... The post-war era up to the 1970s was marked by an emphasis on the specific need for protection against occupational cancer and an increasing awareness of the need for a more comprehensive approach to the human environment in general but also to the working environment.... In 1975, the ILC adopted a resolution that called for national policies as well as policies at the enterprise level. This was the first step in a shift toward a management approach to occupational safety and health, and is noticeable in Conventions adopted since in the emphasis placed on the

³⁴² Troy, Gil. (2009). *The Reagan Revolution: A very short introduction*. Oxford: Oxford University Press. Page 114.

³⁴³ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. (1989). European Union Official Journal L 183, 29/06/1989 P. 0001 - 0008.

responsibilities of the employer and the rights and duties of the workers.³⁴⁴

This “new departure” for the ILO was evident when adopting the Occupational Safety and Health Convention of 1981, Convention 155, designed “to a large extent as a policy instrument rather than an instrument laying down precise legal obligations.”³⁴⁵

This turn to “policy-oriented instruments” on worker health and safety since Convention 155 means that since that time OSH labor standards rarely “elaborate on the substance of the policy. Instead they turn straight to the measures to be taken for the application of the Convention.”³⁴⁶ Since this change, critical global treaties on environmental hazards have since Convention 155 been adopted outside the ILO system entirely. Examples are the Stockholm Convention on Persistent Organic Pollutants,³⁴⁷ the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,³⁴⁸ and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.³⁴⁹ The need for international conventions has thus remained after the ILO’s shift away from the fixed standard model that started with Convention 155.

The challenge the ILO has set for itself in international labor and human rights law is not finding the effective solutions to the declining and worn social fabric left by modern economic ravages. The goal has been finding the best solutions within the

³⁴⁴ International Labour Office. (2003). *ILO standards-related activities in the area of occupational safety and health: An in-depth study for discussion with a view to the elaboration of a plan of action for such activities*. Sixth item on the agenda of the International Labour Conference, Report VI, 91st Session. Geneva: International Labour Office. Pages 12-13.

³⁴⁵ Ibid. Page 13.

³⁴⁶ Ibid. Page 13.

³⁴⁷ *Stockholm Convention on Persistent Organic Pollutants (entered into force 17 May 2004)*, 2256 UNTS 119.

³⁴⁸ *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals (entered into force 24 February 2004)*, 2244 UNTS 337.

³⁴⁹ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (entered into force 5 May 1992)*, 1673 UNTS 57.

narrow framework of acceptable action proscribed by a market discipline. Kalmen Kaplansky, considered a grandfather of the Canadian human rights movement, noted the role of the ILO as standing in opposition to free market economics.³⁵⁰ As the Canadian labor representative to the ILO who aided in the drafting of Convention No. 111 on Discrimination in Employment and Occupation, actions that have been cited as a primary reason for the ILO's Nobel Peace Prize award in 1969, he had described the ILO's original, founding *raison d'être* as being largely a response to market freedom.

The economic doctrine of the Industrial Revolution was *laissez faire* liberalism and individualism, according to which all individuals in society had the same natural rights, and that even if all did not possess equal capability, each could at least understand his own interest so that the best that could be done to help him was to leave him to himself. As applied to economic life this meant freedom of work, free competition, free trade (both internal and external), and correspondingly the non-intervention of the state. But this doctrine of economic freedom, allied to the new inventions which had made the age of machine industry possible, created an upheaval in social relationships.³⁵¹

The ILO's focus on ameliorating upheavals in social relationships at the hands of the liberal market required prescriptive standards. The notion *labor is not a commodity* requires recognizing the human rights of workers. Shortly after the ILO's strong post-war reconstitution, two human rights conventions were adopted, Convention No. 87, Freedom of Association and Protection of the Right to Organize and and Convention No. 98, Right to Organise and Collective Bargaining. For the ILO to stay responsive to its mission of protecting society against destruction, it must interpret these critical conventions in a way that responds to the modern concerns of humanity. That most

³⁵⁰ Lamberston, Ross. (2001). *The Dresden Story: Racism, Human Rights, and the Jewish Labour Committee of Canada. Labour/Le Travail, March*. See also Lambertson, Ross. (2005). *Repression and resistance : Canadian human rights activists, 1930-1960*. Toronto: University of Toronto Press.

³⁵¹ Alcock, Antony Evelyn. (1971). *History of the International Labor Organization* (1st American Edition ed.). New York: Octagon Books.

immediately means protecting human health, safety and the working environment.

Despite giving life to the idea that labor is not a commodity, the response to these two human rights conventions was not positive from all quarters. The most pronounced and articulate disagreement with workers' rights originated from the U.S. as has been chronicled by Anthony Alcock's historical scholarship on ILO politics.

Nowhere was the negative feeling concerning the ILO's standards-setting activity more pronounced than in the United States, the country which had assumed the leadership of the Western world and which had the single greatest influence in the United Nations. And the feeling deepened as a result of the ILO's move, during the second half of 1947 and first half of 1948, to adopt a Convention in the field of human rights, on Freedom of Association. This had aroused the hostility of all those in government and business circles that had supported the adoption by Congress in June 1947 of the Taft-Hartley Acts, [sic] which provided for certain curbs on labor. It was at this crucial moment in the Organization's history when, in June 1948, [Edward] Phelan resigned as Director-General and the Governing Body elected in his place David A. Morse, former Acting Secretary of Labor in the Truman Administration, and United States Government member on the Governing Body. With the election of Morse, the man was found for the hour: the new Director-General was well aware that the ILO would have to take new initiatives in order to escape the doldrums in which it presently found itself.³⁵²

The emerging market discipline of the era would, as its first task given the influence of the U.S. at the ILO, be required to maneuver the ILO's new human rights conventions on workers' freedom of association around the suppression of labor that was legalized in the Taft-Hartley Act of 1947. That Taft-Hartley's restrictions on secondary labor boycotts, collective bargaining for union security, and the protection of employer free speech against union organizing might violate human rights standards on workers' freedom of association was an affront to business and political leaders in the United States. The organized business opposition to Convention No. 87 and Convention No.

³⁵² Ibid. Page 213.

98 resulted in a constitutional crisis in the United States as business and conservative politicians moved to block the self-executing treaty clause with administrative maneuvers and a campaign to amend the United States constitution itself.³⁵³ Workers' freedom of association was at the center of these concerns. A renewed discipline was needed to maintain a more circumscribed policy blueprint for ILO member states.

This chapter has outlined divergent labor rights policy models of protecting the right to refuse unsafe work. These include protection as a *sui generis* employment protection versus protection as an element of workers' freedom of association. This chapter has described how the unique, individualist *sui generis* employment policy model on the right to refuse is now the dominant policy model under ILO global labor rights standards. The dominant policy as defined by the ILO supervisory bodies has failed to recognize the right to refuse unsafe work as an element of workers' freedom of association, opting instead for the weak and restrictive labor rights jurisprudence.

Our original focus on the study of labor and human rights argued for the study of exclusions and the influence of interests. This requires a focus on the alternatives as this chapter has done, and the obstacles social actors face in a policy environment, including how some people can be "prevented from acting upon or conceiving certain posited interests" by structural obstacles and cultural obstacles.³⁵⁴ To study dominant cultural ideas and frameworks that advance certain dominant policies in a way that will allow us to make judgments about the interests served by those decisions, we must evaluate how these policies work in practice and how they serve the interests of workers as the human rights-holding individuals. Investigating how a labor policy

³⁵³ Tananbaum, Duane. (1988). *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership*. Ithaca: Cornell University Press.

³⁵⁴ Gaventa, John. (1982). *Power and Powerlessness: Quiescence and rebellion in an Appalachian valley*. Urbana: University of Illinois Press.

works in practice allows us to make deductions about the interests served by a policy. In turn, we can extend our conclusions to the decision-making process itself, being critical of both the structural and cultural frameworks that gave rise to the dominant policy, and how they served as obstacles in the pursuit of alternative policy visions. The following chapters extend this analysis of exclusion and influence in labor and human rights policy on the right to refuse unsafe work. We have documented a range of alternatives; we now turn to evaluate the impact of the dominant labor rights policy, before documenting the obstacles faced in seeking a stronger constitution of freedom.

CHAPTER V
ANALYZING EFFECTIVENESS

The protection of the right to refuse under the Convention 155 policy model

5.1. The global diffusion of Convention 155 and the right to refuse

Protecting workers' human rights requires understanding the effectiveness of labor policy regimes. Where industrial relations policy endangers occupational health and safety, governments are obligated under international human rights principles to make changes in the rights-obligation structures of economies and societies to ensure the effective protection of human rights. The previous chapter has outlined in detail the international jurisprudence on the right to refuse unsafe work. It detailed how the right to refuse under international labor standards is a very limited rights policy model. This chapter analyzes the effectiveness of this limited Convention 155 model by using the U.S. and Canada as proxies for the study of refusal rights under Convention 155.

Because of similarities in design, refusal protection statutes in North America can be used as proxies for the study of refusal rights under Convention 155. Although neither country has ratified this ILO convention, both Canadian and U.S. work refusal laws follow closely the Convention 155 policy model. Understanding how the right to refuse in this mold works in practice is the main objective of this chapter. As Convention 155 was created and drafted following Anglo-American policy models, it is only logical that these models would conform to the convention's refusal standard.

Canada and the U.S., as two leading liberal market economies, offer a litmus test for workers' rights under Convention 155. As a stand-alone labor convention on the topic of occupational health and safety in the working environment, the interaction between this critical global labor convention and two national regimes characterized

by liberal market employment relations and robust employer termination rights makes for a critical case study of the labor rights protections within the convention. As the U.S.-led effort to promote *laissez-faire*-style policies abroad continued, this so-called “Washington Consensus” spread liberal market employment relations worldwide over the last generation. How these global labor policy models function domestically in the developed liberal market economies illustrates the strength of the convention overall. That both the U.S. and Canada are relatively affluent liberal democracies only adds to the critical dimension of this case study as the failure of basic governance functions cannot be used as an excuse for ineffective rights as is the case in developing nations. Subjecting North American refusal rights to an evaluation of how they work on-the-ground at the case level provides the insight that is needed to make an evaluation of the refusal to work protection advocated by ILO standards. U.S. and Canadian labor policies are in compliance with Convention 155 on the question of refusal rights. The qualitative study here offers a critique of the dominant refusal rights model. It also provides empirical evidence about the efficacy of what has been the ILO’s faithful deference to the “national practices” mantra under ILO international labor standards.

The first section of this chapter is a brief overview of Convention 155 and the global diffusion of the right to refuse protection model. The analysis then turns to the North American context. After reviewing Canadian industrial relations scholarship, I make a case-based analysis of work refusals under Section 11(c) of the Occupational Safety and Health Act in the U.S. by examining a set of investigatory documents that were obtained through a Freedom of Information request to the U.S. Department of Labor. The chapter concludes by arguing that the protection of the right to refuse in the limited Convention 155 model is a demonstrated failure at the national level. This calls for the re-examination of the right to refuse as an integral component of workers’

freedom of association, including in the jurisprudence of the ILO supervisory bodies charged with supervising the application of Convention Nos. 87 and 98. To begin this evaluation, we turn to Convention 155 and examine its global diffusion across nations.

Adopted by the International Labour Conference at its 67th session in Geneva in 1981, Convention 155 has seen a steady increase in ratifications in the thirty years since its adoption. Although the decade of the 1980s saw only ten countries ratify the treaty, another twenty countries ratified the convention in the 1990s, with another twenty-six ILO member-states having ratified the convention in the last ten years. Among the noteworthy characteristics of the fifty-six ratifying states is the many large developing / industrializing states from the global south. Among this notable list are China, Brazil, South Korea, Turkey, Venezuela, Mexico, Viet Nam and South Africa. Taken as a group, the total population of these member-states covers over 2.5 billion people, rivaling the freedom of association conventions in the number of people living in countries that are party to the convention. Each government here has by ratification made a pledge to move their national labor policies on occupational health and safety into conformity with Convention 155. They also have agreed to participate in the ILO regular system of supervision, submitting ongoing, periodic reports to the Committee of Experts on the Application of Conventions and Recommendations to ensure to the global community national workplace safety and health policies conform accordingly.

TABLE 5.1. *Member-states that have ratified Convention 155* ³⁵⁵

Norway (1982.06.22)	Bosnia Herzegovina (1993.06.02)	South Africa (2003.02.18)
Sweden (1982.08.11)	Hungary (1994.01.04)	Zimbabwe (2003.04.09)
Cuba (1982.09.07)	Nigeria (1994.05.03)	Australia (2004.03.26)
Mexico (1984.02.01)	Latvia (1994.08.25)	Albania (2004.09.02)
Venezuela (1984.06.25)	Viet Nam (1994.10.03)	Turkey (2005.04.22)
Finland (1985.04.24)	Ireland (1995.04.04)	Sao Tome & Principe (2005.05.04)
Portugal (1985.05.28)	Denmark (1995.07.10)	Seychelles (2005.10.28)
Spain (1985.09.11)	Kazakhstan (1996.07.30)	Montenegro (2006.06.03)
Uruguay (1988.09.05)	Mongolia (1998.02.03)	Central African Rep. (2006.06.05)
Cyprus (1989.01.16)	Russia (1998.07.02)	Algeria (2006.06.06)
Ethiopia (1991.01.28)	Belize (1999.06.22)	China (2007.01.25)
Netherlands (1991.05.22)	Belarus (2000.03.30)	New Zealand (2007.06.12)
Iceland (1991.06.21)	Moldova (2000.04.28)	Fiji (2008.05.28)
Croatia (1991.10.08)	Cape Verde (2000.08.09)	Republic of Korea (2008.02.20)
Macedonia (1991.11.17)	El Salvador (2000.10.12)	Niger (2009.02.19)
Brazil (1992.05.18)	Serbia (2000.11.24)	Syria (2009.05.19)
Slovenia (1992.05.29)	Luxembourg (2001.03.21)	Bahrain (2009.09.09)
Czech Republic (1993.01.01)	Lesotho (2001.11.01)	Tajikistan (2009.10.21)
Slovakia (1993.01.01)	Antigua & Barbuda (2002.09.16)	

The ILO supervisory bodies describe Convention 155 as “innovative” because it follows what is called “a comprehensive approach” focused on “a cyclical process of development, implementation and review of a policy” versus a process that is “a linear one laying down precise legal obligations.” Convention 155 is a “shift toward a policy approach” versus the establishment of fixed standards on workplace health and safety under the international labor standards system. Since occupational health and safety is a cross-cutting subject matter addressed in around half or more of all international

³⁵⁵ International Labour Organization. (2010). *ILOLEX Database of International Labour Standards*. Online at <http://www.ilo.org/ilolex/english/newratframeE.htm> accessed March 31, 2010. Geneva: International Labour Organization. As of March 2010.

labor standards, this shift to a policy-based approach was a fundamental move for the ILO. Taking a policy-based approach, even where focused on prevention as the ILO argues Convention 155 is, steps back from hazard-based standards traditionally the subject of standards-setting. Consequently, fixed-standard OSH labor conventions are generally no longer adopted by the International Labour Conference of the ILO.³⁵⁶

The policy-based approach to occupational health and safety adopted by the ILO in Convention 155 was first introduced as a fundamental concept by the Robens Report in Great Britain in 1972. (The next chapter discusses these origins in detail). A policy-based approach focuses on the procedural elements of creating a workplace health and safety policy rather than on the substantive elements of that policy itself. This “integrated approach” to occupational health and safety is “the dominant feature of current global efforts to curb the incidents of accidents and disease at work” and has formed the basis for subsequent labor standards. This includes the ILO’s Promotional Framework for Occupational Safety and Health, Convention No. 187 of 2006.³⁵⁷

Taking a short walk through the text of Convention 155 reveals the nature of this policy-oriented approach. Although the scope and objectives are broad and focus on the development of policies focused on the prevention of accidents and illnesses at work, the policy process prescribed by the convention permits so large a range of actions that it is striking to contemplate just how any ILO supervision of compliance with the convention could even happen. The convention is riddled with “flexibility clauses” that seemingly would permit almost any kind of government policy action.

³⁵⁶ International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Report III (Part 1B) to the 98th Session of the International Labor Conference. A report of the Committee of Experts on the Application of Conventions and Recommendations (under articles 19, 22 and 35 of the Constitution). Geneva: International Labour Office. Page 5.

³⁵⁷ Ibid. Page 6.

The Convention includes the following *flexibility clauses*. It allows for the exclusion, in part or in whole, of *particular branches of economic activity* (such as maritime shipping and fishing) in respect of which special problems of a substantial nature arise (Article 1(2)) and of *limited categories of workers concerned* in respect of which there are particular difficulties (Article 2(2)). It enables countries to: formulate national policy *in the light of national conditions and practices* (Article 4(1)); review the national policy at *appropriate intervals either overall or in respect of particular areas* (Article 7); implement the Convention through laws or regulations or *any other method consistent with national conditions and practice* (Article 8); carry out *progressively* certain specified functions (Article 11); ensure that designers, manufacturers, importers, etc., *satisfy themselves that, in so far as is reasonably practicable*, the machinery, equipment or substance does not entail dangers for the safety and health of those using it correctly (Article 12(1)); undertake certain measures or arrangements *in a manner appropriate to national conditions and practice* (Articles 13, 14 and 15); and undertake certain obligations *so far as is reasonably practicable or where necessary* (Articles 4(2), 6 and 18).³⁵⁸

The stated goal of these flexibility clauses is a convention that all ILO member states, irrespective of level of social or economic development, could ratify. Even though it appears nearly any government action could be made acceptable under the convention, the ILO supervisory bodies argue that “the flexibility clauses should thus be used for enabling provisions and should not be used as a means of derogation from effective occupational safety and health protections for workers.”³⁵⁹ The use of the flexibility clauses requires consultation with workers’ and employers’ groups, but it is unclear how any “derogation from effective occupational safety and health protection” could be evaluated as violating the convention when the *permitted* abrogation of the various requirements of the convention are themselves derogations from effective protection. The ILO’s hands-off “integrated policy approach” would appear to have rendered the primary task of the ILO, namely the establishment of universal standards, obsolete.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

Although itself qualified by overlapping flexibility clauses, the one fixed legal obligation pertaining to workers' rights in Convention 155 is the right to refuse unsafe work. The previous chapter outlined the layers of conditions placed upon the right to refuse and its generally limited legal protection afforded here. In following the global diffusion of the Convention 155 model pertaining to the limited protection of the right to refuse unsafe work, following the language of this limited standard is instructive. Under Convention 155 the standard for the protection of rights is situations presenting "an imminent and serious danger to life or health." Tracking the extent of this precise terminology around the world is possible using responses to the 2009 General Survey.

The global diffusion of the Convention 155 model as it relates to protection of the right to refuse unsafe work was evident when ILO member-states responded to a recent survey on the application of the convention. The General Survey is an annual global survey of law and practice on a particular rotating topic related to one or more of the labor conventions adopted by the ILO. The practice is unique in that the ILO is empowered by its constitution to survey all member-states, not just states that ratified particular conventions. The General Survey is a constitutional exercise of global data collection which, since the ILO constitution is itself considered an international treaty, is administered with the authority of international law. In 2009, the ILO drafted and administered the General Survey on Occupational Safety and Health to monitor the conformity of ILO member-states with ILO Convention No. 155, the associated ILO Recommendation No. 164, and the Protocol of 2002 to Convention No. 155. The survey responses to the 2009 General Survey evidence the extent of the dispersion of the national labor policy model on the right to refuse as advocated in Convention 155.

TABLE 5.2. *States reporting refusal laws with serious or imminent danger clauses* ³⁶⁰

Algeria*	Finland	Poland
Australia	Ghana	Portugal
Azerbaijan	Greece*	Romania
Belarus	Ireland	Serbia
Belgium	Israel*	Slovenia
Brazil	Italy	Spain
Bulgaria	Latvia	Sri Lanka**
Burkina Faso	Lithuania	Suriname
Canada	Macedonia	Sweden
Cuba	Mauritius	Trinidad and Tobago
Cyprus	Mexico	Turkey
Czech Republic	Moldova	United Kingdom
Eritrea	Netherlands	United States
Estonia	New Zealand	Venezuela

* Applicable to workplace safety representatives only.

** Included in draft legislation begin negotiated at the time of reporting.

The language of the limited right to refuse has dispersed worldwide. The goal of this chapter is not to evaluate how the provisions of Convention 155 interact with the various institutional environments found in each of the countries moving toward compliance with the convention. It is instead a critical case study of a limited policy model on the protection of the right to refuse unsafe work defined by this convention.

Although neither Canada nor the United States has ratified Convention 155, the domestic labor policies of both countries have served as models for protection of

³⁶⁰ Table includes countries reporting either “imminent and serious risk”, “imminent and serious danger”, “imminent, urgent and life-threatening danger”, “significant threat to life”, “serious risk to life or health”, “serious and unavoidable danger”, “direct hazard to life or health”, or “serious, imminent and inevitable hazard”. This list does not include all of the countries implementing the European Framework Directive 89/391/EEC introducing measures to encourage improvements in the safety and health of workers at work which includes a serious and imminent danger work refusal standard, nor does this list include information from countries that did not respond to the ILO 2009 General Survey, nor does it include information from countries whose survey response was unclear.

the right to refuse under international law. By consequence, they have influenced the domestic laws where countries have followed the international standards for national labor policy. The limited protection model of the right to refuse unsafe work is largely a North American creation. Studying refusal rights in North America thus serves as a proxy for the study of the right to refuse unsafe work under the international standards.

As the Government of Canada was quick to point out in its response to the ILO General Survey request for information about protection of the right to refuse, Canada has been at the forefront of protecting the right to refuse in Canadian OSH legislation.

The Federal Labour Code and all the provincial occupational safety and health legislations reflect fully the relevant provisions of [Convention 155]. The right to refuse to work in case of imminent danger is one of the cornerstones of the Canadian occupational safety and health legislation. The Code provides a very detailed definition of the term “danger” and conditions under which the right of refusal to work may or may not be exercised by workers. For example, an employee may not refuse work if the refusal puts the life, health or safety of another person directly in danger, or the danger is a normal condition of employment. Thus the master of a ship or the pilot of an aircraft is empowered, having regard to the overall safety of the ship or aircraft, to suspend this right while the ship or aircraft is in operation. This right is also limited for fire fighters, health care workers, or correctional service workers. Both federal and provincial legislators have established mechanisms ensuring that no prejudicial measures are taken by the employer against workers who have exercised in good faith their refusal to work or have complained of a dangerous work situation.³⁶¹

Limited refusal protections in national labor policy, modern judicial systems, and developed, industrial economies make the evaluation of Canadian and U.S. refusal to work protections a critical case study of Convention 155. As both are liberal market economies, the protection of refusal rights must be made viable in this context if it is to be a viable protection anywhere. In this framework, we evaluate North America as

³⁶¹ Government of Canada. (2009). Reply submitted in response to the 2009 General Survey of the International Labor Organization. Document on file with author.

a critical test case for the employee protection provisions of Convention 155, the main ILO labor convention on occupational safety and health in the working environment.

5.2. Evidence from Canadian industrial relations scholarship

The Canadian policy on occupational health and safety, while administered differently across the federal and provincial jurisdictions, largely follows a model of what Eric Tucker has described as a “mandated partial self-regulation” labor policy.³⁶² This system—informally the “internal responsibility system”—mandates a regime of weak worker participation rights in occupational safety and health management. This includes legal rules for the establishment of workplace health and safety committees, the protection of the right to know about certain hazards encountered by workers, and a limited protection of the right to refuse unsafe work. The right to refuse unsafe work continues to be protected through negotiated collective bargaining agreements and the related arbitral jurisprudence. Our concern here, however, is the statutory model that emerged in the 1970s and came to dominate in North America. It is the labor policy model incorporated in and diffused through Convention No. 155. This policy design, now globalized, is the model this chapter endeavors to analyze and evaluate.

The Canadian system of mandated self-regulation has since its beginning in the 1970s been characterized by diverging levels of protection across the jurisdictions. Although each provincial health and safety system has been “shaped by the balance of power (political and economic) between organized workers and employers, their ideological orientations, and popular discourses”, these variations are nevertheless narrow, with workers continuing to face limited participation rights in the employment

³⁶² Tucker, Eric. (2003). Diverging Trends in Worker Health and Safety Protection and Participation in Canada, 1985-2000. *Relations Industrielles / Industrial Relations*, 58(3), 395-424.

relationship.³⁶³ The right to refuse unsafe work has persisted in the Canadian context since the adoption of Convention No. 155 in 1981. This limited *sui generis*-style employment protection of the right to refuse that was North America's gift to the international community through Convention 155 raises specific concerns, however.

In this limited refusal protection model, an anti-social rational individualism is made law and enforced. This style of individualism enforces individual frames even where individual actors constitute their action beyond the individual self, as the seeds of collective or associational action. In Canada, as Tucker cites Jenson and Phillips' work on citizenship, this means moving the public policy "from a regime of equitable citizenship in which the values of social justice and equity provided the justification for an expansion of social rights towards a marketized regime." This romanticization of the market logic is characterized by "a reduction of the space in which citizens can act together...."³⁶⁴ This is the story of the right to refuse in the Canadian experience.

³⁶³ Ibid. Page 420.

³⁶⁴ Jenson, Jane, & Susan D. Phillips. (2001). Redesigning the Canadian Citizenship Regime: Remaking the Institutions of Representation. In Klaus Eder Colin Crouch, and Damian Tambini (Ed.), *Citizenship, Markets, and the State* (pp. 69-89): Oxford University Press.

TABLE 5.3. *Canadian statutes protecting the right to refuse unsafe work*

Jurisdiction	Statute and refusal to work protection provision
Alberta	Occupational Health and Safety Act, §35
British Columbia	Workers' Compensation Act, Occ. Health and Safety Reg. §3.12 and §3.13
Canada (Federal)	Canada Labor Code, Part II, §128
Manitoba	The Workplace Safety and Health Act, §43
New Brunswick	Occupational Health and Safety Act, §§19-23
Newfoundland and Labrador	An Act Respecting Occupational Safety and Health in the Province, §45
Northwest Territories and Nunavut	Safety Act, §13
Nova Scotia	An Act Respecting Occupational Health and Safety, §43 and §44
Ontario	Occupational Health and Safety Act, Part V
Prince Edward Island	Occupational Health and Safety Act, §28 and §29
Quebec	An Act Respecting Occupational Health and Safety, §2
Saskatchewan	Occupational Health and Safety Act of 1993, as amended, §35
Yukon	Occupational Health and Safety Act, §15

There are three notable problems with the protection of the right to refuse in the Convention 155 model observed in Canada. Canadian industrial relations scholars have documented each of these challenges to the effectuation of the right to refuse. These difficulties are evidence as to the problems with the Convention 155 refusal rights protection model. They also suggest that this model is inherently ineffective.

The first problem is the disparity between union and non-union workers in the exercise of the right to refuse unsafe work. Second is the challenge of establishing the merit of a work refusal where risk must be adjudicated. The third difficulty impacting the effective protection of the right to refuse is the fracturing of refusal rights through individuation, limiting individual rights where they veer towards an associational or collective style protection; in essence, decollectivizing individual rights. This section

highlights the Canadian experience with each of these challenges, using as evidence secondary research from relevant Canadian labor and industrial relations scholarship.

a. *The disparity between union and non-union complainants*

Although Convention No. 155 encourages dialog among the tripartite social partners in establishing a national occupational health and safety policy, the protection of the right to refuse unsafe work does not prescribe union protections via collective bargaining. The best evidence of the failure in the *sui generis* employment law model of the right to refuse are those studies from Canadian industrial relations scholarship documenting the disparity in its exercise between unionized and non-union workers. In the context of North American liberal market employment relations, the different degrees of dismissal protection between unionized workers and non-union workers is the difference between a just cause termination system enforced through a collective agreement versus the precarious nature of an “at-will employment” system in the U.S. and, in Canada, a relatively similar degree of dismissal authority in non-union settings.

Robert Hebdon examined refusal to work complaints by union and non-union status in the province of Ontario. His 1992 study examined all unsafe work refusals investigated in the 1987/1988 year. During that period, 297 individual work refusals were investigated. Of this number only 16.2 percent of the complaints came from the non-union workforce. The remaining refusal investigations, 83.8 percent, were work refusals from union employees also protected by collective bargaining agreement.³⁶⁵

In another study of refusal to work complaints in the first decade of the new statutory regime in Ontario, Eric Tucker observed that “the right to refuse has not

³⁶⁵ Hebdon, Robert. (1992). *Industrial Conflict under Ontario's No-Strike Laws*. Ph.D. Diss., University of Toronto. Page 274. See also Hebdon, Robert, & Douglas Hyatt. (1998). The effects of industrial relations factors on health and safety conflict. *Industrial & Labor Relations Review*, 51(4), 579-593.

significantly altered the balance of power or given workers much leverage in the internal responsibility system.” He observed, “unless workers already possess a modicum of power independent of the statutory right to refuse, then the right will not even be exercised.” Tucker cited 1983/1984 complaint statistics which were investigated by the provincial authorities. The 139 work refusals he examined also came from largely unionized worksites. Ninety-one percent of refusal complaints were from employees protected under a collective agreement, only 9 percent of the work refusals investigated were from non-union employees. “Those whose lack of power was greatest” Tucker wrote, “and who stood to gain the most from a statutory right of refusal have, in reality, gained very little.”³⁶⁶ In both the Hebdon and the Tucker studies, liberal market social relations had trumped statutory rights protections.

Similar to the Hebdon and Tucker studies in Ontario, Marc Renaud and Chantal St-Jacques examined the right to refuse in Québec after the passage of the new provincial occupational safety and health regime. Examining some 1,200 refusal cases running to July 1985, Renaud and St-Jacques reported that only 2.9 percent of refusal complaints in Québec were exercised by non-union employees. At the time, non-union employees represented 72.2 percent of the working population. Across Canada it would seem (with the exception of another model of protection of the right to refuse implemented by the NDP in Saskatchewan in the 1970s described in the next chapter) there are stark disparities for non-union workers seeking refusal rights.³⁶⁷

As ILO member-states moved toward a limited right to refuse, Canadian labor

³⁶⁶ Tucker, Eric. (1984). The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism. In G. England (Ed.), *Essays in Labour Relations Law: Papers Presented at the Conference on Government and Labour Relations: The Death of Voluntarism; School of Management, University of Lethbridge, September 6-8, 1984.*: CCH Canadian Limited. Page 234-5.

³⁶⁷ Renaud, Marc, & Chantal St-Jacques. (1988). The Right to Refuse in Québec: Five-Year Evolution of a New Mode of Expressing Risk. *International Journal of Health Services*, 18(3), 401-417.

scholars documented that “the right to refuse is inextricably linked to an enterprises’ labor relations.”³⁶⁸ The Canadian sociologist Vivian Walters argued “the legislation itself is problematic, for occupational health and safety cannot readily be separated from social relations in production” because “even the progressive decisions, which recognize the problems of compartmentalizing occupational health and safety, are limited in their ability to address the broader issues.”³⁶⁹ Citing how these policies narrowed the “typical” social relations at work, Walters noted even the legislation’s explicit policy aims sought to “transcend the very context in which it is embedded.”³⁷⁰

The relationship between an employer and an employee is one where normally the employer has the right to direct the employee to do work and the employee has the obligation to comply with the direction. Where an employee refuses to comply, the employer can not only stop the employee’s pay and send the employees home, but also can take disciplinary action. One of the longstanding exceptions to these consequences is in the areas of health and safety.... Not only is disciplinary action forbidden but also actions that are coercive, intimidating or amounting to a penalty. We interpret this extension to be reflective of a legislative intent to eliminate actions by an employer which pit the power of the employer over the employee’s life work against the employees’ stamina to stand up for their statutory rights.³⁷¹

The problem with this approach, however, is in its understanding of those “forbidden disciplinary actions” in the context of the right to refuse unsafe work. Yes, this action is forbidden in theory on questions of occupational health and safety. When a worker lacks authority in a labor relations environment, however, there may be no conflict made observable in the first place. Non-union workers exercise the protection far less

³⁶⁸ Tucker, Eric. (2003). Diverging Trends in Worker Health and Safety Protection and Participation in Canada, 1985-2000. *Relations Industrielles / Industrial Relations*, 58(3), 395-424. Page 415.

³⁶⁹ Walters, Vivienne. (1991). State Mediation of Conflicts Over Work Refusals: The Role of the Ontario Labour Relations Board. *International Journal of Health Services*, 21(4), 717-729. Page 728.

³⁷⁰ Ibid.

