

HAZARD OR HARDSHIP

*Crafting Global Norms on the Right to
Refuse Unsafe Work*

JEFFREY HILGERT

ILR PRESS
AN IMPRINT OF
CORNELL UNIVERSITY PRESS
ITHACA AND LONDON

Copyright © 2013 by Cornell University

All rights reserved. Except for brief quotations in a review, this book, or parts thereof, must not be reproduced in any form without permission in writing from the publisher. For information, address Cornell University Press, Sage House, 512 East State Street, Ithaca, New York 14850.

First published 2013 by Cornell University Press

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Hilgert, Jeffrey, 1974–

Hazard or hardship : crafting global norms on the right to refuse unsafe work / Jeffrey Hilgert.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-8014-5189-8 (cloth : alk. paper)

1. Industrial safety—Law and legislation. 2. Employee rights.
3. Labor laws and legislation. I. Title.

K1830.H55 2013

342'.0684—dc23 2013004467

Cornell University Press strives to use environmentally responsible suppliers and materials to the fullest extent possible in the publishing of its books. Such materials include vegetable-based, low-VOC inks and acid-free papers that are recycled, totally chlorine-free, or partly composed of nonwood fibers. For further information, visit our website at www.cornellpress.cornell.edu.

Cloth printing 10 9 8 7 6 5 4 3 2 1



CONTENTS

Acknowledgments	vii
List of Abbreviations	ix
Introduction: Commodified Workers and the International Response	1
1. Human Rights and the Struggle to Define Hazards	15
2. Theoretical Perspectives on Individual Employment Rights	35
3. The Right to Refuse in International Labor Law	53
4. How Effective Are Convention 155 Refusal Rights?	86
5. Ideological Origins of the Global Framework	119
6. Negotiating "Safe" Rights versus Seeking Social Justice	140
Conclusion: The Future of Labor Rights in the Working Environment	159

Notes	173
Bibliography	189
Index	201

INTRODUCTION

Commodified Workers and the International Response

Colonel Nicholson had again reassured his Japanese captors that the British soldiers under his command could construct their railroad bridge before the deadline. In the classic World War II film *Bridge on the River Kwai*, the exacting commander touts the organizational efficiency of his captive battalion, eventually beaming at the sight of the bridge as it nears completion. Hesitantly, near the end of the enormous construction project crafted entirely from jungle lumber, a young major approaches Nicholson and dissents, saying the soldiers—now Japanese prisoners of war—must be given permission to slow down or openly revolt, given the importance of the railroad bridge to enemy supply lines. Nicholson immediately snaps, indignant at the thought of any insubordination. Glancing at the massive structure he thunders in all his sweaty servitude, “We are prisoners of war! We haven’t the right to refuse work!”

Even in the absence of barbed wire and the pointed rifle of a prison camp, millions of workers around the world are averse to raising one’s voice at work, let alone using open resistance such as refusing unsafe work.

The prospect of meaningful improvement of working conditions seems so unlikely that the common suggestion for action is "Find another job!" rather than challenging management, asking questions, raising concerns, or stopping work. On the surface, "find another job!" may be a wise choice, if a person can find other employment. From a global policy viewpoint, however, there are fundamental drawbacks to this defeatist path of action.

Whether in economics textbooks or neighborhood cafes, people often erroneously see work as unfolding in a simple labor market where buyers and sellers exchange human labor and work for a price. Each government, however, constructs, shapes, and institutionalizes systems of labor and employment. Societies define different boundaries for rights at work and determine how workers can struggle to achieve social justice. Decisions of this nature encompass a variety of constitutions of the right of employees to dissent and struggle to improve their working environment. These issues relate closely to the protection of the freedom of association and collective bargaining. Occupational health and safety laws also define these boundaries. Each of these labor rights institutions shapes work and employment, making "labor markets" more a function of deliberately organized laws, habits and practices rather than the free-for-all open exchange that a "market" metaphor implies.

When workers are resigned to "find another job!" as the only option, both workers and societies ultimately lose. What is lost is the exercise of basic citizenship rights at the workplace. Citizenship, as I use it here, means not the traditional status granted by a government but rather the act of possessing certain inalienable rights and privileges that make possible real participation and representation in the governance of society. Workers have rights that are to be exercised and enjoyed, making each workplace a site of citizenship and government in a free society. When workers quit their jobs because they feel they have no other choice, society loses a degree of freedom and an avenue for voice, representation, and governance in the workplace. Taking a strict "labor market" view thus marginalizes notions of citizenship rights at work and undermines the basic idea of freedom, democracy, and fundamental human rights at the workplace. Such advice is akin to being told to "move to another country!" rather than struggle for social change.

