

THE FUTURE OF WORKPLACE HEALTH AND SAFETY AS A FUNDAMENTAL HUMAN RIGHT

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I. INTRODUCTION: THE HUMAN RIGHTS CHALLENGE FACING SAFETY AND HEALTH AT WORK

The Nineteenth World Congress on Safety and Health at Work was held September 11–15, 2011 at Istanbul, Turkey on the banks of the Golden Horn—a long, historic, and strategic natural harbor inlet that jets away from the legendary Bosphorus, conversely among the most dangerous straits for navigation in the world. World Congresses on Safety and Health at Work have been held every three years since 1955. The Istanbul congress was co-organized by the International Labor Organization and the International Social Security Association. The meeting was billed as “the primary international platform in the field of occupational safety and health”¹ and a global forum “for the exchange of knowledge, practices and experiences.”² It welcomed anyone working in the field of occupational health and safety, be they employers, managers, trade unionists, public administrators, or insurance and social security professionals. Over 5,400 people from over 140 countries attended the Istanbul Congress, the highest congress attendance in recent memory.³

Away from the turbulent waters of the Bosphorus, the Nineteenth World Congress on Safety and Health at Work produced *The Istanbul Declaration on Safety and Health at Work*, a statement drafted and signed by thirty-three labor ministers, almost entirely from the global south.⁴ The declaration affirmed that “promoting the rights of workers to a safe and healthy working environment should be recognized as a fundamental

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1. Press Release, Int’l Lab. Office, World Congress Calls for a Renewed Commitment to Build a Preventative Safety and Health Culture (Sept. 15, 2011), http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_162921/lang-en/index.htm.

2. INT’L LAB.ORG., *XIX World Congress on Safety and Health at Work*, www.ilo.org/osh/congress2011 (last visited Mar. 26, 2013).

3. See Press Release, *supra* note 1.

4. *Istanbul Declaration on Safety and Health at Work*, signed at Istanbul on September 11, 2011, available at <http://www.issa.int/Resources/Resources/Istanbul-Declaration-on-Safety-and-Health-at-Work> (last visited Mar. 26, 2013).

human right[,]”⁵ and that the “building and promotion of a sustainable national preventative safety and health culture should be ensured through a system of defined rights.”⁶ The *Istanbul Declaration* follows a similar worker health and safety declaration that had been signed at the Eighteenth World Congress in Seoul. That declaration similarly affirmed that “the right to a safe and healthy working environment should be recognized as a fundamental human right.”⁷

The high-level advocacy at Istanbul and Seoul of a fundamental human right to a safe and healthy working environment was remarkable on a number of levels. The declarations signed in Istanbul and at Seoul three years earlier both make strong normative statements that are in direct conflict with major declarations made at the International Labor Organization. *The Declaration on Fundamental Principles and Rights at Work* adopted in 1998 excluded safety and health from the list of “core” labor rights.⁸ Ten years later, the *ILO Declaration on Social Justice for a Fair Globalization* repeated the separation of fundamental rights and health and safety at work. That text outlined “four equally important strategic objectives” of the Decent Work Agenda.⁹ While the declaration did mention safety and health, it was not a “fundamental principle and right at work” objective but a “social protection” objective—a category that also covers social security.¹⁰

Another remarkable attribute of the Istanbul and Seoul declarations has been how each of their calls for the treatment of workplace safety and health as a human right has occurred amidst worsening global statistics on safety and health at work. Just as the calm waters of the narrow Golden Horn eventually flow into the stormy Bosphorus, the recognition that worker safety and health is a “fundamental human right” to be “ensured through a defined system of rights” was made with the backdrop of dreary global statistics on work-related mortality, illness, and injury.

The International Labor Office’s introductory report delivered in Istanbul approximates that roughly 2.3 million people die each year from work-related illness and injury. The ILO noted progress made in the area of traumatic work-related accidents, but the overall number of 2.3 million has remained unchanged for over a decade. This figure equals more than 6,300

5. *Id.* at para. 1.

6. *Id.* at § 2.

7. *Seoul Declaration on Safety and Health at Work*, signed at Seoul on June 29, 2008, available at <http://www.seouldeclaration.org/> (last visited Mar. 26, 2013).

8. INT’L LAB. ORG., *ILO Declaration on Fundamental Principles and Rights at Work*, 6 I.H.R.R. 285 (1999), available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

9. *ILO Declaration on Social Justice for a Fair Globalization*, adopted by the International Labour Conference at its Ninety-Seventh Session, Geneva, §1(A) (June 10, 2008).

10. *Id.* at §1(A)(ii).

work-related deaths every day worldwide. Beyond the workplace mortality figures, an equally troubling statistic was reported: roughly 317 million workers suffer injuries causing absences from work of four days or more each year. This equates to 850,000 injuries daily. As if approaching one million injuries per day was not a sufficiently stark concern, one must also add occupational diseases, a problem considered a much larger figure yet a more challenging number to calculate on a global basis.¹¹

The Istanbul and Seoul statements recognizing worker safety and health as a fundamental human right are thus extraordinary for at least two reasons. First, their words counter the current idea that health and safety at work is something other than a fundamental right as has been so clearly noted within two major declarations at the ILO. Second, although they are consistent with the international human rights principles under the International Covenant on Economic, Social and Cultural Rights,¹² both moral declarations are clearly being ignored at the workplace level and thus in national labor policies set to regulate these workplaces where the proverbial rubber hits the road. The global statistics alone evidence this point—there is a failure to effectuate human rights.

Beyond marginalization in declarations, there are other complications to effectuating a human right to safe and healthy work. Emerging safety and health problems make one factor. Such workplace risks include new chemical and biological hazards and workplace hazards appearing in connection to questions of ecological destruction and environmental decline. These and other problems are challenging traditional safety and health regulatory models. They underscore the need for a broad reevaluation of the policy modalities regulating occupational safety and health.