³⁷¹ Ibid.

than do their union counterparts. What was revolutionary in this new regime was the shifting of the role of the state in relationship to health and safety hazards and worker rights. The new legal regimes created boundary lines whereby the once “forbidden disciplinary actions” against protesting workers was sliced apart by objectifying and adjudicating the definition of a work hazard. By adjudicating and narrowing the realm of safety and health hazards, workers that continued to refuse work could be legally terminated, reinforcing employer power to discipline where it once was forbidden.

b. The adjudication of work hazards and its discontents

When the state activates itself to objectify and define hazards in the context of a work refusal, it is laying down the boundaries of acceptable disciplinary action and in turn employment termination protections. The second concern in effectuating work refusals in a limited statutory policy model revolves around adjudicating the hazard in the context of a refusal to work. Certainly there has been a history of inspectorates adjudicating workplace hazards based on statutory or regulatory definitions for over a century. When the state forays into adjudicating hazards in the context of a refusal to work, however, it is conditioning traditional labor relations activity upon a workplace hazard standard. The role of the state is enlarged just as the right to refuse is limited. Critical issues stem directly from this decision to adjudicate hazards by the state in the context of a work refusal. These issues have been studied by Canadian labor scholars.

Garry C. Gray studied the right to refuse dangerous work through a grounded in-depth, five-month participant observation ethnography of a large industrial factory in Canada with a unionized workforce and a full-time health and safety representative on staff. Given the progressive disposition of the company (a unionized workforce and a stated company position that safety was a top priority), Gray’s observations on the limitations of the right to refuse in this context illustrate the limitations found with

the hazard-contingent right to refuse unsafe work. His ethnography found significant subjectivity in the workers' perceptions of what constituted dangerous work. The definition of risky work was constantly negotiated and shifting. Varying perceptions of danger were observed, for instance, when Gray was asked to climb a stack of pipes on the back of a truck trailer 15 feet high. To him, the job was dangerous. To Gray's co-worker, a former mine worker from Poland, the work hazards were "not that bad."

Workers in Gray's ethnographic case study ultimately avoided refusing work due to safety concerns because of the inherently confrontational nature of the refusal. By structuring "the perceptions of what is and is not dangerous, reasonable, normal, usual, inevitable, tolerable, acceptable, etc." the adjudication of hazards in the context of shaping the boundaries of workers' rights is thus a significant foray by the state into the shaping of acceptable disciplinary action in a liberal market employment relations system. Objective hazards defined by the state in adjudicating acceptable refusals to work, upon a detailed examination, entail a significant degree of subjectivity.³⁷²

Once this adjudication of hazard logic is adopted in labor relations policy, other critical questions arise from this framework. Two issues in particular that have been disputed and addressed in Canada are the personal conditions question and the topic of abnormally dangerous work. The personal conditions question arises when employees who, for whatever reason, have personal health concerns that increase their risk of suffering a work-related illness or injury. In Québec during the early years of the new statutory protection of the right to refuse, the province afforded a broad guarantee of protection for workers refusing unsafe work due to personal concerns. Inspectors at the time were empowered to uphold a refusal to work where the risk met

³⁷² Gray, Garry C. (2002). A Socio-Legal Ethnography of the Right to Refuse Dangerous Work. *Studies in Law, Politics, and Society*, 24, 133-169.

the agreed-upon hazard standard or danger. Renaud and St-Jacques describe cases where refusal were upheld during this period of jurisprudence, including an electrician with an allergic reaction to insulation, an office worker blind in one eye and impaired in another refusing to use a photocopier due to irritation from the light source, and a teacher of students with disabilities refusing to lift the students regularly, fearing the aggravation of an injured back. After a few years of protecting a broad array of personal, and thus individual, conditions, however, this legal standard was overturned in the *Bootlegger, Inc. v. Couture* and *Hôtel-Dieu de Québec v. Lévesque* cases.³⁷³

In both the *Bootlegger* case and the *Hôtel-Dieu* case the court ruled that the right to refuse could not be exercised on grounds tied to a personal condition of the worker.³⁷⁴ Where the government turns away from protecting the rights of workers to refuse work based on personal conditions, however, the authorities must establish some kind of normative qualification removed from the context of the actual refusal to work itself. In the years after the passage of the refusal protection statute in Québec, health and safety inspectors from the provincial authority, the Commission de la santé et de la sécurité du travail (CSST), were given latitude in deciding if a specific danger existed for an individual worker refusing work. After these two cases changed the reading of the law, CSST inspectors were much more restricted in their interpretation. Because personal conditions were restricted, another standard for evaluating hazards needed to be created that did not factor the worker (beyond basic job training) into the equation of measuring the degree of risk. A more decontextualized ideal was needed.

³⁷³ Renaud, Marc, & Chantal St-Jacques. (1988). The Right to Refuse in Québec: Five-Year Evolution of a New Mode of Expressing Risk. *International Journal of Health Services*, 18(3), 401-417. Page 413.

³⁷⁴ *Bootlegger Inc. v. Couture*, Superior Court, Montréal, 500-05-008894-832, decision rendered January 24, 1984, Droit du travail express, number 84 T-171. 1984. *Hôtel-Dieu de Québec v. Lévesque*, Labor Court, Québec, 200-28-000576-832, decision rendered April 12, 1984, Droit du travail express, number 84-T-457. 1984.

After this change in jurisprudence, the practice that was adopted by the CSST inspectors in Québec was to evaluate whether the working conditions were “normal” or “abnormal” for that particular industry. Work refusals that were exercised in work environments with “abnormally dangerous conditions” were protected. Unless there are specific qualifications, work refusals in “normally dangerous conditions” were not protected. The jurisprudence of the right to refuse under Convention 155 has followed a similar logic to this Canadian jurisprudence. There is no legal protection of the right to refuse unsafe work in situations of normally dangerous conditions. This policy framework is, I believe, a necessary consequence of stepping back from the protection of refusals to work where there may be personal conditions at issue. Where authorities step away from looking at the qualitative context of a work refusal, the authorities are in a position where they must have another framework for judgment distinct from the actual real life context in which the work refusal unfolds. The “abnormally dangerous conditions” doctrine is such a framework, as artificial as it may appear to be. It allows for the evaluation of a work refusal without having to examine a workers’ experience, or, perhaps more precisely, it allows for a quick disposal of a work refusal complaint where a complainant cannot legally jump this first high hurdle of an abnormal danger.

During the first two decades of the internal responsibility system in Canada, as these cases were working their way through the courts and this work refusal protection jurisprudence was being established, the response from some worker health and safety activists was to criticize the narrowing of the legal definition of risk.³⁷⁵ The creation of the limited *sui generis* right to refuse in employment law, however, mandates that the state adjudicate hazards by defining what is acceptable and what is not acceptable.

³⁷⁵ Sass, Robert. (1986). The Need to Broaden the Legal Concept of Risk in Workplace Health and Safety. *Canadian Public Policy-Analyse De Politiques*, XII(2), 286-293.

These questions of hazard subjectivity are inherent to this policy framework, however. Wherever the right to refuse is constituted in this way, as it has been both in Canada and in Convention 155, the definition of hazardous work will be subjective because the sheer assortment and complexity of working environments demands it be so. A “succession of small elements and actions” are intrinsic to hazardous work. This type of protection of the right to refuse ignores these nuances. It is a state-centric tool that artificially co-opts the “fundamental debate about what is and is not a risk.”³⁷⁶ The only protective standard, therefore, is to remove entirely any hazard adjudication and give all workers the right to exercise refusal rights where they have deemed necessary.

c. The decollectivizing of individual employment rights

The final of the three broad lessons regarding the effective protection of the right to refuse from Canadian labor scholarship is the question of collective action; that socio-legal space where refusals to work turn toward what in labor law has been considered concerted activity. Because the dominant model of the right to refuse has followed an *individualist* rights framework and not an individual rights framework, the treatment of questions of protection for association rights becomes an important issue.

Since this model of the right to refuse is individualistic in policy construction, it is not evaluated or treated as an industrial and labor relations problem where dialog or negotiation between employer and employees as a body results. Instead, each case on an individual level is evaluated separately, with each of the employee’s individual relationship to the hazard of concern evaluated separately from each other worker.

Workers may exercise a right to refuse together, but this is not considered as a collective exercise of the right because it is not exercised under the union’s

³⁷⁶ Renaud, Marc, & Chantal St-Jacques. (1988). The Right to Refuse in Québec: Five-Year Evolution of a New Mode of Expressing Risk. *International Journal of Health Services*, 18(3), 401-417. Page 415.

authority, as the unions wanted, and different decisions may be made for each separate case. Therefore, a worker who exercises a refusal, even within a group, is personally responsible for the consequences in the event that the refusal is judged undue.³⁷⁷

Arturo Brion described this individual construction of refusal rights another way:

The individual character of the right of refusal is one factor that inhibits direct union involvement. A group of workers who claim that they are all at risk can legally refuse to work. However, their refusal will not be recognized as a refusal by a group but as refusals by individual workers belonging to a group. Their claim cannot also be the basis for work refusal by others, whether they belong to or are outside their group, who are not individually at risk. No other entity, whether a union or another worker, can refuse work for a worker: the worker who believes that he or she is at risk must exercise the right of refusal for himself or herself. In line with this basic characteristic the Labour Relations Act itself does not provide that health and safety concerns can be the basis for collective action.³⁷⁸

The statutory right to refuse thus requires a coordination with the industrial relations regime. Where an individual's right to protected concerted activity is already limited, this coordination is easy. No legal changes are necessary and the limited *sui generis* refusal protection clarifies (and solidifies) preexisting restrictions of workers' freedom of association. Where a limited right to refuse contradicts with the right to strike and protected concerted activity, there is an institutional conflict. Employers may argue the right to discharge an employee at the same time a discharged worker is seeking protection from termination based on the same legal facts. The limited right to refuse does not afford a baseline of employment protection against dismissal. As the circumstances of each case entail precisely the same legal facts, restrictions on the right to refuse form a baseline of protection of the liberal market dismissal protection rights enjoyed by employers. Even where concerted refusals may be protected in the

³⁷⁷ Ibid.

³⁷⁸ Brion, Arturo Dizon. (1995). *The Right to Refuse Unsafe Work in Ontario*. LL.M. Thesis, York University. Page 13.

context of health and safety hazards, *making the protection contingent on any kind of adjudication of hazard inherently decollectivizes the individual right to act* because each worker's relationship to a hazard, including each worker's belief or apprehension must be verified before statutory protection is afforded. Richard Brown called this one of the "disturbing implications" in cases of concerted refusals to work.³⁷⁹ The contradiction in institutional logics between the statutory right to refuse unsafe work and an industrial relation system's protected concerted activity is a significant issue.

The limited right to refuse at a basic level requires that the workers possess a "sufficiently close relationship to a perceived hazard that they are themselves in peril of or that they will put another employee in peril by performing their work." So, for example, this policy model affords no protection of the rights of a group of employees to refuse to perform work "because of health and safety concerns over such factors as the location or design of a plant, the choice or design of tools and equipment, the kind of materials used and the overall method of production...."³⁸⁰ What is abandoned in this model of protection is the basic social process of negotiating working conditions.

Mark Harcourt has studied the right to refuse in the Canadian context and how these protections are reconciled with management's right to manage the enterprise. Recognizing that protection of the right to refuse in any model is a proactive approach, he examined the provincial refusal jurisprudence in Canada and found that the right to refuse had "shortcomings as a method for combatting health and safety problems."

The scope for refusing to work is limited, because workers must satisfy several rigid conditions to qualify for protection from discipline.... Boards [tribunals responsible for adjudicating refusal to work cases] do not, in contrast, require

³⁷⁹ Brown, Richard. (1983). The Right To Refuse Unsafe Work. *University of British Columbia Law Review*, 17(1), 1-34. Page 29. See also Fidler, Richard. (1986). The Occupational Health and Safety Act and the Internal Responsibility System. *Osgoode Hall Law Journal*, 24, 315-352.

³⁸⁰ *Robert Pharand, Peter Digiglio and John Tolin, et al, Applicants, v. Inco Metals Co., Respondent*, 1297-79-U [1980] OLRB Rep. July 981. 1980.

managers to justify their right to manage.... As a result, boards have, perhaps unwittingly, endorsed an approach to occupational health and safety that stresses the maintenance of managerial control over the workplace rather than the protection of workers from harm.³⁸¹

Harcourt found that labor relations boards deciding refusal to work cases give undue examination to questions of insubordination, length of service, and work record issues versus exonerating and finding ways to protect workers whose actions fall under the rubric of concern for the health and safety of the working environment, even in those cases where they fail to avoid what Vivienne Walters called the “built-in deterrents” of the decollectivized individual rights model that has come to dominate refusal rights.³⁸²

Together the Canadian socio-legal issues addressed here demonstrate that the dominant model of protecting the right to refuse unsafe work is an ineffective means by which to protect the human right to safe and healthy working conditions. Be it the decollectivizing of individual employment rights, the inequalities and social obstacles inherent in the conditioning of workers’ rights upon adjudicating workplace hazards, or the bleak social disparity in cases between union and non-union complainants, the right to refuse unsafe work as protected in Convention No. 155 requires re-evaluation with international and universal human rights principles as the standard for judgment.

A more protective human rights-based model would broaden the protection of individual rights where refusal rights were not conditioned on any hazard standard but were instead worker status protections based on basic freedom of associational rights.

³⁸¹ Harcourt, John Mark Lawrence. (1995). *The Right to Refuse Unsafe Work: Arbitration and Labour Relations Board Decisions*. Ph.D. Diss., University of Alberta. Page 130. See also Harcourt, Mark, & Sondra Harcourt. (2000). When can an employee refuse unsafe work and expect to be protected from discipline? Evidence from Canada. *Industrial and Labor Relations Review*, 53(4), 684-703.

³⁸² Walters, Vivian. (1983). Occupational Health and Safety Legislation in Ontario: An analysis of its origins and content. *Canadian Review of Sociology And Anthropology*, 20(4), 413-434. Page 426.

These rights are individual but also social, often involving notions of mutual concern to other workers and the broader society. This path strengthens individual rights and expands the ability of workers to autonomously express themselves in their own right. It would challenge the assumptions of modern liberal market employment relations, but protecting human rights is a project that requires significant structural institutional change. Such change would, however, afford a stronger, more effective protection of a worker's fundamental human right to a safe and a healthy working environment.

5.3. The rise of the whistleblower in American labor policy

Although the right to refuse unsafe work is a cornerstone of Canadian health and safety policy, there are now more employee refusal-to-work protection statutes in the United States than in Canada. As in the Canadian history, all of these statutes have been enacted in the neo-liberal post-1970s era. Under federal law in the United States, the first of these protections was Section 11(c) of the Occupational Safety and Health Act of 1970.³⁸³ The U.S. General Accounting Office summarized in a 1988 report the scope of the protection afforded to workers under Section 11(c) of the OSH Act:

Section 11(c) provides all such workers with protections against reprisal when they exercise their rights to file a safety or health complaint, testify about hazardous conditions on the job, and, under certain conditions, when they refuse to engage in work activities which they believe put them in danger of death or serious injury in violation of federal regulations. Any employee who believes that he or she has been discharged or otherwise discriminated against, for one or more of these reasons, may, within 30 days, file a complaint with the Secretary of Labor alleging such discrimination. Upon receipt of such complaint, an investigation is made as the Secretary deems appropriate, and the complainant is to be notified of the Secretary's determination within 90 days after receipt of the complaint. If the Secretary determines that an employee

³⁸³ Occupational Safety and Health Act, Section 11(c). (1970). Although Section 502 of the Taft-Hartley Act of 1947 outlined the right to refuse unsafe work, OSHA 11(c) was the first refusal protection adopted outside an industrial relations statute.

has been discriminated against in violation of Section 11(c), he or she shall bring action in any appropriate U.S. District Court against the employer. The District Court may order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.³⁸⁴

Over the subsequent four decades, the U.S. Congress passed ten statutes protecting the right to refuse. OSHA has been made the agency responsible for the enforcement of the employee protection provisions of these statutes. Whereas once these types of complaints were considered under the rubric of general employee discrimination cases and investigations, over time, these employee complaints were viewed as “blowing the whistle” and not the basic exercise of some fundamental human right in employment.

What emerges with the rise of the “whistleblower” idea is the idea of a public hero sacrificing themselves through the public identification of some kind of affront to the public good. Whistleblowers illuminate anomalies from the norm and the norm is viewed as normally consistent with the public good. Whistleblowing is not, therefore, a mechanism that has been conceptualized for structural governance beyond what is the identification of “a few bad apples” with substandard practices in a given context. Risa Lieberwitz has criticized whistleblowing as a form of corporate governance in the employment context. She views whistleblowing as a “shift from labor protections” in U.S. labor and employment policy and noted the social challenges that are inherent in the whistleblowing laws that have emerged since the 1970s and ‘80s in U.S. states:

With their focus on individual employee reporting conduct, state whistleblowing laws have limited potential for advancing the potential actions promoting collective labor interests. Further, the specificity of state statutory provisions defining protected employees, types of employer misconduct, and reporting routes reduce employee’ autonomy in choosing whether and how to inform the public about health and safety issues. Still, like the anti-retaliation

³⁸⁴ U.S. General Accounting Office. (1988). Whistleblowers: Management of the Program to Protect Trucking Company Employees Against Reprisal. Report GAO/GGD-88-123. September 1988. Washington, D.C. Page 11-12.

provisions of federal health and safety laws, state whistleblowing protections of employees often overlap with their health and safety interests as members of the public.³⁸⁵

What is notable here is the observation that although employee interests generally overlap with the public interest in health and safety, whistleblowing laws inherently limit the full articulation of collective labor interests on health and safety topics by pre-defining protected employees, the harmful acts and procedures for protection.

Today, the Occupational Safety and Health Administration is the default U.S. whistleblower protection agency. Among the nearly two dozen employee protection provisions of various federal statutes enforced by OSHA, the right to refuse unsafe work is included in the statutory language of ten of these whistleblower laws. The current federal “whistleblower” statutes with the right to refuse are listed in Table 5.4. The laws in Table 5.4 do not include state-level refusal protection statutes, including state-level refusal protection statutes under an OSHA State Plan, the provision of the OSH Act that allows U.S. states to strengthen the legislation through state lawmaking. A handful of states have strengthened OSHA Section 11(c) and the respective state-based OSHA authorities thereby assume responsibility for investigating any employee discrimination complaints under the OSHA-approved state plan in lieu of the federal OSHA investigation by OSHA’s Office of the Whistleblower Protection Program.

Additional refusal protections have also been afforded by state courts altering the common law employment at-will doctrine, but examining this jurisprudence is a project beyond the scope and intent of this dissertation. The focus of this dissertation is examining refusal laws under ILO health and safety conventions, and the Canadian

³⁸⁵ Lieberwitz, Risa L. (2010). *Whistleblowing in the United States*. Collo que International, *Les normes de RSE : mise en œuvre, contrôle et sanctions*, 27-29 October 2010, COMPTRASEC, CNRS, Université Montesquieu Bordeaux IV, France. Conference paper. Page 12.

and U.S. safety statutes afford the best models to study. The remainder of this chapter analyzes refusal protection laws by examining the federal investigation of employee work refusals under Section 11(c) of the U.S. Occupational Safety and Health Act.

The U.S. Department of Labor's Inspector General and the U.S. Government Accountability Office have identified ongoing problems with OSHA's whistleblower protection system. Over the previous decade, four major studies have been conducted by the U.S. DOL Office of the Inspector General and the U.S. GAO. Each report has identified what has come to be seen as long-standing weaknesses in enforcement.

A nationwide audit of OSHA 11(c) investigations by the Department of Labor Inspector General in 1997 found the majority of cases were complaints from workers terminated from their employment for complaining about unsafe or unhealthy working conditions. Sixty-seven percent of complainants were terminated from their job, and many of the complainant case files were incomplete. This included the incomplete documentation of back wages lost after termination and the incomplete documentation of complainant investigation statements. Although employees with merit cases are entitled to "all appropriate relief" under the statute, eighty-one percent of the cases referred to the Solicitor of Labor were not promptly acted upon. The management system for the 11(c) complaints was deemed ineffective and was not consistently relied upon by investigators. Investigators negotiated settlements in approximately ninety-nine percent of cases where remedies were received under Section 11(c).³⁸⁶

³⁸⁶ Office of the Inspector General, U.S. Department of Labor. (1997). Nationwide Audit of OSHA's Section 11(c) Discrimination Investigations. Report No. 05-97-107-10-105. March 31, 1997. Washington, D.C. Page 34.

TABLE 5.4. *Federal “whistleblower protection statutes” that include the right to refuse* ³⁸⁷

Year	Statute	Scope
1970	Occupational Safety and Health Act, 29 U.S.C. §660, §11(c)	Employee with a reasonable belief of death or serious injury and there is no reasonable alternative
1978	Energy Reorganization Act, 42 U.S.C. §5851	Employee refusing to engage in practices made unlawful by this Act or the Atomic Energy Act of 1954
1980	Federal Railroad Safety Act, 49 U.S.C. §20109	Employee refusing to violate or assist in the violation of Federal laws, rules, or regulations relating to railroad safety or security.
1982	Surface Transportation Assistance Act, 49 U.S.C. §31105	Employee refusing to operate a vehicle because operation violates a U.S. laws on commercial motor vehicle safety, or has a reasonable apprehension of serious injury to themselves or to the public because of the vehicle's hazardous condition
2002	Pipeline Safety Improvements Act, 49 U.S.C. §60129	Employee refusing to engage in any practice that violates federal law on pipeline safety, if they have notified employer of alleged illegality
2007	National Transit Systems Security Act, 6 U.S.C. §1142	Employee refusing to violate or assist in violating any federal law, rule, or regulation relating to public transportation safety or security
2008	Consumer Product Safety Improvement Act, 15 U.S.C. §2087	Employee refused any assigned task believed to be in violation of the laws enforced by the Consumer Products Safety Commission
2010	Affordable Care Act, P.L. 111-148, §1558	Employee refusing any assigned tasks believed to be in violation of the Affordable Care Act of 2010
2010	Consumer Financial Protection Act, 12 U.S.C.A. §5567, §1057	Employee refusing any assigned task believed to be in violation of the laws enforced by the Bureau of Consumer Financial Protection
2010	Seaman’s Protection Act, as amended by the Coast Guard Authorization Act of 2010, P.L. 111-281, §611	Seaman refusing to perform duties ordered due to a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or to the public

³⁸⁷ As of January 1, 2011 the OSHA Office of the Whistleblower Protection Program is responsible for enforcing the employee protection provisions of twenty (20) different federal statutes. This table includes laws where the right to refuse is explicitly protected in the statute or the regulation enforced by OSHA. Excluded, for example, is the right to refuse under the U.S. Federal Mine Safety and Health Act of 1977, a refusal protection enforced by the Mine Safety and Health Administration.

Responding to the DOL Inspector General's 1997 evaluation, OSHA officials defended the negotiation of settlements as a form of alternative dispute resolution.

The conclusion in the report stating that OSHA's actions to settle merit cases without referring them to the Secretary of Labor for litigation limits the participation of the courts in developing the discrimination provisions of the Act, clearly indicates a failure to discuss this issue with the Secretary of Labor or with the U.S. District Court Judges, whose dockets are filled with a range of federal litigation. The Attorney General of the United States chaired a briefing in June 1996, on the need for "Alternative Dispute Resolution." Two U.S. District Court Judges specifically identified whistleblower cases to get out of the Courts. The whole basis of Alternative Dispute Resolution (ADR) is compromise. The Department of Labor presently has a proposal for a DOL ADR Program with whistleblower cases being the primary focus of the program. This action by the department flies in the face of the report's recommendation for more litigation and seeking "all appropriate relief."³⁸⁸

One month before this report was released in 1997, OSHA had assumed jurisdiction of seven additional whistleblower statutes from the DOL Wage and Hour Division. No additional resources were provided to OSHA despite all seven of the statutes requiring that the investigation of the employee's complaint be completed within 30 days.

OSHA Section 11(c), our concern here, provides for enforcement through the U.S. District Court system. There is no private right of action, however. The Solicitor of the Department of Labor must bring the case to court. To prove merit in a Section 11(c) case, OSHA must show the presence of four essential elements in the complaint: (1) the complainant engaged in protected activities, (2) the employer knew about the protected activity, (3) the employer retaliated against the employee, and (4) nexus, a connection between the protected activity and the retaliation. Of the cases examined by the Inspector General in 1997, the settlements negotiated by OSHA investigators and agreed to by complainants contained back-pay awards and, sometimes, employee

³⁸⁸ Ibid.

reinstatement. No indication of the abatement of hazardous working conditions was reported as being included in any 11(c) settlement. Section 11(c), with or without OSHA's focus on Alternative Dispute Resolution and settlement negotiations, is a labor policy model that individualizes interests in labor and employment relations.

In September of 2010, the DOL Office of Inspector General again investigated the OSHA 11(c) complaint system in a study investigating whistleblower protections. Again, the OIG found incomplete case files and settlement procedures that "deprived complainants of full and appropriate relief." The DOL Inspector General found that the on-the-ground refusal to work investigators lacked the resources needed to make thorough investigations in accordance with stated policies and lacked training and legal assistance required to understand the various statutes and perform investigations.

The average settlement payment for all OSHA 11(c) cases, which consisted of back wages and compensation, was \$4,800. The range of settlements ran from \$8 to \$129,150 over the year ending October 31, 2009. The reinstatement of employees, however, was found in less than 3 percent of cases. The OIG found that across the top three whistleblower statutes in terms of complaint volume (the OSH Act, the Surface Transportation Assistance Act, and the Sarbanes-Oxley Act), an estimated 80 percent of investigations did not follow one or more of the 8 essential elements of a complaint investigation process under the policies set forth in the Whistleblower Investigations Manual. These essential elements included (1) conducting a formal interview with the complainant, (2) documenting the interview with complainant via a signed statement or digital recording, (3) obtaining suggested witnesses from the complainant, (4) interviewing or attempting to interview all pertinent complainant witnesses, (5) documenting complainant witness interviews via signed statements or digital recordings, (6) conducting face-to-face interviews or on-site investigative work, (7)

allowing the complainant an adequate opportunity to refute the employer’s defense or resolve other discrepancies, and (8) conducting a closing conference with the complainant. These discrepancies are breakdowns in administration. They compound the already sharp move away from broad status-based protections that traditionally have protected workers’ activity and have allows workers’ interests to be expressed through the traditional industrial and labor relations-based national labor policies.³⁸⁹

The U.S. Government Accountability Office has evaluated the “whistleblower protection” system enforced by OSHA in two recent oversight reports, from January 2009 and from August 2010. A total of 1,864 employee complaints were entered into the OSHA database, investigated, and closed in Fiscal Year 2007. 1,211 complaints (65.6 percent) were dismissed. 253 of the cases were withdrawn by the complainant (13.5 percent). 390 (20.9 percent) were found by OSHA investigators to have merit.

Of those cases found to have merit, 371 complaints (95.1 percent) entered into a negotiated settlement process and were settled. The settlements negotiated under OSHA Section 11(c) with monetary payments for Fiscal Year 2007 averaged \$5,288. Settlements ranged from \$65 to \$94,500. The remaining 19 cases that did not settle were forwarded for litigation to the Solicitor of Labor, with 12 of these dismissed.³⁹⁰

Complaints made under Section 11(c) deemed by investigators as not a *prima facie* case are not recorded as complaints in OSHA’s central database. They are not opened or considered investigated. As of late 2010, tracking the “screen-outs” varied

³⁸⁹ Office of the Inspector General, U.S. Department of Labor. (2010). Complainants Did Not Always Receive Appropriate Investigations Under The Whistleblower Protection Program. Report No. 02-10-202-10-105. Washington, D.C. Page 22.

³⁹⁰ U.S. Government Accountability Office. (2009). Whistleblower Protection Program: Better Data and Improvised Oversight Would Help Ensure Program Quality and Consistency. Report GAO-09-106. January 2009. Washington, D.C. Page 25-27. See also U.S. Government Accountability Office. (2010). Whistleblower Protection: Sustained Management Attention Needs to Address Long-Standing Program Weaknesses. Report GAO-10-722. August 2010. Washington, D.C.

according to the policy of the individual OSHA region. Differing criteria across these regional offices appeared to be used to screen-out, indicating a lack of consistency. A lack of consistency also appears regarding how screen-outs are recorded. Screen-outs do not warrant an investigation and are not recorded in the OSHA case investigation database. The vast majority of all whistleblower complaints screened-out fall under the OSHA Section 11(c) law, according to the Government Accountability Office.³⁹¹

Among the challenging obstacles to “whistleblower” enforcement identified by government oversight reports has been the stark lack of resources made available to investigators to do their job. One-third of investigators reported that inadequate equipment hinders their whistleblower investigation. In some regional offices, the number of whistleblower investigators reporting inadequate equipment as a hindrance to their investigation work was as high as 80 percent. Over one-half of the investigators reported spending some out-of-pocket personal funds on work-related equipment, supplies, or transportation in calendar year 2007. The amount of these personal expenditures ranged from \$75 to \$2,000. The equipment purchased with personal funds included laptop computers, printers and personal cell phone service. Recording devices were also reported by some investigators as not available:³⁹²

In one instance, an investigator who was preparing to attend a mandatory 2-week investigation training course learned that the course required participants to bring laptops with operating systems that were compatible with the software being used for the course. Lacking this, the investigator used his or her own money to buy a laptop with a compatible operating system.³⁹³

³⁹¹ U.S. Government Accountability Office. (2009). Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency. Report GAO-09-106. January 2009. Washington, D.C. Page 28.

³⁹² Ibid. Page 37-39.

³⁹³ Ibid.

These material challenges to health and safety whistleblower investigations handled by OSHA exacerbate the already complex nature of individual refusal to work cases.

According to government oversight reports, nearly all OSHA Section 11(c) health and safety investigation files (over 95 percent) contain a Final Investigation Report (FIR). Each FIR documents the employee complaint, states the grievance of the worker, provides the employer's defense, gives the investigator's analysis, and lists the final agency disposition of the case. Even though government reports have documented the many failings of protecting workers' rights to health and safety in the "whistleblower" era in the United States, a qualitative, in-depth analysis of actual case investigations is needed. Analyzing a collection of the refusal to work investigations documented by these "Final Investigation Reports" under OSHA Section 11(c) is one strategy that can help us answer the question of effectiveness. Highlighting how, as with the Canadian studies indicating the social challenges inherent in the limited-style protection of the right to refuse, the problem of effectiveness extends beyond sloppy administration of the whistleblower program by OSHA. An inherent weakness exists in this workers' rights protection model. The remainder of this chapter focuses on this inherent weakness by examining the refusal to work cases under OSHA Section 11(c).

5.4. Evidence from OSHA Section 11(c) work refusal investigations

After some months of negotiation with the Department of Labor, a Freedom of Information Act request was granted in January 2009 for "Final Investigative Reports" held in the case files of OSHA investigations under Section 11(c) of the Occupational Safety and Health Act and under Section 405 of the Surface Transportation Assistance Act. The documents were made available for the cases closed over the previous five calendar years, making documents available from January 2004 to December 2008.

Over the subsequent twelve months, the Freedom of Information staff in nine of the ten regional OSHA offices, where the files were located, made paper or electronic copies of hundreds of FIRs and forwarded them by mail for this research project.

According to the OSHA case management database, a total of 402 cases under OSHA 11(c) were investigated as exclusively “refusal to work” cases. Another 473 refusal to work investigation cases were released under Section 405 of the Surface Transportation Assistance Act. Considering the number of additional refusal to work cases compiled including those from other federal and state statutes, and state common law employment cases, the collection of refusal cases collected for this research is possibly the largest collection of refusal to work case documents in private hands in North America, if not anywhere given the dominance of this model in North America.

Due to the challenge of reading and evaluating each Final Investigative Report, I deferred examination of the Surface Transportation and Assistance Act cases in favor of examining in detail the OSHA 11(c) cases which, importantly, are representative of a broader cross-section of the economy beyond the surface transport sector. By 2010 each of the regional OSHA offices with the exception of one had complied with the Freedom of Information Act request and had released the reports in their possession.

The files released were made available in electronic format as PDF documents or in hard copy. After sorting through and reorganizing what in some cases were not entirely organized collections of documents, a total of 326 Final Investigative Reports were identified and organized as PDFs in a computer file. Paper copies were scanned in this process so all of 326 documents were in this digitized format. Removing the case totals listed in Region 2, a total of 326 FIRs represented 86.0 percent of the total open and closed refusal to work cases investigated and recorded by OSHA’s database from 2004 to 2008. This figure is 9 percent lower than the number of FIRs identified

in case files by government oversight reports. This discrepancy may be due to errors in identifying refusal to work cases by the FOIA officers within each regional office. It may also mean that refusal to work cases under OSHA Section 11(c), which protects against other forms of discrimination and retaliation beyond refusal to work cases, are simply investigated and administered with less attention, precision, and care.