If workers, conversely, disregard the all too common advice to "find another job!" and exercise citizenship rights at work, a particular set of

problems immediately surfaces. Will society's labor and employment system offer protection? Will changes be made to correct the original problem? If the problem is a safety and health concern, government inspectors may be called upon to enforce specific regulations. Will those regulations be enough? What regulations apply? What happens after the health and safety inspector leaves? If I try to organize to push my concern, will I be fired? If we all cause too much "trouble" will the company close and move elsewhere? Each of these uncertainties raises key questions about the boundaries of workers' rights and the distribution of power in the governance of the workplace. The answers are an indication of how each society defines and shapes the role of workers as citizens.¹

Decisions about the constitution of workers' rights do not unfold in a vacuum; quite the opposite. History plays an important role. Legislators, judges, policymakers, and other key decision-makers possess different value systems that they transpose onto various institutional practices. Ideas and the value systems that certain ideas represent are shared, adopted and at times imposed across national borders. Globally, particular labor and social policy models are exchanged and advocated. The International Labor Organization has since 1919 gathered delegates from around the world to discuss and adopt international conventions on particular labor and employment policies. These norms as ideas shape national and local choices and strategies for protecting workers' rights. The international human rights treaty system is yet another international venue for the advocacy, negotiation, and setting of labor and employment rights standards.

Taken together, the decisions made in establishing citizenship rights at work—their underlying values and moral paradigms, their real world effectiveness on the ground where people work, and the history and politics behind their development—form an important object of study for both the citizen-worker and the labor scholar. This book is an in-depth examination of a narrow but essential citizenship right at the workplace, the rights of workers to refuse unsafe, hazardous, or unhealthy work. The employment relationship in all its divergent and precarious forms is a global phenomenon. Studying how employees are empowered to dissent and the models of protection on the right to refuse is, therefore, a question of international importance.

Across the contemporary globalized workplace, a "right to refuse" is exercised when one or more workers decide not to perform some task or

assignment at work for fear of a health and safety risk—even after being ordered to do the job by a supervisor, manager, or some other superior. Where such refusals are safeguarded effectively, there are systems of protections for the worker with avenues for redress. These may include legal protections against retaliation or discrimination and systems to ameliorate the workers' health and safety concern. Where refusal rights are not well protected, this book asks why this is so. The diverging ways this unique citizenship right has been respected, exercised, and protected in law and in practice is the focus of this book. It is the story of how human society has shaped and restricted the global norms that define the workers' right to protest and in turn how society defines social justice and human rights in the struggle for a healthy and safe work environment.

The story of "the right to refuse" moves back and forth from local grievance to international political negotiation. The diversity of questions raised by this subject are equally legal, political, economic, social, and indeed philosophic. Refusal rights strike at the heart of employment in a capitalist society, defining how workers are protected when they fear for their health and safety. This book is about how society has decided to treat people willing to risk their livelihood to protest a concern about their basic working environment. The issue is not an abstract legal debate but rather a series of poignant and unnerving human experiences. The choices made define social justice, determine the degree of risk faced by people and communities, and delineate the line between a dignified and undignified human existence. Attention is paid to the North American experience for the instructive qualities of its labor history but also because this experience has influenced the global norms. This book is the history of the right to refuse unsafe work under international labor standards, a global legal framework and jurisprudence that fails workers seeking social justice by refusing unsafe work.

When Workers Refuse Unsafe Work

Duane Carlson was a cement truck operator employed by Arrowhead Concrete Works, a major concrete supplier in northeast Minnesota. When a mechanic and the company safety director verified his safety concerns about the truck he was driving, he refused to drive until repairs were made.

Court documents filed in his 2003 wrongful dismissal lawsuit attest to the pressure workers can face when they decide to refuse unsafe work. The company owner told 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 Carlson, a member of the Teamsters union, continued to refuse despite the threats, management's commands escalated into a full-throated verbal assault. "Listen you little cocksucker," the owner screamed, "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."² Carlson was not called back to work after a seasonal layoff and ultimately lost his discharge case in 2008 after five years of litigation and appeals.

Minutes away on U.S. Interstate Highway 35, Deborah Scott had made a similar decision in a different kind of workplace, six years earlier. Scott refused a routine job assignment to a dialysis unit of the Miller-Dwan Medical Center in Duluth. 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 another employee that exposure to the chemical should be avoided by pregnant women. Scott was six months pregnant and experiencing preterm labor. According to court documents in her health and safety retaliation case, three other dialysis technicians had also reported problems with their pregnancies while working with Renalin. After Scott's obstetrician ordered her to avoid exposure, she refused to return to her job. Management placed her on "unpaid leave" during her pregnancy, forcing Scott's family into economic hardship.³

Like Scott and Carlson, Richard Gizbert, an ABC News correspondent based in London, England, had a similar experience. Gizbert was fired after he refused to accept a third war zone assignment weeks before the Iraq War in 2003. Terminated despite a voluntary war zone policy, Gizbert sought £1.5 million for lost compensation with the Central London Employment Tribunal. He was awarded £98,781 after the tribunal found his dismissal unfair and based on his refusal to go to Iraq. ABC News appealed the decision, reducing the award to £60,000 while establishing jurisprudence under U.K. safety law that no right to refuse had occurred. "His place of work was London," said the 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 later found work reporting with the al-Jazeera network.⁴

