3 The Right to Refuse in International Labor Law

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That human rights are individual rights at the expense of collective rights has been an argument against human rights frameworks in both national labor policy and workers’ rights advocacy. The right to refuse unsafe work, however, introduces more complexity to this debate. As workers’ freedom of association rights are often viewed as only those rights dealing with the establishment of trade unions, it is often forgotten that the freedom of association also entails certain individual rights. One example is a worker reserving the individual prerogative to support a union without discrimination or retaliation. There is a history of the right to refuse as an individual right embedded in the broader status protection of workers’ freedom of association. A basic employee right to dissent and to act against inhumane working conditions has at times been an element of workers’ freedom of association. This basic right is different than trying to enforce a particular health and safety standard; it is a protection based on the worker’s status as a rights holder in another’s employ, not based on a hazard threshold. Under this model of protection, workers have the right to act to
improve their working conditions not in order to enforce predetermined health or safety regulations but through their status as workers. Because such models are not based on a hazard threshold, workers have latitude to decide what working conditions to contest; protection is afforded to allow for the pursuit of a satisfactory resolution of the dispute, which the workers themselves have defined. Again, the underlying logic of this type of right in employment is not contingent on a particular hazard threshold or a particular working environment. This logic is rooted in the basic status protection of workers as a class of people in an employment relationship deserving unique protections on account of unequal power relations.

When the freedom of association is removed as the philosophic foundation for the right to refuse, other rationales are needed to justify the legal protection. This is the case under global labor standards on worker health and safety. The primary alternative is to use an objectified definition of a hazard to define unacceptable work hazards. Workers under this policy model must demonstrate that a hazard at work meets such a predetermined legal standard. This second model is also clearly an individual rights framework as such a right is not a status- or association-based protection at its foundation. It does not create class-based assumptions but instead depends on an “objective” hazard as defined through a particular legislative, judicial, or administrative authority. This form of labor protection is a safer constitution of rights at work for employers because it dramatically limits the worker’s class-based power.

Global labor standards on refusal rights follow this restricted model. Refusal rights are constrained in this way under ILO occupational safety and health standards. In turn, refusal rights are also limited under the freedom of association standards. The result is a global policy that eliminates preorganizational activity as a freedom of association protection. (Preorganizational activity is workers’ collective action outside of formal union organization.) Furthermore, although health and safety norms and freedom of association norms appear to be independent of each other, they are not. On the right to refuse, each regulates the same single act at the workplace. The laws act on each other in the real world and can create contradictions in an employment system. Because the right to refuse is a freedom of association issue, any legal restriction of its exercise under health and safety laws implicitly restricts freedom of association rights, granting particular powers to employers even where stronger rights exist elsewhere.
in a country’s legal framework. This may be difficult to grasp for lawyers who develop their expertise under various statutory regimes independent of one another, but for the worker the social reality is likely not difficult to understand. The single act of a dissenting employee faced with termination and hardship requires immediate legal protection. Conflicting statutory regimes cause confusion and confound effective and timely safeguards for workers.

The underlying logic of a restricted right to refuse requires the policy architect to construct and make a series of important decisions. A typology of the “refusable” hazards must be created and then justified; the basic threshold of risk must be clearly defined. A worker’s psychology or “belief” may be judged when a concern is not deemed to be a hazard so as to determine whether the dissenting act is worthy of legal protection. There must also be a resolution of the legal boundary dispute that creates policy dissonance in national policy with the freedom of association so as to eliminate the perception and real existence of any conflicting and stronger refusal rights protections for workers.

Richard Brown described these required labor policymaking tasks shortly after Canada moved toward what has been called the internal responsibility system:

A legal architect who sets out to design a model right to refuse law must perform several tasks. The first is to determine what type of hazard justifies a refusal to work. Second, a mechanism should be established for investigating the level of risk when a refusal occurs. Next, the architect must adopt a standard for reviewing an employee’s perception of a danger which is not real. The fourth concern is an employer’s response to a refusal, which could include disciplining an employee, withholding pay and assuming a second worker as a replacement. Finally, the blueprint must sketch the legal boundaries of concerted refusals to work.¹

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

Drawing out these divergent policy models on protecting the right to refuse is not simply an abstract debate. They are each based in sharp philosophical differences on the role of workers as human beings, the dominance of markets in society, and the state’s legal support for the prerogatives of private enterprise. They also raise critical moral questions about business, workers’ control, and each person’s life and death. These issues complicate the scholarly debate about workers’ rights as human rights being largely the promotion of individualism to the detriment of collective protections. One model of protection is associational based on participatory principles, yet it is a stronger protection of individual rights. The other provides no organizational or collective protection and restricts the exercise of the individual right. Both are individual rights, but each is markedly different for workers. The more restricted individual right has come to dominate in the so-called era of individual employment rights. A new vocabulary is therefore needed if we are to move beyond the totalizing and misleading characterizations of rights individualism in conflict with human rights and understand the inherently dual individual-collective nature of these worker rights.

International labor and human rights jurisprudence fails to give adequate protection to the right to refuse unsafe work. A comparative policy history of the right to refuse within one period of North American labor policy provides a contrast to the more restrictive international standard. I use the U.S. case because it illustrates clearly the logic of this associational model of legal protection. It also ironically illustrates how a belief in an “individual rights era” has not been the governing principle across U.S. labor and employment relations as a number of labor scholars have suggested. This stronger labor jurisprudence is no longer U.S. law. Recounting this history for its comparative value illuminates a chapter in U.S. labor policy that conflicts with the current standard adopted in the global norms under ILO Convention No. 155 on occupational safety, health, and the working environment. Alternative labor rights models did exist and were advocated and made into national labor policy in North America, an irony
in the labor policy history of a region that remains a strong global advocate for market-based policy solutions.