TABLE 5.5. OSHA 11(c) refusal to work cases by region, 2004-2008

OSHA region	Jurisdiction	Cases in DOL system	FIRs released through FOIA
Atlanta (4)	Alabama, Florida, Georgia, Kentucky*, South Carolina*, North Carolina*, Mississippi, Tennessee*	151	120
Chicago (5)	Indiana*, Illinois**, Minnesota*, Michigan*, Ohio, Wisconsin	119	105
Dallas (6)	New Mexico*, Oklahoma, Texas, Louisiana, Arkansas	42	38
New York (2)	New Jersey**, New York**, Puerto Rico*, Virgin Islands**	23	0
Boston (1)	Vermont*, New Hampshire, Maine, Massachusetts, Connecticut**, Rhode Island	22	20
Denver (8)	Colorado, Montana, North Dakota, South Dakota, Wyoming*, Utah*	14	20
Philadelphia (3)	District of Columbia, Delaware, Maryland*, Pennsylvania, Virginia*, West Virginia	11	4
Kansas City (7)	Iowa*, Nebraska, Kansas, Missouri	9	9
Seattle (10)	Alaska*, Idaho, Oregon*, Washington*	7	6
San Francisco (9)	California*, Arizona*, Nevada*, Hawaii*	4	4
Total		402	326

* Indicates states with OSHA State Plan. **Indicates states with OSHA State Plans that cover only public sector employment. OSHA defers to state OSHA agencies to investigate Section 11(c) complaints. The variation in the number of cases collected across OSHA regions is due in part to cases being handled by state OSHA agencies. This chart only includes investigations by the OSHA in locations under federal jurisdiction. It does not include cases investigated by state OSHA agencies.

The number of FIRs collected varies significantly across each OSHA regional office. This is due largely to variation in the federal jurisdiction of OSHA at the state level. Region 4, for example, headquartered in Atlanta, released 120 FIRs. Region 4 includes Alabama, Florida, Mississippi and Georgia, states with significant population and each without state-level OSHA agencies pre-empting the federal investigation of Section 11(c) complaints. Likewise, Region 5, headquartered in Chicago, covers both Ohio and Wisconsin, states with sizeable population without a state OSHA agency to preempt the federal investigation. Region 5 released 105 FIRs. Conversely, in those regions that include mostly states with OSHA State Plans, the regional office had few FIRs to release. Region 9, headquartered in San Francisco, for example, released only 4 FIRs. Each state within Region 9 has an OSHA State Plan and a state-level OSHA preempting federal investigation. Here, the handful of the FIRs that were released are from the sectors still under OSHA jurisdiction despite the establishment of an OSHA State Plan, such as the United States Postal Service or Native American reservations.

The discrepancies in investigating 11(c) refusal to work cases across each of the OSHA regions does raise a public administration problem related to expertise and skill management. In those federal OSHA regional offices where few Section 11(c) investigations are conducted due to the existence of OSHA state plans, investigators would be conducting far fewer investigations each year. In some cases, this may be as few as only one investigation of a refusal to work discrimination complaint annually. The legal experience and technical expertise needed to investigate these discrimination cases effectively would be lacking in those federal OSHA regions with a lighter case complaint intake due to the existence of OSHA State Plans in the respective region.

Although OSHA State Plan status does explain a large part of the variation in FIRs released by the regional offices, there remain discrepancies outside this pattern.

In Region 3, Pennsylvania, Washington, D.C., Delaware and West Virginia are each without state OSHA plans and yet only four FIRs were made available out of 11 investigations recorded by OSHA. There remain unexplained disparities across the regional offices in regards to Section 11(c) employee discrimination complaints.

Each of the Final Investigative Reports open with a copy of the letter mailed to the complainant indicating the investigator's final disposal of the case. These letters are typically one of three generic form letters, a letter acknowledging the settlement agreement, a letter dismissing the case outright, and a letter acknowledging that the complainant has withdrawn the case. Dismissal letters have similar language across the regions, as in this May 2006 letter from the Tampa Bay Area office in Region 4:

Your complaint of discrimination in violation of Section 11(c) of the Occupational Safety and Health Act (the Act) has been investigated and the results thereof carefully considered. As a result of the investigation, it appears that the burden of establishing jurisdiction or a violation cannot be sustained. The evidence developed during the investigation was not sufficient to support the finding of statutory jurisdiction and a violation. Accordingly, further proceedings in this matter are deemed unwarranted and the complaint is hereby dismissed.³⁹⁴

Cases that conclude in settlement agreements are closed with slightly different letters. Settlement information, including the amount and the name of the complainant, is not public information. Letters indicating withdraw of a case are similarly brief. Each of these form letters close the investigation documented in the Final Investigative Report.

Final Investigative Reports, including cover letters, range from two to thirteen pages, with the average between five and six pages. Regional offices elected to redact different pieces of information from each FIR, but generally each of the documents

³⁹⁴ Occupational Health and Safety Administration, Region 4 (Atlanta). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed May 22, 2006. On file with author as Case No. 76.

includes a standard format page listing the date the case was opened, the name of the regional investigator, the complainant's name, the complainant's representative, the respondent, and the respondent's representative. This first section also includes a brief statement of the complainant's allegation, the employer's defense, and a "coverage" line indicating how the employer falls into OSHA's jurisdiction. Each also included a redacted list of the witnesses, where there were witnesses. The most extensive section of the document is an "Investigative Findings" narrative. This is followed by the "Analysis" section, a "Closing Conference" section, and a "Recommendation" section.

The complainant information and the list of witnesses is redacted throughout each of the 326 cases that have been obtained. The only other sections of the FIR that are redacted across the regions is the "Analysis" section which documents the OSHA investigator's thinking about the case and the "Recommendation" section which can be deduced by the case closing cover letter despite this redaction. The "Investigative Findings" section is the investigator's narrative report of the grievance, the statement of the employee complainant, the investigator's conversations with witnesses, and the investigator's discussion with the respondent. Through these non-redacted sections, the case is reconstructed and we can learn about the experience of this legal recourse.

Among the information that would have been helpful to collect but was either not collected or not available systematically in all investigation reports include union presence, industrial sector of the employer, the number of employees at the worksite, and complainant occupation. Despite no systematic information on these topics, the following count of the top ten occupations by broad category was pieced together from the Atlanta Region 4 cases which provided over one-third of all FIRs examined:

1. Equipment operators, from forklifts to cranes (14.4%)
2. Manufacturing and fabricating employees (13.5%)
3. Commercial drivers, all varieties (13.5%)
4. General laborers (12.5%)
5. Retail services, including food service (9.6%)
6. Other construction workers (8.6%)
7. Mechanics and maintenance workers (8.6%)
8. Cleaners, all varieties (7.7%)
9. Pipefitters and welders (6.7%)
10. Social service and healthcare employees (4.8%)

Given the high legal bar in OSHA 11(c) refusal cases, one might expect that a bias exists towards the traditionally dangerous occupations. This list does confirm this bias to a degree. This list also includes a number of service sector-related occupations and this may be indicative of the difficulty of pursuing the right to refuse under this model of protection outside of what has been considered more traditionally hazardous work.

Four specific areas of concern exist in the framework of OSHA Section 11(c) refusal to work discrimination cases. This analysis follows the principle that workers' health and safety is a human rights issue, namely that labor policies on worker health and safety must be made effective in accordance with human rights principles. These four areas of concerns are: (1) the disposition of cases by OSHA regions, (2) employer defenses and social dialog about health and safety, (3) worker representation and the role of investigators, and (4) the de-collectivization of individual employment rights. Each of these four key concerns is addressed in a separate section. The conclusion of the chapter follows the presentation of these four areas of concern and summarizes the overall evaluation of the right to refuse unsafe work under the Convention 155 model.

a. *The disposition of cases by OSHA regional offices*

The responsibility for the initial screening and investigation of refusal to work discrimination cases under OSHA Section 11(c) falls to the ten regional OSHA offices where states have not adopted OSHA State Plans. Twenty-eight U.S. states have not adopted OSHA State Plans for the private sector. The number of complaints remains low relative to work-related illnesses and injuries around the country and inadequate data is available about OSHA's process of screening-out Section 11(c) refusal to work complaints. Where cases are deemed to have merit, the practice is the negotiation of a settlement agreement versus the pursuit of broader enforcement remedies. The 11(c) complaint mechanism thus has become a supplemental unemployment compensation program with a legal recourse that fails to protect any degree of the right to refuse.

Across the ten OSHA regions a total of 402 refusal to work cases were closed from 2004 to 2008. According to the Bureau of Labor Statistics, the number of fatal workplace injuries (not including fatal workplace illnesses) over the same period is 28,209 people.³⁹⁵ We can deduce that either the current legal recourse protecting the right to refuse is an ineffective framework for protection, or that recorded workplace fatalities have occurred so suddenly that no time exists to contemplate the refusal of unsafe work. If the latter is false in even a fraction of workplace deaths, then workers in America either voluntarily supplicate themselves to their employer's will so totally that they die for them without question, or workers in America are coerced to death by a failed industrial relations system where only 6.9 percent of all private sector workers nationwide enjoy the basic freedom of association right to collective bargaining.³⁹⁶

³⁹⁵ Bureau of Labor Statistics. (2004-2008). Census of Fatal Occupational Injuries. Washington, D.C.: U.S. Department of Labor.

³⁹⁶ Bureau of Labor Statistics. (2010). Union Members Survey. Washington, D.C.: U.S. Department of Labor.

The 11(c) refusal to work complaints received by OSHA regions significantly exceeds the number of cases opened for investigation. Many complaints are “screen-outs” and are not recorded by the regional offices in any systematic way. A count of screened-out refusal complaints under Section 11(c) is unavailable. According to correspondence with the Office of the Whistleblower Protection Program, the number of refusal screen-outs to open investigations under Section 11(c) may be as high as a 5-to-1 ratio. This would place screened 11(c) refusals closer to 500 cases annually.

The majority of Section 11(c) work refusal investigations are closed by either a dismissal or the complainant withdrawing the case. Complainants who withdraw the case are often told by OSHA investigators that their case is going to be dismissed, and the investigator extends a courtesy period to the complainant to withdraw the case to avoid a formal dismissal. In a handful of cases withdrawn, the worker indicates to the investigator they are seeking remedies through the grievance procedure of a collective bargaining agreement. There is evidence from the FIRs that workers terminated for their refusal seek unemployment compensation and withdraw their case to avoid receiving a dismissal that may jeopardize their unemployment compensation claims.

Altogether, 12.1% of cases were withdrawn by the complainant, the majority, 66.3% of cases, were dismissed as without merit under the statute, and 21.3% of cases had negotiated settlement agreements. These figures are consistent with past oversight reports of Section 11(c) investigations. The average time to disposition of the cases examined, from the date OSHA receives the complaint, is 90.95 days. The longest disposition was 818 days and the shortest was one day. Over 2/3rds (the standard deviation) were disposed between 34.8 days and 146.7 days after receipt of complaint.

As settlement agreements were the overwhelming method of choice to resolve merit cases, the negotiated process of alternative dispute resolution pursued by each

regional OSHA office needs scrutiny. The only information made available through this Freedom of Information Act request regarding settlement agreements is the one page final disposition letter that accompanies each Final Investigative Report. Each of the settlement agreements, to the displeasure of labor scholars, is classified as exempt from public release under the Freedom of Information Act. Government oversight studies have reported that less than 3 percent of all Section 11(c) settlements include the reinstatement of the worker to employment. This figure includes all OSHA discrimination and retaliation cases. Given the legal challenges facing refusal to work investigations, one might deduce that the overall employee reinstatement rate for refusal to work cases settled under Section 11(c) may be lower than 3 percent. As public policy, however, these findings demonstrate that Section 11(c) functions little more than a supplementary unemployment benefit for a handful of those discharged.

The anti-discrimination protections under OSHA Section 11(c) do not function as workers' rights protections. No evidence suggests that any settlement negotiations entail negotiating changes to the original health and safety hazard that was of concern. The dominant remedy is a lump sum payment to an individual complainant. Such remedies do not conform to the statutory requirement of providing workers with "all appropriate remedies". These remedies also keep the authority of 11(c) insulated from a litigation record that might be developed and pursued by the Office of the Solicitor of Labor. OSHA administrators must decide if refusal to work protections afforded under Section 11(c) should remain simply supplemental unemployment benefits for a small group of workers. Developing a litigation strategy with the Solicitor of Labor and perhaps the General Counsel of the NLRB to push refusal to work cases could be pursued to broaden the protection of worker activism on health and safety concerns. Overall, the disposition of cases by OSHA is dreadful and sacrifices workers' rights

without a fight while failing to push the boundaries of an admittedly restrictive statute.

b. Employer defenses and social dialog about health and safety

Given the legal framework underlying the limited refusal protection model that is followed by Section 11(c) and ILO Convention No. 155, employers can leverage the power granted by the law to afford themselves a strong defense. The statutory and the regulatory intent behind Section 11(c) is not adequate to overcome a given employer's common law status assumptions in employment relations. As a result, the regulatory requirement to debate the degree of hazard (to protect workers against serious and imminent dangers), never effectively happens. The strong managerialist orientation at the root of Section 11(c) makes the effective protection of workers meaningless within this kind of legal protection. Employees face a major hurdle in overcoming the burden of proof required to secure legal protection. Temporary and contract workers face unique obstacles. The employer's legal defenses stand like a fortified army garrison.

Dismissal letters sometimes offer complainants a detailed explanation as to what is required to prove an allegation under Section 11(c) and its regulations. One dismissal letter, sent to a Florida man employed as a temporary worker contracted to Consolidated Minerals in Orlando, Florida, included a clear and detailed description of the various Section 11(c) administrative requirements, offered as an explanation.

Specifically, in order to have proven allegations under 29 C.F.R. 1977.12 (b) (2), the investigation needed to establish that the following conditions were met: 1) where possible, Complainant asked Respondent to eliminate the danger, and the Respondent failed to do so; **and** 2) Complainant refused to work in "good faith." Specifically, that Complainant genuinely believed that an imminent danger existed. Complainant's refusal could not be a disguised attempt to harass Respondent or disrupt business; **and** 3) a reasonable person would agree that there was a real danger or serious injury; **and** 4) there was not enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Further, when all of the above conditions are met, the investigation needed to establish that Complainant took the following steps: 1) he asked Respondent to correct the hazard; 2) he asked Respondent for other work; 3) he told Respondent that he would not perform the work unless and until the hazard was corrected; **and** 4) he remained at the work site until ordered to leave by Respondent. By you and your own admission, you were not told by management you were being discharged and you did not remain at the worksite until ordered by Respondent to leave. Finally, there is no evidence that you attempted to contact OSHA to report the hazard prior to leaving the worksite.³⁹⁷ (Emphasis in original letter)

These requirements shift the burden of proof on to the worker-complainant. This shift thus creates a significant social burden most complainants are not able to overcome.

Because the burden of proof is on the complainant, and not on the employer, the employer is not obligated to show health and safety. Employers simply fall back on their everyday legal powers, the power to control their workforce. These liberal market status assumptions are valuable in fighting work refusals. Table 5.6 ranks the primary employer defenses in each Final Investigative Report. The existence of a safe and healthy workplace is argued as an employer defense in only 8.3 percent of the 11(c) refusal to work investigations. The other 91 percent of the time employers use what in the U.S. are common law status assumptions regulating liberal employment relations. These include allegations of insubordination, job abandonment, behavioral issues, voluntary quits, poor performance, and reduction or layoffs as arguments for terminating employees. Because the burden of proof is on the complainant to show imminent and serious danger, employer respondents do not have to engage in this debate and can fall back on their legal power base, employment termination rights. To correct this inequity, employers should be required to demonstrate safety and health as

³⁹⁷ Occupational Health and Safety Administration, Region 4 (Atlanta). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed March 28, 2005. On file with author as Case No. 06.

the first obligation; otherwise an employee must be granted immediate reinstatement.

TABLE 5.6. *Primary employer defenses in OSHA 11(c) work refusals (n=241)*

Defense	Percentage of Cases
1. Insubordination	29.5
2. Job abandonment	22.4
3. Voluntarily quit	14.5
4. Poor performance	12.0
5. Behavioral issues	9.5
6. HEALTH / SAFETY	8.3
7. Reduction or layoff	3.3

Shifting the burden of proof would, in this highly regulated framework, still leave obstacles and afford employers unequal avenues to sustaining and ensuring their own defense. The obligation that complainants first ask the employer-respondent to eliminate a hazard *as a precondition* for exercising the right to refuse afforded some employers time to build the case against those workers unfortunate enough to voice their concerns. This includes evidence tampering, the shifting or altering of the work site without safety or health hazard abatement. When workers voice their complaint and refuse a work assignment, there is a delay from the time of termination to the time an inspector from an OSHA regional office might examine a worksite. This delay may be two days or longer. In some cases, it is not clear that the inspector ever did an on-site investigation of workplace hazards. This delay gives employers time to tamper with the evidence. In one work refusal, an employee complained about unsafe scaffolding. When the OSHA inspector arrived to investigate the refusal to work, the

scaffolding structure had been removed entirely.³⁹⁸ In another case, a worker made a complaint about adequate cave-in protection while working in a trench. By the time the OSHA inspector investigated the work site and the refusal to work, the trench had been filled with earth and was no longer there, making any evaluation of serious or imminent danger impossible.³⁹⁹ These cases show the social inequities built into the complaint and defense positioning of Section 11(c) refusal to work protections.

The employer defense of reduction or layoff takes on a special meaning when the complainant is a temporary or contract worker. Employers in these cases shape their defenses around the contract work relationship with the temporary work agency. In one such case that is typical of the handful of cases that fall into this category, an employer said that no termination had occurred, that the contracted temporary agency was still a client of the employer, but that there was just no work available at that moment to be contract; they would be contacted when their services were needed.⁴⁰⁰ Employers have an extra degree of leverage over workers in precarious arrangements.

Because employers have no burden of proof to demonstrate safety, 11(c) case investigators go along with employer defenses in their fact-finding efforts. This may be logical in this model of protection because employees are required to demonstrate they are entering into a work refusal with a good faith belief of a dangerous or serious injury. Thus the employee's character is called into question repeatedly in the process of investigating refusal complaints. This buttresses an employer's standard defensive

³⁹⁸ Occupational Health and Safety Administration, Region 4 (Atlanta). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed February 13, 2006. On file with author as Case No. 71.

³⁹⁹ Occupational Health and Safety Administration, Region 4 (Atlanta). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed April 24, 2006. On file with author as Case No. 54.

⁴⁰⁰ Occupational Health and Safety Administration, Region 4 (Atlanta). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed June 29, 2006. On file with author as Case No. 70.

posture because investigators collect evidence as to the worker's moral character and honor, respect and trustworthiness as an employee. Some investigators spend most of their fact-finding work collecting evidence of the workers' character and job history. This may include the number of days they are late to work, their attendance records, their past disciplinary experience, etc. In a handful of cases, this is the entire focus. The following case chronology from OSHA Region 4 is illustrative of this key point:

Investigative Findings

(chronology)

- 6-27-05 Complainant was hired as a (**redacted**) installing glass block at various construction sites in South Florida. The job required employees to work on a ladder installing the glass block masonry. Respondent said Complainant was unable to work on ladders and he would try to work solely on the ground. Respondent said Complainant took 7 personal days in 60 days of work.
- 8-1-05 Complainant took day off for personal reasons.
- 8-15-05 Complainant took day off for personal reasons.
- 8-17-05 Complainant left work early with shoulder pain.
- 8-18-05 Complainant had back pain and went on workers' compensation until 8-22-05.
- 8-24-05 Complainant was 20 minutes late for work.
- 8-25-05 Complainant took day off for personal reasons.
- 8-31-05 Complainant took day off because he broke his glasses.⁴⁰¹

Some investigators even compare the Complainant's insubordinate behavior leading to

⁴⁰¹ Occupational Health and Safety Administration, Region 4 (Atlanta). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed November 15, 2005. On file with author as Case No. 36.

the work refusal to the policies outlined in management's employee handbook:

The records provided by the Respondent documented the events which led up to the Complainants termination. She was terminated for refusing to perform her assigned work which is considered insubordination per company policy 6-1-B. The Complainant signed the Review of Employee Handbook on May 6, 2003. Section Six "Personal Conduct" identifies causes for immediate discharge. Item B states "Refusal to perform assigned work" as one of the reasons for immediate discharge.⁴⁰²

In each of these cases, the fact-finding work of the investigator was focused on the insubordination of the employee, from character flaws to violating company policies. Legal rights in this mold are contingent upon moral character. Under the limited framework of Section 11(c) and Convention No. 155, a worker who has a poor work attendance record, or violates company policy, for instance, is less likely to win legal protection than is someone without such a record because their character is called into question. Creating a different burden of proof where employers must prove a task is safe for a particular worker could be one answer to this conundrum. Employers will still be in a position to alter a situation prior to OSHA intervention as well as argue that individual "workplace sensitivities" should not gain protected status wherever workers' rights are made contingent upon the adjudication of a hazard. Workers' rights should not be made contingent upon a social dialog with employers that rests upon the evaluation of a workers' moral character. Where such a contingency exists it will be called into question and liberal market employment relations will afford the employer a strong defense rooted in charges against one's character and moral standing as opposed any real protection of workers' occupational health and safety.

⁴⁰² Occupational Health and Safety Administration, Region 5 (Chicago). Final Investigative Report. Section 11(c) Refusal to Work Complaint. Closed June 13, 2006. On file with author as Case No. 144.

c. *Representation and the role of the investigator*

Section 11(c) work refusal investigations are qualitatively different than the standard labor inspection tasks that occupy most of the time of the investigatory staff of the OSHA regional offices. The issue of how workers' interests are represented in refusal investigations is important. This means examining the relationship between the investigator and the complainant, and the role the investigator plays in disposing of refusal cases. This relationship is especially important given the social inequities that unorganized workers face in representing their legal claims, unlike the representation available to employers documented in Section 11(c) refusal to work investigations.

No provision exists under Section 11(c) (or defined in Convention No. 155) for unorganized workers to secure representation. In the 326 cases examined between 2004 and 2008, employees had no representation and were self-represented in 95.9 percent of cases. Only 3 percent of complainants listed lawyers as the address of their legal representation. Conversely, employers responding to refusal to work complaints listed a variety of legal representatives. These included in-house company attorneys; hired corporate counsel; company owners, presidents and executives; plant and worksite managers; senior human resource directors; and safety directors. Health and safety directors were reported as the company representatives in a handful of 11(c) refusal to work cases (2.4 percent of investigations where the employer representatives were identified). All employers had some representation, with 22.9 percent reporting lawyers (in-house or otherwise), 26.1 percent reporting company executives, and 48.6 percent reporting managers or other representatives such as human resource managers.

This disparity in legal representation between the parties is atrocious from a social justice perspective. Given the obstacles workers face in justifying their exercise of the right to refuse unsafe work, including the burden of proof orientation behind the

Section 11(c) refusal to work framework, no representation exacerbates this inequity.

Legal representation for unorganized, non-union workers exercising individual employment rights is dealt with as a social justice issue in other settings. In Ontario, the provincial government funds the Office of the Worker Advisor as an independent agency of the Ministry of Labor. This agency provides free services to non-unionized injured workers regarding the pursuit of workers' compensation claims. Although not as overtly assuming the role of worker advocate, another good example is the U.S. National Labor Relations Act. The NLRA created the General Counsel independent from the adjudicative functions of the National Labor Relations Board. As a result, "Information Officers" receive charges made by workers and conduct preliminary fact-finding to determine sufficient evidence to warrant a formal charge. If there is sufficient evidence of an Unfair Labor Practice under the NLRA, the investigator issues a formal complaint and becomes the legal advocate for the worker as the case moves before an Administrative Law Judge for adjudication. Thus within the model established by the NLRA, the investigation and adjudication functions are separated very early in the complaint process. The fact-finder becomes the de facto worker advocate once a basic and sufficient evidentiary threshold has been satisfied.

The institutionalized and government-supported labor advocacy arrangements found in the Office of the Worker Advisor and the NLRA General Counsel division does not exist in the administrative framework established under OSHA Section 11(c). Technically, there is no adjudication of Section 11(c) complaints until the Solicitor of Labor brings a case to U.S. District Court against an employer. As a result, all 11(c) investigators are always wearing the dual hats of an investigator and mediator, never fully assuming the position of worker advocate like the General Counsel at the NLRB in documenting Unfair Labor Practice violations of protected concerted activity by an

unorganized worker or group of workers. Section 11(c) investigators hold the role of gatekeeper, which binds their investigation with a more quasi-adjudicative function.

One proposal to address this inequity in-house at OSHA would be to separate the case adjudicative function from the OSHA investigators, in turn allowing all OSHA 11(c) case investigators to assume an overt posture of worker advocate. The Office of the Whistleblower Protection Program might establish an informal panel and allow investigators to assume the role of worker advocate on an exclusive basis where cases were screened and investigations opened. The DOL Office of the Solicitor could create a dedicated liaison with the in-house 11(c) panel to immediately draft enforcement orders to be taken to U.S. District Court. Most importantly, enforcement orders should strive for abatement of hazards and, especially, the reinstatement of the worker, developing a stronger jurisprudence under federal law in the process. The DOL Solicitor of Labor could also establish a procedure for requesting the temporary reinstatement of workers with complaints under review by the in-house 11(c) panel.

Investigations of Section 11(c) are contingent in part on meeting an imminent danger standard. There appears to be evidence across the investigatory documents indicating that Section 11(c) investigators give more weight to hazards that directly violate current OSHA health and safety standards. This means new and emerging hazards that may pose an imminent and serious danger but may not violate current OSHA standards face a higher threshold to achieving merit status. Investigators should be trained to know that Section 11(c) cases do not need to demonstrate a direct relationship to OSHA health and safety standards. Merit cases can exist statutorily regarding hazards that have no relationship to the current body of OSHA standards.

Underlying the disparities in representation between workers and employers in Section 11(c) refusal cases and highlighting the nature of the relationship between

complainant and investigator is evidence from the Final Investigative Reports about the loss of contact with complainants during an investigation. Across dismissed cases, exactly one-third of work refusals ended with the OSHA investigator losing contact with the worker-complainant. This was the result of either a simple disconnected telephone line or returned postal mail, for example. Losing contact with individual worker-complainants in this fashion is an indication of the social inequity inherent when workers are forced to self-represent in pursuing individual employment rights.

The role of the investigator, as the point of first contact for the employee-complainant in Section 11(c) work refusals, must be scrutinized and adjusted so as to ensure the effective protection of the right to health and safety on the job. The many disparities in representation in these cases point to the need for an institutionalized system of labor advocacy, and the role of the first contact investigator is important in the effectuation of such a system. Not establishing the proper legal and administrative safeguards for employee-complainants jeopardizes the protection of the right to refuse at best, and, at worst, makes the right simply a meaningless expression on paper only.

d. The de-collectivization of individual employment rights

Despite the horrid disposition of cases, the defenses afforded to employers, and the social inequities in worker representation, a more fundamental legal rights problem exists. This problem impacts directly the exercise of workers' rights in this limited refusal protection model. OSHA Section 11(c) refusal rights (and by extension the rights accepted by Convention 155) work to decollectivize individual employment rights. This was documented in the Canadian case and this reading of case documents also provides evidence to this effect in the U.S. Section 11(c) cases document a socio-legal misfit between what is an "individualist" rights regime and the social experience of the employment relationship itself. Section 11(c) forces workers to represent their

legal claims in ways that do not fit their social experience in employment. It is not, therefore, the rights-based framework that has weakened worker's efforts to promote their interests. Rather, it is the restriction of rights and freedoms that has challenged independent advocacy and threatened health and safety in the working environment.

Under the National Labor Relations Act, as discussed in a previous chapter, unorganized workers who voice their concerns about working conditions are protected under Section 7 as engaging in protected concerted activity. The extent to which an individual employee can engage in protected concerted activity in part depends on the nature of the activity itself. Signing a labor union authorization card is by nature, for example, protected concerted activity. NLRB jurisprudence since the early 1980s, specifically since the *Meyers Industries* cases, started a new era of narrowing the individual activity defined as protected by Section 7.⁴⁰³ Whereas once the NLRB considered the right to refuse unsafe work by an individual worker of obvious mutual concern and thus protected concerted activity, since the *Meyers*-era jurisprudence this protected individual activity has been restricted sharply. The NLRB since *Meyers* has followed an "objective" concerted activity standard. Under this standard, an employee must demonstrably act with another employee to gain the legal protection of Section 7.

OSHA Section 11(c) protections, which are afforded to individuals, encounter an interesting problem in relationship to activity that once would have been afforded broad Section 7 protections under the NLRA. Evidence exists within the investigation case files of both constructive and objective concerted activity. The term constructive concerted activity is given to protected concerted activity engaged in where there is no overt demonstrable joint act with other workers (even though the act itself might be clearly of obvious mutual concern). Because Section 11(c) cases document both

⁴⁰³ *Meyers Industries, Inc. and Kenneth P. Prill*, 268 NLRB 73. 1984.

constructed and objective concerted activity, it raises serious questions about why more joint efforts are not being made by OSHA and the NLRB to enforce workers' rights where the jurisprudence overlaps. Section 11(c) cases examined here are filled with instances of objective concerted activity. OSHA investigators act to slice up legal complaints from more than one employee and they administer the investigation according to the statutory and regulatory mandates of the more individualist employee protection provisions of the Occupational Safety and Health Act under Section 11(c).

Although the time may be ripe for defending constructed concerted activity and obvious mutual concern (especially in the wake of catastrophes like the BP's Deepwater Horizon oil rig explosion in the Gulf of Mexico), attention must be placed on the treatment of *objective* concerted activity scenarios observed in OSHA Section 11(c) refusal to work discrimination cases. This task is important because it highlights a fundamental weakness in the refusal protection model under ILO international labor standards: How this legal framework actively atomizes workers by making individual employment rights an exclusively individualist endeavor, even in situations where complainants consider and seek to pursue their complaint in broader social terms that include themselves but are not limited to only themselves. Where concerted action in its objective definition is observed, Section 11(c) investigations reconstitute the legal claims as individualist complaints. This is a fundamental problem with Section 11(c) and the refusal protection model that is advocated by international labor standards.

Table 5.7 breaks down the types of employee concerted activity observed in the OSHA Section 11(c) work refusals. Since each case is either a type of objective concerted activity or a constructive concerted activity, adding constructive concerted activity to this table brings this total to 100 percent. In many cases, as a caveat to this analysis, there simply was not enough information in the investigative report to assess

the situation with any degree of certainty. These cases are coded missing data and are not included in the total, reducing the total number of cases examined. Examples of this include where a report has been heavily redacted, where pages are missing, or where the FIR is only a one-page case handling memo with no field investigation.

Where there is case narrative documented with no evidence of any objective concerted action apparent, the case has been coded as constructive concerted activity. Where objective concerted activity is noted, the cases have been categorized through a simple content analysis in order to give the reader a better explanation as to what is being observed. This method likely undercounts the extent of the objective concerted activity because investigators are documenting individual cases and often ignore the social context, giving no further evidence about the position of co-workers in a case.

TABLE 5.7. *Concerted activity in OSHA 11(c) work refusals by type (n=190*)*

Objective concerted activity		54.2%
Joint refusal to work or investigation indicated that other workers had previously refused the same or similar assigned task being refused	22.1%	
Another work was hurt, hospitalized or nearly hurt / made ill by the hazard	15.8%	
Investigator documented co-worker support for the complainant refusal	12.6%	
Co-worker expressed hesitation of fear regarding the hazard at issue	3.7%	
Constructive concerted activity		45.8%

* Full field investigations

Over half of full field investigations under Section 11(c) showed evidence of objective concerted activity. Despite this high percentage, not a single investigation documents a referral to the National Labor Relations Board. Four groups of objective concerted activity were documented. The first type observed was the classic collective work refusal where two or more complainants either refused the work task or another

employee or employees were mentioned as refusing the same task previously. These joint refusals were 22.1 percent of all cases receiving a full OSHA field investigation.

A second form of objective concerted activity was documented where any co-workers expressed support for the lone refusing complainant. These cases represented 12.6 percent of cases. Other co-workers expressing a shared hesitation or fear about assuming the assignment was found in 3.7 percent of cases. In 15.8 percent of cases a co-worker was reported as being hurt, hospitalized, endangered or the subject of a near miss accident from the hazard or exposed to a hazard for which OSHA had issued the employer a citation. Each case was categorized into the one single category that best described each situation, making the categories listed in Table 5.7 mutually exclusive.

