1 Human Rights and the Struggle to Define Hazards

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Hilgert, Jeffrey.
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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.” 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.”

Canadian provincial labor law began requiring that collective bargaining agreements include clauses that discipline could only be for just cause. 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.

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. The leading case after this jurisprudence became Steel Company of Canada in 1974, a case that was cited favorably throughout the 1970s. 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.” 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.” 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. 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.” 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.”

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.”

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’.”

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.

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.  

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.  

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” 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. “Everybody is being forced into looking at this question,” said Mazzocchi. “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." 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.

**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. 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. 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 environment. 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.

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.” 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.” 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.

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 OCAW:

Because workers are exposed first to substances that eventually reach the environment, they are the “first line of awareness on environmental issues.” . . . Unorganized workers will not have the courage to complain about harmful work conditions. Labor-law reform is an environmental issue after all.35

Strengthening workers’ rights would be a logical place to start for workers, unions, and other environmental health and safety advocates seeking concrete change.36

Other unions brought forward similar claims in bargaining that contributed to this general social movement to varying degrees of success. UFW leader Cesar Chavez argued that “we have come to realize . . . that the issue of pesticide poisoning is more important today than even wages.”37 Fighting sweetheart agreements between the growers and the Teamsters Union, the UFW negotiated contracts restricting the most dangerous pesticides, without the backing of national leaders such as AFL-CIO president George Meany. UFW alliances with environmental groups were strained when growers moved to organophosphate pesticides, a change favored by environmentalists for its ability to break down quickly after application, despite being more deadly for farmworkers. Teamsters president Frank Fitzsimmons led a raid on the UFW’s 150 grape contracts in 1973 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.”38 Regardless of setbacks like these, the movement did exist as a central concern of the UFW and a dialog unfolded with other unions such as OCAW. Ongoing financial difficulties exacerbated efforts at coalition building, however; the UFW was unable to send any delegates to key health and safety conferences, one
of the many roadblocks faced by the United Farm Workers in their work ecology activism.39

The Steelworkers were also strong advocates of environmental protections in collective bargaining, most aggressively in Canada. The USWA signed the 1970–72 agreement with the Cominco mining company, which included giving workers a voice on environmental policy. It 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 (which killed twenty and sickened seven thousand more), had held a U.S. legislative conference on air pollution in 1969, reportedly the first in the nation. Laurie Mercier’s *Anaconda* details an equally important priority for the postwar USWA, aggressive red-baiting against unions purged from the Congress of Industrial Organizations in 1950.40 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 unions advocated environmental health and safety in smelter work through major grievances and contract negotiations. This included the control of sulfur dioxide and arsenic discharges into the surrounding environment. These discharges bleached chlorophyll in tree needles and leaves, leaving little vegetation between Anaconda and Butte, and left Anaconda with a lung cancer rate above the national average. The struggle for environmental health and safety remained a priority despite debilitating labor politics.

Labor’s efforts were 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; the Glass Bottle Blowers union 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 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 Pulp, Sulphite and Paper Mill Workers had a “detailed environmental program for its local unions” including joint environmental control
committees to “consider, investigate and make proposals to the company with respect to the environmental problems arising from the operation of the plant.” The aim was collective bargaining that would make the phrase “unfair environmental practice” roll off a worker’s tongue as frequently and easily as “unfair labor practice.”

Labor consciousness of health and safety formed a unique constitutional insurgency. These were moral actions in the individual and the collective interests of society. North American labor history illustrates that the right to refuse unsafe work has been a struggle to decide who is empowered to define it. This debate would soon become a global concern, and Anglo-American countries would play a significant role on the global stage. The right to refuse would come to be defined by ILO Convention No. 155 on occupational safety and health in the working environment. But North American political and economic hegemony would leave a heavy footprint upon international worker health and safety policy.

**Refusal Rights as Fundamental Human Rights**

The right to refuse unsafe work is a critical global policy debate today because occupational safety and health is a fundamental human right under international law. Because human rights embody a different understanding than traditional legal rights, seeing worker health and safety—and refusal rights—through the human rights lens requires understanding what it means when one says something is a basic human right. The question is intertwined with the issue of labor as a commodity; both value systems recognize the inherent moral worth of each human being. Human rights are also inherently linked with environmental protection, as environmental degradation often restricts the ability to exercise human rights and enjoy a fully human life. What a human rights view adds is a detailed framework for respecting human beings in law and everyday society.

The Universal Declaration of Human Rights of 1948 states that “everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.” Similarly, the International Covenant on Economic, Social and Cultural Rights, adopted in 1966 and ratified widely, protects “safe and healthy working conditions” and “rest, leisure and reasonable limitations of
working hours.” Together, these documents form part of the International Bill of Human Rights and establish the basic principles from which the fundamental human right to a healthy and safe working environment is to be derived.