Two cases highlight this problem. First, the scientific evaluation of the risk of chemical and biological substances is far behind the production of new substances. One 2009 report indicated “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.”¹³ No data are available for about 95% of substances.

11. ILO, XIX WORLD CONGRESS ON SAFETY AND HEALTH AT WORK—ILO INTRODUCTORY TRENDS AND CHALLENGES ON OCCUPATIONAL SAFETY AND HEALTH 9–11 (Sept. 12, 2011), *availbe at* http://www.ilo.org/safework/info/publications/WCMS_162662/lang--en/index.htm.

12. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

13. *See* INT’L LAB. CONF., GENERAL SURVEY CONCERNING THE OCCUPATIONAL SAFETY AND HEALTH CONVENTION, 1981 (NO. 155), THE OCCUPATIONAL SAFETY AND HEALTH RECOMMENDATION, 1981 (NO. 164), AND THE PROTOCOL OF 2002 TO THE OCCUPATIONAL SAFETY AND HEALTH CONVENTION, 1981: REPORT III (PART 1B) c.II § (7)(D)(2) (98th sess., 2009),

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 have been set for only 500–600 single hazardous chemicals. Very little assessment data is available for mixtures of chemicals.¹⁴

Legal regulation clearly has not kept pace with the technological production of such substances, creating an institutional misfit between workplace risks and traditional labor inspection models that typically operate through predetermined standards based on scientific study. This is an additional problem to the more general challenges facing labor inspection services, such as the need to maintain a certain inspector-to-worker ratio¹⁵ and enforcing effective penalties against violators.¹⁶

Another case in point can be found via ecological decline and environmental destruction. Scientists agree the “warming of the planet is unequivocal” and humanity is facing irreversible ecologic change.¹⁷ Certain hazards are likely to increase as a result: ambient temperature, air pollution, ultraviolet exposure, extreme weather, vector-borne disease and expanded habitats, hazards in industrial transitions and emerging industries, and changes in the built environment.¹⁸ Whether a classic safety and health standard-setting and labor inspection regulatory model can respond adequately to these changes is unclear. New forms of governance will likely be needed.

These challenges have unfolded in parallel to the crisis in labor law and policy generally, such as collective bargaining, weak state enforcement mechanisms, growth in precarious work arrangements, or the challenge of labor protection in a hypercompetitive global economy. It is not clear on the international policy level why safety and health has been inoculated from a series of important statements as less than a fundamental right at

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103485.pdf [hereinafter GENERAL SURVEY REPORT].

14. *Id.*

15. INT'L LAB. CONF., GENERAL SURVEY CONCERNING THE LABOUR INSPECTION CONVENTION, 1947 (NO. 81), AND THE PROTOCOL OF 1995 TO THE LABOUR INSPECTION CONVENTION, 1947, AND THE LABOUR INSPECTION RECOMMENDATION, 1947 (NO. 81), THE LABOUR INSPECTION (MINING AND TRANSPORT) RECOMMENDATION, 1947 (NO. 82), THE LABOUR INSPECTION (AGRICULTURE) CONVENTION, 1969 (NO. 129), AND THE LABOUR INSPECTION (AGRICULTURE) RECOMMENDATION, 1969 (NO. 133): REPORT III (PART 1B) c.V § (I)(A) (95th sess., 2006), <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-iii-1b.pdf> [hereinafter GENERAL SURVEY CONCERNING THE LABOUR INSPECTION CONVENTION REPORT].

16. *Id.* at c.III § III(A).

17. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (2007), http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

18. Paul A. Schulte & Hee Kyoung Chun, *Climate Change and Occupational Safety and Health: Establishing a Preliminary Framework*, 6 J. OCCUPATIONAL & ENVTL. HYGIENE 543 (2009).

work. Health and safety at the workplace, however, is a qualitatively different animal than other rights at work. Occupational safety and health requires specific changes in the production process and, in turn, the functioning of management at the operational level. This feature makes the subject different from forced labor, child labor, or gender or racial discrimination in employment where the goal is often the abolition of a particular employment practice. It is also different from voluntary collective bargaining where all issues are negotiable and made subject to basic power relations. These aspects of safety and health have likely contributed to the topic being marginalized on the international stage.

Compounding traditional managerial opposition to labor protections on safety and health are the structural economic changes that have unfolded rapidly in recent decades, the adverse impacts of which have been exacerbated by the current economic and financial crises. The breakdown of many classic employment relationships with the rise of new para-subordinate work relations requires the redefining of traditional legal institutions of labor law in response.¹⁹ Establishing the boundaries of regulation requires examining not just labels but the material facts and power relations where people are doing work. Effectuating rights is essential to a human rights approach. Given the challenge that detached systems of labor and employment pose in many countries, the human rights-based prescriptions made in this Article are followed by a Section discussing these obstacles and how the strategies outlined here relate to these changes.

Although serious challenges to the regulation of the working environment endure, fair and favorable conditions of work continue to be recognized and advocated as being fundamental human rights. What does this normative and moral recognition mean in practice, and how should it shape our understanding of labor rights policies as they interact with the working environment? What foundational principles are of relevance to a fundamental human rights-based approach to worker safety and health? How would such principles change the labor rights policy models that have been agreed upon and advocated globally via the ILO international labor standards system?