The limited refusal protection model represents a socio-legal misfit in the protection of workers' rights. Where OSHA investigations are charged with enforcing the protection, they are often times placed in the role of atomizing and individualizing what are otherwise genuine social concerns. This legal framework is thus ill-equipped to deal with the unequal power in the employment relationship. It decollectivizes individual employment rights and is not ultimately in the interests of workers' right to health and safety or society's desire for the protection of the working environment.

5.5. The effectiveness of the right to refuse under Convention 155

Where labor policies protecting human rights do not secure the interests of those rights-holding individuals they proclaim to protect, no real consensus exists. Where labor policies are assumed to represent a social consensus in society and they fail to protect the interests of groups of workers said to support this consensus, there exists a false consensus. Given the available evidence from Canadian labor relations scholarship and the documentation from U.S. case files of work refusal investigations

under OSHA Section 11(c), the limited legal protection of the right to refuse unsafe work is a *false consensus* under North American labor policy and by extension under the related ILO international labor standards, namely ILO Convention No. 155.

An earnest discussion is needed about the protection of workers' rights in the context of occupational health and safety questions. If society is to continue on its present course of enforcing rights-obligation structures that buttress and protect the liberal market employment relationship and in turn weaken nascent efforts for the organization and empowerment of workers, it is likely that occupational safety and health hazards will go on unabated and work-related illness and injury will continue.

Given the complexity of workplace hazards and the convergence of health and safety hazards with environmental protection, the failure to establish real workplace or industrial representation systems where workers may legally work to ameliorate their concerns bodes ill for workers' rights and society. This is a moral concern as another 2.2 million workers will continue to die of work-related causes every year. It is also an ecologic concern as the industrial consumer-based economy continues ungoverned on these matters globally. Ensuring effective rights-obligations structures for workers' rights on health and safety matters is an endeavor that has been ignored in neo-liberal global worker health and safety policy. Global worker health and safety policy under this paradigm of worker protection is ineffective and it constitutes a false consensus.

CHAPTER VI

POLICYMAKING OBSTACLES

A cultural history of the right to refuse as global worker health and safety policy

6.1. Cultural obstacles as employer political activity

This chapter is an analysis of the policymaking that gave rise to the restrictive protection of the right to refuse unsafe work in global worker health and safety policy. The focus is upon the historical period of the development, negotiation and adoption of Convention No. 155, the convention on occupational health, safety and the working environment. This focus includes the role of business and employer political activity in a way that extends beyond the basic political pressure tactics and influence-seeking mechanisms commonly employed in labor policymaking. The key factor this chapter examines is the role of culture as culture played a formidable role in policymaking. The term “culture” in this context is not defined in the narrow sense used in everyday speech but as a general term often used in social science to encompass all “symbolic and learned aspects of human society.”⁴⁰⁴ This definition encompasses matters like knowledge, beliefs, values, morals, norms, ideas and customs. In the shaping of ILO Convention No. 155, such cultural factors were used strategically and formed effective influencing-seeking strategies in the design of global worker health and safety policy.

In contested politics and political research, the political influence of ideas has been recognized as able to define the boundaries of what constitute the “appropriate, legitimate, and proper” issues for social action. Béland and Cox describe this view:

⁴⁰⁴ Scott, John, & Gordon Marshall. (2005). *A dictionary of sociology* (3rd ed.). Oxford and Toronto: Oxford University Press.

Ideas shape how we understand political problems.... By giving definition to our values and preferences, ideas provide us with interpretive frameworks that make us see some facts as important, and others as less so.... By focusing on ideas, we can explain . . . how policy ideas are produced, disseminated and reproduced.⁴⁰⁵

A cultural history of global worker health and safety policy reveals the influence of ideas in the context of labor rights policymaking and employer counter-mobilization. Idea-based cultural strategies have been essential as an employer political tool against health and safety rights. These strategies are responsible for the failure of global labor rights policy on the right to refuse unsafe work and thus the establishment of a false consensus in global worker health and safety policy. This chapter documents the development of these idea-based “cultural” policymaking obstacles and their use in the negotiation of Convention No. 155 on health and safety in the working environment.

Investigating political obstacles in labor policymaking is important to the study of workers’ rights as human rights. Because human rights theory says human rights must be effective, political processes that confound effective protection are themselves barriers to the realization of human rights. Where, for example, employers as political actors strategically advance ideas that confound effective policies, broader concerns must be raised about the politics and process of decision-making. Where human rights policies are ineffective, a false consensus exists from the rights-holder’s perspective.

The issue of “cultural politics” has been identified as of concern to human rights policymakers. The sociologist Kate Nash has defined one approach to this analysis, writing that cultural politics “concerns public contests over how society is imagined” and “how social relations are, could and should be organized.” These strategies are not just the domain of the creative activist seeking revolutionary change.

⁴⁰⁵ Béland, Daniel, & Robert Henry Cox (Eds.). (2011). *Ideas and Politics in Social Science Research*: Oxford University Press.

They are used “just as likely, in defending what already exists” as cultural politics dynamics “validate particular perspectives, creating hierarchies of subordination and obscuring or excluding recognition of differences and inequalities.”⁴⁰⁶ Dynamics such as these influence policymaking and enable some social policy forms over others.

New ideas emerged in the field of worker health and safety policy prior to the creation of Convention No. 155. These cultural ideas were spread and caused the ILO to undergo striking changes in its standards- setting policy on health and safety and the working environment. The right to refuse unsafe work played an important role in the construction of this narrative. The global influence of North America in the second half of the 20th century made market-based policy models influential as the neoliberal “Washington Consensus” dominated international institutions from the 1970s onward. Today, Convention No. 155 is the ILO’s primary global response to worker health and safety hazards. Adopted in 1981 after a period of social discontent with business and an increasingly protectionist sentiment throughout the 1970s, Convention No. 155 was drafted and advocated as a strategy for global labor standards to more easily be tied to trade liberalization.⁴⁰⁷ The self-regulatory logic underlying the labor convention made the demand for labor standards-linked trade easier to digest for neoliberal advocates.

The U.S. pushed this debate by asking what the “truly minimum” international labor standards actually were. Health and safety was made subject to a sweeping new set of values, beliefs and culture understandings. This worldview created a contested political negotiation for Convention No. 155. The right to refuse unsafe work was at key moments promoted by business to appease a suspicious global union leadership

⁴⁰⁶ Nash, Kate. (2009). *The Cultural Politics of Human Rights*. Cambridge and New York: Cambridge University Press. Pages 1-5.

⁴⁰⁷ For a more in-depth analysis about the relationship between worker health and safety standards and the global trade debate, see Samuel, Howard D. (1984). International Occupational Health Standards: An American Perspective. *American Journal of Industrial Medicine*, 6, 67-73.

seeking stronger, more effective rights-based discrimination protections. Ultimately, the right to refuse was used at key decision-making junctures to obtain basic tripartite political buy-in from organized labor in lieu of any strong discrimination protections. Before this the limited right to refuse unsafe work had been largely a North American creation. Canada, in particular, led the world in legislating this model of refusal rights and advocated a polished and half-true version of its domestic experience globally.

The new values and beliefs that emerged on health and safety from this period dictated the range of acceptable policy choices. When members of the ILO Workers' Group became suspect and attempted to shift course in the negotiation of Convention 155, the accepted arena of values and beliefs that had already been laid made change impossible. The result was a new chapter in the history of market consciousness and culture spread globally and a new era of thought on worker health and safety policy.

When the U.S. returned to ILO membership in 1980, the first of two formal negotiations on Convention 155 had begun at the International Labor Conference in Geneva. The Employers' Group was among the strongest advocates globally for the advancement of what would become the new ILO values and cultural system in global labor rights policy. Canada, at the intersection of a British legacy of self-regulatory economic ideology, pro-market Fabian socialism in industrial relations, and a North American political culture of atomized market individualism, possessed the unique formula needed to blend the right to refuse unsafe work with this cultural political strategy. The re-casting of the old-style British industrial relations voluntarism was the political response to an increasingly contentious debate on global trade and labor rights that had workers and environmental activists demanding government action. These were cultural political strategies at work, designing a global labor rights policy not safe for workers, but instead safe for private enterprise, managerial rights, and the

liberalization of trade policy. An individual's right to be protected against employer discrimination for health and safety activism was, in reality, of little to no importance.

Convention 155 has celebrated thirty years since its adoption. Heralded with each new ratification, fifty-six countries are a party to the labor treaty, including many developing countries. Today, 2.3 billion people reside within the borders of countries that have ratified Convention 155. Each of these countries is shaping national labor policies in the model of protection that has been described throughout this dissertation. This is a story of the most insidious form of social exclusion, social exclusion which occurs without the full knowledge of those social actors being excluded. In the view of employer political activity, this is the best strategy for conflict avoidance, and the best strategy for mobilizing against the effective protection of workers' human rights.

6.2. The anti-worker origins of the Convention 155 values system

The first important postwar effort to re-conceptualize the trajectory of labor policy on workers' health and safety first developed in Great Britain, the birthplace of the self-regulatory political philosophy. Alfred Robens, a member of the House of Commons since 1945, was considered the Labour Party's rising star. Pegged as a successor to opposition leader Hugh Gaitskell, Robens eyed being Prime Minister and his political ascendancy was said to bode well for Labour's return to power. In 1960, however, Lord Alfred Robens' career trajectory would change. He would accept an offer by the conservative Prime Minister of the U.K., Harold Macmillan, to lead the National Coal Board, "one of the most important nationalized industries" in Britain.⁴⁰⁸

The decision was denounced by trade unionists. Mineworkers and the colliery managers association feared that an outside chairman would restructure the

⁴⁰⁸ Robens, Alfred. (1972). *Ten Year Stint*. London: Cassell & Company. Page 1.

industry in a way that would ultimately harm the workers and the nation. Robens' first act as chairmen of the National Coal Board was to tour every coal field, to, in his words, "give me a chance to assess the quality of the people occupying these posts, to get their views on the prospects of the industry, and to establish myself as the future Chairman."⁴⁰⁹ Robens later noted in detail his lessons learned from the tour:

My tour of the coalfields and discussions with experts both inside the industry and among our customers and suppliers had, long before I finally took over the Chairmanship, convinced me that what the Coal Board needed was a massive sales campaign, backed up by the greatest mechanization drive the industry had ever seen and a complete administrative reorganization. The need for the sales drive was obvious. Coal had been losing business for several years, stocks had been piling up at the pithead, and competition from fuel oil was intense. On the production side, I could see that new machines capable of carrying the industry to unheard-of heights of productivity were already available. What was needed was determined and sustained effort to bring them rapidly into the pits and with goodwill on the part of the men. I could see that this was something the unions would support wholeheartedly and, to this day, there has been no Ludditism in the industry."⁴¹⁰

Always the consummate politician, Robens enjoyed gathering meetings "to discuss the big policy questions" with people in the industry. His incessant focus on productivity would not subside throughout his ten year reign as National Coal Board chairman.

The fears of many British mine workers would be realized. In 1960 there were roughly 602,000 men "on colliery books" according to Lord Robens' autobiography. After ten years of Robens' tenure, a mere 285,000 workers had remained.⁴¹¹ His focus was productivity. Lord Robens' incessant drive for increasing productivity was his primary goal. Workers' health and safety for Lord Robens was a secondary concern to increasing productivity, mechanization, and the entrenchment of market economics.

⁴⁰⁹ Ibid. Page 9.

⁴¹⁰ Ibid. Pages 9-10.

⁴¹¹ Ibid. Page 310.

That was the case until the black avalanche of Friday, October 21, 1966.

It began an otherwise normal morning as elementary students gathered to sing “All Things Bright and Beautiful” in an assembly at the Pantglas Junior School in the small Welsh mining village of Aberfan. Silence broke the song as the rumble of what some thought was a loud jet plane was heard approaching the building. In seconds, walls were collapsing and windows cracking as 140,000 cubic yards of dense liquefied coal mining byproduct called “tip complex” rushed down the nearby mountainside:

Mr. Davis, our teacher, got the board out and wrote our maths class work and we were all working, and then it began. It was a tremendous rumbling sound and all the school went dead. You could hear a pin drop. Everyone was petrified, afraid to move. Everyone just froze in their seats. I just managed to get up and I reached the end of my desk when the sound got louder and nearer, ‘til I could see the black out of the window. I can’t remember any more but I woke up to find that a horrible nightmare had just begun in front of my eyes.

I was there for about an hour and a half until the fire brigade found me. I heard cries and screams, but I couldn’t move. The desk was jammed into my stomach and my leg was under the radiator. The little girl next to me was dead and her head was on my shoulder.⁴¹²

The Aberfan disaster killed 116 children between the ages of seven and ten. Twenty-eight adults including five school teachers also perished. The disaster started a full-on political firestorm surrounding Lord Alfred Robens and the National Coal Board.

Robens would admit fault to a Parliamentary tribunal which placed the blame on the National Coal Board for failure to properly regulate health and safety and the working environment. This was not before a “devastating” report was released to the public as Robens explained in the weeks leading up to the final inquiry report about an “unknown hazard” in an “unknown spring” beneath the liquid byproduct. The village

⁴¹² Iain McLean, Martin Johnes and the individual sources. (1999). The Last Day Before Half-Term Retrieved March 30, 2010, from <http://www.nuffield.ox.ac.uk/politics/aberfan/chap1.htm>

residents, however, informed the inquiry they “had known for years that the [National Coal Board] had been tipping on top of two streams.” The inquiry pointed directly to the National Coal Board. Despite his apology, Robens and his “inconsistent answers” under cross-examination were defiant. He “hoped the Government would never again set up a tribunal of this nature” as it was “a conspiracy of silence” for not blaming the local NCB officers. The Aberfan disaster inquiry pointed to Robens’ ineptitude:⁴¹³

As we shall hereafter seek to make clear, our strong and unanimous view is that the Aberfan disaster could and should have been prevented. We were not unmindful of the fact that strong words of calumny had been used before our Inquiry began. But the Report which follows tells not of wickedness but of ignorance, ineptitude and a failure in communications.⁴¹⁴

The Aberfan inquiry cited “ignorance on the part of those charged at all levels with the sitting, control and daily management of tips” and “bungling ineptitude on the part of those who had the duty of supervising and directing them.” It found “failure on the part of those having knowledge of the factors which affect tip safety” and failure to in any meaningful way “communicate that knowledge and to see that it was applied.”⁴¹⁵

As the Aberfan disaster pushed Robens and the National Coal Board into full damage control mode, Lord Robens became nasty. He initially offered 50 pounds compensation per bereaved family, holding fast at 500 pounds after the public outcry. The NCB refused to remove the waste tips remaining above the village. Ministers were “advised against holding a memorial service at Westminster Abbey on the grounds that ‘the Welsh Church was disestablished and had no claim on Westminster

⁴¹³ Mclean, Iain. (1997). Heartless Bully Who Added to Agony of Aberfan. *The Observer*, January 5 Sunday, Page 12. Quote from Prime Minister Harold Wilson.

⁴¹⁴ Tribunal Appointed to Inquire into the Disaster at Aberfan on October 21st, 1966. (1967). *Report of the Tribunal Appointed to Inquire into the Disaster at Aberfan on October 21st, 1966*. London: Her Majesty's Stationery Office. See also Robens, Alfred. (1972). *Ten Year Stint*. London: Cassell & Company. Page 256.

⁴¹⁵ Ibid.

Abbey’.” Buckingham Palace “discouraged the Lord-Lieutenant of Glamorgan from laying a wreath on the first anniversary of the disaster ‘on the grounds that there will be an anniversary every year and no doubt there will be other disasters too’.”⁴¹⁶

The historic implications of the Aberfan disaster would also provide one of the most ironic and odd political twists in all of modern global labor policy. Robens would not only “survive a report condemning him in forthright and emotional terms”—an inquiry that concluded his actions were a part of the “ignorance, ineptitude” and “failure” that resulted in the gruesome death of 116 Welsh children. He “was able to bully and bluster out the remainder of his term of office until he was appointed to chair a committee reviewing the law on health and safety at work,” a committee that concluded “that negligence of health and safety should not be a criminal offense.”⁴¹⁷

Lord Robens would become chair of the major investigation ordered by the British Parliament to examine occupational safety and health policy. In yet a further twist of irony, the “Lord Robens Committee Report” as it became known, outlined sweeping changes in the values, beliefs and general cultural approach to be taken by government to protect health and safety in the working environment. This cultural logic would not only be influential in Canada and the United States, it would later form the basis for a remarkable paradigm shift in ILO global labor rights standards.

The “Robens Committee” was established to examine “the safety and health of persons in the course of employment...and to consider whether any changes are needed in: (1) the scope or nature of the major relevant enactments, or (2) the nature and extent of voluntary action concerned with these matters...” The goal was to find “whether any further steps are required to safeguard members of the public... and to

⁴¹⁶ Mclean, Iain. (1997). Heartless Bully Who Added to Agony of Aberfan. *The Observer*, January 5 Sunday, Page 12.

⁴¹⁷ Ibid.

make recommendations.”⁴¹⁸ The importance of the timing of the Robens Committee was acknowledged by industrial health experts. One professor noted that “although there have been a number of committees which have studied segments of the subject, there has never, until Robens, been a comprehensive review by a single body.”⁴¹⁹

The Robens Committee Report criticized nine health and safety statutes under separate legal authorities and recommend consolidating the responsibility for worker health and safety under a single national authority.⁴²⁰ The single national authority would assume the management of all statutory enforcement. The authority prescribed, however, was not to have strengthened enforcement powers or empower trade unions. Instead, the value system constructed was a paradigm where worker health and safety was the responsibility of “day-to-day good management” and “a more effective self-regulating system.”⁴²¹ Robens had re-packaged the voluntarism of old for a new age:

The first and perhaps the most fundamental defect of the statutory system is simply that there is too much law....

The primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them. The point is quite crucial. Our present system encourages rather too much reliance on state regulation, and rather too little on personal responsibility and voluntary, self-generating effort. This imbalance must be redressed. A start should be made by reducing the sheer weight of the legislation. There is a role in the field for regulatory law and a role for government action. But these roles should be predominantly concerned not with detailed prescriptions for innumerable day-to-day circumstances but with influencing attitudes and with creating a framework for better safety and health

⁴¹⁸ Committee on Safety and Health at Work; Lord Robens, Chairman. (1972). *Safety and Health at Work, Report of the Committee, 1970-1972*. Presented to Parliament by the Secretary of State for Employment by Command of Her Majesty. London: Her Majesty's Stationery Office. Page XIV.

⁴¹⁹ Browne, R.C. (1973). Safety and Health at Work: The Robens Report. *British Journal of Industrial Medicine*, 30(1), 87-94. Page 87.

⁴²⁰ The Robens Committee visited the United States in May 1971 shortly after the passage of the U.S. Occupational Safety and Health Act of 1970.

⁴²¹ Browne, R.C. (1973). Safety and Health at Work: The Robens Report. *British Journal of Industrial Medicine*, 30(1), 87-94. Pages 87-88.

organization and action by industry itself.⁴²²

The Robens Committee Report argued the best way to avoid the sluggishness of the regulatory state would be “to associate outside interests right from the start with the process of making regulations.” Furthermore, the committee argued, “No further law should be made if the situation can be met by a voluntary code of practice.”⁴²³

In responding to their Parliamentary mandate to answer the question “What is wrong with the system?” the Robens Report wrote fondly of the industrial relations theorists: “None has put the matter more aptly than Sidney Webb” Roben exclaimed in the introduction of his final report. With authority Webb wrote of a market-based policy, at the time considered “English practical empiricism” and not “abstract theory of social justice....” This was described in the final version of the Robens Report:

This century of experiment in factory legislation affords a typical example of English practical empiricism. We began with no abstract theory of social justice or the rights of man. We seem always to have been incapable even to taking a general view of the subject we were legislating upon. Each successive statute aimed at remedying a single ascertained evil. It was in vain that objectors urged that other evils, no more defensible, existed in other trades or amongst other classes, or with persons of ages other than those to which the particular Bill applied. Neither logic nor consistency, neither the over-nice consideration of even-handed justice nor the quixotic appeal of a general humanitarianism, was permitted to stand in the way of a practical remedy for a proved wrong.⁴²⁴

Robens and Webb were doppelgangers when it came to designing their labor policy solutions to unsafe working conditions. The solution, whatever it was to be, was not

⁴²² Committee on Safety and Health at Work; Lord Robens, Chairman. (1972). *Safety and Health at Work, Report of the Committee, 1970-1972*. Presented to Parliament by the Secretary of State for Employment by Command of Her Majesty. London: Her Majesty's Stationery Office. Page 7.

⁴²³ Browne, R.C. (1973). Safety and Health at Work: The Robens Report. *British Journal of Industrial Medicine*, 30(1), 87-94. Page 88.

⁴²⁴ Committee on Safety and Health at Work; Lord Robens, Chairman. (1972). *Safety and Health at Work, Report of the Committee, 1970-1972*. Presented to Parliament by the Secretary of State for Employment by Command of Her Majesty. London: Her Majesty's Stationery Office. Page 5.

permitted to interfere with business productivity and the self-regulating marketplace.

At a critical time in the history of policymaking on workers' health, safety and the working environment, the Robens Report became an international sensation in the occupational health and safety field. The report was cited by the first OSHA leaders in the U.S. as they charted the new regulatory agency's enforcement strategy.⁴²⁵ The inquiry served as a model for a royal commission in Canada on workplace health and safety. Two years later, a "new" employer-friendly model of labor policy had emerged and its underlying logic was one of classic self-regulation for employers.

Robens' prescriptions were cast as aiming to solve the problem of workplace accidents and injuries as the primary goal. They did not, however, address the rights of workers to refuse unsafe work. That task would be taken up by Canada. Canada would prove vital during the negotiation of Convention 155 as the need arose for a strategy on rights able to satisfy labor and the ILO Workers' Group as voluntarism was repackaged and advanced inside a cohesive, *laissez-faire* cultural framework.

6.3. Shaping a new discourse on the right to refuse unsafe work

Canada followed the Robens Model closely, with key modifications. Within two years of the publication of the Robens Report the Province of Ontario, as the most populous and industrialized province in Canada and holding jurisdiction over almost all private sector labor relations in that province, conducted an investigation seeking recommendations for worker health and safety policy. In 1974 James M. Ham was appointed to head the Ontario Royal Commission on the Health and Safety of Workers in the Mines. Dr. Ham was an MIT-trained engineer and joined the Department of Electrical Engineering at the University of Toronto. At the time of his appointment to

⁴²⁵ See Ashford. Page 514.

the Royal Commission he was Dean of Applied Science and Engineering and would later be appointed president of the University of Toronto from 1978 to 1983.⁴²⁶

Joining Dr. Ham on the commission was an industrial advisor R. Peter Riggin. Riggin was vice president of corporate relations for Noranda Mines, Ltd., an old and established Canadian mining company incorporated in 1922. Edmund A. Perry was the commission's engineering advisor. Mr. Perry was a representative to the mining branch of the Council of the Association of Professional Engineers of Ontario. Jean Beaudry, a member of the staff of the United Steelworkers of America, was the labor advisor to the commission. Frederick Hume, a principal in the firm of Hume, Martin and Timmins, provided legal counsel for the commission. Cameron Gray, executive vice president of the Ontario Lung Disease Association and professor in the Department of Medicine at the University of Toronto, acted as medical consultant for the commission. Arthur L. Gladstone was executive secretary to the commission and did the heavy lifting for the group. He would find himself in an important role as he was also the senior policy advisory to Bette M. Stephenson, a conservative firebrand, member of Ontario Parliament, and Minister of Labor from the York Mills riding.⁴²⁷

That a royal commission on a topic restricted to a single industrial sector in one province should provide the foundation for reshaping labor policy across Canada could be seen as a questionable claim. Considering the nature of employer political influence in Canada and the role of the royal commission in providing key political leadership, however, the importance of what became known as the Ham Commission is evident. Michael Useem described this phenomenon in *The Inner Circle: Large Corporations and the Rise of Business Political Activity in the U.S. and U.K.* Political

⁴²⁶ Institute of Electrical and Electronics Engineers Canada. (1977). McNaughton Medal Winner Biographies Retrieved February 10, 2010, from <http://www.ieee.ca/awards/bios.htm>

⁴²⁷ Sass, Robert. (2010). Interview with the author. Saskatoon.

action on matters important to business is the product of diffusely structured networks:

These networks define a segment of the business community whose strategic location and internal organization propel it into a political leadership role on behalf of the entire corporate community. John Porter's description of Canada's system of power could equally well have been developed for the American and British counterparts. He closes his study of the Canadian 'vertical mosaic' with the conclusion that the multiple directors linking the country's large corporations 'are the ultimate decisionmakers and coordinators within the private sector of the economy. It is they who at the frontiers of economic and political systems represent the interests of corporate power. They are the real planners of the economy.'⁴²⁸

John Porter's sweeping study of Canadian society and decision-making singled-out the imperative role of the use of the royal commission as important shapers of discourse. The various royal commissions are "outstanding among the official bodies in which the economic elite are found." Royal commissions are "not composed exclusively of the corporate elite" because in most cases are made "to represent various institutional orders."⁴²⁹ Porter noted that often the "economic elite" provide significant input and influence on royal commissions to assure that the various private sector interests are protected. The extension of power beyond the boardrooms occurs by the "creation of a cultural social product" able to extend power "beyond the economic system."⁴³⁰

These cultural strategies aim "to make their ideology pervade the entire society until it becomes identified with the common good." If, at times, they "accept changes like labour legislation or health insurance," wrote Porter on Canada's political culture, "it is not because of an opposing social movement based on class conflict, but because other elites, such as the political, are at work seeking to consolidate their power" as the

⁴²⁸ Useem, Michael. (1984). *The Inner Circle: Large corporations and the rise of business political activity in the U.S. and U.K.* New York: Oxford University Press. Page 194.

⁴²⁹ Porter, John. (1968). *The Vertical Mosaic: An analysis of social class and power in Canada.* Toronto: University of Toronto Press. Page 299-307.

⁴³⁰ Ibid.

ideology articulated by one sector of elite actors is adopted as the ideology for all:⁴³¹

In public debate words often undergo a strange metamorphosis... From the point of view of social power it is not so much a question of whether these propositions are true or false, but rather the influence the corporate elite has far beyond their own board rooms. The ideology they articulate becomes that of all business large or small.⁴³²

In the Canadian context, the Ontario Royal Commission on the Health and Safety of Workers in the Mines, although focused on the extractive industries in one province alone, was a broad exercise of political debate that would shape labor policy across domestic jurisdictions. The importance of the extractive sector to the economy in Canada and the stature of private interests within Ontario only served to heighten the influence of the Ham Commission in establishing the future labor policy trajectory.

More important than the various technical findings discussed by the final Ham Commission Report is the overall cultural system on workplace health and safety that set forth the terms of the debate on each page and chapter. Great Britain was first among the countries visited by the Ham Commissioners in the course of fact-finding and the work of the Robens Report is discussed in the Ham Report. Like Robens, Ham made sweeping recommendations for changing worker health and safety policy to move to a system of voluntarism and the self-regulation of private enterprise.⁴³³

The Ham Commission concerned itself with uncovering the “defects in the institutional arrangements” among “government, industry, and the workers for dealing with the hazards at work.” The “overriding concern” was to “establish a more coherent basis for government, industry, and the workforce to deal with the problems

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Royal Commission on the Health and Safety of Workers in the Mines, James M. Ham, Commissioner. (1976). *Report of the Royal Commission on the Health and Safety of Workers in the Mines*. Toronto: Ministry of the Attorney General. Preface.

of industrial disease and accidents according to their skills and in accordance with well-defined duties and responsibilities.”⁴³⁴ The commission, in keeping with the themes of the Robens Report from the United Kingdom and its main focus on self-regulation, defined the need for what it called an “internal responsibility-system at the company level” and described this as “key to the quality of the over-all control of occupational hazards.”⁴³⁵ In turning to define an “internal responsibility-system” the commission advanced a razor-sharp tone against unions and collective bargaining.

“Questions of health and safety” said the commission, “are not suitable issues for collective bargaining.” What was needed was “a carefully defined framework” of joint labour-management health and safety committees. Workers must “fulfill a proper responsibility to contribute to the resolution of problems of health and safety” said the commission which hoped for a “new measure of labour-management co-operation.” “The adamantly confrontational character of Canadian labour-management relations” it said, “has deterred the creation of sensible arrangements for worker participation.”

The Commission believes that a part of the wide variation in accident frequencies among different companies is related to the quality of human relations that exist within them, relations in which both management and the collective bargaining unit (where such exists) play crucial roles. A well-founded internal responsibility-system in which labour and management co-operate to control occupational hazards ought to exhibit a high measure of self-regulation for which mines inspection and openly reported environmental and epidemiological reviews can provide the necessary external evaluation.⁴³⁶

The Ham Commission advised to divorce the health and safety of workers’ from collective bargaining. This was the consolidation of an institutional framework on worker health and safety within the logic of self-regulation and the voluntarism that

⁴³⁴ Ibid. Page 249

⁴³⁵ Ibid. Page 250.

⁴³⁶ Ibid. Page 250.

served for so many years as an ideological basis for Anglo-American labor relations.

Unlike the Robens Report, the Ham Commission addressed the right to refuse unsafe work. It argued that it was “the responsibility of the shift boss to assign work and to decide if the conditions for that work meet standards for its performance.” It argued there was “no substitute for the exercise of this responsibility supported by first class training and experience.” Given the importance of the right to refuse to mineworkers, however, the Ham Commission painted themselves into a corner with their anti-collective bargaining stance. Any “substantive difference in judgment between a worker and his shift boss about a condition of work” would be “a relatively infrequent event” said the commission. This assessment was asserted despite what the commission had called the “adamantly confrontational” nature of labor relations.

The Ham Commission recommended a restricted, limited right to refuse. This recommendation argued the right to refuse unsafe work could be protected within the framework of an “internal responsibility-system” via a limited, formulaic protection. The state would act to protect management rights and would, only as the last resort, providing for an *external* judgment to determine the merit of the safety hazard under protest. It also recommended that all work refusals have the approval of supervisors:

That where a worker, after due consultation with his immediate supervisor, believes that the work then assigned cannot be performed by standard procedures without encountering personal risks deemed by him to be unreasonable, there be a statutory requirement that the work situation be examined and judged by a member of senior supervision in the presence of a worker-auditor acting as an observer and that a report of the circumstances be made by the mines inspectorate to the manager.⁴³⁷

Dr. Ham recognized that these situations “would by their nature be ones of great tension between the workman and his supervisor.” Nonetheless, the report argued,

⁴³⁷ Ibid. Page 178.

“the worker has a right in natural justice” that “a well-considered disagreement in judgment between himself and his immediate supervisor about the risks of work” is “fairly examined” without “discrimination for having stood by his convictions.”⁴³⁸

For the Ham Commission, the *internal* responsibility system was in need of *external* state intervention when it came to employee work refusals that challenged the labor market discipline. The new voluntarist system would be an *internal* system for management rights, but would remain *external* to control the exercise of labor rights.

The Ham Commission’s definition of the “natural right” to refuse was a right subject to state-backed market forces. It was a right deserving of protection where “well-considered” and after “fair examination” was made. Where supervisory and governmental authorities determine a workers’ action was not well considered or the concern was not fair, there would be no protection of the right to refuse and the managers of the liberal marketplace could rear their “natural” powers of termination.

6.4. The labor and political opposition to the new refusal formula

The effort to consolidate health and safety policy into a single self-regulatory framework was unfolding at the same time as Canadian labor advocates were meeting resistance for pushing stronger, more broad-based hard law legal protections. As the demand for change continued, the political management of dissent would become an important task for Canada, especially as elements of an Internal Responsibility System were soon advocated globally as the “Canadian Model” of worker safety and health. As the Ham Commission Report was published limiting the right to refuse in a single self-regulatory framework, health and safety advocates challenged this elite discourse first in the prairie province of Saskatchewan and continuing in Ontario and elsewhere.

⁴³⁸ Ibid. Page 178.

Most of the laws in Canada on worker health and safety at the time centered on traditional hard law workplace inspectorates. All of the jurisdictions except Prince Edward Island could prosecute employers for violating health and safety legislation.⁴³⁹ Seven jurisdictions were empowered to levy fines and imprisonment of between 3 to 12 months for an offense under the legislation. Between 1971 and 1973, Quebec and Ontario undertook prosecution programs including 1,130 prosecutions in Quebec and 1,359 prosecutions in Ontario.⁴⁴⁰ Prince Edward Island, Alberta, and British Columbia permitted suits for compensation for work accident and injuries.⁴⁴¹

The story of Saskatchewan begins the history of the political management of dissent surrounding the right to refuse. Saskatchewan was a unique case because the political history of populist agrarian socialism coupled with the lack of a politically-aggressive private sector in a provincial economy dominated by farm cooperatives and crown corporations afforded policymakers a unique window of opportunity through which to craft and advocate significant creative labor policy changes throughout the 1970s, most without any well-organized and coordinated private corporate opposition.