Restricting the right to refuse, especially amid the ongoing problem of health and safety globally, means that the ILO approach falls short in protecting the human right to workplace safety and health. As an agency that predated the Universal Declaration of Human Rights by a generation, the ILO has struggled to develop a cohesive human rights policy. The ILO’s approach to social justice, including its articulation of a set of core labor rights, has been critiqued from a human rights perspective. The right to refuse is not adequately protected through either the freedom of association standards or the occupational safety and health standards. Workers’ protest and activism against hazardous work receives limited protection in the global model for national labor policies. The right to refuse faces a very high threshold for securing protection under global occupational safety and health standards. As a result, international labor standards, as a body of worker protection, reinforce the market contours of the modern employment relationship. Unquestioned is a world of employee subservience, undignified but mandatory employer loyalty obligations, and the logic of arbitrary management charges of insubordination and disloyalty.

In the world of labor and employment relations where employers exercise the right to hire and fire employees, it is often said that any legal protection is better than none; that some rights, however weak and limited, are better than nothing at all. The problem with this view in the context of employment relations is that labor relations do not come before the law upon an untouched tabula rasa. Labor and employment is a relationship shaped by the law from the beginning; it is not an organic life system. Rights frameworks lay down boundary lines between management rights and workers’ rights, shaping the degree of power to terminate employment. Any limited labor rights framework for workers, therefore, draws a broader scope of protection for managerial prerogatives. On the right to refuse unsafe work, this is the history of the jurisprudence that has become dominant over the last generation. What has unfolded is not the establishment of a limited but basic set of legal rights for employees from which they can leapfrog to stronger protections. What has happened is the limiting and restriction of a worker’s right to the freedom of association and by consequence a worker’s freedom in society.
Workers’ Freedom of Association Standards

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

The ILO Constitution is a treaty between nations under international law. Member states have an obligation to respect freedom of association, regardless of whether they have ratified the freedom of association conventions. This obligation includes having domestic labor policies supervised by the ILO. A special supervisory body created by the ILO Governing Body, the Committee on Freedom of Association, receives complaints from employers’ and workers’ groups made against governments irrespective of whether a country has ratified conventions on freedom of association. If a particular convention is ratified, supervision also occurs by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR).

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

Outside the context of a collective bargaining agreement, labor law scholars consider the right to refuse unsafe work to be a form of preorganizational
worker activity. The term preorganizational comes from the view that even though workers have not yet organized for collective bargaining, they still are undertaking actions that are an important component of basic organizing and thus of workers’ freedom of association. This is a broader legal classification than formal union membership and organizing activity. Preorganizational activity is an important element of national labor policy protecting workers’ freedom of association. Under these labor policy standards, any discrimination or retaliation against workers who have engaged in this form of preorganizational freedom of association activity is illegal and considered an unfair labor practice. Workers cannot be terminated for engaging in this protected activity.

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

How the ILO supervisory bodies constitute discrimination under the freedom of association conventions is important to the right to refuse unsafe work. Because the right to refuse unsafe work has generally been viewed as organizational activity, national labor policies have a track record of affording protection of the right to refuse unsafe work in a workers’ freedom of association framework through domestic labor laws. An important caveat for workers exists in the ILO’s definition of retaliation and discrimination, however. ILO freedom of association rights extend only to employees “dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities.” Through its supervisory decisions, the ILO argues that “anti-union discrimination is one of the most serious violations of freedom of association,” but the caveat is found in what constitutes a protected act under the freedom of association conventions. The rub for workers under these ILO standards is that the freedom of association jurisprudence fails to protect preorganizational activity by individual workers. The right to refuse unsafe work as preorganizational activity undertaken by unorganized workers in their own defense is not protected under the ILO freedom of association jurisprudence.
This nuanced distinction is important as more workers become vulnerable in the face of declining union density and the rise of precarious work arrangements and disguised employment relations.

The ILO is forthright in its legal definitions, stating that the ILO Governing Body’s Committee on Freedom of Association “is not called upon to pronounce upon the question of the breaking of a contract of employment by dismissal except in cases in which the provisions on dismissal imply anti-union discrimination.” Although antiunion discrimination and interference covers a range of employer actions such as discriminatory hiring practices, retaliatory dismissals, and “transfers, downgrading and other acts that are prejudicial to the worker,” this coverage applies only to discrimination against workers for “union membership” or “union activities” and not for preorganizational activity that exists before and extends beyond formal union membership activity and official unionization efforts. Workers that question their working environment and dare refuse to perform work that they see as unsafe receive no recognition for engaging in freedom of association. In this regard, ILO association rights are oriented toward institutional affiliation rather than to protecting preorganizational freedoms that more often encompass the exercise of the right to refuse today.