Although the prospects for protecting worker health and safety as a fundamental human right appear dim, considering health and safety at work as a human right provides an opportunity to reevaluate the relationship between occupational safety and health on the one hand and labor rights on the other. Health and safety has been marginalized as a labor policy topic

19. See THE EMPLOYMENT RELATIONSHIP: A COMPARATIVE OVERVIEW 86 (Giuseppe Casale ed., 2011).

and is often extracted entirely from the question of workers' rights. The two are too often treated as separate and distinct legal topics when in reality, there is interconnectedness and overlap in certain key areas. At the same time, the global models for national policy on safety and health remain limited in their protection of workers' rights. Instead, these policy models have often hardened around a rigidly conventional pattern, with beliefs about the proper modalities for safety and health regulation divorced from worker activism and in turn a degree of responsiveness to emerging risks.²⁰

This Article discusses the policy implications that extend from treating safety and health in the working environment as a fundamental human right. Using basic human rights principles as the standard of judgment, it identifies the need to rethink labor policy in general and relocates the issue of labor rights within the context of the working environment. It further identifies specific gaps in the global labor jurisprudence and offers three policy prescriptions that—it is argued—extend from an understanding of health and safety in the working environment as a fundamental human right.

II. HUMAN RIGHTS PRINCIPLES AND WORKPLACE HEALTH AND SAFETY

Occupational health and safety has been considered a fundamental human right since the dawn of the modern human rights era. The Universal Declaration of Human Rights proclaimed by the United National General Assembly in Paris on December 10, 1948 states that everyone has the right “to just and favourable conditions of work.”²¹ As the international community drafted a more detailed International Bill of Human Rights in the subsequent decades, health and safety at work remained a human rights topic of importance and concern. The UN International Covenant on Economic, Social and Cultural Rights of 1966 defines “safe and healthy working conditions” as fundamental human rights.²² There has remained for decades, therefore, a clear and shared global understanding that occupational health and safety is a fundamental human rights question.

20. An example of convergence toward a limited model of protecting occupational safety and health is found in the increasing number of ratifications of ILO Convention (No. 155) concerning occupational safety and health and the working environment. A total of fifty-nine member states of the ILO have ratified the convention as of June 2012 including China, Mexico, The Republic of Korea, Turkey, The Russian Federation, Brazil, and Vietnam. The weakness of Convention No. 155 as an international human rights instrument is discussed below. See *infra* Part III.

21. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at 17 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

22. International Covenant on Economic, Social and Cultural Rights, art. 7, Dec. 16, 1966, 993 U.N.T.S. 3.

Bringing the human rights question to workplace health and safety raises particular issues unique to a human rights approach. As human rights scholar Tony Evans has noted, the idea of a fundamental human right entails not only a distinct discourse on international legal standards, it also entails a moral discourse and an explicitly political discourse that challenges certain power relations while supporting some particular interests over others.²³ To unpack the basic system of values and politics underlying a human rights view of occupational safety and health, one good place to start is examining the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR), the UN committee that is charged with monitoring implementation of the International Covenant on Economic, Social and Cultural Rights. The CESCR has discussed safety and health at work as a human right, as well as broader rights such as the right to health and the right to life.

What is clear from the work of the CESCR is that “human rights” embody a different understanding than traditional legal rights. The human right to health under the International Covenant on Economic, Social, and Cultural Rights, for example, encompasses the right to control one’s health and body and a right to be free from interference.²⁴ The Committee considers safe and healthy working conditions and a healthy environment as two factors important to the human right to health. The right to health encompasses a right to participation “in all health-related decision making” and places a priority on the participation of the human rights holder in the governance of his or her own human rights.

In addition to freedom from interference and participation in all health-related decision making, another principle is interdependence. The CESCR has noted how the human right to health is “closely related to and dependent upon the realization of other human rights.”²⁵ The Committee defines these allied human rights as including the right to work, the right to nondiscrimination, and “the freedoms of association, assembly, and movement.”²⁶ Each of these rights is defined as “integral components of the right to health.”²⁷ These principles of interdependence, nondiscrimination, freedom from interference, and rights-holder participation in governance are baselines across this jurisprudence. On the

23. Tony Evans, *International Human Rights Law As Power/Knowledge*, 27 HUM. RTS. Q. 1046, 1057 (2005).

24. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rgts., General Comment No. 14: The Right to the Highest Attainable Standard of Health, 22d Sess., 2000, U.N. Doc. 3E/C.12/2000/4, art. 13, para. 8 (Aug. 11, 2000) [hereinafter ECOSOC].

25. *Id.* at para. 3.

26. *Id.*

27. *Id.*

topic of employment injury benefits, for example, injured workers as beneficiaries must have a role in the governance of injury benefit systems.²⁸

These basic values form a unique set of principles of direct relevance to the human right to a safe and healthy working environment. It could thus be argued that even where there is a silver bullet, workplace safety and health intervention to eliminate a particular hazard, taking a technocratic, managerial approach that avoids participation and representation is a divergence from these basic human rights principles. A human rights approach to worker health and safety requires not only adopting effective intervention strategies, but it requires a respect for basic human rights principles such as antidiscrimination, noninterference, participation, and the interdependency of rights.

Although the UN international human rights system via the CESCR has defined these and other principles of relevance to the right to life, health and other human rights, occupational safety and health has not received as much attention as other economic and social human rights. The CESCR has in general deferred to the ILO on questions of occupational health and safety, citing specific ILO standards on labor inspection²⁹ and on the establishment of national policies on occupational safety and health as methods to effectuate the human right to safe and healthy working conditions under the International Covenant on Economic, Social and Human Rights.³⁰ As Matthew Craven has noted, however, this deference to the ILO implies an expectation that these standards will be implemented with respect to the human rights set forth in the Covenant.³¹ The CESCR, therefore, lacks specificity in its jurisprudence on the human right to health and safety at work. This lack of specificity has left the task of defining key standards up to the ILO machinery, creating a blind spot in the international jurisprudence given the ILO's treatment of the topic.