The New Democratic Party of Saskatchewan held power from 1971 to 1982 and formed a government under party leader Allan Blakeney. Blakeney served in the cabinet of the revered Thomas C. Douglas who helped establish the first public health-care system in North America. The NDP came to power in 1971 on a campaign called New Deal for People and won 45 of 60 provincial assembly seats.⁴⁴² The Blakeney government was embarrassed by the seemingly more progressive U.S. Congress in

⁴³⁹ Economics and Research Branch, Labour Canada. (1975). *Safety Enforcement Policies and Practices in Canada*. Ottawa: Department of Labour. Page 28.

⁴⁴⁰ Ibid. Page 34.

⁴⁴¹ Ibid. Page 42.

⁴⁴² Gruending, Dennis. Encyclopedia of Saskatchewan: Blakeney, Allan E. (1925–) Retrieved March 30, 2010, from http://esask.uregina.ca/entry/blakeney_allan_e_1925-.html

passing the Occupational Safety and Health Act of 1970.⁴⁴³ The Saskatchewan NDP introduced the *Occupational Health and Safety Act* modeled on the U.S. Occupational Safety and Health Act of 1970.⁴⁴⁴ The 1972 act consolidated occupational health and safety into one administration and mandated joint labor-management committees on occupational health be established in every workplace with more than ten employees. That the establishment of joint health and safety committees met with little resistance from the Liberal Party was in part because “health” even as a workplace concern was being viewed by provincial political leaders as being an extension of Medicare.⁴⁴⁵

The NDP could not enact the right to refuse into law during the negotiation of the 1972 *Occupational Health and Safety Act*. The right to refuse was introduced and passed as part of an amendment to the 1973 *Labor Standards Act*. The right to refuse clause “did prompt outspoken employers in the province to criticize this amendment as unnecessary.”⁴⁴⁶ Organized labor in the province generally supported the clause as a way to strengthen the rights of workers on the joint health and safety committees.

Strengthening the joint labor management health and safety committees would be an important issue to the NDP in Saskatchewan between 1971 and 1982. This was to include a unique series of actions in support of the committees, including requiring the labor ministry to keep a central registry of all health and safety committees in the province and the names of their members. Each joint health and safety committee was required to record the minutes of each meeting and supply the meeting minutes to the provincial labor ministry which would in turn make the minutes public. By 1981 there were more than 2,800 joint health and safety committees covering 80 percent of the

⁴⁴³ Sass, Robert. (2010). Interview with the author. Saskatoon.

⁴⁴⁴ Sass, Robert. (Undated-b). *A Rights-Based Approach to Workplace Health and Safety*. Unpublished paper on file with author. Page 2.

⁴⁴⁵ Ibid. Page 3.

⁴⁴⁶ Ibid. Page 5.

Saskatchewan non-farm workforce. Government records had been collected on 29,723 committee meetings between 1972 and 1981.⁴⁴⁷ When the NDP lost the 1982 election, among the first acts of the new Progressive Conservative government of Grant Devine was to destroy the computerized files and end the practice of a central government registration and monitoring of these joint health and safety committees.⁴⁴⁸

The Saskatchewan Federation of Labor in 1972 “complained to the Minister of Labour that they were dissatisfied with the administration of the Act, especially with regard to the role of workers on the joint committees prescribed by the Act.” The director of the OHS Branch was fired and Bob Sass became Assistant Deputy Minister of Labor and Chief Industrial Relations Officer, shortly thereafter promoted to Associate Deputy Minister of Labor and Executive Director of the Occupational Health and Safety Branch where he would serve until the NDP government was voted out of office in 1982. Largely in response to the Saskatchewan Federation of Labor’s continuing complaints to the NDP government, the Minister of Labour advocated for strengthening the laws. In 1973, the right to refuse was proposed as an amendment to the provincial Labour Standards Act as a way to strengthen the joint committees.⁴⁴⁹

After a 1977 amendment, the language of the Saskatchewan statute robustly protected the right to refuse by including broad prohibitions on discrimination with presumptions in favor of workers.⁴⁵⁰ Although the right to refuse was codified in

⁴⁴⁷ Ibid. Page 13.

⁴⁴⁸ Sass, Robert. (2010). Interview with the author. Saskatoon.

⁴⁴⁹ Sass, Robert. (1993). The Work Environment Board and the Limits of Social Democracy in Canada. *International Journal of Health Services*, 23(2), 279-300. Page 280.

⁴⁵⁰ The text of the amended 1977 statute read:

DEFINITION OF DISCRIMINATION

Section 2

(f) “discriminatory action” means any action by an employer which adversely affects a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes the action of dismissal, layoff, suspension, demotion, transfer of job or location, reduction in wages, change in hours of work or reprimand.

OCCUPATIONAL HEALTH COMMITTEE TO INVESTIGATE

Section 24

Saskatchewan as an “unusually dangerous” standard, this was “unusually dangerous” to a given workers’ health and not “unusually dangerous” for a given industry. The protection extended to workers “by reason of the fact that he has exercised” the right to refuse. This was not the limited refusal model formulated by the Ham Commission.

The Saskatchewan Model that emerged was the protection of the right to refuse unsafe work as if it was a universal status-based protection for all workers. Bob Sass

(4) The duties of the committee shall include:

(e) The investigation of any matter referred to in subsection (1) of section 26.

NO DISCRIMINATION ACTION ALLOWED Section 25

(1) No discriminatory action shall be taken against any worker by reason of the worker’s participation in or association with any functions of the occupational health committee at his place of employment.

(2) Where discriminatory action is taken against a worker who has been or is participating in, or has been or is associated with, any functions of the occupational health committee at his place of employment, there shall be a presumption in favor of the worker that the discriminatory action was taken against him by reason of his participation in or association with any functions of the occupational health committee, and the onus shall be upon the employer to establish that the worker was discriminated against for good and sufficient other reasons.

RIGHT OF WORKER TO REFUSE DANGEROUS ACTS Section 26

(1) A worker may refuse to do any particular act or series of acts at work which he has reasonable grounds to believe are unusually dangerous to his health or safety or the health and safety of any other person at the place of employment until the occupational health committee or occupational health officers has investigated the matter and advised him otherwise.

(2) No discriminatory action shall be taken against any worker by reason of the fact that he has exercised the right conferred upon him by subsection (1).

(3) Where discriminatory action shall be taken against any worker who has exercised the right conferred upon him by subsection (1), there shall be a presumption in favour of the worker that the discriminatory action was taken against him for that reason, and the onus shall be upon the employer to establish that the worker was discriminated against for good and sufficient other reason.

(4) Notwithstanding any other provision of this Act, temporary assignment to alternative work at no loss in pay to the worker until the matter mentioned in subsection (1) is resolved shall be deemed not to constitute discriminatory action within the meaning of this section.

ORDER TO REINSTATE WORKER Section 27

Where an employer is convicted of taking discriminatory action against a worker contrary to any provision of this Act, the convicting provincial magistrate shall order:

(a) the employer to cease the discriminatory action and to reinstate the worker to his former employment under the same terms and conditions under which he was formerly employed;

(b) the employer to pay to the worker any wages the worker would have earned had he not been wrongfully discriminated against; and

(c) any reprimand or other reference to the matter in the employer’s records on the worker to be removed. 1976-77, c. 53, s. 27.

From: Occupational Health and Safety Branch, Saskatchewan Labour. (1978). *Manual for Occupational Health Committees*. Saskatoon: Saskatchewan Labour. Page 8.

described these refusal rights as based in an Aristotelian philosophy of *knowledge* and *experience*. The workers' experience was judged as co-equal to society's *knowledge* about what constituted an acceptable hazard worthy of affording the right to refuse. The approach championed by the Saskatchewan NDP government was to construct an alternative labor policy system of worker consultation through joint committees and to work to strengthen the joint committees through various means once their weakness became apparent to the organized trade union movement throughout Saskatchewan.

This Saskatchewan strategy became called "stretch". Stretch meant adopting aggressive policies to make the joint health and safety committee system work. They were empowered with the authority to investigate as if government labor inspectors. They were charged with investigating work refusals. They were granted the right to have information about known chemicals in the workplace. In a pilot project at the Potash Corporation of Saskatchewan, a "Work Environment Board" was established to deal with "*all* matters pertaining to the work environment."⁴⁵¹ Worker representatives would chair the committee, thus giving the workers a majority. This approach was started with an eye for expanding it throughout the private sector. What was certain about how the Saskatchewan Model was developing despite its constitution outside a trade union and collective bargaining framework was that it was not a *laissez-faire* industrial relations enterprise. The state had a key role in the creation of strong health and safety committees, including mandates on the working environment subjects to be discussed and requirements to consult, co-operate, and protect against discrimination.

Such an expansion or "stretch" more directly confronts management prerogatives. Employers have demonstrated greater resistance to this expansion than to expenditures relating to lowering noise, better ventilation,

⁴⁵¹ Sass, Robert. (Undated-b). *A Rights-Based Approach to Workplace Health and Safety*. Unpublished paper on file with author. Page 18.

machine guarding, chemical substitution, and provision of safety equipment of all sorts. This “stretch” ... is seen as an unwarranted intrusion upon management’s legitimate right to manage (for example, to pursue greater productivity and efficiency) through absolute control over the human factor of production. This resistance was evident in Saskatchewan, as elsewhere.⁴⁵²

Stretch was the case as Bob Sass and the Ministry of Labour offered blanket support to all work refusals. Between the enactment of the right in 1973 to the end of the NDP government in 1982 over 1,500 individual work refusals were reported to the Ministry of Labour in Saskatchewan. All refusals were protected as if a universal protection.⁴⁵³

The Saskatchewan law provided that where “there is an unreasonably unsafe and dangerous condition prevailing in any plant or mine, that the employees should at the risk of their lives” not be compelled to work. The original language rooted in the weaker philosophy based on limited workers’ rights granted rights “where there are unreasonably dangerous conditions” that can be “investigated by the occupational health and safety committee to determine whether that is a fact.”⁴⁵⁴ The 1977 reforms altered this language. The stronger policy was passed as the result of wage and price controls being considered by the province in 1976. The NDP elected to join the price control system which was wildly unpopular with organized labor. The 1977 change to occupational health and safety law was an effort to keep the political alliance between the NDP and organized labor intact in the wake of NDP support for unpopular wage and price controls. Strong protection of the right to refuse, in contrast to the limited framework, was in part the NDP’s way of keeping the party-labor alliance together.

⁴⁵² Ibid. Page 15.

⁴⁵³ Sass, Robert. (2010). Interview with the author. Saskatoon.

⁴⁵⁴ Legislative Assembly Office, Regina. (1973). Debates and Proceedings. *Legislative Assembly of Saskatchewan. Official Report Session. 3rd Session, 17th Legislature, XIII(4 (May 2, 1973))*, 3184-3185.

This Saskatchewan model conflicted with the “Internal Responsibility System” proposed by the Ham Commission in Ontario. It was understood that there was an important role for the government as the state was needed to enforce workers’ rights. There was sympathy for status-style blanket protections for workers, although this did not manifest itself in a framework of workers’ freedom of association due to politics. Trade unionists expressed their skepticism of Sass and his ideas of protecting the right to refuse, individually, even though they supported strengthening the law. As the NDP remained in power through the ‘70s they strengthened the protections in practice. Refusal rights under the NDP were for a decade treated as if they were universal, fundamental human rights protections, despite the policy on paper being less than so.

In the late 1970s, business leaders from around Canada would respond and counter-mobilize against these policies. Bob Sass described the moves as efforts to counter a rights-based approach: “In 1977 and 1978, all provincial governments and industry began a counter-plot to the rights-based approach with the intent of reducing the legislation to a mere paper and returning to a pre-rights-based approach.”⁴⁵⁵ The Saskatchewan model in policy had become a system of strong state interventions on behalf of worker rights. This was not the Ham Commission’s Internal Responsibility System (I.R.S.). It was a policy that in practice was in direct conflict with the I.R.S.

In Ontario, Bill 139, *An Act Respecting Employees’ Health and Safety*, passed the Legislative Assembly in early 1977, the same time that the NDP in Saskatchewan was strengthening their right to refuse laws. Bill 139 was interim legislation, a trial run at reform that would be replaced with permanent legislation after one year in Bill 70. Bill 139 established a formula for work refusals for a broad test of danger. This was a move, as in Saskatchewan, towards considering the right to refuse unsafe work

⁴⁵⁵ Sass, Robert. (2010). Interview with the author. Saskatoon.

as an absolute right. It contrasted with other provincial laws such as that in Manitoba where a worker could be disciplined for refusing to work for a “frivolous” reason.

In Canada, it was organized labor’s position that collective bargaining was the best mechanism for dealing with safety and health hazards in the work environment.

Labour’s basic position is that it has often been impractical for a worker to refuse to undertake a hazardous job on an individual basis, either out of fear of victimization, or because the well-being of fellow workers may also be jeopardized. The fact that the degree of protection afforded workers through legislation, regulatory enforcement and arbitration practice, has often been viewed as inadequate, and has otherwise varied widely over the years, is cited as support for greater union involvement in such situations.⁴⁵⁶

Trade unions and labor leaders in Canada were not at first entirely opposed to the new enactments on occupational safety and health. As the policy debate shifted to the use of health and safety committees, however, the right to refuse by an individual worker was prescribed as a way to strengthen joint committees. It was written in articles at the time that the right to refuse for a health and safety committee was akin to the right to strike for a trade union. In this context, there was organized labor support for the right to refuse for individuals. Collective bargaining, however, was organized labor’s preferred method of advocating for the rights of workers. This stance was perhaps in part self-interested institutional bias, but certainly there was also a broader and deeper understanding of the inherent lived inequalities in the employment relationship that realized that employee rights could not generally be effective as only individual rights.

One weakness of organized labor in allowing this emergent individualist model of worker protection to develop as far as it did without a stronger critique from within the ranks of labor may have been the result of Canada’s unique political history. The

⁴⁵⁶ Sass, Robert. (Undated-b). *A Rights-Based Approach to Workplace Health and Safety*. Unpublished paper on file with author. Page 15.

lack of a constitutionalized rights-based political culture in Canada meant historically that rights have not as aggressively been used within employer counter-mobilization strategies against labor as was the case in the United States. There could have simply been less ground historically upon which organized labor in Canada had a basis to be suspicious of the notion of rights, focused as the Canadian political tradition was in an orientation towards and belief in a Commonwealth sovereign parliamentary system.

In Ontario, the legislature was considering laws in response to the concern over the working environment well before the Ham Commission reported in 1976. The Ham Commission's recommendations, however, shaped the discourse not of the interim Bill 139 but more so the final Bill 70. As employers and political elites were organizing to advance a vision of self-regulation in public policy, the Ontario Federation of Labour thought the progressive elements of Bill 139 would be brought forward into the omnibus Bill 70. The concerns of labor on occupational safety and health had been growing throughout the 1970s. The activism of Stephen Lewis as the leader of the left-of-center Ontario New Democratic Party and the NDP "specific and persistent criticism" in part led to the need for the Ham Commission to help Ontario and Canadian elites re-consolidate the activists' discourse along safer political lines.⁴⁵⁷

When the new Bill 70 was first reported in the Ontario Legislature, organized labor quickly realized how rights could be used against them. The right to refuse was made a restricted, limited right. The draft permanent Bill 70 to replace the Bill 139 included what the sociologist Vivienne Walters called "built-in deterrents". These "built-in deterrents" had been advocated by management and corporate leaders to the

⁴⁵⁷ Doern, Bruce G. (1977). The Political Economy of Regulating Occupational Health: The Ham and Beaudry Reports. *Canadian Public Administration-Administration Publique Du Canada*, 20(1), 1-35.

Minister of Labour. Bill 70 caused uproar inside the Ontario Federation of Labour.⁴⁵⁸

Organized labor considered the new legislation “regressive” and challenged the constitution of the right to refuse. Business views were split on refusal rights between two camps, those corporations opposed to the protection of any rights on the one hand versus the more politically savvy companies and employer associations that wanted the Ham Commission’s constitution of the right to refuse unsafe work as a way to remove worker health and safety from trade unions and collective bargaining.

Employer briefs submitted to the Ham Commission, submitted in response to a survey by the Ministry of Labour in Ontario requesting reaction to the interim Bill 139, and submitted as part of the hearings of the Resources Development Committee of the Ontario Legislature illustrate that many employers supported a limited right to refuse.

The draft Bill 70 was applauded by the Canadian Manufacturers’ Association. “We concur with the approach taken by the government on many of the items in Bill 70, especially those pertaining to safety committees and the right of refusal to work.” The Dominion Foundries and Steel Company was “pleased with the approach that the Bill takes in three areas; right of refusal to work; health and safety committees and / or representatives and toxic substances.” Other employers altogether opposed inclusion of any employment “rights” on the matter of occupational safety and health.⁴⁵⁹

When the proposed permanent Bill 70 was released in draft form, organized labor became “mortified” at the changes proposed. One Ontario Federation of Labor delegate called it “a piece of garbage” and said it afforded less protection for workers than Bill 139. The collective opposition from organized labor solidified around their “profound disappointment” with the work of the Minister of Labor and the draft Bill

⁴⁵⁸ Walters, Vivian. (1983). Occupational Health and Safety Legislation in Ontario: An analysis of its origins and content. *Canadian Review of Sociology And Anthropology*, 20(4), 413-434.

⁴⁵⁹ Ibid. Page 427.

70's failure to provide workers with strong protection against discrimination and the victimization of workers protesting working conditions. Workers were "guinea pigs" and the draft bill was "infuriatingly indifferent" to the prevention of health hazards.⁴⁶⁰

Bill 70 would under protest be modified before passage, yet the Ontario labor movement had been bested by the business community. Employers had influenced the drafting process and effectively moved the bill towards overall weaker protections. In the words of one trade union leader, the employers refused to face the social calamity, instead opting for a sophisticated politicization of the worker health and safety issue:

It is as though there has been, in the last five years, no deaths from cancer of sintering plant workers, to Gus Frobel to single-handedly wage an unforgivably difficult struggle to win compensation for lung cancer induced by radiation exposure, no Matachewan, no Johns-Manville deaths from asbestos-induced cancer, no deaths from vinyl chloride induced cancer, no liver damage from PCB ingestion and so on and so on.⁴⁶¹

Despite Bill 70's final form, organized labor remained disappointment with the bill.

Three years after Bill 70 passed the Ontario Legislature and became law, the provincial New Democratic Party established a task force to study the Occupational Health and Safety Act of 1978. The NDP Task Force studied how this new system was working three years after enactment. Visiting ten cities in Ontario – Hamilton, Sudbury, Thunder Bay, Peterborough, St. Catherine's, Ottawa, Toronto, Kitchener, London, and Windsor – an advisory committee of 28 leading union health and safety activists held hearings and collected over 200 statements from individual workers and union members, university experts and environmental activists with experience with the new Internal Responsibility System. The Task Force Report opened with a quote published by the ILO in 1963. The International Labor Organization had asserted that

⁴⁶⁰ Ibid. Page 427.

⁴⁶¹ Ibid. Page 429.

the objective of occupational health is “the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations.”⁴⁶²

Ironically, it would be this political history that would help change this strong ILO policy on global workers health and safety a few years later in Convention No. 155.

The report responded to the “inadequacy of the legislation... becoming apparent to workers struggling to use the Act to improve health and safety conditions in their workplaces”⁴⁶³ The Internal Responsibility System “left workers vulnerable to the economic decisions of their employers” and “ultimately, workers had to depend on the willingness of management to institute suggested reforms.” When workers faced “an uncooperative management, workers had far too little power to make their workplaces safe.” The new provisions for the testing of workers with symptoms of occupational illnesses were also being abused, creating as they did “new threats to workers’ rights to keep their medical problems and histories confidential.”⁴⁶⁴ The Task Force report criticized the new Internal Responsibility System as ineffective:

The Task Force was told repeatedly that the Internal Responsibility System did not work. The imbalance of power between workers and management meant cooperation and information-sharing often broke down to the detriment of workers’ health and safety. As long as management enjoys a monopoly over final decisions to clean up the workplace, health and safety conditions can never be improved to the satisfaction of workers.⁴⁶⁵

The report found worker representatives on health and safety committees set up by the Ontario statute were often appointed by management and “management-orientated”. Unions recounted fruitless correspondence to the Ministry of Labor trying to correct

⁴⁶² Ontario New Democratic Party Task Force on Occupational Safety and Health. (1983). *Not Yet Healthy, Not Yet Safe*. Toronto: Ontario New Democratic Party (also submitted as a speech in the Ontario Legislature April 1983 by Elie Martel, MPP).

⁴⁶³ Ibid. Page 1.

⁴⁶⁴ Ibid. Pages 1-2.

⁴⁶⁵ Ibid. Page 3.

the inequality in committee assignments. Union representatives also complained of no central registry of the joint health and safety committees under the new Ontario law.

On the right to refuse unsafe work, the worker had no legal right to assistance by fellow workers and had to engage in work refusals alone. The task force dedicated a special section to the right to refuse dangerous work under the new law. The final report of the task force said in no uncertain terms that the right to refuse was a failure.

Recognizing that the right to refuse was one of the most important rights to be protected by the new legislative act, the task force reported many workers found it not to their advantage to refuse hazardous work out of a fear of being discharge and losing their livelihood. Reports were submitted documenting how labor inspectors did not treat work refusals as work refusals, but instead as simple complaints to health and safety inspectors. By not recognizing refusals as protected rights, labor inspectors had left workers more vulnerable to termination even as they cited employers for health and safety hazards identified by the worker as being the cause of their work refusal.⁴⁶⁶

The New Democratic Party Task Force Report recommended specific changes be made to the statute protecting the right to refuse unsafe work. Among the changes sought was protection of group work refusals, extending protections beyond a narrow definition of hazards to include hazards such as causes of stress, assault and attempted assault, and extending the law to all workers with wage and benefit protection.⁴⁶⁷

Although regulation of occupational health and safety has made some forward strides in the past few years there is a growing danger of reversing the gains. Increased unemployment and the over-all economic slump puts pressure on government to respond by relaxing the stand on basic worker rights under corporate pressures. Diligence must be maintained to keep a forward

⁴⁶⁶ Ibid. For detailed stories, see pages 17-20.

⁴⁶⁷ Ontario New Democratic Party Task Force on Occupational Safety and Health. (1983). *Not Yet Healthy, Not Yet Safe*. Toronto: Ontario New Democratic Party (also submitted as a speech in the Ontario Legislature April 1983 by Elie Martel, MPP). Page 20.

movement since in reality the needless loss of one human life due to preventable occupational illness or accident is too heavy a premium.⁴⁶⁸

The final report recommended amending the Ontario statute to reiterate the ILO's definition of occupational health as "the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations."⁴⁶⁹

Another task force was organized on similar lines by the NDP on the impact of health and safety reforms in the federal jurisdiction. That inquiry visited 25 cities and offered similar recommendations, reporting there were "Too Few Laws, Too Little Order" in what was a clear rhetorical swipe at Lord Alfred Robens' and his original conclusion that there was "too much law" in his final Robens Committee Report.⁴⁷⁰ A follow-up task force in Ontario three years later found the lack of changes in the legal regime objectionable and reported workers were "still not healthy, still not safe."⁴⁷¹

The idea of an Internal Responsibility System was never part of the vocabulary of the worker health and safety activists during this time. It was not a good label for the achieving the rights-based model they strived for because asserting a rights-based model necessitated positive state actions for the protection of workers. This made the impact of the Ham Commission all the more insidious. The commission essentially re-shaped the discourse emerging from Saskatchewan into a system of self-regulation and neo-voluntarism with little state intervention for the protection of workers' rights. The end of the Saskatchewan NDP government in 1982 ended further advancement of the emergent Saskatchewan model. What remained was the old shell of rights rooted

⁴⁶⁸ Ibid. Page 2. Quote is from Ron Rowbottom, Occupational Health and Safety Coordinator, Simcoe Can Workers' Union Local 535.

⁴⁶⁹ Ibid. Page 2.

⁴⁷⁰ NDP Special Task Force on Occupational Health and Safety in the Federal Workplace. (1982). *Graveyard Shifts: Life and Death on the Job in Canada*. Ottawa: New Democratic Party.

⁴⁷¹ Safety, Second Task Force on Occupational Health and. (1986). *Still Not Healthy, Still Not Safe*. Toronto: Ontario New Democratic Party (also submitted as a speech in the Ontario Legislature July 1986 by Elie Martel, MPP).

as they were in an individualist rights framework conceived outside the domain of workers freedom of association and collective bargaining. As the state retreated in protecting the right to refuse as a universal employment protection, there was no institutional mechanism in place to continue this protection of effective representation.

The ILO's 2009 General Survey does not recognize the significance of these contested politics. The report cites the origins of the Internal Responsibility System as from common law rights dating back to 1880s Saskatchewan, leapfrogging historical connections with the creative Saskatchewan labor policies of the 1970s.⁴⁷² It fails to recognize the domestic dissent of the organized labor movement in Canada. After the NDP was defeated, counter-mobilization worked to discredit Sass and administered the right to refuse along narrow lines. A labor policy formed and administered outside of a workers' freedom of association framework failed to withstand the heat of a high-profile royal commission that would advance a cultural politics for business interests.

In November 1978, two years after the Hamm Commission report, the ILO Governing Body voted to begin the official negotiation of a new global labor standard on occupational safety and health and the working environment. Eight jurisdictions had at the time adopted reforms that included the right to refuse; Nova Scotia, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and Newfoundland. Similar language was used across the provinces, from refusal standards of "dangerous" to "unusually dangerous" to "hazardous" and "imminent danger".⁴⁷³ Despite the weak

⁴⁷² International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Report III (Part 1B) to the 98th Session of the International Labor Conference. A report of the Committee of Experts on the Application of Conventions and Recommendations (under articles 19, 22 and 35 of the Constitution). Geneva: International Labour Office.

⁴⁷³ Aykroyd, Colin. (1978). An Examination of the Right to Refuse Unsafe Work. *Labor Research Bulletin, Research and Planning Branch, Province of British Columbia, Ministry of Labour*. 6(6), 10-18. Page 12.

legal language, workers continued to argue the right to refuse was an absolute right. The Ham Commission, however, successfully wedded a very limited *sui generis* right to refuse to the cultural idea of a new self-regulatory Internal Responsibility System.

Bob Sass would later comment on the triumph of the Internal Responsibility System as current public policy. On “the corruption of occupational health and safety in Canada” Sass described how governing elites and employers together politicized and altered the course of workplace health and safety as public policy across Canada:

The changing political-economy resulted in a response by both government regulators and employers to the politicization of workplace health and safety. Ontario took the lead in promoting the Internal Responsibility System (IRS) with the intent of containing the occupational health and safety ‘movement’ and the demand for strong worker rights challenging that sacred fortress: Management prerogatives.⁴⁷⁴

Sass continued and described how the IRS was used as business counter-mobilization:

The IRS became a code word for both employers and public policy regulators to bring work environment matters back into line. And this strategy required a shift from worker rights to the pre-OSHA practices of ensuring the privileged status of the varied experts and professionals who shape occupational health and safety. These experts were to again be the ultimate arbiters in worker / union disputes with employers and government regulators. And to maintain the “scientific discourse” and professional knowledge as the only way of effectuating policy instruments: Standard-setting, enforcement and compliance and the ultimate sanction of prosecution. This strategy had intended consequences first, to undermine the rights-based approach to occupational safety and worker experiences, and second, to “neutralize” both government bureaucrats and managers from seeming indifferent to worker pain and suffering. In a scientific culture, only the diverse experts in “collusion” with regulators and employers could guarantee the efficacy of the Internal Responsibility System policy of containment and the undermining of worker rights articulated by occupational health and safety activists.⁴⁷⁵

⁴⁷⁴ Sass, Robert. (Undated-a). *The Corruption of Occupational Health and Safety in Canada: The Triumph of the Internal Responsibility System (IRS) as Public Policy*. Unpublished paper on file with author.

⁴⁷⁵ Ibid.

On the current state of occupational health and safety policies in Canada as a result of counter-mobilization, “Today,” Bob Sass lamented, “the IRS policy has evolved into a boring doggerel accompanied by a pretentious chorus of pre-OSHA assumptions.”

It has, in fact, ‘tightened the noose’ about worker activation and gripped workers and unions in a neo-liberal corporate agenda. The role of naïve and not so naïve ‘experts’ orchestrated by their government and employer masters succeeded in undermining the occupational health and safety ‘movement’.⁴⁷⁶

The emergent Saskatchewan Model would become the “safe rights” Canadian Model which would ultimately become the safe model for the rest of the world through the passage of a new kind of worker health and safety protection within Convention 155.

6.5. The ILO’s global campaign for “humanizing work”

The International Labour Affairs department at Labour Canada adopted the intellectual precepts of the Internal Responsibility System early on as the solution to the worker health and safety question. John Mainwaring, representing Canada at the ILO in Geneva, gave a review of international labour conventions in a 1974 report issued immediately after the Robens Report was published. Mainwaring proposed a new “Modern International Labour Code” and said Canada should advocate in favor of this modernization. The goal was “to redefine the role that standards-setting should play in the context of the ILO’s program of action.” This was needed as “the very quantity of ILO Conventions seem to defeat the purpose of using them as a measure of social progress.” On safety and health, Mainwaring wrote “there may also be a need for a policy framework for standard setting on specific hazards, as an improvement on the present rather arbitrary approach to the selection of subjects for Conventions.”⁴⁷⁷

⁴⁷⁶ Ibid.

⁴⁷⁷ Mainwaring, John. (1974). *A Review of International Labour Conventions*. Ottawa:

Canada's view came at a time of a growing consensus among all ILO delegates that new action was needed to address hazards in the working environment. Upon the untimely death of ILO director-general Wilfred Jenks after a tumultuous 1973 meeting dominated by the Arab-Israeli conflict, a new leader was found in Francis Blanchard. Francis Blanchard was for years involved with ILO technical assistance to developing countries under the direction of David Morse, the long-serving Truman confidant and one time Acting U.S. Secretary of Labor. At his election in 1970, Jenks had been supported as the candidate of the West and defeated Blanchard by three votes where the U.S. delegation cast decisive ballots amidst a growing decolonized membership.

Francis Blanchard, however, quickly gained broad support as a “practical man and a sound administrator, forward looking, of warm human qualities, dedicated to the ILO's human rights objectives and to its principles, not a spell-binding orator but a convincing speaker.”⁴⁷⁸ Mr. Blanchard set the tone for the future work of the ILO:

Our world is striving for greater justice, which must be brought about gradually within each nation and among nations. The ILO must play a larger role in working out measures adapted to meeting these expectations. That implies that [the ILO] will remain a special place for dialogue and for interchange, a centre of reflection and research. It implies that it will deal realistically and boldly with bringing international labour standards up to date, and with working out new standards which should inspire governments, employers and workers to meet demands for greater equality of opportunity, greater security and greater human dignity.⁴⁷⁹

The first meeting of the Governing Body under Blanchard's direction set the agenda

International Labour Affairs Branch, Labour Canada. Pages 4, 30. See also Mainwaring, John. (1968). *Canada as an ILO Member: Performance and Potential*. Paper presented to the International Affairs Seminar of the Canadian Labour Congress. Ottawa: International Labour Affairs Branch, Labour Canada.

⁴⁷⁸ Mainwaring, John. (1986). *The International Labour Organization: A Canadian View*. Ottawa: Labour Canada. Page 154.

⁴⁷⁹ International Labour Office. (1974). *ILO Governing Body Spring Session Decisions*. Press Release. Friday 1 March 1974. Geneva: International Labour Office.

for a long-term plan for the years 1976 to 1981. “In striving to improve working and social conditions” the plan set forth a list of areas where greater concentration of ILO efforts was required. Among the top three items for ILO action on the list after the standard postwar ILO agenda items of “promoting employment” and “developing skills and aptitudes for work” was a new item which had emerged in response to what Blanchard would later call the need to avoid “disruptions and disorder in the social systems quite out of proportion with the economic costs of any lucid measure to improve conditions of work...” The ILO under Blanchard’s leadership would now pursue new strategies for “improving working conditions and humanizing work.”⁴⁸⁰

A second goal of the 1976-‘81 work agenda was “helping trade liberalization” through new “increased efforts to secure ratification and observance of international labour standards” as “an ILO contribution toward trade liberalization, which is seen as an important means of promoting the social and economic development of the world’s poorer countries.”⁴⁸¹ The director-general was asked by the ILO Governing Body to “appeal to all governments which have not yet done so to give the most serious consideration to ratifying and putting into practice International Labour Conventions bearing on fair labour standards.”⁴⁸² In the context of occupational health and safety, this meant ratifying a series of hazard-based standards on the working environment.