ILO standards on dismissal protection also fail to protect preorganizational freedom of association rights. The Termination of Employment Convention, No. 158, says “a worker shall not be terminated” for “union membership or participation in union activities,” for “seeking office, or having acted in the capacity of a workers’ representative,” for “filing a complaint” for alleged violation of laws, or for “race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.” Convention No. 158 does not extend the definition of freedom of association beyond its definition under the core freedom of association conventions. The convention permits termination where “there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

The right to strike under ILO norms on workers’ freedom of association could be an alternative way of protecting the right to refuse unsafe work. Here, too, however, the ILO jurisprudence falls far short of affording workers adequate protection. The right to strike is not set out in the
text of any ILO convention or recommendation. It is derived from ILO jurisprudence and the decisions of the supervisory bodies. While the right to strike is a right that workers are entitled to under the freedom of association standards, the supervisory bodies have accepted making the exercise of the right to strike subject to the agreement of a certain percentage of workers, regardless of any union membership. Thus while the ILO has determined that “any work stoppage, however brief and limited, may generally be considered a strike” and that “restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful,” a national government remains in compliance with international standards by regulating strike actions through industrial relations procedures. Requiring a certain percentage of workers to vote to strike is acceptable, meaning the right to refuse by an individual worker or a small group of two or more workers would rarely qualify as a legitimate labor strike, even if peaceful. National governments are allowed under the freedom of association standards to regulate labor strikes by requiring a larger workplace vote, raising an obstacle to the small group of workers that elects to protect themselves by striking to improve their conditions.

The question this ILO jurisprudence leaves unanswered is whether the right to strike or any other work stoppage for workplace health and safety is to be afforded to a small group of workers, or even a single individual refusing work, regardless of the particular merit of the hazard. Is the right to strike purely an institution-based right or is it an individual right under international labor and human rights standards? Laws requiring a quorum and a majority are acceptable under ILO labor rights standards, so long as they are fixed at a reasonable level as defined by the ILO supervisory bodies. Under the international standards on workers’ freedom of association, therefore, states are not obligated to protect the right to strike as an individual right to strike, even in situations where common sense might dictate otherwise, as in a refusal to work.

Another issue that arises from the protection of the right to refuse unsafe work as a component of the right to strike is the view that the right to strike is “a basic right,” argue the supervisory bodies, “but it is not an end in itself.” The right is therefore considered a means to an end, an enforcement corollary to the industrial and labor relations system of a nation. Consequently, a strike action “cannot be seen in isolation from industrial relations as a whole,” and thus exhaustion of the conciliation
or the mediation process within an industrial relations system may be required:\textsuperscript{17}

In a large number of countries, legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is compatible with Article 4 of Convention 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements.\textsuperscript{18}

In the context of the right to strike, the protection of the right to refuse is conditioned on exhausting mediation and conciliation procedures. This makes the stop-work protection meaningless for workers concerned about safety and health. Even if an individual worker was granted the protection, this poses an obstacle in the context of the right to refuse, especially in common-law countries where refusals are job abandonment, which is grounds for the termination of employment. Thus, the right to strike jurisprudence also fails, as do ILO standards protecting against preorganizational discrimination that might protect the right to refuse as a component of the freedom of association. Under this jurisprudence, the argument could be made that the current U.S. labor law protections for worker health and safety wildcat strikes, the \textit{Washington Aluminum} decision, extend well beyond these minimum ILO labor standards.\textsuperscript{19}

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

**Occupational Health and Safety Standards**

The right to refuse unsafe work was not a sui generis topic under international labor standards until the adoption of ILO Convention No. 155 in 1981. For more than sixty years worker health and safety focused on adopting labor conventions identifying specific hazards or working conditions of global concern significant enough to warrant an international treaty. This practice changed in 1981, when the ILO adopted a “policy-oriented approach” to worker safety and health that focused on developing more generic and unified national policy frameworks. This represented a new form of ILO standard-setting on occupational safety and health, beyond the basic agreement on hazards. This new approach meant a foray into the traditional domain of labor rights, addressing issues such as discrimination protection, worker participation, and union representation on safety and health. In response, it becomes necessary to recognize these aspects of occupational health and safety laws as components of traditional labor and industrial relations policy, in addition to being a unique and dedicated subject of a country’s regulatory framework for labor and employment relations.

Under ILO Convention No. 155 of 1981, the right of workers to refuse unsafe work faces a high legal bar in affording protection under international labor standards. The International Labour Office (the headquarters staff of the ILO) is quick to explain how the right to refuse unsafe work is not an absolute right. To dissect these limitations, I will begin with Convention No. 155 and also review a small group of other ILO instruments that followed this trend. According to a recent ILO General Survey on safety and health, there are very clear conditions that have to be established to govern the exercise of the right to refuse:

[Under Convention No. 155] no disciplinary action can be taken against workers who remove themselves from work if the following conditions are met: (a) the workers concerned have a reasonable justification to believe that there is an imminent and serious danger to their life or health;
Each of these obstacles—the adjudication of the merit of a hazard, the compliance with certain workplace arrangements, and the taking of actions in conformity with national policy—pose unique obstacles for workers. Before we visit each of these obstacles and the implications of these points as critical labor policy questions, a brief review of the language protecting the right to refuse within these standards is required.

Four provisions of the text of Convention No. 155 are relevant to the study of employee dissent and the right to refuse. The first is Article 4, which outlines in broad terms what is meant by a national safety and health policy. The definition of national policy laid down in this convention is important because the right to refuse unsafe work is protected only where it is “in conformity with the national policy.” Article 4 reads:

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

Article 5 continues to reference this national policy requirement. It requires national policies on occupational safety and health to take into account a basic list of “spheres of action” that affect occupational safety and health and the working environment. The right to refuse is therefore listed in Article 5 under the letter “e” subsection:

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

Although vague, Article 5(e) is an employee protection against employer retaliation.
The right to refuse is detailed in Article 13. Under Article 13, a worker must be protected where there is a reasonable justification of imminent and serious danger to life or health. It further limits this protection in accordance with national policies:

Article 13. A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.24

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

Article 19. There shall be arrangements at the level of the undertaking . . . (f). a worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health.25

This collection of articles, Article 4, 5(e), 13, and 19(f), jointly define the right to refuse unsafe work under Convention No. 155. Despite the identification of workers’ health and safety in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, no international treaty defines in as much detail the precise boundaries and definition of the right to refuse unsafe work.