As a result of this blind spot, human rights values underpinning other topics are at times forgotten when the question turns to protecting workers' safety and health. One example of such misapplication of values on occupational safety and health can be found in one recent General Comment of the CESCR. Despite clear statements defining fundamental human rights values on the right to health, the Committee, turning to the topic of occupational safety and health, stated that hazards "inherent in the working environment" were to be minimized only "so far as is reasonably

28. ECOSOC, Comm. on Econ., Soc. & Cultural Rgts., General Comment No. 19: The Right to Social Security, 39th Sess., 2007, U.N. Doc. E/C.12/GC/19, art. 9, para 26 (Nov. 23, 2007).

29. ILO Convention No. 81: Labour Inspection Convention, 54 U.N.T.S. 792 (1947).

30. ILO Convention No. 155 Concerning Occupational Safety and Health and the Working Environment, 1331 U.N.T.S. 22345 (1981) [hereinafter ILO Convention No. 155].

31. MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 241 (1995).

practicable.”³² These phrases come directly from the text of ILO Convention No. 155, which is the product of a heated negotiation between employers and workers in 1980–1981.³³ Such a random limitation of rights runs counter to the edifice of human rights values and principles on which other international human rights jurisprudence is based. Such language demonstrates the clash of values that has confronted safety and health at work as a fundamental human right.

What has been the practice in the treatment of safety and health at work as a human right is that the unspoken taken-for-granted values of employer power, management control, and the maintenance of production have trumped the application of human rights values. However, there is no justifiable reason why this should be so under human rights principles. Highlighting this pattern is necessary for the history and practice to be identified as a focus of concern and critiqued. Applying internationally articulated human rights principles as standards of judgment to occupational safety and health logically moves the question toward the issue of labor rights in the working environment. As such, any in-depth examination of safety and health at work under international human rights principles has to consequently entail recasting the foundations of labor policy within a new mold of respect for fundamental human rights in the working environment.

III. INTERNATIONAL LABOR STANDARDS IN LIGHT OF HUMAN RIGHTS VALUES

The UN human rights and the ILO international labor standards systems are two distinct global forums for evaluating domestic policy on occupational health and safety. Because the protection of safety and health at work as a fundamental human right remains a challenge on a number of levels, it is important to evaluate the models of protection that are being advocated by the ILO in light of the fundamental human rights principles described in Part II. To do this requires studying the labor protections being advanced by the ILO and whether these norms treat the protection of safety and health as anything less than fundamental human rights.

Upon a close inspection, the ILO’s global worker health and safety policy is an overall policy that can be said to follow a mandated partial or flexible self-regulation approach within an individual employment rights model divorced by design from questions of collective governance and

32. ECOSOC, *supra* note 24, at para. 15.

33. See Jeffrey A. Hilgert, *The Protection of the Right to Refuse Unsafe Work: Human Rights and the Failure of Global Worker Health and Safety Policy* c.VI (Cornell University, Ph.D. Dissertation, 2011).

workers' freedom of association.³⁴ This model of labor protection impedes the realization of worker health and safety as a fundamental human right. The basic human rights values of antidiscrimination, noninterference, participation in the governance of rights, the right to control one's health and body, and the interdependence of rights are not respected in the ILO's primary labor conventions of importance to occupational safety and health. The ILO norms are either silent or restrictive on key areas of labor protection germane to the working environment.

The primary concern in the text of the relevant ILO labor conventions is weak or absent language that leaves workers unprotected. This is the case of the ILO's main labor convention on worker health and safety, Convention No. 155, the convention concerning occupational safety and health and the working environment, which is arguably the most important ILO labor convention on occupational safety and health. Convention No. 155 fails the human rights litmus test because it does not conform to basic human rights principles as defined by the CESCR. Article 4 of the convention outlines the obligation of states to "formulate, implement and periodically review a coherent national policy" on occupational safety and health.³⁵ While the national policy to be created under Convention No. 155 must cover an array of topics from the material elements of work, training, communication, the right to refuse unsafe work, and the protection of workers from disciplinary measures, flexibility clauses are found throughout the text at key points that weaken protections. These flexibility clauses permit implementing its provisions according to "national conditions and practice" – a phrase that appears seven times in the convention³⁶ – to other provisions that can be implemented "so far as is reasonably practicable," a phrase that appears five times.³⁷ Although flexibility is often touted by ILO officials and the ILO supervisory bodies as being responsive to local conditions, the result is a weakened model for national-level labor policy that does not protect occupational safety and health on a fundamental human right basis.

At the height of its legitimacy in the 1960s and 1970s, the Director-General of the ILO reported "wide agreement that flexibility should have no place in standards aimed at ensuring safety and health at work."³⁸ Adopted in 1981 and ratified widely, Convention No. 155 moves away from this

34. The term "mandated partial self-regulation" is adapted from Eric Tucker's description of Canadian occupational safety and health policy. See Eric Tucker, *Diverging Trends in Worker Health and Safety Protection and Participation in Canada, 1985-2000*, 58 INDS. REL. 395 (2003).

35. ILO Convention No. 155, *supra* note 30.

36. See *id.* at arts. 4(1), (6), (8), 13, 14, 15(1), and 15(2).

37. See *id.* at arts. 4(2), 12(a), 16(1), 16(2), and 16(3).

38. ILO, MAKING WORK MORE HUMAN, WORKING CONDITIONS AND ENVIRONMENT, REPORT OF THE DIRECTOR-GENERAL TO THE 60TH INTERNATIONAL LABOUR CONFERENCE (1975).

strong standard. The flexibility in designing national health and safety policies even encompasses antidiscrimination law, subject to “national conditions and practices” which nations may apply “so far as is reasonably practicable.”³⁹ These weak norms also extend to the protection of worker activists. Workers who refuse work for reasons of safety are obligated to follow management channels first and are protected only where inspectors find a serious and imminent danger, which is a difficult burden of proof when many risks remain unknown. Convention No. 155 does not mandate labor representation or collective governance of the working environment. It moves the general logic of the individual employment rights era into worker health and safety, detailing neither protection for workers’ concerted activity nor expressions of mutual concern.