With the ILO agenda set into the 1980s, Blanchard’s job would be to maneuver the global organization towards achieving these two seemingly contradictory goals of on the one hand improving labor standards, the working environment and humanizing

⁴⁸⁰ International Labour Organization. (1975). *Making Work More Human, Working Conditions and Environment, Report of the Director-General*. First item on the agenda for the 60th International Labour Conference. Geneva: International Labour Office. Page 2.

⁴⁸¹ International Labour Office. (1974). *ILO Governing Body Spring Session Decisions*. Press Release. Friday 1 March 1974. Geneva: International Labour Office.

⁴⁸² Ibid.

work while on the other hand promoting increased global competition among workers with the liberalization of trade relations across national borders. In his 1975 report to the International Labor Conference *Making Work More Human: Working Conditions and the Environment*, Blanchard cited “a complete lack of progress” on the frequency rates of accidents in countries like India where such rates had increased by 50 percent through the previous decade. Emerging hazards were cause for alarm as “the first victims of toxic substances are the workers.” Blanchard’s report asked “how many new products appear on the market each year whose effects on the human being are not really known?”⁴⁸³ Francis Blanchard continued to detail the global problems of the working environment, citing specific hazards like vinyl chloride, ergonomics, the role of working time and the organization and content of work. He concluded with a call for opening a dialog on the role of new international labor standards that could serve as a basis to improve the working environment and make the experience of work and employment for millions of workers worldwide “tolerable or even attractive”.⁴⁸⁴

Three years later the ILO’s new International Program for the Improvement of Working Conditions and Environment (known by its French acronym PIACT) started to struggle with budget cuts as a result of the U.S. withdrawal from the ILO. PIACT was what the ILO Workers’ Group called an ILO program of “great value to defending working people.”⁴⁸⁵ As the U.S. made its removal from the ILO official in 1978, Canada kept the proverbial North American home fires burning by organizing an important caucus of the leading OECD countries at the ILO. Mainwaring noted:

⁴⁸³ International Labour Organization. (1975). *Making Work More Human, Working Conditions and Environment, Report of the Director-General*. First item on the agenda for the 60th International Labour Conference. Geneva: International Labour Office. Page 13.

⁴⁸⁴ Ibid. Page 76.

⁴⁸⁵ International Labour Organization. (1984). *Evaluation of the International Programme for the Improvement of Working Conditions and Environment*. Report VII for the 70th International Labour Conference. Geneva: International Labour Office. Page 50.

In Canada, the U.S. withdrawal was even a signal for a healthy reappraisal of the Canadian relationship with the ILO. Early in December, the newly created International Labour and Social Affairs Committee of the Canadian Manufacturers' Association, and other employer organizations, visited the Minister of Labour and discussed the ILO situation with him. The ILSA group told the Minister that, while it did not recommend that Canada follow the United States' example in leaving the ILO, nevertheless Canada should take the occasion for a reassessment of where the ILO was going and Canada's role in the Organization. The Minister agreed, and this led to some studies being made and a tripartite meeting being held in October 1978, at which a number of improvements in ILO work were recognized as desirable but the general usefulness of the Organization was not questioned.⁴⁸⁶

The U.S. set up a "Cabinet-Level Committee" to monitor the ILO upon their departure in 1978. It included the Secretary of State, the Secretary of Labor, a White House representative, and employer and labor leaders.⁴⁸⁷ The problem, according to the U.S., said a Canadian official who spoke with a U.S. ambassador at the time was, "not how to get the United States to modify its position but rather how to change the ILO."⁴⁸⁸

The stated position of the Canadian government was that the ILO and the United Nations would be weakened if the U.S. left the ILO. Canada arranged for meetings to be held informally of the "democratic industrialized countries" that each wanted to keep the United States in the ILO and offered "a willingness to coordinate their plans, and even to maintain a certain discipline in their actions."⁴⁸⁹ This group became the "Industrialized Market Economy Countries" group. The "IMEC" group continues to caucus in the halls of the ILO today, with Canada holding permanent chairmanship of the IMEC, an arrangement made when Canada was bumped off the Governing Body by Brazil as the list of the top ten states of chief industrial importance

⁴⁸⁶ Mainwaring, John. (1986). *The International Labour Organization: A Canadian View*. Ottawa: Labour Canada. Page 153.

⁴⁸⁷ Ibid. Page 148.

⁴⁸⁸ Ibid. Page 149.

⁴⁸⁹ Ibid. Page 149.

was reshuffled when the U.S. re-joined the ILO in 1980. Mainwaring reported the IMEC founding and the importance of Canada in creating the ILO's IMEC group:

The Canadian position as convenor of the IMEC group was not easy. We realized that we would have to take a more aggressive stance towards Communist and some of the third-world countries than we thought desirable and run the risk of being regarded by other ILO delegates as a U.S. satellite.... The IMEC group maintained and strengthened its solidarity. Indeed, if the balance of power within the ILO shifted after the U.S. withdrawal it was in the direction of the IMEC group. As for third-world countries.... The conferences of 1978 and 1979 saw more a willingness to seek negotiated solutions....⁴⁹⁰

At the November 1978 meeting of the Governing Body, the meeting that officially started the drafting process for what would become Convention 155 by placing the item on the International Labour Conference agenda to start negotiations. Canada held its seat as a country of chief industrial importance and was also recognized as chair of the newly formed and authoritative Industrialized Market Economy Countries caucus.

Canada spoke in support of drafting a new convention on safety and health and the working environment. Canada joined the United Kingdom in encouraging that the new draft convention, however, encompass "the broader approach to the problems of the working environment generally now being taken in a number of countries."⁴⁹¹ At the Governing Body meeting in November 1978 the vote passed to move forward on Francis Blanchard's vision, encouraging "a broader approach." The ILO Governing Body voted to include on the agenda of the 66th Session of the International Labor Conference in 1980 the opening negotiation of a new global labor standard on the general question of *Occupational Safety and Health and the Working Environment*.

Another impetus for ILO action was that the ILO for the first time was to be

⁴⁹⁰ Ibid. Page 153.

⁴⁹¹ International Labour Organization Governing Body. (1978). *Draft Minutes of the 208th Session*. November 14-17. Geneva: International Labour Office.

reporting to the United Nations on the Convention on Economic, Social and Cultural Rights, which had just come into force in 1977. The CESCR stated in clear language that worker health and safety was an economic and social human right. The ILO had followed through and complied with a request to start reporting related to the CESCR.

As the ILO prepared the Law and Practice global survey that would be used to write the first draft of Convention 155 for the opening 1980 negotiations, the question of the right to refuse appeared on the survey, amidst question after question regarding each government's perspective on a voluntarist and self-regulating policy approach:

Question 28 –

(1) Should the instrument(s) provide that a worker has the right to refuse to commence work, or to cease work, when, through his knowledge and experience, he has reason to believe that there would be a high risk to life or health if he carried out the assigned task, on condition that he makes an immediate report, as envisaged in question 27(d)?

(2) Should the instrument(s) provide further that no measures prejudicial to a worker should be taken by reference to the fact that, in good faith, he complained of what he considered to be a breach of statutory requirements or a serious gap in the measures taken by the undertaking in respect of safety and health and the working environment?

Sixty-three countries replied to these questions, forty-nine in the affirmative, including Canada, 9 negative, including the United Kingdom and 5 other countries. No other question on the ILO's Law and Practice global survey was posed to the ILO member states regarding the constitution of any refusal rights or discrimination protections.

Canada was *the only country* to report that their national practice included the protection of the right to refuse as an individual employment protection outside the domain of trade union protection and workers' freedom of association. This coincides with the responses to the more recent ILO General Survey on Occupational Safety and

Health where some ILO member states did report adopting the individual *sui generis* legal protection, although they dated these policies as adopted *after* the adoption of Convention 155.⁴⁹² Although a majority responded to the original Law and Practice survey agreeing in principle to the protection against prejudice, a majority of countries expressed very serious reservations about protecting the right to refuse unsafe work.

Canada nonetheless provided leadership by alone advocating the inclusion of the right to refuse unsafe work in the new global labor convention from a position of experience. The response to Question 28 (1) from Canada was “Yes. Such a right is now widely recognized and is explicitly provided for in the safety and health legislation of most Canadian jurisdictions.” On Question 28 (2), Canada responded, “Yes, this is essential for the protection of the worker against discriminatory action; without this provision, workers (especially unorganized ones) will be reluctant to refuse unsafe assignments or to report serious hazards to safety or health.”⁴⁹³

Despite Canada’s enthusiasm, however, the ILO drafters decided to exclude the language from the convention in favor of a less authoritative recommendation. “A significant number of governments expressed objections or serious reservations” about the right to refuse, the ILO reported in its summary of the Law and Practice survey. Some governments argued “such a provision may lead to abuses or strained labour-management relations.” The provisions on the right to refuse as drafted in the original proposed conclusions were included in the recommendation under a section entitled “Action at the Level of the Undertaking” thus placing the text under the draft self-

⁴⁹² International Labour Office. (2009b). *Individual country responses to Question 9 of the 2009 General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Unpublished. On file with author.

⁴⁹³ International Labour Organization. (1980a). *Proposed Conclusions on Safety and Health and the Working Environment*. Report VII (a) (2) for the 66th Session of the International Labour Conference. Geneva: International Labour Organization. Page 78.

regulatory framework versus in a stand-alone requirement for national policy.⁴⁹⁴

6.6. *Negotiating global rights in a culture of disempowerment*

After a two year exile from ILO membership, the United States wasted no time projecting itself upon its return. “The ILO should” said Ray Marshall, U.S. Secretary of Labor and U.S. delegate to the 1980 International Labour Conference in Geneva, “identify the most appropriate means for providing protection to the workers and trainees *while at the same time satisfying other objectives...*” (emphasis added).⁴⁹⁵

Of concern to the United States was a growing social antagonism to economic globalization and world trade. The impact of trade policies on human rights was being questioned internationally, including by advocates of a New International Economic Order.⁴⁹⁶ Linking global trade to global labor standards, whatever shape that idea might ultimately take, was becoming a U.S. foreign policy objective. The content of those “minimum” international labour standards was of concern, including the creation of minimum wage floors. Occupational health and safety, however, was not a concern that could so easily be addressed without in some way presenting a challenge to the structure of the organization of work and in turn liberalist managerial prerogatives.

The U.S. delegation was ready to help the ILO work toward “the development of a system of minimum international labor standards.” It was as if the United States had just learned about the ILO, despite its work on setting minimum international labor standards since its founding in 1919. But for the U.S. it was a world made new, as if the ILO history should be done over again, only differently. Marshall questioned

⁴⁹⁴ Ibid. Page 80.

⁴⁹⁵ International Labour Organization. (1980b). *Record of Proceedings of the 66th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 14/7.

⁴⁹⁶ The term New International Economic Order was advanced by a group of Third World governments in the 1970s who advocated more equitable terms of international trade and development.

what were the “truly” minimum standards and how the ILO could be supported with technical assistance projects to help countries with “true” standards. In his opening statement upon the U.S. rejoining the ILO, Marshall laid out his views on helping the ILO discover what were the truly minimum set of international labor standards.⁴⁹⁷

First, does there now exist a basic set of truly minimum international labour standards which are universally accepted—or with few exceptions—in every region of the world? Second, is it possible to develop a specific set of multilateral technical co-operation programs which would assist all countries in meeting such minimum international labour standards? Third, what role might the ILO play in any future system of minimum international labour standards in ascertaining the extent to which these basic standards are in fact being implemented in practice? An analysis based on these questions would provide an essential point of reference for subsequent consideration by the ILO or other organizations of the development of a system of minimum international labour standards.⁴⁹⁸

“In the field of occupational safety and health,” Marshall explained “the ILO can play a unique role in the family of international organizations.” As the conference made its assignments to a Committee on Safety and Health that would draft the new convention on occupational safety and health and the working environment, Marshall explained, “The United States Government representative in the Committee on Safety and Health will expand on this suggestion in the days ahead.” Marshall clarified his overall aim:

Our aim is to ensure that international trade flourishes under conditions which permit workers in all countries to benefit up to their full potential. We do not seek to propose a specific across-the-board minimum wage. Nor do we consider that all of the ILO's standards represent minimum levels of protection. Some standards are clearly, deliberately and correctly ‘promotional’ in nature; that is, they establish desirable goals rather than minimum requirements.⁴⁹⁹

⁴⁹⁷ International Labour Organization. (1980b). *Record of Proceedings of the 66th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 14/7 (Marshall).

⁴⁹⁸ Ibid. Page 14/7 (Marshall).

⁴⁹⁹ Ibid. Page 14/7 (Marshall).

“The ILO must not avoid controversial ideas,” Marshall said, “nor should it rush blindly into them.” What was needed was a “careful and objective review of the facts” which meant reviewing “the case of minimum international labor standards.”⁵⁰⁰

As the Committee on Safety and Health gaveled to order at the 66th Conference in 1980, the U.S. government representative was elected to the post of Reporter, a key job responsible for reporting the drafting work of the committee to the full assembly. The United States would hold this position at both the committee’s 1980 and 1981 meetings, seeing the drafting of Convention No. 155 through the ILO constitutional double discussion process. The committee elected as chair a government delegate from Poland, with the United Kingdom’s employers’ representative and a workers’ representative from the Netherlands as vice chairs. These officers, along with one additional member, a French government delegate, formed the drafting committee. The total membership of the committee numbered 140 members, 70 government delegates, 29 employer members, and 41 delegates from workers’ organizations.⁵⁰¹

That the drafting committee was composed entirely of ILO members from Europe and the United States was not expressed as a concern. “All countries were developing countries from the point of view of safety and health and the working environment” said Mrs. Koradecka, the committee chair from the Polish government. This would prove a handy mantra that would be repeated the following two years.⁵⁰² It would be the continuing articulation of a cultural framework designed to legitimate the advance of a self-regulatory ideology, this time on an international policy level.

⁵⁰⁰ Ibid. Page 14/7 (Marshall).

⁵⁰¹ Ibid. Page 35/1.

⁵⁰² Ibid. Page 35/2.

The committee's leadership encouraged adopting "a new and complementary mode of approaching the question" of health and safety versus what it called "the piecemeal approach of the existing standards" which numbered "some 50 instruments" on specific aspects of occupational safety and health. The draft text before the committee "covered the entire question of the prevention of occupational hazards and the improvement of the working environment." The task at hand was to draft a labor convention "to lay the foundations for a national policy to establish as far as possible a total and coherent system of prevention, taking into consideration the present-day realities of the working world." The convention was "not a text which necessarily called for immediate action" but would instead claim to "promote the progressive application of new and far-reaching measures at the national level."⁵⁰³ The values work being done to frame the drafting of the convention characterized the current fixed standards as "piecemeal" and divorced from the "present-day realities". The new system was "complimentary" and somehow promoted "far-reaching measures" without a call for any immediate action. The cultural strategy for the negotiating session was now laid. Excluded were fixed-standards (they were piecemeal approaches). The "present day realities" as factors any sensible person would want to recognize, meant adopting "complimentary" approaches (thus avoiding the assertion of being a contradictory approach). These "far reaching measures" meant broad non-fixed standards, vague principles pursued within broad national practices.

The introductory remarks from the Employer's Group were articulate and their expressed goals were concise and well-planned. The Employers Group would accept a convention and recommendation that followed four principles as "suitable criteria." First, "the whole purpose of the instruments must be to influence what happened at the

⁵⁰³ Ibid. Page 53/1.

workplace. Legislation had limited effect unless supported by both the employer and the workers at the workplace and was seen by them to make sense....⁵⁰⁴

TABLE 6.1. *Strategic cultural frames in the negotiation of Convention 155*

EMPLOYERS	GOVERNMENTS
The focus must be the “undertaking level” and be supported by both workers and employers	Fixed standards approach used by the ILO was a “piecemeal” approach to labor standards
Employers and workers share a “common interest” in protecting health and safety	New convention was “complimentary” to the fixed standards approach to labor standards
Favorable results at the workplace were best achieved by “cooperation not confrontation”	New approach was “far-reaching” versus the traditional narrow fixed-standards model
Legal requirements must not “erode the clear line of responsibility” assumed by employers	New approach responded to “present day realities” but did not suggest immediate action
Giving rights to others would “dilute the responsibility assumed” by the employers	New convention advocated “a total and coherent system of protection” for workers
Convention must consider different “national practices and enforcement arrangements”	The new convention advocated “practical measures” not “abstract philosophical criteria”

Second, “Employers and workers had a common interest” and “favourable results at the workplace could best be achieved by co-operation rather than confrontation.” Third, any “elaboration of legal requirements” must not “erode” the “clear line of responsibility” at the workplace. This responsibility was “Employers accepting that they must bear the primary responsibility” for protecting workers. Fourth, the convention “must aim at instruments which would be widely capable of ratification, bearing in mind national practices both as regards to legal systems and enforcement arrangements....” The Workers’ members proposed no such framework

⁵⁰⁴ Ibid. Page 35/2.

of principles, and agreed with the Employer's Group on the joint concern about health and safety. They hoped for a standard with a "full legal basis" and that all workers in all sectors, from civil servants to domestic workers, be covered without exception.⁵⁰⁵

As negotiations for a new convention continued throughout the first meeting of the Committee on Safety and Health, the draft convention proposed was promotional, preferred self-regulatory logic, was flexible, and afforded great latitude and respect for "national practice" including few fixed legal points (See Appendix A). The draft encouraged national policies on vague managerialist tasks, such as "the relationships between the material elements of work and the persons who carry out or supervise the work." National policies were to be set based on "national practices and conditions" leaving essentially no basis upon which ILO supervision could ever occur. This was a major paradigm shift in occupational health and safety labor standards at the ILO, a body with a rich history of passing specific and concrete hazard-based standards.⁵⁰⁶

Discrimination protection was nowhere to be found in the draft subsequently passed after the first negotiation at the ILC in 1980 (See Appendix B). The Workers' Group, realizing that deficiency in the draft, proposed a new clause to make the vague national policies address directly the issue of discrimination against health and safety activists. "Real-world experience" made the Workers' Group advocate discrimination protection. The employers were adamantly against any amendments, arguing that the issue of employment discrimination "was out of place in an instrument concerning safety and health." The government delegates were split in their support for discrimination protection. Several governments considered discrimination to extend

⁵⁰⁵ Ibid. Page 35/2.

⁵⁰⁶ International Labour Organization. (1981b). *Safety and Health and the Working Environment*. Report VI (1) to the 67th International Labour Conference. Geneva: International Labour Office. Page 56.

only to protect workers when they contacted labor inspectors. Others sided with the employers and opposed the idea, while still other governments encouraged discrimination be included in the non-binding recommendation that was being drafted simultaneously, not in the stronger mechanism of the convention. Amendments on discrimination protection failed to pass in the 1980 negotiation and the workers vowed to raise the issue of discrimination at the second and final negotiation in June 1981.⁵⁰⁷

As the first negotiation for Convention No. 155 drew to a close, the Workers' Group brought forth a new proposal for workers' protection, this time specifically on the right to cease work. The convention was taking shape to address action countries should take at both the national policy-making level and, given its focus on managerial responsibility and voluntary self-regulation, actions "at the level of the undertaking." Given this focus on the workplace level, it was only logical that the right to refuse should be included and protected as a basic right of workers. The language proposed by the Workers' Group amendment, however, was a limited protection of the right to refuse that essentially reiterated the logic of the negotiation's Law and Practice survey.

- (1) A worker should have the right to cease work if he judges the work to cause immediate and serious risk to his life or health, provided that the cessation of work is immediately reported to the employer or the safety delegate.
- (2) A worker ceasing to work under such conditions is not to be victimized or held responsible for any damages or liabilities arising from the cessation of work, as measured from the time the work ceases until a decision is made to resume work.⁵⁰⁸

⁵⁰⁷ International Labour Organization. (1980b). *Record of Proceedings of the 66th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 35/9-10.

⁵⁰⁸ Ibid. Page 35/14.

Why the limited *sui generis* right to refuse was proposed by the Workers' Group is not recorded in the historical record. There was sheer hostility to any notion of rights and the protection against discrimination in the drafting of Convention 155. The cultural politics creatively constructed by both employers and Western governments altogether blocked any in-depth and honest discussion of the discrimination faced when workers protest health and safety hazards in their respective working environments. The labor policy approach assumed by Convention 155 was one of cooperation and sharing. It did not recognize any inherent power inequalities within the employment relationship. Hostility to the Workers' Group proposal was eased by the inclusion of the right to refuse taken from the original ILO Law and Practice survey on the right to refuse.

In the view of the Employers' Group, it would be impossible for countries to give a legal definition to the imminent hazard standard proposed by the workers in their last-minute amendment. Given the difficulty even the U.S. Supreme Court had with the legal concept of protecting workers from imminent hazards, the Employers' were in all likelihood correct about this assertion: "The principle behind the law proposed" they argued, "could not be enforced." Besides, "the primary responsibility for safeguarding safety and health must be that of the employer. To give rights to others could only dilute that responsibility."⁵⁰⁹ Government delegates were split on supporting the right to refuse. A block of northern industrialized countries including Belgium, France, Japan, and the United Kingdom opposed the idea. Canada, despite enthusiastically advocating the right to refuse in domestic labor policy to the ILO the year before, joined this block in their opposition.⁵¹⁰ The United States had supported adoption of the right to refuse amendment, with other countries.⁵¹¹ The amendment

⁵⁰⁹ Ibid. Page 35/14.

⁵¹⁰ Ibid. Pages 35/14-35/17.

⁵¹¹ It is unclear from the historical record why the U.S. government supported this amendment.

was adopted by the slimmest of margins: Of the delegates voting 47.8 percent voted to adopt the limited right to refuse amendment (31,552 votes), 47.2 percent opposed adoption (31,142 votes), with the balance of votes being abstentions (3,277 votes).⁵¹²

At the end of the 1980 negotiation, the workers' delegates brought yet another amendment for adoption. The clause for the first time would include a mention of the role of trade unions, an element all but forgotten in the negotiations, a seeming affront to the cultural vision created by the advocates of the Robens-esque new-style ILO labor convention. Workers should, said the proposal "be given time for an exchange of views, during the working hours and in the workplace, to enable them to keep each other informed and discuss with their trade union representatives any problems concerning occupational safety and health."⁵¹³ To the employers, the new amendment "jeopardized the over-all compromise" reached on the right to refuse unsafe work and they opposed it. The Employers' Group caucused. Upon their return, they offered a rewritten draft amendment to grant "reasonable time off with pay" and replacing the key words "trade union" with "the representatives of workers" in the final draft.⁵¹⁴

As the U.S. government delegate took the podium at the full ILC assembly, his report of the committee's work was laudatory and further constructed the vision of the dawn of a new era in labor policy. The goal was nothing short of a "total and coherent system of prevention of occupational accidents and occupational diseases" where each state would promote "the progressive application of new and far-reaching measures at the national level." "We are all developing nations when it comes to safety and

⁵¹² International Labour Organization. (1980b). *Record of Proceedings of the 66th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 35/15. The reason for the large number of votes is the ILO's traditional weighting of the votes of the members of the committee to assure equal tripartite voting between governments, employer and worker delegates.

⁵¹³ Ibid. Page 35/19.

⁵¹⁴ Ibid. Page 35/19.

health,” he repeated, “and it will take the co-operation of all nations, all employers and all employees to stop the insults placed upon men and women in our workplaces.”⁵¹⁵

The American delegate reported to the assembly on the work of the 1980 negotiations:

Prevalent throughout our discussion was the fact that co-operation, not confrontation, between employer, employee and government was the fastest way to success in reduction of the insults to men, that employers have a responsibility to provide safe and healthy conditions... This document is shaping the model for safety and health for all men for the 1980s and probably beyond, shaping a coherent nation-wide system in the true spirit of tripartism. We are looking forward to the second discussion next year.⁵¹⁶

For the Employers’ and Workers’ Groups, however, each acknowledged in diplomatic tones that a contentious negotiation had just concluded. “Our subsequent differences,” said the leader of the Employers’ Group from the United Kingdom, “which I may say were strongly—but objectively—debated, were about means and measures rather than aims.” The delegate of the Workers’ Group was more explicit. “The positive role of the trade unions must,” he said “be more clearly spelled out in both instruments.”⁵¹⁷

6.7. The final negotiation and adoption of Convention No. 155

As the committee reconvened for its final negotiation in 1981, organized labor would find itself further thrown off balance. The workers held to its promise to take up the cause of discrimination protection in the final negotiations. Mr. MacKenzie, the U.S. government representative on the committee, continued as Reporter through the second discussion. Mr. Cobb, the U.K. employers’ delegate and Mr. de Bruin, the Dutch workers’ delegate were again the tripartite representatives. The representative from Poland as chair rounded out the unchanged Eurocentric drafting committee.

⁵¹⁵ Ibid. Page 42/1.

⁵¹⁶ Ibid. Page 42/1.

⁵¹⁷ Ibid. Pages 42/2-42/3.

The opening remarks of the final discussion were punctuated with sweeping statements attesting to the importance of the work at hand. “At no time during the era of industrialization has there been so great an awareness of the need to protect the life and health of workers as during the last few years” wrote the staff reporters for the International Labor Office as they summarized the speakers opening remarks.⁵¹⁸

The draft international instrument submitted for the Committee’s consideration was clearly the reflection, at the international level, of this new national awareness. The instruments dealt with the whole question of the prevention of occupational hazards and the improvement of the working environment, an area where national legislation was often still fragmentary.⁵¹⁹

Echoing the sentiments of some government delegates, the Employers’ Group stressed the importance of the work of the committee and the need to take action to protect the safety and health of workers. They restated their guiding principles and echoed Webb and Robens as the final session opened with a call for the adoption of new “practical measures” versus “a text attempting to satisfy abstract philosophical criteria.”⁵²⁰

The workers’ opened their remarks with strikingly less diplomatic tones than either the Employers’ Group or the governments. They launched into a critique of the basic drafting of the convention but their critique failed to challenge effectively the underlying voluntarist foundation upon which the overall negotiations had been based.

The workers’ delegates stated their overall reservations with the direction of the negotiations. They were awakening too late to realize just what was transpiring with their tacit approval, however, as much as they didn’t like what they were seeing. First, the Workers’ Group “regretted that several points in their favour had not been

⁵¹⁸ International Labour Organization. (1981a). *Record of Proceedings of the 67th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 25/1.

⁵¹⁹ Ibid. Page 25/1.

⁵²⁰ Ibid. Page 25/2.

retained in the new document prepared for the second discussion.” These were said to be simple interpretive mistakes by the staff of the International Labor Office.

Second, on the votes taken during the previous negotiation, where the vote was close in the Workers’ Group favor, the results were detailed. Elsewhere, where votes were close in the Employer’s Group favor, the votes were not detailed. This gave the impression of consensus and harmony surrounding the employers’ main points while at the same time giving a sense of discord and disagreement on the points proposed by the Workers’ Group. Third, the workers proposed to continue the critical discussion on key topics about which they “had expressed reservations” the prior year, but these reservations had been “deleted or modified” in the official ILO record by “several editorial changes” that had been made after the first round 1980 negotiation. This included the redrafting of the right to refuse unsafe work. It also included rewording language on consultations between employers and unions, and subcontracting, which had somehow been “dropped without any explanation” from the negotiated draft text.

The changed draft was circulated as the agreed-upon proposed convention text from the 1980 negotiation at the start of the final 1981 negotiation (See Appendix C). The workers had, at the 1980 negotiation, won a close vote on inclusion of the right to refuse. Again, a review of the wording from the agreed 1980 amendment is needed.

Article 20

- (1) A worker should have the right to cease work if he judges the work to cause immediate and serious danger to his life or health, provided that the cessation of work is immediately reported to the employer or the workers’ safety delegate.
- (2) A worker ceasing to work under such conditions is not to be victimized or held responsible for any damages or liabilities arising from the cessation of work, as measured from the time the work ceases until a

decision is made to resume work.⁵²¹

When the ILO tripartite delegates arrived in Geneva in June 1981 and collected their documents in preparation for the final negotiation, the text had been changed entirely. Removed was the clause about being held responsible for damages and liabilities and victimization for the cessation of work. The new draft text placed new barriers to the exercise of the right to refuse by establishing an objective hazard evidence standard.

Article 17

There shall be arrangements at the level of the undertaking under which –

...

- (f) a worker reports forthwith to his immediate supervisor any situation which he has objective reason to believe presents and imminent and serious danger to his life or health, and is enabled to cease work in such cases if it has not proved possible to obtain in time a decision of management as to whether work should continue, it being understood that the worker shall not incur prejudice as a result of cessation of work in these circumstances where he has acted in good faith.⁵²²

The language of the protection was changed. Astonishingly, the right to refuse was yet again merged with a list of general provisions to be arranged “at the level of the undertaking”. This was the section of convention text that highlighted the enterprise level action to be taken voluntarily by employers, versus the requirements to be made a part of national policy. The agreed upon text from the previous year had protected the right to refuse as a stand-alone item of importance. It had not been listed in the category designated for those matters purely in the domain of voluntary managerial

⁵²¹ International Labour Organization. (1980b). *Record of Proceedings of the 66th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 35/23

⁵²² International Labour Organization. (1981b). *Safety and Health and the Working Environment*. Report VI (1) to the 67th International Labour Conference. Geneva: International Labour Office. Page 64.

concern at the level of the undertaking. There is no indication in the historical record explaining how such an obvious and likely intentional change came to pass out of the Anglo-centric negotiating committee. The change, however, was more than a simple transcription error. Given the contentious nature of the negotiations one could deduce from its placement it was the clear result of political underhandedness at some level.

The final negotiation of Convention 155 saw amendment after amendment proposed by the Workers' Group. Most were shot down by a bloc of governments and the Employers' Group. Workers proposed amendments to replace the self-regulatory and voluntarist language throughout the altered draft text. They proposed removing words such as "so far as is reasonably practicable" and action required "in accordance with national law and practice" as well as language proposing the convention be made national policy "progressively" and "insofar as reasonably practicable." The Canadian government delegates proposed keeping the national law and practice language, siding with the Employers' Group. Proposed amendment after proposed amendment made the Employers' Group "astonished that these amendments had not been proposed after all the discussion which had taken place on this question the previous year with the compromise which had been so laboriously arrived at..."⁵²³ The workers had been dealt the lower hand not only culturally but structurally as well. The altered draft text fiasco still was not enough to stop the Employers' Group from making self-serving statements about how shocked and incredulous they were about the ill-preparedness of the Workers' Group in conceptualizing, articulating and offering their amendments.

The question of discrimination protection was proposed again by the workers' members. The workers wanted a convention to include concrete language to protect

⁵²³ International Labour Organization. (1981a). *Record of Proceedings of the 67th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 25/5.

workers from employer “victimization and dismissal” for their activism for workers’ health and safety. The employers disagreed with this completely and suggested it be referred to another committee at the ILO that handled the termination of employment. According to the Employers’ Group, protection for victimization and dismissal in this convention “went far outside the scope of the instrument under discussion.”⁵²⁴

The workers held fast on this point and proposed to include a requirement that the innocuous and vague “national policy” the convention required countries to create also include “provisions for the protection of workers and their representatives from victimization and dismissal...”⁵²⁵ In the face of worker insistence a broad clause on discrimination was included in the convention. Several governments questioned the language, citing conflicts with their current laws on discrimination. The Workers’ Group encountered a wall of opposition from the Employers’ Group, combined with a split government block. This combined to doomed any attempt to improve the vague language on discrimination and victimization, leaving these protections ill-defined and made contingent upon “national practice” and “as reasonably practicable” standards.

The employers argued vehemently against strengthening the language of discrimination protection, falling back on generations-old arguments not on human rights but about the precarious position of workers agitating for improvements in working conditions. “Some potential hazards” argued the Employers’ Group, “were inherent in the nature of the work” and “the worker was aware of these and was free to not to accept a contract of employment.” The amendments proposed would allow a worker to “break his contract suddenly.”⁵²⁶ What ultimately became the language on discrimination that was adopted in Convention 155 was a watered-down statement on

⁵²⁴ Ibid. Page 25/5.

⁵²⁵ Ibid. Pages 25/5-25/6.

⁵²⁶ Ibid. Page 25/6.

the protection of workers from victimization “in accordance with the national policy.” The new language read that national policies should include provisions “for the protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in accordance with national policy.”⁵²⁷ No clarity was given about the constitution of discrimination or the protected acts of workers.