Subsequent health and safety treaties have followed the model first established by the ILO’s Convention No. 155 after its adoption in 1981. An important example is Convention No. 176 concerning the Safety and Health of Mines. Article 13.1(e) of the convention grants workers the right to “remove themselves from any location at the mine when circumstances arise which appear, with reasonable justification, to pose a serious danger to their safety or health.” Again, the protection is encased within the
hazard threshold alongside a standard of judgment on the worker’s underlying belief, a similar legal model as Convention No. 155.26

International labor standards include both conventions and recommendations. Two nonbinding recommendations adopted by the ILO also identify refusal rights. Recommendation No. 172, the Asbestos Recommendation, and Recommendation No. 177, the Chemicals Recommendation, address the right to refuse unsafe work. These standards also follow the general logic of Convention No. 155. The protection of the right to refuse unsafe work here covers situations of “serious danger to his [sic] life or health” and “imminent and serious risk to their safety or health,” respectively. The following is the text of each relevant section.

**Recommendation 172 (Asbestos)**

Article 9 (1) A worker who has removed himself from a work situation which he has reasonable justification to believe presents serious danger to his life or health should—(a) alert his immediate supervisor; (b) be protected from retaliatory or disciplinary measures, in accordance with national conditions and practice.27

**Recommendation 177 (Chemicals)**

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

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

(3) Where workers have removed themselves from danger in accordance with subparagraph (1) (b), the employer, in cooperation with workers and their representatives, should immediately investigate the risk and take any corrective steps necessary.28

The recommendation on chemicals affords workers a slightly wider degree of latitude by the phrase “imminent and serious risk to their safety and health” versus “life or health” as is found in the asbestos recommendation. Nonetheless, the logic behind each is similar and creates a high bar
to the exercise of the right to refuse unsafe work. ILO recommendations are also not considered binding under international law in contrast to ILO conventions, which are treaties to be ratified and implemented in national law and practice by governments.

Three policy obstacles in particular underlie these standards. Dissecting each legal obstacle one by one is an important task if we are to contrast this model of the protection of the right to refuse with other models, including the exercise of the right to refuse as freedom of association activity. First is the case-by-case adjudication of a hazard. Second is the requirement that managerial or supervisory procedures be followed. Third is the qualification of the exercise of the right to refuse by any number of wide-ranging national policies and national practices. Critiquing each of these provisions reveals inherent weaknesses.

Adjudicating Hazards

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

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

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

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

Precise and reliable data on the number of existing natural or synthetic chemical substances, the quantities used and produced and hazard assessment data is difficult to find, often outdated and contradictory. Thirty-two million organic and inorganic, natural and synthetic substances have been identified and registered worldwide. Out of the 110,000 synthetic chemicals that are produced in industrial quantities, adequate hazard assessment data is available only for about 6,000 substances, and occupational exposure limits (OELs) have been set for only 500–600 single hazardous chemicals. Very little assessment data is available for mixtures of chemicals.29

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

Introducing hazard thresholds into the formula for protecting workers’ rights to refuse unsafe work sets the legal protection on unstable ground. The standard can in no way be objectively enforced. There are simply too many unknowns. Thus, global labor standards default to protecting only the most severe traumatic injury risks or similar known chemical or radiation hazards, leaving unprotected those workers faced with emerging or undocumented hazards, or workers otherwise unable to provide the scientific evidence to justify their actions. The logic of the sui generis employment right
removes any hope that global labor rights will protect workers in a way capable of guarding against emerging hazards before environmental harm is done or in a way that recognizes the social limits of scientific evidence.

Evaluations of thresholds also generally marginalize people exposed to hazards with longer latency periods and leave off the radar socially based hazards such as violence at work or psychosocial hazards that can be just as debilitating and damaging to a worker’s health.

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

Mandating Managerial Procedures

Presuming a worker successfully jumps the hurdle of establishing a legal claim with merit for a particular hazard, the Convention No. 155 model of worker protection requires that workers follow a prescribed process in their work refusal. Individual workers are obligated under the convention’s norm to “report ‘forthwith’ to their ‘immediate supervisor’ any such situations representing imminent and serious dangers”30 for evaluation of the refusal by a company’s management.

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

Qualification by National Policies and Practices

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

Worker health and safety, according to the supervisory bodies, is pursued “so far as is reasonably practicable.”

Permitting a wide range of “national conditions and practice” and focusing on what is “reasonably practicable” for each country, with no assertion of any universal protections, was for the ILO a major paradigm shift in worker health and safety under international labor standards. Convention No. 155 on occupational safety and health, adopted in 1981, started this trend. The ILO recognized no fixed standard, marking a significant trend in ILO health and safety standard setting. This shift away from more concrete norms, while implicit in Convention No. 155, would eventually become an ongoing practice in future health and safety labor standards. The best example of this is Convention No. 187, which explicitly states that the aim of the convention is to be a “Promotional Framework” for occupational health and safety. The ILO deprioritized developing international labor standards on specific workplace hazards, standards that before this trend made up roughly half of all global labor standards adopted by the ILO.