About five kilometers across the border from Trieste, Italy, is the Slovenian port of Luka Koper on the Adriatic Sea. Once operated as a socially owned enterprise by a workers' council in the former Yugoslavia, the port would become one of the first free-trade zones years before the fall of the Soviet Union. Today, Luka Koper handles more than sixteen million tons of cargo annually and is an important logistics hub for the region. As traffic has increased with global trade, however, worker health and safety has become an important concern for the port workers. In August 2011, a small group of less than two dozen crane operators walked off the job to protest deteriorating working conditions. Individual contract workers, some reportedly on the job for several shifts in a row, wildcatted sporadically to protest "brutal growth in tonnage at the port" and "accidents happening almost every day." These refusals to work led to new health and safety protections in a collective agreement, including health and safety protections for some of the most precarious workers at Luka Koper.⁵

China has become Africa's biggest trading partner, boosting employment and "providing more loans . . . to poor countries than the World Bank."⁶ As investment has grown, however, reports of hazardous working conditions have surfaced with workers facing retribution for refusing unsafe work. Workers at the Chinese-owned Chambishi Copper Mine in Zambia told Human Rights Watch that they are routinely threatened for raising the prospect of refusing to work in unsafe areas. "Speak about safety, stop working—you're dismissed," say the managers, according to the underground miners. "I will say 'This is unsafe, we should not go ahead,' but the boss will say, 'No, go work,' and threaten to dismiss me. If you don't go along, you don't keep your job." Hazardous work has created the "mixed blessing" of employment in Africa.⁷

As in Chambishi and Luka Koper, the question of refusing unsafe work is also faced by people working in illicit and unregulated occupations. Sex workers across Asia, for example, have campaigned for regulation and occupational health and safety, including the right to refuse unsafe sex.⁸ One sex worker in Blackburn, Australia, a Melbourne suburb, was found assaulted by a man who "aggressively grabbed her, flipped her onto her back and attempted to rape her" before pulling a gun on her when she protested. The woman had "persistently refused to have sex with him without

a condom" and went on to file a claim for injured workers' compensation. Her lawyer argued "whether you work in a bank or a brothel, everyone has the right to feel safe and work."⁹ Like workers in other types of illegal employment, from child laborers to undocumented migrant labor, working in the underground economy compounds the challenge of protecting safety and health, including the right to refuse unsafe work.

Workers in emergencies have also struggled to refuse. Kathleen Blanco, the governor of Louisiana, called in hundreds of National Guard troops "fresh back from Iraq" and granted shoot to kill authority to "restore order" in New Orleans in the wake of Hurricane Katrina.¹⁰ As tensions rose and people realized the magnitude of the disaster that displaced three hundred thousand residents and caused damages in excess of \$100 billion, a crew of private security guards reported for duty at a fifty-one-story private office building downtown.¹¹ The crew was ordered to take SWAT action to remove vandals said to be taking advantage of the electrical blackout. Concerned about working in the tense environment, the employees requested more training and bulletproof vests. The crew was terminated on the spot for insubordination. Their wrongful discharge case was investigated by health and safety inspectors and was dismissed without merit.¹²

Where work hazards stop and environmental hazards begin is not always clear. Testifying before a congressional committee investigating the Deepwater Horizon oil rig explosion in the Gulf of Mexico that killed eleven workers, Lamar McKay, chairman and president of BP America, argued all employees "anywhere at any level" had the ability "and, in fact, the responsibility to raise their hand and try to get the operations stopped." Steve Newman, president and CEO of Transocean, another company on the same rig, reiterated that all of the employees had "stop work authority" to call "a time out for safety."¹³ This authority had failed, however. Ten hours before the explosion and ecologic disaster, an argument unfolded among the workers about safety. "The company man was basically saying, 'well, this is how it's going to be'," Douglas Brown, a rig mechanic, told federal investigators.¹⁴ Similar attempts to refuse unsafe work were also reported in another of the world's worst industrial accidents, the Union Carbide leak of methyl isocyanate in Bhopal, India, in 1984.¹⁵

Reports of workers refusing work due to safety and health concerns are found around the world and across occupations. Teachers, agricultural workers, retail clerks, nurses, and truck drivers have refused work for

safety and health reasons. Prison guards have refused work due to inadequate staffing levels, workers at nuclear power plants have refused work due to production speedup, and airline pilots have refused to fly due to mechanical concerns. The right to refuse unsafe work has involved individual work hazards, dangers to groups of workers, and risks to broader communities beyond the workplace. Work refusals for safety and health reasons may be isolated actions by one worker acting alone, or they may be group actions taken by any number of workers.