The workers persisted through the final days of negotiations proposing the convention strengthen the enforcement of national policy and remove the voluntarist language within the draft text, and to ensure, in their words, that governments “have appropriate rights of intervention, control and negotiation in the fields of occupational safety, hygiene and health.” They failed on almost every amendment during the final negotiations. To the employers, the amendments were simply the “watering down [of] responsibilities” reserved for employers in the new system of safety and health.⁵²⁸

The negotiation moved to consider one final time the right to refuse unsafe work. The Workers’ Group protested again against the changed language. The U.K. government member stepped in to mediate and explain with paternalistic authority that his government’s Robens-based model legislation “laid the responsibility for ensuring the health and safety of workers squarely upon the employer” thus mitigating the need for a strong state.⁵²⁹ The workers had clearly lost cultural traction. As the negotiation drew to a close, the employers had the upper hand structurally, given the language on the table, and culturally, as the overall vision of a new voluntarism in health and safety policy had been carried forward into the new global labor standard, swiping the goal of a stronger regulatory state out from under the workers’ eleventh hour rhetoric. That a new cultural environment so precisely constructed over a few short years was to be

⁵²⁷ Ibid. Page 25/6.

⁵²⁸ Ibid. Page 25/10.

⁵²⁹ Ibid. Page 25/10.

incorporated as a global labor standard was a feat of political maneuvering by the Anglo-American governments and their tripartite employer allies. What would result was a new global labor standard with rights made safe for managerial prerogatives and market economics. The postwar honesty focused on labor conventions with protective language for workers' freedom of association rights had come to a screeching halt in the face of economic globalization and the increasing elite demand for liberalist trade.

6.8. A "new international awareness" under global labor standards

The contentious negotiations for Convention 155 were not matters of simple tripartite discourse and decision-making. What had occurred was a more insidious use of power. Classic *laissez-faire* self-regulation, the very problem giving rise to the ILO itself, had become codified in global labor standards and used as an argument *in favor of* the alleged protection of workers. Orwell could not have orchestrated any more of an insidious feat. Workers' delegates were effectively sidelined in their representation before the negotiations for the new convention had even begun. They could not gain conceptual or rhetorical footing once the cultural environment was established and its approach tacitly agreed upon in the mandate to draft a new labor convention. The best strategy the Workers' Group could have followed would have been to storm out of the negotiations of Convention 155 and allow the drafting of the convention to collapse.

That trade unions needed a more sophisticated understanding of the cultural environment in their institutional analysis was apparent as the final negotiations for Convention 155 concluded. There was not time, however, for any kind of cultural analysis strategy to develop while the text-drafting negotiations were in mid-stream. The leadership of the committee and their structural positions of authority also helped to shepherd the new convention through what became a contentious cultural debate.

The cultural strategy re-constructed by Alfred Robens supported employer power even in the face of the historical experience of *laissez-faire* policies on worker protection against dangerous working conditions. This cultural strategy was re-created from Sidney Webb's work and was now bearing fruit for employers as the negotiation of Convention 155 concluded. The workers' proposed amendment after amendment through the course of the negotiations, but the arguments underlying their proposals were inconsistent with the "new" logic of the Robens-esque cultural world. The only option was to support the strongest rights framework available within this hegemonic narrative, namely the limited right to refuse unsafe work. Anything else was simply "adamantly confrontational" collective bargaining and union rights, regardless of how effective a confrontational policy approach may have been to counteracting the inherent inequality in employment and giving workers basic job security from which to enforce rights like the human rights to a safe and healthy working environment.

As the negotiations drew to a close the workers were clearly taxed and the ILO Committee on Safety and Health had put off the negotiation of the right to refuse to the end of the final negotiating session. Were negotiations not to implode or collapse entirely, the issue of rights would need to be addressed to demonstrate at least on the surface some basic level of commitment to protecting workers' rights in the face of the new cultural paradigms' outright attack on trade unions. The workers' submitted a new amendment on the right to refuse unsafe work toward the end, when the issue could no longer be avoided by the other parties. The Workers' Group submitted the new language in response to the mysteriously deleted language that had been removed.

- (i) a worker shall have the right to cease work judged by him to involve immediate and serious danger to the life or health of the worker on the condition that the danger cannot be immediately corrected by the employer or his representative;

- (ii) work may be halted only to the extent that the worker considers necessary to avoid danger;
- (iii) the halting of work and the reason for this shall be reported without delay to the employer or his representative;
- (iv) a worker ceasing to work under the above conditions shall not be dismissed or otherwise prejudiced nor shall he be held responsible for any damages or liability by reason of having ceased to work in accordance with the provision of this Article.⁵³⁰

Government delegates were split on the proposal. The Federal Republic of Germany asked for the amendment to be redrafted. Belgium argued workers could not leave their posts when it might endanger the lives of others. The workers' amendment was rejected by the committee with 44.5 percent in favor (24,597 votes) and 45.9 percent against (25,363 votes) with another 9.5 percent abstaining (5,265 votes).⁵³¹

The Employers, responding to a revised draft made by a group of ten western European countries including the United Kingdom, proposed an amendment that the right to refuse be protected "in accordance with national law and practice." This was defeated by the slimmest of margins. The vote was 46.9 percent in favor (26,325 votes) to 48.1 percent (26,955 votes) with 5 percent abstaining (2,808 votes).⁵³² The employers were quick to point out that the right to refuse "was not a question of an absolute right" and the employer's consent should be required for its exercise. This quote placed in the official record would be used by the ILO Committee of Experts to justify the constitution of the right to refuse as "not a question of an absolute right."⁵³³

⁵³⁰ Ibid. Page 25/11.

⁵³¹ Ibid. Page 25/11.

⁵³² Ibid. Page 25/12.

⁵³³ International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981. Report III (Part 1B) to the 98th Session of the International Labor Conference.* A report of the

The final language in Convention 155 was agreed upon with the support of the block of ten western governments. In addition to requiring parties to the convention to develop (in accordance with national practice) a discrimination policy, it included two provisions in respect to the right to refuse unsafe work, in Articles 13 and 19 (f).

Article 13 – A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.

...

Article 19 (f) – a worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health.

The Canadian formula of promoting a self-regulation logic in the management of occupational safety and health and advancing the right to refuse unsafe work as a *sui generis* employment protection was thus codified as a global labor right for countries around the world to ratify, model, and implement in national labor policy. The limited right to refuse ensured organized labor stayed at the table as a labor policy framework advanced advocating managerial prerogatives and private enterprise self-regulation.

Negotiations for a recommendation to accompany Convention 155 followed, and the workers became more forward, proposing “the right to bargain collectively must be recognized at all stages of the decision-making process and with regard to all safety and health issues at the workplace.”⁵³⁴ Their proposed amendments along this

Committee of Experts on the Application of Conventions and Recommendations (under articles 19, 22 and 35 of the Constitution). Geneva: International Labour Office.

⁵³⁴ International Labour Organization. (1981a). *Record of Proceedings of the 67th Session of the International Labour Conference*. Geneva: International Labour Organization. Page 25/13.

line were never adopted and the cultural barriers constructed were not overcome. The employers' were quick to remind the workers' that in their view, such an amendment "was absolutely contrary to the spirit of the rest of the instruments."⁵³⁵ Abstract ideas about social justice aside, "the spirit" of the negotiations was in the employers' favor.

As the Committee on Safety and Health submitted its work for adoption by the International Labour Conference the morning of Friday, June 19, 1981, the delegate from the U.S. government, Mr. MacKenzie, acting as Reporter of the Committee on Safety and Health, took to the assembly's podium. The work of the committee was finished. Their goal had been accomplished and "co-operation, not confrontation, between employer, employee and government was the fastest way to success in the reduction of injuries to man...." Workers' safety and health, argued MacKenzie, "is a recognized human right. Safety and health have no political or economic boundaries and both industrialized and developing countries suffer from these conditions."⁵³⁶

It is the foundation for a national policy to establish as far as possible a total and coherent system of prevention of occupational accidents and occupational diseases. The purpose of the instrument is to encourage member States to promote the progressive application of new and far reaching measures at the national level. As stated last year, we are all developing nations when it comes to safety and health and the co-operation of all nations, all employers and all employees will be needed to reduce the carnage that has occurred in the past. Governments cannot do it alone; employers cannot do it alone; employees cannot do it alone. But in the true sense of tripartism, we can all work together with a common goal toward reducing these disabilities.... This document is shaping the model for safety and health for all men for the 1980s and beyond; it is shaping a coherent world-wide system in the true spirit of tripartism."⁵³⁷

The employers' representative from the United Kingdom, Mr. Cobb, took the podium and argued that it was the employers' "that have the primary responsibility for the

⁵³⁵ Ibid. Page 25/14.

⁵³⁶ Ibid. Page 30/1-30/2.

⁵³⁷ Ibid. Page 30/1 and 30/2.

protection of workers” as “both sides can feel that they have got a good and fair bargain when the provisions of the instruments are taken as a whole.” The committee was able to “concentrate our discussions on practical steps which will help to avoid workers being injured, rather than on a text which attempted to satisfy abstract philosophical criteria. You now have the results...”⁵³⁸ The Polish chair echoed the sentiments, proclaiming the new global legal texts “model and realistic documents.”⁵³⁹

Mr. Bruin, the workers’ delegate from the Netherlands and the acting leader of the Workers’ Group in the Committee on Safety and Health, placed a positive spin on what were contentious and unsettled negotiations. “The instruments now definitely spell out that workers, their representatives, the safety delegates and their trade unions have a progressive role to play and shall be recognized as effective and responsible partners at all levels of the workplace and the undertaking, up to and including the national level.”⁵⁴⁰ Yet for workers, the term “trade union” appeared nowhere in the convention and the recommendation. Bruin’s description was an overly liberal one, if not either an outright negligent misrepresentation or irresponsible mischaracterization.

The final recorded vote on the Convention concerning Occupational Safety and Health and the Working Environment was 408 of the tripartite delegates in favor, and one delegate opposed. The U.S. employer’s delegate could not bring themselves to vote in favor of the convention, citing several unacceptable elements, including text in the convention that insinuated workers not pay for safety equipment and text that the design, construction and layout of workplaces be conducted with consideration of safety and health in a way that appeared to give governments the authority to demand prior approval to operate. The U.S. employers’ delegates were clearly emboldened,

⁵³⁸ Ibid. Page 30/2.

⁵³⁹ Ibid. Page 30/4.

⁵⁴⁰ Ibid. Page 30/3.

however, by the 1980 presidential election. The U.S. employers shared their views:

The electorate of the United States has sent forth a statement in the elections of November 1980. It has said clearly that it finds unacceptable the concentration of power largely in the national capital. By the people's vote it has freely expressed its dissatisfaction with the proposition that all wisdom resides centrally. By exercise of its democratic right it has sent a clear message that so-called democratic centralism is at best only 50 per cent adequate, and that as it becomes more and more central it becomes less and less democratic....

Because of the stimulation of the tendency to centralism within this document, we believe that this Convention's spirit is inconsistent with what the American people have told us by their vote of November 1980.... But the enhancement of centralism is inconsistent with present realities in the United States today.

For these reasons, I do not believe this Convention in its present form is acceptable to the employers of the United States, and so I must reluctantly cast a negative vote on their behalf.⁵⁴¹

Despite the overarching foundation in a self-regulating and even implicitly anti-union philosophy, the U.S. employers delegation still found the convention offensive of the broader utopian philosophy of markets as sacrosanct stateless phenomena.

Convention 155 was adopted and open for ratification by the nations of the world. The thirty year anniversary of Convention No. 155 in 2011 will include the celebration of at least 56 ratifications covering the major developing countries like Brazil, China and Mexico. The new model succeeded in globalizing the world over, reshaping the postwar trajectory of global worker health and safety policy. Instead of making this rights safe not for workers, however, this policy has served to make rights safe for managerial prerogatives and neoliberal global capitalism. A cultural politics was advanced that created specific obstacles before and during the negotiations for Convention 155. This involved limiting the range of acceptable alternatives and the

⁵⁴¹ Ibid. Page 30/5.

creation of obstacles to the protection of the right to refuse unsafe work as a critical component of global labor rights policy. These cultural politics confound the effective protection of the human right to workplace health and safety. They also demonstrate that employer political activity and counter-mobilization has shaped the constitution of global worker health and safety policy. Lessons are also relevant here for the debates on workers' rights as human rights. Where certain values and beliefs are mobilized in a strategic way to confound effective labor rights protections, the failure of the rights-based framework cannot be attributed to rights-based labor advocacy per se. The real reason is socially-contested politics. A stronger analysis of human rights institutions must, therefore, be incorporated into labor rights advocacy and policy-making. These must pay attention to both the excluded voices and excluded choices in policy-making, while striving for the most effective protection of workers' fundamental human rights.

CHAPTER VII

CONCLUSIONS AND CONSEQUENCES

The human right to refuse unsafe work; implications and final reflections

7.1. Protecting the right to refuse unsafe work as a human right

The protection of the right to refuse unsafe work has in the last generation been engrossed in social conflict. This social conflict extends beyond the workplace where workers face discrimination when protesting working conditions. It extends beyond national labor policy arenas. Social conflict surrounding the protection of the right to refuse has encompassed the international arena where global labor rights standards are adopted and monitored. As concerns about workers' health and safety and the health and safety of the working environment developed in the public consciousness over the last half of the twentieth century, the traditional means of worker protection, collective bargaining, was challenged. Business and pro-business government elites engaged in strategic political activity that challenged collective bargaining and workers' freedom of association. This political activity has involved more than the traditional influence-seeking mechanisms, however. Elaborate cultural political strategies have reshaped the discourse on worker health and safety policy. The discourse that emerged from these politics advocated restricting worker discrimination protections on the question of the right to refuse unsafe work. This new constitution of worker health and safety protection has ultimately served to "make rights safe" for business and its managerial prerogatives. The ideas that dominated and made this change possible were adopted in Convention No. 155 in 1981 and have reshaped the global labor rights policy on questions of the protection of workers' health and safety in the working environment.

The protection of the right to refuse unsafe work is a form of discrimination protection in employment. This protection is an important policy issue across all types of labor and employment relations. It is not exclusively a concern of those working in the traditionally dangerous occupations. Work refusals are clashes between the liberal market contours of the modern day employment relationship and society's desire for a safe and healthy environment at work. The adoption of Convention No. 155 in 1981 has led to the global dispersion of weak and inadequate discrimination protections for workers who advocate for health and safety in the working environment. These weak refusal rights are ineffective protections and represent a failure in global worker health and safety policy. Where stronger, viable alternatives were available to policymakers, key decision-makers followed those cultural logics as advocated by employers' groups and pro-business government officials. Those who advocated for a more protective constitution of the right to refuse were essentially excluded from decision-making.

This dissertation has focused on the U.S. and Canada because North American politics shaped this trajectory which has led to the failure of global worker health and safety policy. Canada adopted a model of limited self-regulation from the U.K. in the 1970s on worker health and safety. This model was merged with a restrictive refusal rights framework and advocated globally during the negotiation of Convention 155. The U.S. domination of global politics during this period advanced this paradigm of restricted rights and self-regulation in global worker health and safety policy. These historical dynamics even altered standard-setting practices on worker safety and health within the International Labor Organization. ILO standard-setting shifted from fixed health and safety standards to a "policy-based" approach envisioned as synonymous with and permissive of restricted labor rights protections and voluntary self-regulation.

Because global health and safety standards were based on U.S. and Canadian policy frameworks, these North American labor policies with restricted refusal rights serve as proxy case studies for the study of ILO labor standards made from this mold.

This study has examined Canadian scholarship and U.S. case investigations on the right to refuse unsafe work. Examining the evidence of effectiveness shows that a limited model of protection of the right to refuse is *inherently* ineffective. Non-union workers including temporary and contingent workers do not dare to use this legal recourse given their precarious and unequal position in the employment relationship. Qualifying the protection of the right to refuse upon a particular hazard threshold also exacerbates these social inequalities. Workers must prove a particular hazard meets a high legal bar to be protected. A good faith belief, versus acting in simple good faith, is required where hazards do not meet this threshold, to determine if legal protections are warranted. The objective standards which workers are required to meet are often difficult to establish in a world of complex hazards. Workers may also have personal conditions that alter hazard standards. The limited protection model that has come to dominate globally also individualizes employment rights. This means concerted action is not protected, even when refusals are themselves concerted. No avenues exist for a work refusal to cause structural change at the workplace as no system of representation or corporate governance is prescribed on questions of health and safety. Management rights are protected in this restricted refusal rights framework. Workers are even required to confront management independently first when they fear a hazard. This remarkable edifice of restricted labor rights means employers are afforded the opportunity to retaliate and alter a working environment before any legal authorities such as a labor inspectorate become involved in evaluating adequate work protection.

What is most striking about this refusal protection model now adopted globally is the absence of any respect for the inherent inequalities in the modern employment relationship. The protection of the right to refuse in global standards fails to recognize the inherent inequalities in the employment relationship. The conditions attached to its exercise mean that effective protection can never be achieved in this framework. It is an *inherently* ineffective protection. Among the lessons this failure points to is the importance of industrial relations systems in the effective protection of refusal rights. The alternative strategies for protecting the right to refuse documented are protective of the right to refuse as akin to pre-organizational activity, a critical component of workers' freedom of association and, ultimately, of shared managerial governance.

The right to refuse unsafe work under international labor standards has been made a *safe right*. Unobtrusive power dynamics have prevented workers and union advocates from acting upon or even conceiving more *effective* rights. These dynamics have prevented more *representative* interests from being expressed that would have advanced a stronger protection of workers' rights on health, safety and the working environment. This is a global policy *made safe* for business, not safe for workers, communities, and the working environment. Employer political activities made this process possible and the effective use of cultural strategies manufactured and manipulated in the run up to Convention 155 cleared away any political opposition that dared to advance the notion of a stronger regime for protecting of workers' rights.

In addition to a study of labor policy, this dissertation has examined the right to refuse as a human rights issue. Because the right to refuse is both a human rights issue and an important industrial relations concern, this topic has afforded an opportunity to build-out a human rights-based institutional analysis in a labor scholarship field that has struggled with human rights ideas. To build-out such a human rights analysis, key

tenants of the human rights worldview, theory and philosophy have been documented and used to construct this institutional analysis in labor and employment relations. This required extending the analytical approach beyond legal positivism and positivist social science. In this analysis, *effectiveness* is a critical concept. The notion that human rights are the *first responsibility* of governments was also noted as a critical concern when rights-obligation structures clash as they often do in the world of work.

The logic of human rights leads us to ask particular questions of and pursue particular approaches to government. Human rights must be examined through a lens of *effectiveness*.⁵⁴² Protecting fundamental human rights is the *first responsibility* of governments.⁵⁴³ These critical foundation blocks mean that policies which adversely affect human rights must be changed. It also means that human rights policies such as labor law, must be evaluated for on-the-ground impact and effectiveness. In the case of the ILO, where ILO labor standards are said to be the link between more broad universal human rights principles and national labor policies, it is necessary that those standards be critiqued from a human rights perspective. Human rights principles hold that the protection of effective rights is the first responsibility of governments, thus society's rights-obligation structures must be altered where human rights are not made effective and enjoyed. These principles are two key elements of a human rights view and this approach offers labor scholarship a human rights-based institutional analysis.

Bringing this approach to the question of the right to refuse unsafe work, this study challenges the consensus upon which Convention 155 rests. It encourages the exploration of alternative rights-obligation structures that could replace the outmoded

⁵⁴² United Nations. (1948). *Universal Declaration of Human Rights*. Adopted at the 183rd meeting of the General Assembly in Paris, 10 December 1948. Article 8.

⁵⁴³ United Nations. (1993). *Vienna Declaration on Human Rights*. Adopted by the General Assembly A/CONF.157/23 - 12 July 1993. Article 1.

rights-obligation structures of the neo-liberal era that exist only for the protection of employer prerogatives, not for the protection of basic human rights at the workplace.

Workplace health and safety is an internationally-recognized human right. The Universal Declaration of Human Rights states that “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”⁵⁴⁴ Following this sentiment with more specificity, the right is defined by the International Covenant on Economic, Social and Cultural Rights which protects “safe and healthy working conditions” as well as “rest, leisure and reasonable limitations of working hours.”⁵⁴⁵ As fundamental and universal human rights, workers must be granted the right to refuse unsafe work. Because of the real social inequalities in the employment relationship, the right to refuse unsafe work cannot be made into an effective protection within a limited, restricted policy framework. The evidence here points to the view that it must be protected as a status protection similar to if not under entirely the framework of workers’ freedom of association pre-organizational activity.

Because liberal market termination rights have no standing as human rights, it is an obligation of states and societies to preference the rights of workers to a healthy and safety working environment. Where employer-secured legal rights conflict with the right to refuse unsafe work, the human right must be prioritized and protected first. Society’s rights-obligation structures must be changed accordingly if universal human rights principles are to be followed. Fundamental human rights are not to be balanced against lesser labor policy obligations like the protection of employer prerogatives.

The crisis evident in refusal rights documented here requires a re-evaluation of

⁵⁴⁴ United Nations. (1948). *Universal Declaration of Human Rights*. Adopted at the 183rd meeting of the General Assembly in Paris, 10 December 1948. Article 23.

⁵⁴⁵ United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights*. 993 UNTS 3.

global worker health and safety policy. The UN International Covenant on Economic, Social and Cultural Rights elaborates the right to a health and safety workplace. It provides in Article 7(b) everyone has a right to safe and healthy working conditions. The UN Committee on Economic, Social and Cultural Rights, the body charged with monitoring this covenant, has not elaborated specific standards or rights that should apply under Article 7(b). The Committee has, however, referred to the Occupational Safety and Health Convention No. 155 of 1981. As the human rights scholar Matthew Craven noted, “it may be concluded that the Committee expects those standards to operate with respect to the Covenant, especially as regards the obligation to formulate a ‘coherent national policy’”.⁵⁴⁶ It may well be appropriate for the Committee to clarify this position.⁵⁴⁶ Indeed, this clarification of human rights protections is needed.

The flexibility within this “coherent national framework” is a conflict between the International Bill of Human Rights as represented in the International Covenant on Economic, Social and Cultural Rights and ILO Convention No. 155. In evaluating the discrepancy between ICESCR Article 7(b) and ILO Convention 155, Craven keenly notes that the Director-General of the ILO in 1974 reported “there is wide agreement that flexibility should have no place in standards aimed at ensuring safety and health at work.”⁵⁴⁷ Convention 155, however, permits a wide-range of national policies and practices. This flexibility extends to the right to refuse unsafe work, even permitting, as this dissertation has evidenced, national labor policies on the issue that are entirely ineffective in a world of precarious employment and work disorganization amidst new technologies, substances and working methods altering the landscape of work hazards.

⁵⁴⁶ Craven, Matthew C. R. (1995). *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development*. Oxford: Clarendon Press. Page 241.

⁵⁴⁷ International Labour Organization. (1975). *Making Work More Human, Working Conditions and Environment, Report of the Director-General*. First item on the agenda for the 60th International Labour Conference. Geneva: International Labour Office.

What this dissertation has identified on the topic of global labor rights is the failure of a key ILO standard to conform to human rights conventions. The task of the ILO supervisory bodies should be to alter their monitoring of Convention 155 to be in conformity with the International Covenant on Economic, Social and Cultural Rights. ILO supervision of health and safety conventions must be done with recognition of the real-world social inequalities faced in the employment relationship. The enforcement of workers' rights on occupational health and safety must constitute an *effective* global labor rights framework. Likewise, ILO supervisory bodies monitoring compliance with workers' freedom of association standards should expand their jurisprudence to protect discrimination against the right to refuse unsafe work as a central component of workers' freedom of association. Responsibility for developing this jurisprudence rests with the ILO's Committee of Experts on the Application of Conventions and Recommendations, the Conference Committee on the Application of Conventions and Recommendations, and the Governing Body's Committee on Freedom of Association.

The ILO, if it is to conform to human rights principles on workplace health and safety, must break its recent historic pattern of conditioning standards on a wide range of national practices. It should focus on visioning and articulating the most effective strategies for protecting workers' human rights. One example of the obstacles facing the ILO on this point unfolded in the wake of the 2008 financial crisis. Juan Somavia, the Director-General of the ILO, offered the International Labor Conference what was a sentiment echoed by the ILO Committee of Experts: "The capacity of governments has been reduced over the past decades with the belief that markets could deliver better development results on their own. . . . It is now painfully clear that inclusive markets function best alongside a strong State. . . . The multilateral system should identify rebuilding state institutional capacity as a priority objective of development

cooperation and emergency assistance.”⁵⁴⁸ Given the social impact of the crisis, the Committee of Experts called on states to regulate markets *by all appropriate means*.

The global financial crisis calls for a State that is willing and able to effectively regulate markets by all appropriate means.... Rebuilding the State’s institutional and regulatory capacity ... now needs to be identified as a priority objective of international cooperation in the field of social security. ... The prospects of overcoming the crisis are linked to more, and not less government regulation....⁵⁴⁹

The Employers’ Group protested the inclusion of these statements in the ILO reports, saying the international financial crisis was “not a failure of markets in general.”

We take strong exception to the statement ... the “global financial crisis calls for a State that is willing and able to effectively regulate markets by all appropriate means”. We hope that the intended meaning of the sentence was not as broad as it appeared.... The world needs a balance between the maintenance of labour standards and economic flexibility to stimulate job creation and raise productivity.⁵⁵⁰

The ILO Committee of Experts quickly backtracked on the statement, offering a more digestible interpretation of labor protections respectful to a market discipline while falling back into its old pattern of fearing to envision strong human rights protections. These comments were made to a committee of the International Labour Conference:

The Employer’s Group took strong exception to Paragraph 133 of our Report, which discussed the impact of the financial crisis on social security, where it states: “the global financial crisis calls for a State that is willing and able to effectively regulate markets by all appropriate means.” ... we were referring

⁵⁴⁸ International Labour Office. (2009a). *Application of International Labour Standards 2009 (I), Report III (Part 1A). Report of the Committee of Experts on the Application of Conventions and Recommendations*. 98th Session of the International Labour Conference. Geneva. The quote is from a discussion paper on the social consequences of the financial and economic crises by Juan Somavia, ILO Director-General to the UN system Chief Executive Board (CEB) in New York in October 2008.

⁵⁴⁹ Ibid.

⁵⁵⁰ International Labor Organization. (2009). *Provisional Record of the 98th Session of the International Labour Conference; Report of the Committee on the Application of Standards, Document 16, Part 1: Third item on the agenda, information and reports on the application of Conventions and Recommendations*. Geneva. Paragraph 69.

to regulation of financial markets, and not of labor markets. Moreover, we used the term “appropriate means” since the way in which governments choose to act to ensure financial stability will be different in different national contexts.⁵⁵¹

The Committee of Experts representative continued to clarify and re-interpret these remarks by describing the appropriate solutions to the new global financial crises.

Turning to the concern voiced by Worker members that the financial crisis may have a negative impact on [labor rights], she pointed out that it would be ironic indeed if this happened, because it was not some failure of labour markets that caused the economic crisis, a speedy recovery depended on well functioning labour markets. Observance of [international labor standards] could lead to efficient labour markets, and several Conventions focused on the capacity of governments to improve the functioning of labour markets.⁵⁵²

Encapsulated in these short exchanges is a wider institutional problem that haunts the ILO’s standards-setting work: Sacrificing human rights by adopting a labor market metaphor and discipline. This discipline is not always a *laissez-faire* ideology, it may mean adopting a more market-based institutional economics view. Maintained is a formulaic, strictly enforced set of rules that delineates how to protect workers’ rights. Moving toward compliance with the International Covenant on Economic, Social and Cultural Rights, however, means *effective* rights protections *by all appropriate means*. The ILO’s practice of respecting wide-ranging national practices drawn expansively challenges the basic premise of the protection of universal, fundamental human rights.

⁵⁵¹ Ibid. Paragraph 109.

⁵⁵² Ibid. Paragraph 110.

7.2. Rethinking the rights-based labor policy debate

Among the contemporary debates in labor scholarship that has emerged over the last ten years is the question of workers' rights as human rights. One side of this debate argues that labor solidarity and advancement is weakened by rights-based labor policies. Rights-based labor policies are said to damage civic engagement, promote social atomism and selfish individualism, create a dependency on legal and technical experts, and overall harm the necessary collective dimension of labor activism and as a result ultimately serves to reinforce employer power. Because the right to refuse unsafe work falls into this category of being rights-based labor policy and is a failure, it is a positive case on the dependent variable that seemingly illustrates the inability of rights-based labor policies to protect labor's interests on a topic of critical importance.

An in-depth qualitative case study of the right to refuse unsafe work in this context has afforded an ability to examine this question. This study indicates that the representations made by the adversaries of rights-based labor policies are simplistic and in need of a more complex analysis. Contested politics, not rights-based labor policies, are responsible for confounding global and national labor policies on the right to refuse unsafe work. The stronger constitution of labor rights in this case is both an individual and an associational protection. It was strategic employer political activity that manipulated the values and beliefs underlying the discourse in the creation of this rights framework. These dynamics worked to contravene the stronger constitution of rights in favor of an individualism that neither empowered nor protected workers.

Two lessons are critical on this point for labor rights and industrial relations. First, this case evidences as unfounded the viewpoint that rights-based frameworks *inherently* disempower the collective force of organized labor. What has happened is contested politics and strategic employer political activity has worked to reshape the

very constitution of labor rights so as to *make rights safe* for management power and employer control. Second, this study challenges the underlying assumptions of labor scholarship about the nature of the “individual employment rights” era. It shows how this era in no way entailed an expansion of individual rights but was much more so a contraction of individual worker rights. The individual employment rights narrative in this context has been a misrepresentation in employment relations scholarship.

Speaking of individual rights in employment relations is impossible without recognizing the associational and collective dimensions within those individual rights. Because of the social nature of employment, one worker’s hazard simply becomes the next worker’s problem. There is insight to be gained from the dissent in the *Meyers Industries* case. The dissent argued a “work-related statutory right is not in essence an individual right; it is a right shared by and created for employees as a group through the legislative process at the federal or state level” and thus any assertion of a right in the employment relationship is “literal group action”.⁵⁵³ Individual employment rights are not derogations of association action but rather expressions of associational action. What must be reinterpreted is the view that says the rights documented in this study are protective of individual rights. They are not. Restricting the literal group action dimension of workers’ rights is not protective of individual rights but a disciplinary neo-liberalism where managerial prerogatives reign supreme over human rights.

The right to refuse unsafe work, as protected under global labor rights policy and within many domestic labor policies, is a case of contested politics and employer political activity reshaping employment rights for managerial ends. It is not a failed labor policy because it followed a human rights-based framework. It fails because this model of protecting the right to refuse fails to conform to human rights principles.

⁵⁵³ *Meyers Industries, Inc. and Kenneth P. Prill*, 268 NLRB 73. 1984.

7.3. Final thoughts on the protection of the right to refuse unsafe work

Contested politics and employer political strategies have been used to shape values and beliefs to serve their own self-interested political ends. Milton Rokeach has described the importance of values and the function they play in decision-making.

One way to approach the question: what functions do values serve? is to think of values as standards that guide ongoing activities, and of value systems as general plans employed to resolve conflicts and to make decisions.

Human values are social products that have been transmitted and preserved in successive generations through one or more of society's institutions.⁵⁵⁴

If values and belief systems are standards that guide action, are employed to resolve conflict, and are used to make decisions, it is no wonder that ideological and cultural factors have served to shape human rights structures. These strategies have shaped global and national worker health and safety policy towards a constitution of rights that is not in the interest of workers or society. This is known not because we project our vision of worker interests upon the political debate that has unfolded on the topic of the right to refuse unsafe work. It is known because it is deduced from the impact of the institutional practices created. The evidence shows how these practices play out in the real world. This includes how these practices have protected worker health and safety and protected workers' ecology, creating serious challenges to the protection of a safe and healthy working environment and all that that social protection has entailed.

Workplace human rights activists must move themselves to develop a more sweeping critique of the values and beliefs that challenge human rights. Anticipating a dynamic "thesis of perverse effect" as Albert Hirschman described, is one example

⁵⁵⁴ Rokeach, Milton. (1973). *The Nature of Human Values*. Free Press. Page 12, 24.

and a good starting point. Here, human rights are endorsed “sincerely or otherwise” but the advocacy of stronger, more effective enforcement is “ill conceived” and will have “a chain of unintended consequences” that will result in “the exact contrary of the objective being proclaimed and pursued.”⁵⁵⁵ This ideational / cultural critique and values critique is an important part of the human rights activist’s strategic toolbox.