The consequences of this paradigm shift were enormous for employee health and safety protests. The failure of the ILO to establish concrete legal obligations meant that employee protections could fall through the cracks of international labor and human rights standards. This shift is demonstrated in Article 5 of Convention No. 155, which outlines general “spheres of action” that “must be taken into account” by states in their national occupational safety and health policies. These include areas such as training, communication, and control of material elements at work. Only the broad areas of policy are identified, with few protective details. This list includes protecting workers from discrimination, yet there is no explicit definition of what constitutes discrimination against workers by employers. This is a matter left to “national policy,” to be defined by individual governments. The ILO has clarified the broad scope of the convention’s “national policy” blanket on discrimination:
Article 5(e) does not itself seek to prescribe protection of workers and their representatives from disciplinary measures. It prescribes only that a national policy must provide for such protection. In other words, it is for the [ILO] Member to determine the extent and conditions of the protection.”

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

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

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

Leaving health and safety standards subject to vague national policy norms means that discrimination against employee work refusals does not follow human rights principles but is rather subject to “flexibility” in implementation. This “flexibility” in policy development means that countries can apply “any other method consistent with national conditions and practice” to implement their policy. Given these nebulous discrimination boundaries within ILO standards on employee health and safety, the ILO has accepted even the most highly restrictive and limited protections of the right to refuse unsafe work:

The nature of the work at issue may also have an influence on the exercise of the right to cease work. In New Zealand (as in Canada and Poland) this right cannot be exercised if the danger is a normal condition of employment (as, for example, for firefighters); in such cases, workers may only refuse such work if the understood risk of serious harm has materially increased in a given situation, that is, the risk of harm has become significantly more likely.
What is missing under global labor standards is a strong definition of discrimination that outlines the legal obligations of the state to protect the right to refuse unsafe work in accordance with basic human rights principles. Workers are left with global norms that give wide latitude to employer discrimination while at the same time place restrictions on their own effective exercise of both the right to protest unsafe or hazardous work and the right to refuse.

The Right to Refuse as Organizational Activity

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

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

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.39

How the right to refuse was protected by the NLRB is one example of how the refusal rights of workers are protected in a workers’ freedom of association rights framework.
Jack Henley was a maintenance man for the Alleluia Cushion Company in the cities of Carson and Commerce, California. Shortly after starting his new job in 1974, Henley observed a pattern of neglect of workplace health and safety. There were no protective guards on the machines, no safety instructions for the chemicals used in production, and the factory lacked eyewash stations, much less a safety program. Unlike Henley, the majority of employees in the Carson factory did not speak English, and safety instructions were not communicated to the workers in their native Spanish.

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

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

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

The ruling continued:

Safe working conditions are matters of great and continuing concern for all within the work force. Indeed, occupational safety is one of the most
important conditions of employment. Recent years have witnessed the recognition of this vital interest by Congress through enactment of the Occupational Safety and Health Act, 29 U.S.C. Sec. 651–678, and by state and local governments through the passage of similar legislation. The National Labor Relations Board cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme.\(^41\)

The Board continued.

It would be incongruous with the public policy enunciated in such occupational safety legislation to presume that, absent an outward manifestation of support, Henley’s fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on the Company for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.\(^42\)

The Board supported Jack Henley and ruled against the Alleluia Cushion Company. The NLRB would protect workers invoking statutory rights and would also grant individual Section 7 rights based on an “obvious mutual concern” legal standard.

The jurisprudence that followed the NLRB’s decision in the *Alleluia Cushion Company* case followed two lines of argument. First, legal protection was granted to individual employees seeking enforcement of the law. In one case, the NLRB protected a lone female employee who refused her reassignment to a job where all women in the positions were paid less than men in violation of an equal pay for equal work statute.\(^43\) In another case, the NLRB protected an employee that tried to enforce state banking regulations related to the late payment of wages that were due to employees.\(^44\) The NLRB in these cases extended the definition of “obvious mutual concern” to general law enforcement, leveraging the authority of Section 7 and the right of workers to protest to secure law enforcement.
A second group of post-"Alleluia" decisions dealt directly with the right of the lone individual employee to exercise refusal rights. In one case, the Board protected a single employee’s walkout to protest terms and conditions of employment for all the employees, even where other employees refused to join the walkout. This case was important because it recognized that individual workers need not rely exclusively on a preexisting statute to invoke the “obvious mutual concern” standard; the terms and conditions of employment at issue were alone enough to invoke Section 7 rights. In another case, the NLRB reinstated an employee after she individually walked off her job at an upstate New York knife manufacturing plant over a dispute about scheduling the night shift for the most dirty production work on a recurring basis. In both these Section 7 cases, an individual employee walkout was protected activity as a workers’ freedom of association right not because enforcement of some other statute or regulation was at issue but because the nature of the individual dispute was defined as being of obvious mutual concern.

In yet another "Alleluia" progeny case, an employee for a contract hauler of the U.S. Postal Service in Detroit had refused to drive a truck with defective brakes. The employee was found to be protected under Section 7 because “to drive a motor vehicle with malfunctioning brakes would clearly violate traffic regulations” and because the employee’s “refusal to drive such an unsafe vehicle would inure to the benefit of all Respondent’s drivers” and was thus of obvious mutual concern. In this case, all three justifications for protection were documented: the enforcement of a statute by an individual worker, action by an individual worker of obvious mutual concern, and that the employee had consulted with other drivers, providing a justification of united action.