What is troublesome about how the ILO jurisprudence on worker health and safety has developed over the last thirty years is its rising faith in managerialism, the lack of respect for the social inequalities between workers and management within the employment relationship, the flexibility allowed to define health and safety norms, and the general disconnect with workers’ freedom of association and collective governance of the working environment. Each of these problems is evident within the ILO’s approach to basic occupational health and safety principles.

The underlying ILO strategy argues this approach is a “policy-based” versus a “fixed-rule” approach to workplace health and safety policy. Lost in this vision is the idea that worker health and safety is a fundamental human right. The specific provisions of Convention No. 155 are more, as the ILO notes, “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.”⁴⁰ Clearly, these trends in global worker health and safety policy represent dramatic and unfortunate shifts away from notions of a fundamental human right over the last few decades.

Changes are needed if health and safety is to have a future as a human right. There is a degree of global convergence in occupational health and safety policy toward this ILO model. The model fails to recognize basic human rights principles in the working environment. Many countries see this global policy framework as a viable model for national work safety and health policy, making mandated partial self-regulation and individual employment rights divorced from questions related to workers’ freedom of association, the dominant approach.

Too little attention has been paid to the international community’s legal prescriptions for inhumane and dangerous working conditions. If our

39. ILO Convention No. 155, *supra* note 30, at art. 5(e).

40. GENERAL SURVEY REPORT, *supra* note 13, at 24.

analytic lens turns to this object of study, it becomes clear that there are serious problems within the global norms on safety and health. Global worker health and safety policy has been cut off from bottom-up solutions that empower workers in the working environment. New regulatory models are needed as workers today face emerging hazards, unregulated work, climate change, irregular work arrangements, globalized competition, fewer collective bargaining protections, and ongoing neoliberal policy impacts.

IV. RETHINKING GLOBAL WORKER HEALTH AND SAFETY POLICY

ILO labor conventions cannot be viewed as a link between human rights principles and national policy; they derive from another system of values rooted in tripartite negotiation. A comprehensive review of global worker health and safety policy using human rights principles as the standard for judgment would require a book-length project. This Article focuses instead on three specific changes on account of their universality and evident connection to human rights principles. These policies aim at effectuating worker health and safety as a fundamental human right. They are also based on a critique of the historical development of global worker health and safety policy as well as on an in-depth study of antidiscrimination protections under the current health and safety and freedom of association international labor standards.⁴¹

To summarize, the inherent inequalities in the employment relationship make the pursuit of worker health and safety difficult through any individual employment rights model. Further, participation, representation, and rights-holder governance have been recognized as key human rights principles. Expanding labor rights in the working environment is therefore needed not only to respond to the many challenges facing the contemporary protection of occupational safety and health, but also to align national safety and health policies with elementary human rights norms.

However, at least three significant problems exist under the international jurisprudence governing labor rights in the working environment. First, the core antidiscrimination protections under the freedom of association standards do not extend beyond formal organization. Employers may retaliate against workers engaged in actions to improve the working environment where such actions fall outside of unionization and formal organization. Second, workers' right to refuse unsafe work is not recognized as an intrinsic corollary of workers' freedom of association. The right is restricted to extremely limited cases and is further narrowed in

41. See Hilgert, *supra* note 33, at cs. IV & V.

practice through an individual employment rights model. Third, effective collective governance of the working environment is not recognized in current international labor and human rights norms. The right to collective governance of the working environment is not considered to be an inherent part of voluntary workers' freedom of association and is not mandated across work arrangements.

Each of these problems in the current international jurisprudence is a challenge to the protection of occupational health and safety as a fundamental human right. As we argue below, changes must be made on the international level if health and safety is to have a future as a basic human right.

A. *Strengthening Antidiscrimination Protections*

Worker antidiscrimination protection is at the heart of the international community's understanding of workers' freedom of association. International labor standards protect the right to "establish and join organizations of their own choosing in full freedom."⁴² They say the freedom of association "can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations."⁴³ Without worker protection against discrimination, there is no freedom of association and right to organize. These rights have been recognized under freedom of association international labor standards.⁴⁴ The principles of antidiscrimination and noninterference are also basic human rights values that have been defined and recognized across all other economic and social human rights.⁴⁵

Most human rights observers would be surprised to learn that an employer's retaliation against a small group of workers advocating improvement of their working environment does not violate current ILO international labor rights norms. The current ILO supervisory jurisprudence defines workers' freedom of association in terms of formal union organization. Discrimination protections under the ILO freedom of association standards extend only to formal organizational activity, not

42. FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO, para. 310 (5th ed. 2006) [hereinafter FREEDOM OF ASSOCIATION].

43. *Id.* at para. 44.

44. This includes both Conventions Nos. 87 and 98. See Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, 68 U.N.T.S. 17 (1950); Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 96 U.N.T.S. 258 (1951).

45. See ECOSOC, Comm. on Econ., Soc. & Cultural Rgts., General Comment No. 20: Nondiscrimination in Economic, Social and Cultural Rights, 42d Sess., 2009, U.N. Doc. E/C.12/GC/20, para. 2 (July 2, 2009).

concerted action. Dismissing workers on account of membership in an organization is thus prohibited, as are dismissals for trade union activity. Concerted action by workers at the workplace level, as action that exists outside of formal organization, however, is not protected.