Despite differences in the particular details, there are commonalities shared across all work refusals. When workers face a hazard as they see it, they encounter a critical decision. If avenues for the redress of grievances exist, the decision may not be difficult. Safety and health can be secured via institutional means at the workers' initiative. Where workers are afforded no role in governance at work, however, or where their employment is so precarious the worker does not see any alternative, the decision may not appear to exist at all: Continue work. Be quiet. Keep your head down. Don't get fired or not called back. Loss of income. Unemployment. Ruin. For millions of workers around the world the choice is simple: hazard or hardship.

The right to refuse unsafe work is a global policy question that confronts all nations. Around the world, every society and government must decide how to protect, or not to protect, each worker from retaliation and termination. This involves not just drafting a progressive antidiscrimination law; it also involves the regulating of work and employment relations on a more fundamental level. Each country defines the rights of workers differently, but each national labor policy rests on a framework of laws and regulations that defines how workers who refuse work for reasons of safety and health will be treated. This "individual" decision by workers is thus an individual decision that is the result of a larger social process. The larger social process, namely how a nation writes laws and structures its business and employment systems, is found in every country of the world. From the social democracies of northern Europe and the informal workplaces of Africa, to the immense factories of East Asia and the export processing zones of Central America, to the vast agribusiness farmlands and the declining industrial towns across North America, individual worker decisions are encased in a broader institutional framework regulating each society's economies.

The right to refuse unsafe work—silently contemplated or actively engaged in—is ultimately a moral question for society. It is the worker that must face the greatest burden of occupational injuries and illnesses. If society crafts institutions, laws, and regulations that expose workers to hostile supervisors and managers without effective recourse, a moral choice has been made. Such a moral choice finds it acceptable that workers are forced to choose between two unthinkable alternatives: their physical health and safety or their economic livelihood and basic subsistence. Under this type of moral system, laws and regulations make a worker's safety and health nothing more than a commodity to be bought and sold for a price. Where a society offers no means of protecting the right to refuse unsafe work, workers themselves hold no more standing than their monetary value to the company. Here, workers are commodities. Health and safety—and thus the worker—become marketable commodities to be sold for a profit while workers assume the private burden of "their" injuries and illnesses.

The problem with this moral choice is that human beings are not commodities; human beings—people—are not mere objects to be bought and sold in a marketplace. Each human being has intrinsic worth. Slavery is widely seen as an affront to morality; slave markets have become prohibited institutions. As the question has become buying worker health and safety versus the whole human being, this moral logic, somehow, breaks down. The rights of workers in a globalized economy, especially those rights that protect safety and health, are limited. The "modern" imperative gives a higher priority to ongoing production, the authority of corporations, and making a profit. Despite weak systems of workplace rights, however, the underlying moral dilemma remains unchanged: if human beings as workers do not have the right to refuse unsafe work, they are nothing more than a commodity upon a global stage.

Labor Is Not a Commodity

At the dawn of the modern human rights era, after the wreckage of the Second World War, the idea that a worker is not a commodity was recognized and accepted internationally. Founded in 1919, the International Labor Organization was reconstituted through the Declaration of Philadelphia, adopted in 1944. "Labor is not a commodity" became the first

fundamental principle of the ILO. This was followed with the solemn obligation to advance policies and programs to achieve "adequate protection for the life and health of all workers in all occupations." The ILO had, since its beginning, served as a global forum for the negotiation and supervision of treaties on labor standards. The new Declaration of Philadelphia was an international recognition that "labor was not a commodity" and connected this principle to the aim of improving working conditions.

Franklin D. Roosevelt remarked at the time how the new declaration "was an historical document on a level with the U.S. Declaration of Independence in 1776."¹⁶ The text "sums up the aspirations of an epoch," the U.S. president noted, "affirming the rights of all human beings to material well-being and spiritual development under conditions of freedom and dignity." He implored "attainment of those conditions must constitute a central aim of national and international policy." "Indeed," he concluded, "the worthiness and success of international policies will be measured in the future by the extent to which they promote the achievement of this end."¹⁷

That labor was not a commodity had gained acceptance in the postwar years of social protection. Although "labor market" as a phrase was applied to systems of work and employment—a place where "buyers" and "sellers" exchange work and pay for a price—all were not in agreement with this metaphor. Notable writers such as Karl Polanyi¹⁸ described labor as a *fictitious* commodity. The economy was organized by institutions that enforced labor's unnatural commodification. Labor as a *fictitious* commodity was contrasted with *genuine* commodities such as basic material goods. Polanyi and others argued that new institutions could be built to provide social protection, enough social protection to *decommodify* labor and employment. This *decommodification* required knowledge of institutions. As the Cambridge economist Ha-joon Chang later noted, following Polanyi's logic, economics was itself the study of institutions and how the various institutions constitute "rights-obligation structures" throughout an economy.¹⁹