The policy debate post-"Alleluia" shows the basic nature of worker freedom of association as a status-based protection in employment relations and not based in some perceived severity of a danger or hazard at work. The Board jurisprudence from the "Alleluia" era recognized that the merit of a workers’ health and safety grievance is otherwise irrelevant in determining a worker’s protected status. In a case from Pittsburgh where retail workers refused to sell products in an unheated area of a shopping mall in cold weather, the Board unanimously agreed that the merits of such complaints “would not affect the employees’ statutory right to seek what they regarded as a more desirable management response.” NLRB decisions followed this sentiment in judging the merits of the dispute. Among
the decisions where Section 7 protections were extended was a case where the Board refused to judge the merit of worker complaints about working conditions, wages, as well as “racism, sexism and favoritism” when a worker wrote an individual protest letter.49

The Board also ruled that a grievance that qualifies as a workers’ freedom of association right did not require a focus on the merit of a hazard so long as the general issue fell under the rubric of protected concerted activity. “We have recently held in Alleluia Cushion Co., Inc.,” wrote a majority for the Board, that considering merit “is not necessary so long as there is evidence that fellow employees share the acting employee’s concern and interest in common complaints.”50 That a safety statute existed was one element of common concern. The terms and conditions of work were also evidence of such “obvious mutual concern” and thus afforded workers protection.

The Alleluia Board also went a step further to protect the rights of workers under Section 7. The Board majority decided that in those cases where working conditions alone were cited as a basis for obvious mutual concern, direct evidence that the dispute pursued by the individual grievant was of mutual concern might be lacking because other employees were fearful to speak. The board developed a policy of an assumption of mutual concern on all health and safety questions. The majority wrote that “in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.”51 It was on this point that employer control was threatened the most. On all matters of health and safety, the NLRB had granted employees a great individual authority. They were to be protected in their employment as individual advocates for health and safety, deputized as rights-holding citizen-workers on questions of the working environment. This decision constituted refusal rights as altering the liberal market employee status assumptions and in turn effectively protecting a key individual component of workers’ freedom of association, the right to refuse unsafe work as a fundamental human right.

The Harsh Consequences of Denying Individual Rights

Unlike the NLRB’s Alleluia doctrine, Section 11(c) of the Occupational Safety and Health Act did not grant U.S. workers the right to refuse
unsafe work. Instead, it afforded protection from discrimination because of the exercise “on behalf of himself or others of any right afforded by this Act.” Although OSHA required that employers provide places of employment “free from recognized hazards” the vague language was looked upon as problematic from the start. As a result, federal rulemaking was used to establish a regulatory standard defining the statutory rights of employees under the Occupational Safety and Health Act. This regulatory standard—29 CFR 1977—became law on January 29, 1973.

The right to protest safety and health hazards in the working environment was set forth in federal rule Part 1977.12 (b). Two key paragraphs identified the right of employees to refuse unsafe work. The rule is listed here with emphasis added. It was a much more limiting right in employment than the NLRB’s Alleluia Cushion doctrine:

1977.12(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

1977.12(b)(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also
have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The Supreme Court reviewed OSHA’s authority to promulgate this key standard after conflicts developed across three appeals courts about the U.S. secretary of labor’s authority to create the rule. The Supreme Court in *Whirlpool Corp.* upheld the regulation and the limited nature of the rule’s protective language. The unanimous Whirlpool court cited the first paragraph of the rule, which proclaimed “as a general matter, there is no right afforded by the [OSH] Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.”

Section 11(c) rights are afforded when workers meet a two-part test. First, the employee “is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury.” Second, the employee “has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.” Thus a great burden was established regarding what constituted a reasonable hazard under Section 11(c), in addition to the requirement to seek managerial redress first.

Contrast this labor policy with the right to refuse through workers’ freedom of association and the NLRB’s *Alleluia* doctrine. The health and safety law limited the rights of workers to refuse by accepting the proposition that the hazard threshold of a worker’s complaint must be judged. *Alleluia*, in contrast, affords workers protection independent of an evaluation of the disputed hazard. Section 11(c), a limited standard, constructs what for many workers are insurmountable hurdles. Not only must workers speculate as to how a federal judge will interpret the hazard they face, they must also weigh the possibility that if the law finds no imminent danger, the courts may find that they had acted in an “unreasonable” way. “Moreover,” explained the Whirlpool court, “any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith.” The court can simply find that the employee did not have a reasonable belief and in turn subject the worker to discharge. The unanimous court knew exactly what kind of protection it was affording to workers. “The employees have
no power under the regulation,” Justice Stewart wrote in *Whirlpool*, “to order their employer to correct the hazardous condition or to clear the dangerous workplace of others.”

At this point, it is necessary to pause and consider the validity of the claim that the modern era of “individual rights” in employment relations has actually been an era of expanding “individual rights” at all. In the case of occupational safety and health and the right to refuse unsafe work, the so-called individual rights framework has been more a restriction on individual rights for workers. The right to refuse was extracted from the more expansive notion of the right to refuse within the doctrines and legal frameworks of workers’ freedom of association. The end result was a restriction on workers’ self-help protection by the legal machinery of the state.