Workers struggling for a safe and healthy work environment may elect to act on a more informal basis outside formal organizational efforts. This type of concerted action and mutual aid may be voicing concerns to management about working conditions, or speaking with one or more coworkers, demonstrating in front of a factory, informing other labor or NGO actors in a supply chain, or launching of an international boycott of their employer. Each of these acts is concerted action of mutual concern, or literal group actions that are each basic building blocks of both workers' freedom of association and basic participation and representation in the working environment. These forms of mutuality and labor actions are elemental components of the exercise of the fundamental human right to a healthy and safe working environment.

Such style or model of labor actions often occurs independently of a formalized act of labor organizing and unionization. Given the challenges industrial unionism has faced over the last generation, it may even be the most common form of worker activity for health and safety. The ILO supervisory bodies do not interpret such basic mutual aid activity as subject to the antidiscrimination protections under the international labor conventions on workers' freedom of association. Acts of mutual aid are not protected under the ILO's international labor standards on occupational safety and health. Consequently, governments that model their national labor policies on ILO conventions leave workers unprotected as actors in the working environment.

The first order of change necessary under ILO international labor jurisprudence would therefore be to strengthen and extend antidiscrimination protections to concerted activity and acts of mutual aid regarding the working environment. Protecting mutual aid is an important dimension of protecting workplace health and safety as a human right. If the ILO supervisory bodies will not recognize basic concerted activity as protected activity under the current workers' freedom of association conventions, the CESCR could and should develop these principles of safety and health at work under the International Covenant on Economic, Social and Cultural Rights. New ILO standard setting would be yet another option.

B. Recognizing the Right to Refuse Unsafe Work

Taking action for the working environment needs special protection under international labor and human rights standards. The freedom of association and the occupational health and safety labor conventions construct multiple hurdles to the exercise of the right to refuse unsafe work, leaving refusals effectively unprotected. The right to refuse unsafe work, once a protection only found in negotiated collective agreements, emerged in the 1970s as an individual employment right with a maze of overlapping restrictions controlling its exercise by workers. This limited, restricted model of protection was adopted by the ILO in the 1980s and forms a notable part of international labor law on the topic of occupational safety and health. Although the right to refuse unsafe work is found within ILO health and safety standards, it has been designed as a protection divorced from questions of participatory action, collective governance, and is not an effective protection under the international health and safety conventions.

Likewise, the freedom of association conventions fail to protect the right to refuse unsafe work. Activity outside formal organization is not protected, as mentioned, and the right to strike is protected, but in a highly regulated way. For example, requiring mandatory conciliation before a strike is an accepted practice under ILO freedom of association standards.⁴⁶ This means a worker could be disciplined for stopping work before the industrial relations machinery has been exhausted. Governments can also make legal requirements as to the minimum number of workers required to legally engage in a strike at their workplace.⁴⁷ They may prohibit strikes for the duration of a collective agreement.⁴⁸ These provisions mean that a worker or a small group of workers refusing work for reasons of occupational safety and health may acceptably have no standing to undertake such action as a component of a human right to the freedom of association.

Despite these restrictions, good models already exist for extending workers' freedom of association to refusal rights. The right to strike is not outlined in either of the core conventions on the freedom of association, Convention Nos. 87 and 98, yet the right is now interpreted as an "intrinsic corollary" of the right to organize.⁴⁹ The right to refuse could also be such an "intrinsic corollary," if the ILO supervisory bodies were to recognize its underlying importance.

46. FREEDOM OF ASSOCIATION, *supra* note 42, at para. 549.

47. *Id.* at para. 559.

48. *Id.* at para. 533.

49. *Id.* at para. 523.

What might the protection of the right to refuse unsafe work look like as an “intrinsic corollary” of the freedom of association? One choice would be to afford the basic protection to workers independent of a health and safety inspector’s evaluation. This means workers would hold a good faith right to act and management would have to respond to their concerns without engaging in retaliation of any kind. Industrial relations authorities would need to devise methods of adjudicating discrimination claims and reinstating workers accordingly. They would also consequently need new mechanisms for workplace governance to ensure that matters raised by workers were incorporated into management practices. This brings us to a third problem with regard to health and safety as a human right, namely collective governance of the work environment.

C. Expanding Collective Governance of the Working Environment

The third weakness in the international labor standards system on the question of labor rights in the working environment relates to the question of governance. As workers engage in concerted activity and refuse work based on their concerns surrounding a working environment, relying uniquely on an antidiscrimination protection model means that this issue rests largely on a voluntary foundation. Assuming antidiscrimination laws are expanded and made effective in national labor policy, workers would remain without the kind of institutional avenue needed to ensure effective participation and representation in the working environment. The failure to mandate a system of collective governance of the working environment places a large burden upon concerted action.

The ILO jurisprudence creates difficulties by defining collective bargaining as a mostly voluntary endeavor, in both formal labor union organization and in the process of collective negotiation and governance.⁵⁰ Unorganized workers are left out, and when organized, issues of the working environment may be negotiated away. Protecting the right to minority collective bargaining is recognized by ILO standards, but this too falls well short of ensuring any form of universal worker participation and governance of the working environment. International labor and human rights norms must recognize an effective system of universal and collective worker governance of the working environment. Protecting workers against discrimination and protecting the right to refuse is critical to protecting worker safety and health as a fundamental human right. Yet questions of institutional governance are equally important. Occupational health and safety as a fundamental human right will remain unrealized

50. *Id.* at paras. 880–84.

without first establishing some mechanism for effective collective worker-based governance of the working environment.