The international body that defines economic and social human rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) is the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR was established by a 1985 resolution of the UN Economic and Social Council (ECOSOC) as the treaty had enabled ECOSOC to report to the UN General Assembly on the “progress made in achieving general observance of the rights recognized” in the Covenant. The CESCR therefore reports on an array of economic and social rights under the Covenant, from education and health to food, clothing, and housing, to the right to form a trade union.

The CESCR has noted repeatedly that implementing ILO Convention No. 155 is a part of the human right to occupational safety and health. Since the right to refuse unsafe work is a part of Convention No. 155, the protection of the basic right to refuse is thus a human rights obligation under international human rights law. How the right to refuse is to be protected, however, remains undefined. For workers’ refusing work due to safety and health concerns, the means by which the right to refuse is protected is the difference between exercising and enjoying the human right versus suffering from retaliatory discharge and victimization as a result of acting on one’s concerns.

The UN international human rights system and its treaty bodies are a different legal system than the ILO system of labor conventions. This means that although the ILO supervises workplace health and safety under, for example, Convention No. 155, human rights treaty bodies may differ with the ILO’s interpretation. The CESCR has one interpretation of ILO conventions and the ILO makes its own legal interpretation. Some legal scholars have even suggested the CESCR expects the ILO to conform to the CESCR’s interpretation of ILO Conventions as the CESCR evaluates laws and policies based on fundamental human rights principles. ILO supervision is based on no more than the text of a convention as agreed on through tripartite negotiation.

When the CESCR cites Convention No. 155, therefore, it does not signify that it is in agreement with all ILO supervisory decisions on the
topic. For example, the CESCR views safe and health working conditions as a universal protection, where the ILO’s interpretation of Convention No. 155 allows for excluding specific branches of economic activity. The CESCR has agreed, however, that a coherent national policy on occupational safety and health must be established, as Convention No. 155 states.

On the right to refuse unsafe work, the CESCR has yet to articulate its specific interpretation of the human right. Despite recognizing the basic right to refuse unsafe work, the definition of the right remains undefined by the international human rights system. The ILO definition, on the other hand, is very clear and is a focus of critique throughout this book. To help the CESCR and other human rights bodies deduce the right to refuse unsafe work as a human right, there are elementary road signs of basic values found throughout human rights norms. Deducing what the human right would look like requires more than a focus on the law. As Tony Evans notes, human rights entails a discourse of law, a philosophical discourse as well as a political analysis. Throughout this book, as evidence is presented about how the right to refuse unsafe work is exercised in practice, a model emerges that defines the specific boundary lines that would logically demarcate protecting the right to refuse as a basic human right.

Although the CESCR jurisprudence is silent on the specific constitution of the right to refuse unsafe work as a human right, reviewing some of the committee’s key observations over the last two decades can begin to clarify what principles might be used to determine the constitution of the right to refuse as a basic human right. One relevant topic that the CESCR has elaborated in detail is the human right to health.

The CESCR has noted how the human right to health is “closely related to and dependent upon the realization of other human rights.” Among these connected human rights is the right to work, the right to nondiscrimination, and “the freedoms of association, assembly, and movement.” All are defined as “integral components of the right to health.” Recognizing how the human right to health is dependent on other human rights means rethinking whether limitations on these other human rights are legitimate in light of their exceptional importance in protecting the right to health, apart from their own value as fundamental human rights protections.

The human right to health as defined under the International Covenant on Economic, Social and Cultural Rights encompasses the right to control one’s health and body, and a right to be free from interference in the
protection of your health. The CESCR has considered safe and healthy working conditions and a healthy environment as two factors important to the human right to health. This explicit right to control one’s health and body and freedom from interference in the safeguarding of one’s health is of direct relevance to the right to refuse. Workers exercising rights to protect their health should not meet with interference such as employer retaliation. Were the CESCR to elaborate on its specific legal scope, these are among the human rights principles that should shape and define the human right to refuse unsafe work.

The CESCR has also noted the principle of meaningful participation. The right to health encompasses a right to participation “in all health-related decision-making.” The CESCR places a clear priority on the participation of the human rights holder in the governance of his or her own human rights. On the topic of employment injury benefits, for example, the CESCR finds that employment injury benefit systems must include participation mechanisms not only in the design phase of these systems but also in the ongoing administration and governance of employment injury benefits. Here, the right to refuse could be interpreted as an important form of the right to participation in the protection of occupational safety and health as a human right.

The baseline used to protect the human right to health under the International Covenant on Economic, Social and Cultural Rights is “the highest attainable standard of health.” Altogether, the principles and standards defining the human right to health form a strong basis for protecting the right to refuse unsafe work. Given the “highest attainable standard of health” as the benchmark, the Committee must recognize that a variety of enforcement and participation mechanisms are needed to secure this human right. There is no reason why going to work should limit this fundamental protection.