In the decades after the Declaration of Philadelphia was adopted at its twenty-sixth general conference, the ILO advocated labor and social policies for a postwar world based in social justice. The ILO was awarded the Nobel Peace Prize in 1969 in part for the idea *Si vis pacem, cole justitiam*—if the world is to achieve peace, it must cultivate justice. Led by a tripartite

(unions, employers, and governments) system of decision-making, the ILO directed its actions at the formalized and predominantly male labor force. This focus was critiqued but would remain amid a backdrop of "reduced labor-based inequality" in the 1960s. Social justice required direct engagement with employment relations and macroeconomic planning. The ILO led the effort to transform the principle of labor, decommodified, into reality.²⁰

The ILO's social justice efforts in the postwar decades were most innovative in the work of the World Employment Program of the 1960s and 1970s. Recognizing global economic disparities, the WEP advocated policies seeking full employment and a human needs-based model of economic development. This required creating diverse state interventions beyond classic market-based policy. The ILO's WEP advocated redistribution and broad national economic planning. At one point, ILO experts were assisting national governments in developing five-year plans. Through the 1960s and early 1970s, a global macroeconomic alternative had even emerged in response to neoliberalism's "failed policies of the counter-revolution." Such strategies eventually met the ire of U.S. government leaders, U.S. trade union leaders, and employers from both the United States and Europe. Each of these key national and social actors voted against the WEP agenda when the issue came to a head at the World Employment Conference in 1975.²¹

The 1970s and 1980s was a period of "intellectual shrinkage" for the ILO. The United States stopped its dues contributions to the ILO in 1970, suspending its membership in November 1975. Various reasons were given for the U.S. withdrawal, but the most direct impact on the ILO was an immediate reduction on the annual ILO budget:

The strident letter sent by Henry Kissinger, U.S. Secretary of State, to the Director-General was in fact written by Harvard Professor John Dunlop, the doyen of American industrial relations theorists. The suspension created immediate difficulties for the ILO, since the USA, which contributed a quarter of the ILO's regular budget, had also failed to pay its huge backlog of financial dues.²²

As globalization and the decline of industrial unionism challenged the ILO's tripartite governance, the U.S. withdrawal placed the ILO on the

defensive. The ILO offered no response to the World Bank's structural adjustment strategies that proposed "a dismantling of protective regulations and a substitution of pro-individualistic, pro-market regulations." The labor market flexibility debate grew yet when the ILO had "come up with evidence of the adverse effects of the new pro-market policies, efforts were made to keep it quiet to avoid alienating key governments," especially key states that were promoting neoliberal reforms. Intellectual shrinkage after 1980 meant the pace of standard setting would slow, the content of labor conventions would become more voluntarist and favorable to employers, and ILO supervision would be weakened.²³

The disintegration of the Soviet Union and the spread of capitalism created a new opportunity for the ILO. The World Bank, the International Monetary Fund, and the Organisation for Economic Cooperation and Development (OECD) all challenged the historic ILO role of institution-building for social justice. Popular unrest would keep social justice afloat yet pro-market critics argued against the "proliferation" of labor conventions.²⁴ One of the ILO's post-Cold War responses was *The Declaration of Fundamental Principles and Rights at Work*, a statement that defined four "core" issues as fundamental rights. These included the right to freedom from forced labor, the right to freedom from child labor, the right to equality and freedom from discrimination, and the freedom of association. What was lost, aside from work safety and health listed as a fundamental right, was a more expansive consciousness of the ILO as a forum for advancing broader systems of institutional governance through labor and social policy, not just silos of particular rights at work.

Today, the ILO estimates about 2.3 million workers are killed by work-related injuries and illnesses annually²⁵ and the figure is not declining.²⁶ Another 270 million nonfatal work-related accidents occur annually, in addition to about 160 million new cases of work-related disease identified each year.²⁷ Global capitalism today exacts an incalculable human toll on society and the planet. The financial toll is estimated to be between 2 to 11 percent of gross domestic product, stark figures that if halved would in some countries eliminate all foreign debt.²⁸ The reality that work-related illnesses and injuries have become a leading cause of adult morbidity is the tragic backdrop to the strategic weakening of the ILO over the last generation.²⁹ More people are killed at work today than by warfare. Workers' rights continue to be challenged not only by a hypercompetitive global

economy but also by increasingly precarious work arrangements and the failure to address the many new economic realities challenging human rights at work.