How universal worker governance of the working environment could happen remains an open question, but there are models to be found even at the international level. Article 12 of ILO Recommendation No. 164 offers a list of ways workers' health and safety committees should be supported. Another example is Article 6 of ILO Recommendation No. 197 which recommends the adoption of safety and health management systems that include worker participation, such as the ILO-OSH 2001 Guidelines on occupational safety and health management systems. It could be argued these already constitute components of the human rights obligation to safe and healthy working conditions since the CESCR has cited, independent from the ILO, the concomitant labor conventions these labor recommendations help define. These models offer a point of departure, but if human rights principles are to apply to safety and health at work, what must happen is that rights-holders, in our case workers, must be given the priority in the governance of the working environment.

Another possibility would be for systems of universal worker governance of the working environment to be implemented through the practice of labor inspectorates mandating participation and preventive action in management plans. There are weaknesses in this approach⁵¹ but along with the workers' safety and health committee and a participatory management system, these models could be the foundation of new industrial relations systems that give priority to health and safety and worker governance of the working environment. Developing these policy tools into new approaches is one avenue to ensure health and safety has a future as a fundamental human right.

Ultimately, this choice requires a shift in thinking from the enduring Fabian vision of industrial relations. Voluntary negotiation is important in a pluralistic society, but questions of fundamental human rights and the need for collective governance of the working environment challenge extreme visions of market voluntarism. Fabian socialists in England laid the unique conceptual foundation for the voluntary industrial relations systems that emerged in the twentieth century. These systems rooted labor rights in the idea of market relations where national policy structured voluntary negotiations between labor market actors. In this model, both the process of organizing into unions and the subjects of collective bargaining were made largely functions of social power. Ensuring universal participatory governance of the working environment requires a conceptual

51. See Geneviève Baril-Gringas, *The Québec Mandatory OHS "Prevention Programme,"* in *REGULATING WORKPLACE RISKS: A COMPARATIVE STUDY OF INSPECTION REGIMES IN TIMES OF CHANGE* 213 (David Walters et al. eds., 2011).

break from this enduring vision. Certain labor rights would need to extend beyond the legal structures that now underpin voluntary systems. Restricting national labor policy to narrow market ideologies has left workers vulnerable and many important issues off the table. A human rights approach necessitates new forms of industrial relations capable of protecting those labor rights that would be needed to ensure mandating universal workplace representation and the effective governance of safety and health in the working environment.

V. SHARED REGULATORY OBSTACLES IN A TIME OF GLOBAL ECONOMIC CRISIS

A human rights treatment of worker safety and health policy could serve as an effective response to one of the most intractable problems facing workers in the global economy today, the breakdown of the standard employment relationship into a diverse array of organizational forms. Although concerted action, refusal rights, and creating collective systems for governance of the working environment each have unique enforcement challenges, each could act as a significant response to the rise of precarious work. Precarious work arrangements have increased with the current backdrop of the global economic crisis.⁵² Any efforts to elaborate these human rights tenets nationally will confront these obstacles directly. Highlighting the nature of this challenge is needed to determine how such labor policies can function in a landscape of disorganized work.

Although the question of the need to better define the employment relationship has been on the ILO's agenda for decades, the most recent high-level debate on the topic concluded with the International Labour Conference adopting the Employment Relationship Recommendation, 2006 (No. 198).⁵³ The need for such a global discussion is the result of the many wide-spread changes in management practices encouraged by new technologies and increasing competition.⁵⁴ Many enterprises have organized their activities so as to utilize labor in increasingly diversified and selective ways, including various kinds of contracts, the decentralization of activities to subcontractors or self-employed workers, or the use of temporary employment agencies.⁵⁵

52. See MALCOLM SARGEANT & MARIA GIOVANNE, *VULNERABLE WORKERS: HEALTH, SAFETY AND WELL-BEING* (2011).

53. *THE EMPLOYMENT RELATIONSHIP: A COMPARATIVE OVERVIEW* 13 (Giuseppe Casale ed., 2011).

54. *GENERAL SURVEY CONCERNING THE LABOUR INSPECTION CONVENTION REPORT*, *supra* note 15.

55. *Id.* at para. 33.

Although the Employment Relationship Recommendation of 2006 advocates a national policy for determining the existence of an employment relationship based on material facts, it gives a list of only a few suggested indicators to use in defining laws and regulations. Employers at the ILO were opposed to creating a universal definition of the material substance of the employment relationship that could be used to guide a broader regulation of these management practices.⁵⁶

Quasi-employment arrangements include a variety of employment practices and evidence suggests workers under these arrangements face increased health and safety risks.⁵⁷ The names of such arrangements include temporary work, part-time work, contingent or fixed short-term work, outsourcing, subcontracted workers, cascading contracting or resubcontracting work, self-employed workers in some settings, economically dependent workers, disguised employment, employment intermediaries, home workers, independent contractors, and other forms of contract work arrangements that lie outside the framework of an employment relationship but where the material facts indicate that a subordinate or a para-subordinate economic relationship exists.

Each of the three policy approaches raised in this Article is capable of being applied where management has implemented fragmented and precarious employment relations policies. Some labor law scholars argue the reclassification of these work arrangements as employment relations is necessary for their subsequent regulation.⁵⁸ While classification aids enforcement, concerted action and the right to refuse unsafe work could be protected without a traditionally defined employment relationship. Both seek protection against retaliation and retaliation can be remedied as a phenomenon that occurs across economic relations generally not just where there is a traditional employment relationship. Likewise, establishing mechanisms for the collective governance of the working environment would be aided with the reclassification of many forms of precarious and contingent work, but collective governance mechanisms could just as easily be created based on a physical work process or a particular work location versus employment status.

What these strategies require, however, are new approaches to labor regulation that move beyond an understanding of the regulation of work as limited to the employment relationship. A human right to safety and health means addressing the fragmented nature of these new forms of employment and building regulatory structures accordingly. Safety and health as a

56. *Id.* at para. 18.

57. *Id.* at para. 37.