Kenneth Smuckler noted the dreadful impact of *Whirlpool* once Reagan-era appointees assumed control of the NLRB and replaced the *Alleluia*’s “obvious mutual concern” with a much more restrictive “united concert” standard. This was accomplished in a series of decisions beginning with *Meyers Industries* in 1984. The results were “harsh consequences” for workers electing to protest their work hazards:

The standards developed by the *Whirlpool* court for triggering section 11(c) protection restrict workers’ self-help in safety disputes in a manner not found in the NLRA cases before *Meyers Industries*. The trilogy of cases culminating in *Alleluia Cushion* had accepted the proposition that the merit of an employee safety complaint had no bearing upon the determination of an existing unfair labor practice. The court also considered the degree of danger perceived by the employee to be irrelevant. The sole prerequisites for the establishment of a prima facie section 8(a)(1) violation were that the worker make a safety protest in good faith and that the complaint caused the employer’s retaliatory action; thus, section 8(a)(1) could protect safety protests in which the danger was neither immediate nor grievous.

By contrast, the Court in *Whirlpool* narrowed section 11(c) to encompass only those safety protests which were “reasonable” in light of the totality of circumstances. *Whirlpool* further distinguished section 11(c) protection from that afforded by section 8(a)(1) by requiring that the perceived danger pose “an imminent risk of death or serious bodily injury.” Although the Court did not expand upon these two criteria, a few lower court decisions in this area have hammered out their meaning. . . . These cases show harsh
consequences which the *Whirlpool* limitations have upon the protection of individual safety protests. ... The courts have demonstrated tight rein on the concept of “reasonableness” and “imminent danger of serious injury or death.”57

On inspection, the era of so-called individual employment rights in labor policy resembles nothing of the sort. What was more accurately unfolding was that critical individual rights were being restricted and eliminated by ideologues forcing particular cultural values and beliefs about pseudo-individuality and the market on labor policy. All this was unfolding as the international human rights jurisprudence on economic, social, and cultural rights, including avenues for supervision, was still taking shape. Market ideology was the real culprit in this history.

Whether it was the rejection of the NLRB’s *Alleluia* doctrine by courts of appeals, restrictions on workers’ protected concerted activity under the conservative Reagan appointees to the National Labor Relations Board, or the unanimous U.S. Supreme Court justices in *Whirlpool* and the “tight rein” of its judicial progeny, the rights of individual employees to protest health and safety conditions through this era were harshly restricted. On the right to refuse unsafe work, if there was a period of individual rights in employment and labor relations, the state through this national labor policy quickly dispelled workers of the notion that any status protection of the right to refuse would ever be allowed to infringe upon the state-backed “laissez-faire” labor market.

The dissent in the Board’s original *Meyers Industries* decision, the first attack by the new NLRB on the *Alleluia Cushion* doctrine, rejected the majority’s turn to the protection of rational *homo economicus* from broad individual protection of different forms of concerted activity. The dissent as expressed by board member Donald Zimmerman argued for the *Alleluia* doctrine:

My colleagues report today that the Board is not God. If only their expectations of employees covered by the Act were equally humble. Protection for such employees, they now announce, will be withheld entirely if in trying to ensure reasonably safe working conditions they happen not to be so omniscient as to rally other employees to their aid in advance. No matter that the conditions complained of are a potential peril to other employees, or that they are the subject of Government safety regulation. This is
a distortion of the rights guaranteed employees by the Act. The historical roots of “concerted activity” lie in the movement to shield organized labor from the criminal conspiracy laws and the injunctive power of the courts. It goes against the history and spirit of Federal labor laws to use the concept of concerted activity to cut off protection for the individual employee who asserts collective rights.\textsuperscript{58}

Employees were left with the narrow employment protection of OSHA Section 11(c) regulating the right to refuse with a case-by-case assessment of contested hazards and a psychological assessment of an employee’s “reasonable” belief in their refusal.

The dissent also articulated problems in the logic of this path:

A perplexing problem is presented when no legal standard exists and the severity or likelihood of harm cannot be ascertained, but danger clearly exists. How should society respond to this known but immeasurable hazard? The law ought to err on the side of caution: but to what degree?

Legal protection against reprisals for refusing to perform unsafe work should be provided regardless of the identity of the person at risk and source of danger. An employee may stop work in self-defense or to safeguard either a fellow worker or someone else. A person may be threatened by an unguarded machine, a repeated arm motion, a contaminated work environment or a co-worker who drives recklessly. The right to refuse may be properly invoked in all these settings.\textsuperscript{59}

That employees would have their individual rights restricted was a question of little concern to the new majority on the NLRB. Labor policy here was not a matter of the state stepping back and allowing individuals to flourish under natural market forces. Instead, a state-led labor policy of repressing individual freedoms made employment rights safe for business, promoted unilateral management rights, and assured that these prerogatives would not be unencumbered by social control. This was a more invasive and intrusive state activism on behalf of business. Workers were no longer protected in their work refusals on the basis of their status of being employees in an employment relationship. Instead, the nature of the hazard, once deemed immaterial by the state, would be examined, objectified and held to a restricted standard, regardless of any concern for the genuine protection of individual rights at work.
Individual Employment Rights or Disciplinary Neoliberalism?

The critical distinction for vulnerable workers, which includes most workers around the world, is how each approach protects workers’ rights. Protections like the Alleluia doctrine recognize an underlying power inequality in employment relations. The NLRB had therefore originally held it to be immaterial whether a company is in compliance with the health and safety standards at issue as workers by their status alone hold “a protected right to seek more than compliance.” Workers have, in this view, “a protected right to seek more than compliance with minimum standards or to seek redress of conditions which they believed or considered to be violations . . . whether or not their contentions were correct.”