Bringing the critique of political rhetoric and values to questions of workers’ representation, we pinpoint one of the most important criticisms of any pluralistic system of representation. This includes ILO tripartite representation. Where shared values among all actors in a system counter the interests of an excluded body of rights-holders, no degree of representation will be representative of those excluded interests, however participatory the system of representation. *False consensus* results where the interests of human rights-holders is sacrificed as can happen in pluralistic systems that are subjected to unobtrusive power dynamics that contravene rights-holder interests.

The solution to this problem may or may not be a more participatory-style of representation. It may require changing the underlying quality of labor representation. Human rights activists must focus on the quality of representation and assure rights-holders interests are represented in ILO standard-setting and supervision. Promoting cultures of dissent, resistance *and* democracy are therefore necessary for human rights to be realized and effectuated. Responsive representation means effectively shaping society’s rights-obligation structures. Investigating the real-world implications of labor rights policies said to be in interests of a particular excluded group is critical in this process. It is more than a frame analysis of an opponent’s argument. It requires an analysis of alternative political choices, excluded voices, and real-life experiences.

⁵⁵⁵ Hirschman, Albert O. (1991). *The Rhetoric of Reaction: Perversity, futility, jeopardy*. Cambridge: Belknap Press.

Occupational safety and health is an area of labor and employment law that is “extensively regulated” with “intensive legislative activity worldwide in the area...in the last 5 years.”⁵⁵⁶ How society elects to resolve the socio-legal conflicts that arise in the working environment is a critical human rights concern that is often an ecologic concern as well. Because of the dramatic socioeconomic and ecologic changes facing society, human rights advocates must re-examine the right to refuse in response to the general turbulence facing humanity. Writing the voice of workers out of the solution is not only a moral affront to human rights, it is a dire strategic misstep in protecting society from a world of increasingly disorganized work and hazardous environments.

The everyday affront to dignity that workers face when they have inadequate workplace representation is evident within each refusal to work case. What must be pursued are global labor rights that permit the representation of interests that do not deny or distort the substance of a human rights claim for workplace health and safety. This means creating policy frameworks that recognize the associational dimensions of individual rights to refuse. Only when the inequalities in employment are addressed can the right to refuse be made effective. New strategies must be considered if the human right to a healthy and safe environment is to be effectively protected. Human rights at work will otherwise continue to be violated by unchecked managerial control and the power of a private enterprise system that threatens society’s health and safety.

⁵⁵⁶ International Labour Organization. (2009). *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*. Report III (Part 1B) to the 98th Session of the International Labor Conference. A report of the Committee of Experts on the Application of Conventions and Recommendations (under articles 19, 22 and 35 of the Constitution). Geneva: International Labour Office. Page 29.

APPENDIX A

Convention 155 as drafted in the ILO's Proposed Conclusions (May 1980)

Author's note: After the ILO Governing Body proposed a new international standard in 1978 on the topic of occupational health and safety and the working environment, the staff of the International Labor Office sent a Law and Practice survey to member states. The questions asked and the ILO staff's interpretation of the answers resulted in the first draft of the convention. The following is the text of that original draft convention as provided to the tripartite delegates at the start of the negotiations at the International Labor Conference in June of 1980. The ILO staff decided not to include the right to refuse unsafe work or hard-law discrimination protections in the convention's first draft, instead leaving this language for the ILO recommendation.⁵⁵⁷

PROPOSED CONCLUSIONS

The following are the Proposed Conclusions which have been prepared on the basis of the replies from governments summarised and commented upon in the present report. They have been drafted in the usual form and are intended to serve as a basis for discussion by the International Labour Conference of the seventh item on the agenda of its 66th (1980) Session.

Form of the International Instruments

1. The International Labour Conference should adopt two international instruments concerning safety and health and the working environment.
2. The instruments should take the form of a Convention supplemented by a Recommendation.

Proposed Conclusions with a View to a Convention

I. SCOPE AND DEFINITIONS

3. (1) The proposed instrument should apply to all branches of economic activity.

⁵⁵⁷ International Labour Organization. (1980a). *Proposed Conclusions on Safety and Health and the Working Environment*. Report VII (a) (2) for the 66th Session of the International Labour Conference. Geneva: International Labour Organization.

(2) A Member ratifying the proposed instrument may, after consultation with the representative organisations of employers and workers concerned, where such exist, exclude from the application of the instrument particular branches of economic activity, such as maritime shipping or fishing, in respect of which special problems of a substantial nature arise.

(3) Each Member which ratifies the instrument should list, in the first report on the application of the instrument submitted under article 22 of the Constitution of the International Labour Organisation, any branches which may have been excluded in pursuance of the preceding paragraph, giving the reasons for such exclusion, and should indicate in subsequent reports any progress towards wider application.

4. (1) The proposed instrument should apply to all employed persons in the branches of economic activity covered.

(2) A Member ratifying the proposed instrument may exclude from its application limited categories of workers, such as homeworkers, in respect of which there are particular difficulties of application.

(3) Each Member which ratifies the instrument should list, in the first report on the application of the instrument submitted under article 22 of the Constitution of the International Labour Organisation, any limited categories of workers which may have been excluded in pursuance of the preceding paragraph, giving the reasons for such exclusion, and should indicate in subsequent reports any progress towards wider application.

5. The proposed instrument should apply, as a minimum, to all employed persons covered by labour inspection.

6. For the purpose of the proposed instrument –

(a) the term "workplace" should cover all places where workers need to be or to go by reason of their work and which are under the control of the employer ;

(b) the term "regulations" should cover all provisions given force of law by the competent authority or authorities.

II. PRINCIPLES OF NATIONAL POLICY

7. Each Member should, in the light of national conditions and practice, formulate, implement and periodically review a coherent national policy on safety and health and the working environment, with a view to preventing accidents and injury to health arising out of or occurring in the course of work.
8. The policy referred to in Point 7 should take account of the following main spheres of action :
 - (a) design, choice, installation, arrangement, use and maintenance of the material elements of work (working environment, machinery and equipment, substances and agents used, work processes) ;
 - (b) training, qualifications and motivation of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health ;
 - (c) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment and work processes to the physical and mental capacities of the workers ;
 - (d) communication and collaboration, at the levels of the working group and the undertaking, as well as at the national level.
9. The formulation of the policy referred to in Point 7 should indicate the respective functions and responsibilities in respect of safety and health and the working environment of public authorities, employers, workers and others, taking account both of the complementary character of such responsibilities and of national practice and conditions.
10. The situation regarding safety and health and the working environment should be reviewed at appropriate intervals, either over-all or in respect of particular areas, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results.

III. ACTION AT THE NATIONAL LEVEL

11. Each Member should, by laws or regulations or any other method consistent with national practice and conditions, take such steps as may be necessary to give effect to Point 7.

12. (1) The enforcement of laws and regulations concerning safety and health and the working environment should be secured by an adequate and appropriate system of inspection.

(2) The enforcement system should provide for adequate penalties for violations of the laws and regulations.
13. The measures intended to give effect to the policy on safety and health and the working environment should progressively include the assumption of the following functions by the competent authority or authorities :
 - (a) the determination, where the nature and degree of hazards so require, of conditions governing the construction and arrangement of undertakings, the commencement of their operations, major alterations affecting them and changes in their purposes, as well as the application of procedures for making such steps subject to authorisation by the competent authority or authorities ;
 - (b) the determination of substances and agents exposure to which should be prohibited or made subject to authorisation or control by the competent authority or authorities ;
 - (c) the establishment and application of procedures for the notification of occupational accidents and diseases, by employers, insurance institutions and others directly concerned ;
 - (d) the holding of inquiries, where cases of occupational accidents or diseases appear to reflect situations which are particularly serious ;
 - (e) the publication, annually, of information on measures taken in pursuance of the policy and on occupational accidents and diseases.
14. Measures should be taken with a view to promoting, in a manner appropriate to national practice and conditions, the inclusion of questions of safety and health and the working environment in educational and training programmes, including those of higher technical, medical and professional institutes.
15. (1) With a view to ensuring the over-all coherence of the policy on safety and health and the working environment and of measures for its application, each Member should make arrangements appropriate to national practice and conditions to ensure the necessary co-ordination between various authorities and bodies called upon to give effect to Parts II and III of the instrument.

(2) Whenever circumstances so require and national practice and conditions permit, these arrangements should include the establishment of a central body.

IV. ACTION AT THE LEVEL OF THE UNDERTAKING

16. Undertakings should be required to ensure that, as far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risks to health.
17. Undertakings should further be required to provide, where necessary, for measures to deal with emergencies and accidents, including adequate first-aid arrangements.
18. There should be arrangements under which workers, to the extent of their control over workplaces, machinery, equipment and processes, co-operate in the fulfilment of the obligations placed upon undertakings.
19. Collaboration between management and workers should be an essential element of organisational and other measures taken in pursuance of Points 16 to 18.

V. RELATION TO EXISTING INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS

20. The proposed instrument should specify that it does not revise any international labour Convention or Recommendation.

APPENDIX B

After the first negotiation at the 1980 International Labor Conference (June 1980)

*Author's note: At the conclusion of the first negotiating session, changes were made. The right to refuse was included in the draft text, but broad discrimination protection was not. The right to refuse policy that was included was a weak protection but was in a stand-alone section not beneath the heading "At The Level Of The Undertaking" that was used to identify the self-regulatory duties of business within the convention versus the responsibilities of state authorities to establish new national labor policy.*⁵⁵⁸

PROPOSED CONCLUSIONS

Form of the International Instruments

1. The International Labour Conference should adopt two international instruments concerning safety and health and the working environment.
2. The instruments should take the form of a Convention supplemented by a Recommendation.

Proposed Conclusions with a View to a Convention

I. SCOPE AND DEFINITIONS

3. (1) The proposed instrument should apply to all branches of economic activity.

(2) A Member ratifying the proposed instrument may exclude from its application, in part or in whole, particular branches of economic activity, such as maritime shipping or fishing in respect of which special problems of a substantial nature arise; in making exclusions it shall act in consultation with the representative organisations of employers and workers concerned.

(3) Each Member which ratifies the instrument should list, in the first report on the application of the instrument submitted under article 22 of the Constitution of the International Labour Organisation, any branches which may have been excluded in pursuance of the preceding paragraph, giving the reasons for such exclusion, and should indicate in subsequent reports any progress towards

⁵⁵⁸ International Labour Organization. (1980b). *Record of Proceedings of the 66th Session of the International Labour Conference*. Geneva: International Labour Organization. Pages 35/21-35/23.

wider application.

4. (1) The proposed instrument should apply to all workers in the branches of economic activity covered.

(2) A Member ratifying the proposed instrument may exclude from its application, in part or in whole, limited categories of workers in respect of which there are particular difficulties; in making exclusions it shall act in consultation with the representative organisations of employers and workers concerned.

(3) Each Member which ratifies the instrument should list, in the first report on the application of the instrument submitted under article 22 of the Constitution of the International Labour Organisation, any limited categories of workers which may have been excluded in pursuance of the preceding paragraph, giving the reasons for such exclusion, and should indicate in subsequent reports any progress towards wider application.
5. For the purpose of the proposed instrument –
 - (a) the term "branches of economic activity" includes work in the public service;
 - (b) the term "workers" means all employed persons, including public employees;
 - (c) the term "workplace" should cover all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer;
 - (d) the term "regulations" should cover all provisions given force of law by the competent authority or authorities.

II. PRINCIPLES OF NATIONAL POLICY

6. Each Member should, in the light of national conditions and practice, and in consultation with the representative organisations of employers and workers concerned, formulate, implement and periodically review a coherent national policy on safety, health-including well-being-and the working environment, with a view to preventing accidents and injury to health, including well-being, arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

7. The policy referred to in Point 6 should take account of the following main spheres of action:
 - (a) design, testing, integration, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (working environment, machinery and equipment, substances and chemical, physical and biological agents used, work processes);
 - (b) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of the workers;
 - (c) training, retraining, qualifications and motivation of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health;
 - (d) communication and co-operation, at the levels of the working group and the undertaking, as well as at the national level.
8. The formulation of the policy referred to in Point 6 should indicate the respective functions and responsibilities in respect of safety and health and the working environment of public authorities, employers, workers, and others, taking account both of the complementary character of such responsibilities and of national practice and conditions.
9. The situation regarding safety and health and the working environment should be reviewed at appropriate intervals, either over-all or in respect of particular areas, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results.

III. ACTION AT THE NATIONAL LEVEL

10. Each Member should, by laws or regulations or any other method consistent with national practice and conditions and in consultation with the representative organisations of employers and workers concerned, take such steps as may be necessary to give effect to Point 6.
11. (1) The enforcement of laws and regulations concerning safety and health and the working environment should be secured by an adequate and appropriate system of inspection.

- (2) The enforcement system should provide for adequate penalties for violations of the laws and regulations.
12. Measures should be taken to provide guidance to employers and workers to help them to comply with legal obligations.
13. The measures intended to give effect to the policy on safety and health and the working environment should progressively include the assumption of the following functions by the competent authority or authorities:
- (a) the determination, where the nature and degree of hazards so require, of conditions governing the construction and arrangement of undertakings; the commencement of their operations, major alterations affecting them and changes in their purposes as well as the application of procedures defined by the competent authorities;
 - (b) the determination of substances and agents exposure to which should be prohibited, limited or made subject to authorisation or control by the competent authority or authorities; health hazards due to the simultaneous use of several substances and simultaneous effects should be taken into consideration;
 - (c) the establishment and application of procedures for the notification of occupational accidents and diseases, by employers and, when appropriate, insurance institutions and others directly concerned ; and the production of annual statistics on occupational accidents and diseases;
 - (d) the holding of inquiries, where cases of occupational accidents, occupational diseases and all other injuries to health which arise in the course of or in connection with work appear to reflect situations which are particularly serious;
 - (e) the publication, annually, of information on measures taken in pursuance of the policy on occupational accidents, occupational diseases and all other injuries to health which arise in the course of or in connection with work.
14. Measures should be taken with a view to ensuring that those who design, manufacture, import, provide or transfer machinery, equipment, substances or agents for occupational use –
- (a) satisfy themselves that, in so far as is reasonably practicable, the machinery, equipment, substance or agent does not entail dangers for the safety and health of those using it correctly;

(b) make available information concerning the correct installation and use of machinery and equipment and the correct use of substances and agents;

(c) undertake studies and research or otherwise keep abreast of the scientific and technical knowledge necessary to comply with (a) and (b) above.

15. Measures should be taken with a view to promoting, in a manner appropriate to national practice and conditions, the inclusion of questions of safety and health and the working environment at all levels of education and training, including those of higher technical, medical and professional institutes, in a manner meeting the training needs of all workers.

16. (1) With a view to ensuring the over-all coherence of the policy on safety and health and the working environment and of measures for its application, each Member should, in consultation with the representative organisations of employers and workers concerned, make arrangements appropriate to national practice and conditions to ensure the necessary co-ordination between various authorities and bodies called upon to give effect to Parts II and III of the instrument.

(2) Whenever circumstances so require and national practice and conditions permit, these arrangements should include the establishment of a central body.

IV. ACTION AT THE LEVEL OF THE UNDERTAKING

17. Employers should be required to ensure that, as far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risks to health.

18. Employers should further be required to provide, where necessary, for measures to deal with emergencies and accidents, including adequate first aid arrangements.

19. There should be arrangements at the level of the undertaking under which :

(a) workers, in the course of performing their work, should co-operate in the fulfilment by their employer of the obligations placed upon him ;

(b) representatives of workers in the undertaking should co-operate with the employer in the field of safety and health ;

(c) representatives of workers in an undertaking should be given adequate

information on measures taken by the employer to secure their safety and health including well-being and may consult their representative organisations about such information provided they do not disclose commercial secrets ;

(d) workers and their representatives in the undertaking should be given appropriate training in safety and health including well-being ;

(e) workers and their representative organisations in an undertaking should be enabled to inquire into, and be consulted by the employer on, all aspects of safety and health including well-being associated with their work. For this purpose technical advisers may, by mutual agreement, be brought in from outside the undertaking.

20. (1) A worker should have the right to cease work if he judges the work to cause immediate and serious danger to his life or health, on condition that the cessation of work is immediately reported to the employer, or the worker's safety delegate.

(2) The worker ceasing to work under such conditions is not to be victimised or held responsible for any damages or liabilities arising from the cessation of work, as measured from the time the work ceases until a decision is made to resume work.

21. Co-operation between management and workers and/or their representatives within the undertaking should be an essential element of organisational and other measures taken in pursuance of Points 17 to 19.

V. RELATION TO EXISTING INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS

22. The proposed instrument should specify that it does not revise any international labour Convention or Recommendation.

APPENDIX C

Convention 155 as proposed to the 1981 International Labor Conference (May 1981)

Author's note: Although delegates arrived at the 1981 negotiations expecting to be presented with the same draft negotiated at the 1980 negotiations, somehow the text had been changed. The right to refuse language was edited and weakened further. It was also subsumed as one in a list of provisions in the self-regulatory section "At The Level Of The Under Taking" removing it from direct national policy obligation.⁵⁵⁹

PROPOSED CONVENTION CONCERNING OCCUPATIONAL SAFETY AND HEALTH AND THE WORKING ENVIRONMENT

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-seventh Session on 3 June 1981, and

Having decided upon the adoption of certain proposals with regard to safety and health and the working environment, which is the sixth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, adopts this day of June of the year one thousand nine hundred and eighty-one the following Convention, which may be cited as the Occupational Safety and Health Convention, 1981:

PART I. DEFINITIONS AND SCOPE

Article 1

For the purpose of this Convention—

- (a) the term "branches of economic activity" includes the public service ;
- (b) the term "workers" covers all employed persons, including public employees;

⁵⁵⁹ International Labour Organization. (1981b). *Safety and Health and the Working Environment*. Report VI (1) to the 67th International Labour Conference. Geneva: International Labour Office. Pages 54 – 64.

- (c) the term "workplace" covers all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer;
- (d) the term "regulations" covers all provisions given force of law by the competent authority or authorities.

Article 2

1. This Convention applies to all branches of economic activity.
2. A Member ratifying this Convention may, after consultation with the representative organisations of employers and workers concerned, where such exist, exclude from its application, in part or in whole, particular branches of economic activity, such as maritime shipping or fishing, in respect of which special problems of a substantial nature arise.
3. Each Member which ratifies this Convention shall list, in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation, any branches which may have been excluded in pursuance of paragraph 2 of this Article, giving the reasons for such exclusion, and shall indicate in subsequent reports any progress towards wider application.

Article 3

1. This Convention applies to all workers in the branches of economic activity covered.
2. A Member ratifying this Convention may, after consultation with the representative organisations of employers and workers concerned, where such exist, exclude from its application, in part or in whole, limited categories of workers in respect of which there are particular difficulties.
3. Each Member which ratifies this Convention shall list, in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation, any limited categories of workers which may have been excluded in pursuance of paragraph 2 of this Article, giving the reasons for such exclusion, and shall indicate in subsequent reports any progress towards wider application.

PART II. PRINCIPLES OF NATIONAL POLICY

Article 4

1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, where such exist, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.
2. The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

Article 5

The policy referred to in Article 4 shall take account of the following main spheres of action in so far as they affect occupational safety and health and the working environment:

- (a) design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (working environment, machinery and equipment, chemical, physical and biological substances and agents used, work processes);
- (b) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of the workers ;
- (c) training, qualifications and motivation of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health;
- (d) communication and co-operation, at the levels of the working group and the undertaking, as well as at the national level.

Article 6

The formulation of the policy referred to in Article 4 shall indicate the respective functions and responsibilities in respect of occupational safety and health and the working environment of public authorities, employers, workers, and others, taking

account both of the complementary character of such responsibilities and of national conditions and practice.

Article 7

The situation regarding occupational safety and health and the working environment shall be reviewed at appropriate intervals, either over-all or in respect of particular areas, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results.

PART III. ACTION AT THE NATIONAL LEVEL

Article 8

Each Member shall, by laws or regulations or any other method consistent with national conditions and practice and in consultation with the representative organisations of employers and workers concerned, where such exist, take such steps as may be necessary to give effect to Article 4.

Article 9

1. The enforcement of laws and regulations concerning occupational safety and health and the working environment shall be secured by an adequate and appropriate system of inspection.
2. The enforcement system shall provide for adequate penalties for violations of the laws and regulations.

Article 10

Measures shall be taken to provide guidance to employers and workers so as to help them to comply with legal obligations.

Article 11

The measures to give effect to the policy referred to in Article 4 shall progressively include the assumption of the following functions by the competent authority or authorities:

- (a) the determination, where the nature and degree of hazards so require, of conditions governing the construction and lay-out of undertakings, the commencement of their operations, major alterations affecting them and changes in their purposes, as well as the application of procedures

- defined by the competent authorities;
- (b) the determination of substances and agents exposure to which is to be prohibited, limited or made subject to authorisation or control by the competent authority or authorities; health hazards due to the simultaneous exposure to several substances or agents shall be taken into consideration;
 - (c) the establishment and application of procedures for the notification of occupational accidents and diseases, by employers and, when appropriate, insurance institutions and others directly concerned, and the production of annual statistics on occupational accidents and diseases;
 - (d) the holding of inquiries, where cases of occupational accidents, occupational diseases or any other injuries to health which arise in the course of or in connection with work appear to reflect situations which are particularly serious;
 - (e) the publication, annually, of information on measures taken in pursuance of the policy referred to in Article 4 and on occupational accidents, occupational diseases and other injuries to health which arise in the course of or in connection with work.

Article 12

Measures shall be taken with a view to ensuring that those who design, manufacture, import, provide or transfer machinery, equipment or substances for occupational use—

- (a) satisfy themselves that, in so far as is reasonably practicable, the machinery, equipment or substance does not entail dangers for the safety and health of those using it correctly;
- (b) make available information concerning the correct installation and use of machinery and equipment and the correct use of substances ;
- (c) undertake studies and research or otherwise keep abreast of the scientific and technical knowledge necessary to comply with (a) and (b) above.

Article 13

Measures shall be taken with a view to promoting, in a manner appropriate to national conditions and practice, the inclusion of questions of occupational safety and health and the working environment at all levels of education and training, including higher technical, medical and professional education, in a manner meeting the training needs of all workers.

Article 14

1. With a view to ensuring the coherence of the policy referred to in Article 4 and of measures for its application, each Member shall, after consultation with the most representative organisations of employers and workers, where such exist, and with other agencies as appropriate, make arrangements appropriate to national conditions and practice to ensure the necessary co-ordination between various authorities and bodies called upon to give effect to Parts II and III of this Convention.
2. Whenever circumstances so require and national conditions and practice permit, these arrangements shall include the establishment of a central body.

PART IV. ACTION AT THE LEVEL OF THE UNDERTAKING

Article 15

Employers shall be required to ensure that, as far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risks to health.

Article 16

Employers shall further be required to provide, where necessary, for measures to deal with emergencies and accidents, including adequate first-aid arrangements.

Article 17

There shall be arrangements at the level of the undertaking under which—

- (a) workers, in the course of performing their work, co-operate in the fulfilment by their employer of the obligations placed upon him;
- (b) representatives of workers in the undertaking co-operate with the employer in the field of occupational safety and health;

- (c) representatives of workers in an undertaking are given adequate information on measures taken by the employer to secure their occupational safety and health and may consult their representative organisations about such information provided they do not disclose commercial secrets;
- (d) workers and their representatives in the undertaking are given appropriate training in occupational safety and health ;
- (e) workers, their representatives and, as the case may be, their representative organisations in an undertaking are enabled to inquire into, and are consulted by the employer on, all aspects of occupational safety and health associated with their work; for this purpose technical advisers may, by mutual agreement, be brought in from outside the undertaking;
- (f) a worker reports forthwith to his immediate supervisor any situation which he has objective reason to believe presents an imminent and serious danger to his life or health, and is enabled to cease work in such cases if it has not proved possible to obtain in time a decision of management as to whether work should continue, it being understood that the worker shall not incur prejudice as a result of cessation of work in these circumstances when he has acted in good faith.

Article 18

Co-operation between management and workers and/or their representatives within the undertaking shall be an essential element of organisational and other measures taken in pursuance of Articles 15 to 17.

PART V. RELATION TO EXISTING INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS

Article 19

This Convention does not revise any international labour Convention or Recommendation.

APPENDIX D

Convention No. 155 as adopted by the International Labor Conference (June 22, 1981)

Author's note: The following is the final language of Convention No. 155 Concerning occupational safety and health and the working environment. The convention was adopted by the International Labour Conference at Geneva on June 22, 1981.⁵⁶⁰

CONVENTION 155 – CONVENTION CONCERNING OCCUPATIONAL SAFETY AND HEALTH AND THE WORKING ENVIRONMENT

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-seventh Session on 3 June 1981, and

Having decided upon the adoption of certain proposals with regard to safety and health and the working environment, which is the sixth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, adopts this twenty-second day of June of the year one thousand nine hundred and eighty-one the following Convention, which may be cited as the Occupational Safety and Health Convention, 1981:

PART I. SCOPE AND DEFINITIONS

Article 1

1. This Convention applies to all branches of economic activity.
2. A Member ratifying this Convention may, after consultation at the earliest possible stage with the representative organisations of employers and workers concerned, exclude from its application, in part or in whole, particular branches of economic activity, such as maritime shipping or fishing, in respect of which special problems of a substantial nature arise.
3. Each Member which ratifies this Convention shall list, in the first report on

⁵⁶⁰ International Labour Organization. (1981a). *Record of Proceedings of the 67th Session of the International Labour Conference*. Geneva: International Labour Organization. Pages XXVI-XXXVIII.

the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation, any branches which may have been excluded in pursuance of paragraph 2 of this Article, giving the reasons for such exclusion and describing the measures taken to give adequate protection to workers in excluded branches, and shall indicate in subsequent reports any progress towards wider application.

Article 2

1. This Convention applies to all workers in the branches of economic activity covered.
2. A Member ratifying this Convention may, after consultation at the earliest possible stage with the representative organisations of employers and workers concerned, exclude from its application, in part or in whole, limited categories of workers in respect of which there are particular difficulties.
3. Each Member which ratifies this Convention shall list, in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation, any limited categories of workers which may have been excluded in pursuance of paragraph 2 of this Article, giving the reasons for such exclusion, and shall indicate in subsequent reports any progress towards wider application.

Article 3

For the purpose of this Convention

- (a) the term "branches of economic activity" covers all branches in which workers are employed, including the public service;
- (b) the term " workers " covers all employed persons, including public employees;
- (c) the term "workplace" covers all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer;
- (d) the term "regulations" covers all provisions given force of law by the competent authority or authorities;
- (e) the term "health", in relation to work, indicates not merely the absence of disease or infirmity ; it also includes the physical and mental

elements affecting health which are directly related to safety and hygiene at work.

PART II. PRINCIPLES OF NATIONAL POLICY

Article 4

1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.
2. The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

Article 5

The policy referred to in Article 4 of this Convention shall take account of the following main spheres of action in so far as they affect occupational safety and health and the working environment :

- (a) design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (workplaces, working environment, tools, machinery and equipment, chemical, physical and biological substances and agents, work processes);
- (b) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of the workers ;
- (c) training, including necessary further training, qualifications and motivations of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health;
- (d) communication and co-operation at the levels of the working group and the undertaking and at all other appropriate levels up to and including the national level ;
- (e) the protection of workers and their representatives from disciplinary

measures as a result of actions properly taken by them in conformity with the policy referred to in Article 4 of this Convention.

Article 6

The formulation of the policy referred to in Article 4 of this Convention shall indicate the respective functions and responsibilities in respect of occupational safety and health and the working environment of public authorities, employers, workers and others, taking account both of the complementary character of such responsibilities and of national conditions and practice.

Article 7

The situation regarding occupational safety and health and the working environment shall be reviewed at appropriate intervals, either over-all or in respect of particular areas, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results.

PART III. ACTION AT THE NATIONAL LEVEL

Article 8

Each Member shall, by laws or regulations or any other method consistent with national conditions and practice and in consultation with the representative organisations of employers and workers concerned, take such steps as may be necessary to give effect to Article 4 of this Convention.

Article 9

1. The enforcement of laws and regulations concerning occupational safety and health and the working environment shall be secured by an adequate and appropriate system of inspection.
2. The enforcement system shall provide for adequate penalties for violations of the laws and regulations.

Article 10

Measures shall be taken to provide guidance to employers and workers so as to help them to comply with legal obligations.

Article 11

To give effect to the policy referred to in Article 4 of this Convention, the competent authority or authorities shall ensure that the following functions are progressively carried out:

- (a) the determination, where the nature and degree of hazards so require, of conditions governing the design, construction and layout of undertakings, the commencement of their operations, major alterations affecting them and changes in their purposes, the safety of technical equipment used at work, as well as the application of procedures defined by the competent authorities;
- (b) the determination of work processes and of substances and agents the exposure to which is to be prohibited, limited or made subject to authorisation or control by the competent authority or authorities ; health hazards due to the simultaneous exposure to several substances or agents shall be taken into consideration;
- (c) the establishment and application of procedures for the notification of occupational accidents and diseases, by employers and, when appropriate, insurance institutions and others directly concerned, and the production of annual statistics on occupational accidents and diseases;
- (d) the holding of inquiries, where cases of occupational accidents, occupational diseases or any other injuries to health which arise in the course of or in connection with work appear to reflect situations which are serious;
- (e) the publication, annually, of information on measures taken in pursuance of the policy referred to in Article 4 of this Convention and on occupational accidents, occupational diseases and other injuries to health which arise in the course of or in connection with work ;
- (f) the introduction or extension of systems, taking into account national conditions and possibilities, to examine chemical, physical and biological agents in respect of the risk to the health of workers.

Article 12

Measures shall be taken, in accordance with national law and practice, with a view to ensuring that those who design, manufacture, import, provide or transfer machinery, equipment or substances for occupational use –

- (a) satisfy themselves that, so far as is reasonably practicable, the machinery, equipment or substance does not entail dangers for the safety and health of those using it correctly ;
- (b) make available information concerning the correct installation and use of machinery and equipment and the correct use of substances, and information on hazards of machinery and equipment and dangerous properties of chemical substances and physical and biological agents or products, as well as instructions on how known hazards are to be avoided;
- (c) undertake studies and research or otherwise keep abreast of the scientific and technical knowledge necessary to comply with subparagraphs (a) and (b) of this Article.

Article 13

A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.

Article 14

Measures shall be taken with a view to promoting, in a manner appropriate to national conditions and practice, the inclusion of questions of occupational safety and health and the working environment at all levels of education and training, including higher technical, medical and professional education, in a manner meeting the training needs of all workers.

Article 15

1. With a view to ensuring the coherence of the policy referred to in Article 4 of this Convention and of measures for its application, each Member shall, after consultation at the earliest possible stage with the most representative organisations of employers and workers, and with other bodies as appropriate, make arrangements appropriate to national conditions and practice to ensure

the necessary co-ordination between various authorities and bodies called upon to give effect to Parts II and III of this Convention.

2. Whenever circumstances so require and national conditions and practice permit, these arrangements shall include the establishment of a central body.

PART IV. ACTION AT THE LEVEL OF THE UNDERTAKING

Article 16

1. Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.
2. Employers shall be required to ensure that, so far as is reasonably practicable, the chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken.
3. Employers shall be required to provide, where necessary, adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health.

Article 17

Whenever two or more undertakings engage in activities simultaneously at one workplace, they shall collaborate in applying the requirements of this Convention.

Article 18

Employers shall be required to provide, where necessary, for measures to deal with emergencies and accidents, including adequate first-aid arrangements.

Article 19

There shall be arrangements at the level of the undertaking under which—

- (a) workers, in the course of performing their work, co-operate in the fulfilment by their employer of the obligations placed upon him;
- (b) representatives of workers in the undertaking co-operate with the employer in the field of occupational safety and health;

- (c) representatives of workers in an undertaking are given adequate information on measures taken by the employer to secure occupational safety and health and may consult their representative organisations about such information provided they do not disclose commercial secrets;
- (d) workers and their representatives in the undertaking are given appropriate training in occupational safety and health ;
- (e) workers or their representatives and, as the case may be, their representative organisations in an undertaking, in accordance with national law and practice, are enabled to inquire into, and are consulted by the employer on, all aspects of occupational safety and health associated with their work ; for this purpose technical advisers may, by mutual agreement, be brought in from outside the undertaking;
- (f) a worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health.

Article 20

Co-operation between management and workers and/or their representatives within the undertaking shall be an essential element of organisational and other measures taken in pursuance of Articles 16 to 19 of this Convention.

Article 21

Occupational safety and health measures shall not involve any expenditure for the workers.

PART V. FINAL PROVISIONS

Article 22

This Convention does not revise any international labour Conventions or Recommendations.

Article 23

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 24

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 25

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 26

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 27

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 28

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 29

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides—
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 25 above, if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 30

The English and French versions of the text of this Convention are equally authoritative.

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