58. See Nicola Countouris, *The Employment Relationship: A Comparative Analysis of National Judicial Approaches*, in *THE EMPLOYMENT RELATIONSHIP*, *supra* note 53, at 35.

human right requires respecting human rights principles and creating effective enforcement strategies in response. The policy approaches discussed here have been the subject of some experimentation at the national level.⁵⁹ While these experiments are the subject for another article, the three basic tenets of a human right to safety and health at work can respond to the contemporary fracturing of systems of labor and employment relations with a reasonable degree of regulatory creativity.

VI. CONCLUSION: REVITALIZING LABOR RIGHTS IN THE WORKING ENVIRONMENT

The future of worker health and safety as a fundamental human right is dependent upon revitalizing labor rights in the working environment. A new global direction is needed to move the international norms and in turn national labor policy models away from market voluntarism and towards models that protect human rights in the working environment as first principles. What is needed is a foundational dialog on the boundaries of labor rights as they relate to the working environment because the current international labor and human rights jurisprudence is lacking. The international jurisprudence itself must find a way to break from its narrow visions of industrial relations pluralism, mandated partial self-regulation of workplace health and safety, and worker rights cast within the inherently unequal individual employment rights mold. If the ILO supervisory bodies fail to develop a more principled jurisprudence, a new standard-setting process should begin on the direct question of labor rights in the working environment. The CESCR must also take the lead and clarify the specific labor freedoms that define a basic human right to health and safety.

The ILO Committee of Experts must recognize that international labor conventions may not be interpreted in contravention of basic universal human rights norms. Human rights should serve as a baseline for the interpretation of international labor law. As the ILO supervisory bodies continue to expand their important work of dialog with national policymakers to ensure conformity of national laws with international labor standards, this baseline treatment of human rights is needed more and more.

59. One example of national experimentation with extending concerted activity protections to all refusal to work cases is the Alleluia Cushion Company decision of the U.S. National Labor Relations Board. Although these protections were overturned by a Reagan-appointed board in the 1980s, the Alleluia Cushion doctrine did expand the protection of the right to refuse unsafe work within a traditional labor rights framework. See *Alleluia Cushion Co.*, 221 NLRB 162, 999-1007 (1975). An example of universal participatory governance of the work environment can be found notably across Canada where health and safety statutes mandate the establishment of occupational safety and health committees depending on the size of the employer and industry. The worker protections envisioned in this Article would require that these protections be strengthened for basic human rights principles to be realized.

This means the acceptance of divergent national practices only where they do not violate basic human rights principles. It means that workers must participate in the governance of the working environment, and it means protecting a human right to concerted action and mutual aid, especially regarding safety and health. These changes are necessary for the future of worker safety and health as a human right.

Human rights as international norms advance a particular approach to government policy. They must be examined through the lens of *effectiveness*⁶⁰ and are to be the *first responsibility* of governments.⁶¹ Currently, in our global society production comes first, and moral concerns addressed through social regulation of the economy, second. This order must be reversed. It has been the Anglo-American domination of global politics over the last half-century that has allowed a form of managerialism to dominate the global worker health and safety debate. Power dynamics have prevented the conceiving and expressing of more *effective* rights. Contested politics and employer political activity has shaped the very constitution of labor rights so as to make rights safe not for workers and communities but instead for management power and employer control.

Speaking of individual rights in employment relations is impossible without recognizing the collective dimensions of those individual rights. Because of the social nature of employment, one worker's hazard simply becomes the next worker's problem. There is insight in the view that a work-related right "is not in essence an individual right; it is a right shared by and created for employees as a group through the legislative process" and thus any assertion of a right in the employment relationship is "literal group action."⁶² Restricting the group action dimensions of rights is not protecting individual rights; it advances managerial prerogatives over human rights.

Occupational safety and health is an area of labor policy that is "extensively regulated" with "intensive legislative activity worldwide in the area . . . in the last 5 years."⁶³ How society resolves these socio-legal conflicts in the working environment is ultimately a moral question. Because of dramatic socio-economic and ecologic challenges, society must reexamine labor rights in the working environment. Applying human rights norms to new realities is required in a world of precarious employment, increasingly disorganized work, and hazardous workplaces.

60. Universal Declaration of Human Rights, *supra* note 21, at art. 8.

61. See World Conference on Human Rights, June 14–25, 1993, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 art. 1 (July 12, 1993).

62. Meyers Industries, Inc. and Kenneth P. Prill, 268 NLRB 73 (1984).

63. GENERAL SURVEY REPORT, *supra* note 13, at 29.

Kalmen Kaplansky, a grandfather of the Canadian human rights movement, noted the role of the ILO as standing in opposition to free market economics.⁶⁴ He described the ILO's original *raison d'être* as largely a response to market freedom that "created an upheaval in social relationships."⁶⁵ Focusing on ameliorating those social upheavals at the hands of the liberal market required prescriptive standards and the basic idea that *labor is not a commodity* required recognizing the human rights of workers. For the ILO to stay responsive to its mission of protecting society against destruction, it must reinterpret its critical mission and its most important labor rights conventions in response to the contemporary concerns facing humanity.

A foundational dialog on first principles is needed. This dialog should concern itself with the constitution of labor rights in the working environment. Priority must be given to creating and developing new forms of labor protection in the working environment and new systems of industrial relations governance capable of protecting the fundamental human right to a safe and healthy workplace. This endeavor is essential if workers are to exercise and enjoy their human right of safety and health. It is also critical to protect the human rights of future generations.

64. See Ross Lambertson, "The Dresden Story": *Racism, Human Rights, and the Jewish Labour Committee of Canada*, 47 LE TRAVAIL [LABPOR], Spring 2001, at 43 (Can.).

65. See ANTHONY EVELYN ALCOCK, HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION (1971).

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