Complicating this picture today is how occupational health and safety hazards have become more complex. The “old” occupational health problems such as cotton dust and brown lung have resurfaced in areas of the world with weak governance and regulation—forcing workers “to replay history, despite the availability of information and knowledge transfer unthinkable just a generation ago.”³⁰ New varieties of workplace hazards are also emerging. This includes the explosion of new synthetic chemicals and their global trade. Whereas health hazards such as asbestos, lead, and white phosphorus were once the most serious causes for alarm, now one thousand new synthetic chemicals—two to three per day—are introduced into the global marketplace every year, bringing the number of synthetic chemicals in use to over one hundred thousand and growing. Other types of occupational hazards unknown a few years ago include occupational risks from products manufactured with nanoparticles, genetically engineered organisms of one variety or another, a list of hazards related to climate change, and workplace-based social hazards such as violence, psychological trauma, and mental health issues.

How workers are empowered (or not empowered) by society to protect health and safety is a central question in labor and employment policy. With the weakening of the international response through the ILO, workers are placed at risk and bear the burden of weak institutional protections. The typical response, when safety and health receives attention, is to strengthen the classic labor inspection model. As new hazards emerge while regulatory regimes often remain captured by business, however, new strategies are needed in response. Returning the question of occupational safety and health to the realm of workers’ rights and the role of labor rights in the working environment is a step of fundamental importance for labor policymakers and workers at risk worldwide.

This reexamination requires studying the institutions of worker representation and governance in the working environment. This study focuses on one dimension of worker representation, the right to refuse unsafe work. Among the characteristics that define commodified labor is that management holds the institutional freedom to hire, fire, and exert control over workers. Gradations of this freedom exist across different societies,

but the freedom remains. The OECD summarizes employment dismissal protections for all member states and the Anglo-American countries top the list in the freedom to dismiss workers. The United States, with its employment at-will doctrines, ranks first among OECD member countries, with Canada and the United Kingdom claiming the second and third most “flexible” labor market policies on dismissal protection.³¹

Refusal rights law defines both the rights of workers as well as the termination freedoms held by employers. Just as some societies limit employers’ right to dismiss employees on grounds such as racial or gender discrimination, employee dissent and the right to refuse unsafe work forms a similar moral limit on the termination of the employment relationship. Labor policy in general—the body of laws and regulations controlling work and workers—is the vehicle whereby such moral imperatives are implemented. Labor policies are found in every society.

Where employers hold liberal freedoms of termination, refusal rights become rights that are very difficult to exercise and enjoy. Oftentimes labor policies turn the right to refuse into a case of employee disloyalty and insubordination, placing additional burdens of proof upon the worker. Where workplaces confront a globally competitive environment, or where work itself is organized in a precarious fashion, seemingly insurmountable burdens are placed upon workers exercising the right to refuse. Yet the right to refuse unsafe work may be the most empowering way that workers represent themselves on the question of health and safety in the working environment and remains a ubiquitous question across workplace relations. This book details how workers lost the right to refuse under international labor and human rights norms. It is an in-depth look at how our global society has decided to resolve—and failed to resolve—the protection of any fundamental human right to refuse unsafe work.

HUMAN RIGHTS AND THE STRUGGLE TO DEFINE HAZARDS

Protecting basic refusal rights where workers face the most dangerous working conditions has had wide public support generally. Definitions of workplace hazards, however, are socially contested; meaning workers and employers often disagree about the definition of workplace hazards. The right to refuse typically has been wedded to some threshold, defined legally, that describes the degree of occupational hazard a worker may refuse. The phrase "imminent and serious danger" is one such legal standard that is used to determine when a worker can refuse unsafe work.

One can argue over the specific hazard threshold that will be covered by the right to refuse. At a more fundamental level, however, is the question of *who should have the right to define* hazardous work in the first place. The typical decision makers are the legislators, regulators, and ultimately judges. An alternative view is that the workers themselves should be the ones to decide. Many people have a visceral negative reaction to the idea that a single worker should be empowered to define the very nature of a workplace hazard to which they are exposed. It runs counter to a host of

deeply held values. This is especially the case in the United States, where worker commodification is the norm in law. Arguments against this worker freedom range from an objectivism rooted in scientific rationality to the view that workers are not capable of making such important decisions. Indeed, the scientific infrastructure erected around occupational safety and health in the last generation plays into a basic logic that a technocratic view has the capacity to solve all health and safety concerns. This perspective also views power relations at the workplace as less important, believing instead that if objective science can identify a hazard to human health, a broad social consensus necessarily follows in response.

Labor history is instructive on this point. Where commodification is strongest, as in Anglo-American countries, workers have struggled to refuse unsafe work on their own terms and according to their own definitions of hazardous work. Workers have held a different idea about the right to refuse unsafe work compared to not only employers but to progressive policymakers, regulators, and judges. The struggle for the right to define the nature of a hazard has, therefore, been as much a struggle as have those against particular hazards. These are two sides of the same coin, indivisible throughout labor history. In recounting this rich heritage, I open the debate about who gets to decide the nature of a hazard and thus when society protects the right to refuse. Although the aim of this book is a detailed examination of international labor rights norms, I use Anglo-American labor history to elucidate this key question underlying the global debate, namely, who decides the definition of a hazard at work?