The power granted to workers by this principle means that they should hold the latitude to define the merit of their claim. A market-based model, in contrast, is predicated on establishing, in an adversarial process rife with social inequalities, an objective work hazard that no single party, nor anyone for that matter, may be able to determine. The individual faces challenges in overcoming an inequality in power relations: for example, they may lack legal representation; have scarce material resources; little access to information; face bleak emotional support by co-workers, family members, and community leaders; possess feelings of the need to get on with one’s life; fear the consequences of being labeled a troublemaker; or seek to avoid disrupting career trajectories. Added to these unequal social barriers workers must now defend the merit of their own claim as it relates to a particular occupational safety or health hazard, something even an epidemiologist might find a challenge to do, plus do so following managerial or supervisory procedures that can be further conditioned on various national practices.

These changes came at a time of increasingly complex occupational hazards and during a period of direct attacks on collective bargaining across North America. Challenging corporate control with a weakened labor relations regime would prove ultimately too much for the organized labor movement as employer opposition became increasingly aggressive. Because the two distinct models of protection of the right to refuse advance two opposing philosophies and policy logics, the argument that the limited refusal rights protection acts as a basic “floor” of labor rights is incorrect. Although in theory the two divergent policies could remain law in a
national employment system simultaneously, their different policy logics are in conflict and create a legal and institutional incoherence, confusion, and contradiction. The restrictive refusal rights in practice inherently limit effective workers’ freedom of association, especially for vulnerable workers seeking quick protection against hazards at work where every competing legal claim, every additional evidentiary burden, and every additional administrative process threatens their access to real world social justice. To many workers, institutional fragmentation in labor and employment relations is more a basic fracturing of rights at work, not a new layer of socio-legal protection.

Workers’ freedom of association, although a collective protection, also holds a strong individual dimension. It is for many their only guard against “insubordination” and the loss of basic livelihood within a market society. It is the first fragile flower of unionism. It is also a necessity for the achievement of social justice in the struggle for healthy working conditions. As the jurisprudence of the right to refuse demonstrates, governments have placed barriers on individual rights. Certain freedoms are granted to employers while workers are provided rights that do not violate this managerial market discipline. Individual actions that do not conform to market discipline are not protected. The process of protecting employer power can at times afford certain rights to workers. Such rights, however, are rights that do not interfere with business management prerogatives and the set

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authorities of private enterprise. This basic social process has been used in transforming labor and employment policy as a tool to placate various social challenges in the employment relationship and to maintain private power and privilege.

The global labor jurisprudence on the right to refuse unsafe work does not recognize the right to refuse as a fundamental human right. Contemporary global worker health and safety policy emerged at the same time as a broader political movement across the spectrum of global political affairs.\textsuperscript{62} This movement, however, was not radical individualism. It was conformance to market principles and ideologies, which at times meant enacting harsh restrictions on individual rights. In the closing decades of the twentieth century, as economic globalization was altering communities and societies, the practice of restricted, marketized individual employment rights would move from provincial and national labor policy in the United States and Canada into ILO global labor standards. On refusal rights, this would become the global export of a neoliberal-disciplined employment right, both in ILO global standards that would be ratified and implemented by dozens of developing nations and in regional agreements on occupational safety and health such as in the European Framework Directive on Occupational Safety and Health.\textsuperscript{63}

The turn to global “policy-oriented instruments” on worker health and safety with ILO Convention No. 155 has confounded workers self-help rights in occupational safety and health. These new policy-oriented instruments incorporated many elements of worker protection that had been considered within the traditional domain of labor rights institutions. The vague or restrictive standards of worker protection, however, have confounded efforts to “elaborate on the substance of the policy. Instead they turn straight to the measures to be taken for the application of the Convention.”\textsuperscript{64} Yet developing any measures to be taken in the application of these global norms is challenged both by their vagueness and their restrictiveness where specificity exists.

A secondary consequence to pursuing vague national policy instruments on occupational safety and health is that critical global treaties on environmental hazards, many also addressing occupational hazards, have been adopted outside the ILO. Examples are the Stockholm Convention on Persistent Organic Pollutants,\textsuperscript{65} the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals,
The Right to Refuse in International Labor Law and Pesticides in International Trade, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The need for concrete global norms on specific hazards has thus remained even after the ILO would preference more vague national policy notions versus fixed standards on occupational and environmental safety and health, a trend that can be marked as beginning with Convention No. 155 in 1981 and continued in subsequent decades.

There exist two divergent labor rights policy models for protecting the right to refuse unsafe work. The dominant policy as defined by ILO labor standards has failed to recognize refusal rights as a freedom of association, opting instead for the weak and restrictive model of protection within an occupational safety and health policy framework. The right to refuse in ILO global norms on occupational safety and health was noteworthy because it accompanied the more sweeping trend toward a managerialist focus in the global standards on worker health and safety:

In 1975, the ILC [International Labour Conference] adopted a resolution that called for national policies as well as policies at the enterprise level. This was the first step in a shift toward a management approach to occupational safety and health, and is noticeable in Conventions adopted since in the emphasis placed on the responsibilities of the employer and the rights and duties of the workers.

This “new departure” for the ILO was evident in Convention No. 155 on Occupational Safety, Health and the Working Environment of 1981. It was designed to be “a policy instrument rather than an instrument laying down precise legal obligations.” Worker’s self-help and the protection of the right to refuse would suffer as a result. To study these dominant international norms in a way that illustrates the interests that are served by these legal frameworks, we must now evaluate how these policies work in practice and how they serve the basic interests of workers as human-rights-holding individuals. There are alternatives. Evaluating the impact of these dominant global policy choices, however, we see the complexity of the obstacles facing the pursuit of social justice.