There are challenges within this jurisprudence, however. Despite the strong and expansive language defining these economic and social human rights, the CESCR has suggested—in contrast to the viewpoint of some worker advocates and labor scholars—that hazards are “inherent in the working environment” and should be minimized only “so far as is reasonably practicable.” These words come directly from Convention No. 155, as the CESCR itself has indicated. This seemingly random limitation on workers’ rights, however, is the product of a heated negotiation at the
ILO. It would behoove the CESCR and other human rights treaty bodies to recognize how this language has emerged from the ILO in clear contravention of fundamental human rights principles. Here, human rights principles that lay a clear foundation for the right to refuse unsafe work as a human right encounter opposition from tripartite negotiation at the ILO where formal participation by employers and corporations has shaped labor standards.

Another foundation for protecting the right to refuse as a human right is protection as a component of labor rights such as workers’ freedom of association. As with the right to occupational safety and health, however, the CESCR has not elaborated on the right to refuse unsafe work as a component of the basic freedom of association of workers. In sum, the right to refuse unsafe work has been recognized as a human right through Convention No. 155, but its basic legal scope and definition as labor policy remains undefined in the international human rights system. This oversight leaves workers facing precarity and neoliberal employment relations without a human rights–based conceptual foundation from which to directly challenge hazardous work.

Considering the best foundation for elaborating the right to refuse unsafe work as a human right, another important tenet is the question of effectiveness. Article 8 of the Universal Declaration of Human Rights defines “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.” Effective human rights protections require the comparison of alternative laws and policies; 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. How labor rights policies make workers represent their claims is an important concern as “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”—if they can represent their claim at all. On this point, the debates between individual and collective rights are important, and evaluating different forms of workers’ protection and representation is needed based simply on the principle of effectiveness.

One debate that cuts across all economic and social human rights is the issue of progressive realization. The underlying assumption is that violations of economic and social rights are not the direct result of state
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conduct as are civil and political rights. Economic and social human rights form an obligation of result versus an obligation of conduct on governments. States must, in this view, protect social and economic human rights based on available resources, a lower standard than taking actions that have an “immediate effect” as with civil and political rights. The problem with applying this debate to the right to refuse is that labor and employment systems can be considered direct government conduct. States can change their labor policies with an immediate effect. As the “first responsibility” of government, human rights thus place an immediate, direct burden on the nation-state in labor and employment relations. Such rights are not a “mere offshoot of the eighteenth-century tree of rights.” In the words of Simone Weil, they are not the rights pronounced by “the men of 1789” but are moral norms that form a new logic for the governance of economics and society. Nation-states hold an obligation of conduct when it comes to conforming labor and employment relations according to basic human rights principles.

Even so, why does the right to refuse unsafe work remain in such a zone of fog under the international labor and human rights system? Why is the right to refuse not clarified so that it is among the strongest of human rights under international law? Although the right to refuse unsafe work has been recognized as a human right through recognition of Convention No. 155, the international human rights system has not yet prioritized and defined a strong and effective right to refuse unsafe work. Is there not space for the recognition of this human right as a critical component of participatory governance across the working environment? Can refusal rights be made effective protections? What is it about the right to refuse that makes the issue so different?

“Bargaining over certain matters,” observed labor law scholar James Atleson, “is qualitatively different from dealing with customary matters such as wages and hours.” Working conditions strike at the heart of managerial control, illuminating underlying power inequalities. The right to refuse remains a moral dilemma faced by all nations. Be it through labor inspection, collective bargaining, works councils, or via individual employment rights, each offers differing protection in its effectiveness and serves different interests. Around the world societies decide how they will allow workers to protect their health and safety. These decisions determine whether or not people can “influence their own environment themselves.”
Where workers have no effective means to influence their working environment, it is imperative that people ask why.

As current global worker health and safety policy took shape in the 1970s, the ILO had entered a period of intellectual contraction. The ILO faced the overlapping challenges of declining industrial unionism, globalization, the rise of precarious work, the neoliberal resurgence, and the rise of the individual employment rights era. Despite this turbulent history, the right to refuse was not eclipsed from the human rights arena. Amid popular unrest and calls for a more humane economy, workers’ movements advance autonomous definitions of hazardous work and struggle to control the right to refuse. In time, however, other values would confront these worker movements and transform global labor rights. A new values system emerged to promote managerial prerogatives and corporate decision making unhindered by the popular social controls of regulation and collective bargaining. Employers could not altogether eliminate the idea of “rights” due to their widespread acceptance. Instead, they advocated a value system that made rights safe for unilateral management control. The right to refuse unsafe work was at the center of these international labor politics as they reshaped the international norms protecting the human right to safe and healthy working conditions.