Empowerment to Define Hazards at Work

As a subject of struggle by unions in collective bargaining, the right to refuse was protected as early as the Jellico Agreement of 1893, which covered eight Appalachian mines and was at the time "one of the most advanced agreements of any miners in the country." It allowed a miner "to refuse to work if he thought the mine was dangerous through failure of the bosses to supply enough support timber."¹ James Grey Pope has called conflicts where workers had unique ideas about their rights *constitutional insurgencies*.² Militant strikes by miners in the 1920s clashed with the Kansas Industrial Court, an early U.S. experiment in industrial relations

law. Progressive middle-class reformers maintained that "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."³ The miners disagreed, as did other workers. Quoting Carter Goodrich's *The Miner's Freedom*, these workers were active self-advocates:

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.⁴

This "effective freedom" originated from a "popular rights consciousness" that was distinct from the prevailing legal norms, labor's professional legal representation, the business community, and Progressives who sought to advance their own politics.

After the enactment of the U.S. National Labor Relations Act of 1935 (the Wagner Act) and adoption of Wagner Act principles in Canada in the 1940s, the right to refuse unsafe work gained ground as a viable subject of collective bargaining in North America. Collective labor agreements would become the only way to circumvent the strict common laws on the termination of employment that had commodified workers in the United States and Canada. Refusal rights were not effectively enforced before agreements with labor unions and the passage of new labor laws that facilitated collective bargaining.⁵

By the 1960s and early 1970s, collective bargaining had strengthened the right to refuse in the United States and Canada. Some labor arbitrators—although not all—had stepped back from a "work now, grieve later" standard, often with the aid of explicit contractual language protecting the right to refuse. Just cause termination in labor agreements also altered the common-law rules for terminating employment, affording more

protection to workers refusing unsafe work. These trends did not extend the right to refuse to all, but they did protect against liberal discharge norms for millions covered by collective agreements.

How collective bargaining affected the right to refuse unsafe work is seen in the breadth of these protections. In a survey from the early 1970s of 1,724 labor agreements, each covering more than one thousand 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."⁶

Canadian provincial labor law began requiring that collective bargaining agreements include clauses that discipline could only be for just cause.⁷ Canadian labor arbitrators slowly were becoming more and more comfortable with independently using the language available within a labor agreement to protect a worker's 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.⁸

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*.⁹ The leading case after this jurisprudence became *Steel Company of Canada* in 1974, a case that was cited favorably throughout the 1970s.¹⁰ 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."¹¹ As Richard Brown noted, with *Steel*

Company and other decisions labor arbitrators exercised more discretion in protecting workers against health and safety discrimination:

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.¹²

Such arbitration decisions posed threats to the common law and, therefore, threatened 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 a worker in an employment relationship. The assessment of risk in Canadian arbitration was interpreted based on an arbitrator's judgment and not a legislator's interpretation of hazards at work. Arbitration decisions were imperfect and still focused on the evaluation of the hazard that workers faced before protection against termination was granted, but they represented a new and important trend to protect the right to refuse. Arbitral labor jurisprudence was in one sense becoming a more effective protection of worker refusal rights. This trend was more pronounced in Canada than in the United States, where arbitrator values also continued to treat refusal cases as basic employee insubordination cases.¹³

Although important, 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."¹⁴ Rarely was the management called upon to demonstrate that the work was safe for the worker as a justification for an insubordination charge.

By the 1970s, a substantial North American jurisprudence had developed. This jurisprudence, although it did not always protect the right to refuse, at least attested to what could be called a radical consciousness of health and safety held by workers and their organizations. Not bound by a narrow conceptualization of occupational safety and health, worker activists held unique interpretations of safety and attempted to exercise refusal rights while at the same time negotiating for improved workplace governance. Between 1966 and 1975, safety related work stoppages grew by 385 percent in the United States while the overall rate of stoppages increased more slowly, from 14 percent to 38 percent of all work stoppages in the base year of 1966.¹⁵ Labor conflict over health and safety was on the rise, and unions were becoming an outlet for environmental health and safety concerns.

Across North America, health and safety emerged a top issue in collective bargaining as labor inspectorates were failing in their mission to protect workers from hazards. Unions chided the U.S. health and safety inspectorate for "attitudes that show a priority compassion for the problems and inconveniences of management."¹⁶ One OSHA official responded positively to displeasure from labor and management. "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."¹⁷

A team of labor researchers observed that this odd reaction from early OSHA leaders 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."¹⁸

Even as OSHA came into force in the United States in 1971, union collective bargaining provided the only effective means by which workers held a voice in their working environment. It was thought that OSHA would protect workers better than decentralized collective bargaining, but even though the new agency did raise the profile of safety and health, which was 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.

Allied Chemical employed two hundred members of Local Union 3-586 of the Oil, Chemical and Atomic Workers 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 that 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, fining it \$1,000 and issuing a lengthy, nonbinding cleanup 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'."¹⁹

Labor unions argued that worker health and safety could be protected only when workers are empowered. "The question becomes one of power," noted the health and safety activist Tony Mazzocchi of OCAW on the need for labor rights. "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." Only by thinking of the subject "in terms of empowerment" could a difference be made.²⁰

That OSHA was to take a "hands-off" approach to regulation was evident when MIT professor Nicolas Ashford interviewed the first leaders of OSHA and the National Institute for Occupational Safety and Health (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 strong agreement with the sweeping new findings of the Robens Committee. The Robens Committee's high-profile parliamentary inquiry into worker health and safety policy in Britain had argued for fewer legal restrictions on business and advocated partial voluntary self-regulation of worker health and safety. Key summarized the principles of the Robens Report in a speech to the American Public Health Association in 1972, noting curtly that "not all problems can be solved 'by the strict language of a standard'" before he recommended flexibility in developing worker health and safety standards.²¹

In remarks at the Kennedy School of Government that would foreshadow later debates on worker health and safety at the ILO, George 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.²²

Guenther made these comments less than two years after OSHA's enactment, giving little credibility to his argument, which criticized OSHA's work when the agency was barely up and running. Voluntary compliance was the mantra from day one of OSHA. The values and the belief system behind this "total operating philosophy"²³ were likely lost on the people showing signs of mercury poisoning who were working at the Allied Chemical Company's plant in Moundsville, West Virginia.

Business Week reported that unions had become 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.²⁴ "Everybody is being forced into looking at this question," said Maz-zocchi. "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."²⁵ Likewise, a number of collective bargaining 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 itself with an increasingly sympathetic public willing to legitimize new environmental labor rights.²⁶

Collective Bargaining for the Working Environment

Safety and health in the working environment became more important to the collective bargaining of a number of major unions in this period, including the United Auto Workers, OCAW, the United Farm Workers, the United Mine Workers, and to a degree the United Steelworkers of America. An entirely different conception of safety and health in the working environment was emerging and being advocated by workers directly.

After holding union conferences around the country entitled "Hazards in the Industrial Environment" in 1969 and 1970, OCAW surveyed 508 local unions on safety, health, and environmental concerns. The UAW surveyed over four hundred local unions. Fifty-nine percent of the local unions knew their workplaces were contributing to air, water, and land pollution, including 79 percent of those with over one thousand members. Thirty-seven percent reported members being assigned job tasks resulting in air or water pollution, including nearly half of the locals with a thousand or more members.²⁷ These concerns would be prominent in labor campaigns in subsequent years and demonstrated how effective an in-plant local system of collective bargaining was in raising the issue of hazards and in advocating change.

One of the first conferences organized by 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.²⁸ This was part of a broad-based movement with labor union activism at center stage. Labor 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 fast becoming major structural challenges from economic globalization.

Collective bargaining, despite passage of the law authorizing OSHA in 1970, continued to be the 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 in operation, a company foreman again insisted that Pugliese push the button. Local media embarrassed the USWA into fighting his impending discharge for insubordination. Pugliese kept the job he had held for eighteen 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.²⁹

It was collective bargaining that afforded protection against insubordination charges; OSHA had ignored the right to refuse. Protection against "imminent danger" was left in the statute but did not explicitly enable any refusal rights. This would be a topic for later regulatory rulemaking. The best protection of the right to refuse would be protections from at-will employment through a collectively bargained just clause contract provision. As with Gilbert Pugliese, for many there was but little difference between the legal right to refuse unsafe hazards at work and an unsafe hazard at work that would later damage a community's environment.

Although 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 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 the moral dimension of this labor activism, especially with the growing backdrop of precarious employment relations under increasingly competitive globalization.

Numerous cases can be found across North America illustrating how workers struggled to expand the definition of unsafe and hazardous work. Health and safety issues figured prominently in the sixty-seven day strike against General Motors in 1970. Management at forty plants agreed to nearly two thousand worker demands on health and safety, over one-third

of which addressed "onerous, dangerous" and "uncomfortable" conditions in the plant environment³⁰ Better ventilation, reductions in noise pollution, and the removal of oil and debris from factory floors were among the gains. This did not change the polluting automobile (changes that were advocated in bargaining), but these proposals advanced by workers and agreed to by management resulted in immediate environmental improvements through collective bargaining.³¹

OCAW was prepared for a prolonged confrontation for health and safety committees in the 1972 negotiations with leading U.S. 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."³² A nationwide industrial confrontation was averted when the American Oil Company agreed to the demands. By January 1973 twelve of the fourteen major oil companies accepted similar terms. The campaign then turned to Shell Oil Company, a holdout. Shell workers walked off the job and launched 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."³³ Nearly every major environmental group supported the strike, including the 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.³⁴

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