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Eric Tucker

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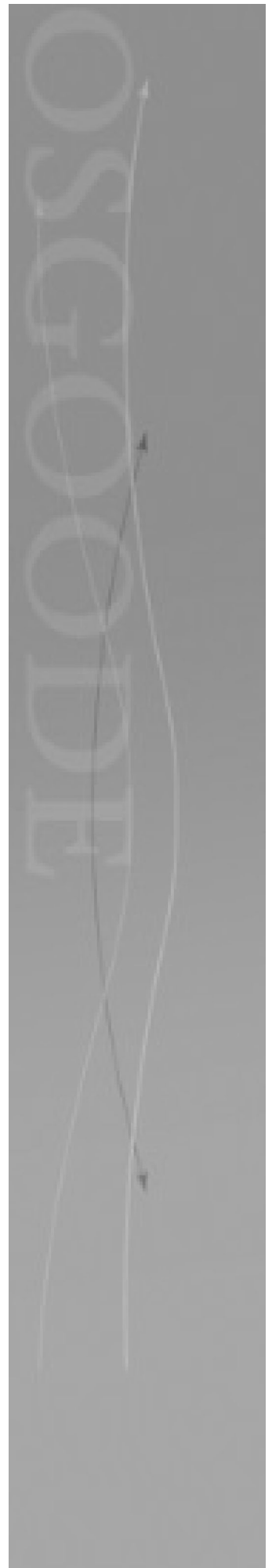
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Comparative Research in
Law & Political Economy



GIVING VOICE TO THE PRECARIOUSLY EMPLOYED? MAPPING AND EXPLORING CHANNELS OF WORKER VOICE IN OCCUPATIONAL HEALTH AND SAFETY REGULATION

ERIC TUCKER

1. Introduction

Most contemporary occupational health and safety (OHS) regimes incorporate some arrangement to facilitate worker voice. This policy is based on a belief that worker voice desirable for two reasons. First, there is a normative argument that the people who bear the risk of being injured, made ill or dying from unsafe and unhealthy work ought to have a say about the regulation of hazardous working conditions. This moral intuition led James Ham to assert in his influential *Report of the Royal Commission on the Health and Safety of Workers in Mines* that “the employee has the legitimate right, under the principle of natural justice, to appraise the conditions under which he works and to express his views on their adequacy.”¹ Second, there is a positive claim, well supported by empirical research, that OHS systems providing for worker voice produce better outcomes than those that do not.² In an ideal world, a policy that is normatively appealing and would improve OHS outcomes would be widely embraced. But this was not the case for worker voice in OHS. Workers had to struggle to obtain voice rights and the extent of those rights tended to reflect the strength of worker mobilization and bargaining and political power.

¹ Ham, J. 1976. “Report of the Royal Commission on the Health and Safety of Workers in Mines,” Ministry of the Attorney General, 146.

² Nichols, T., and D. Walters. 2007. *Worker Representation and Workplace Health and Safety*. Basingstoke: Palgrave MacMillan.

Given the timing of the struggle in the late-1960s, and its location principally in mines and factories,³ it is not surprising that policy-makers and worker advocates designed worker voice mechanisms on the assumption that their target population was comprised of full-time workers having more or less secure jobs with their current employers. This is manifestly no longer true posing a serious challenge to the efficacy of the ways worker voice has been institutionalized and the OHS regimes that assume worker voice is working. The purpose of this chapter is to explore this challenge and to examine various initiatives that have been suggested to meet it.

I begin this chapter by briefly describing the contours of the changing labour market and the vulnerabilities it is producing. Following that, I describe some earlier mapping models of OHS regulation that incorporated worker participation as a critical dimension, but that did not try to identify the channels in which worker voice might be exercised. I then produce a map of those channels, based on three variables: the subject of worker voice, the object of worker voice and the audience for worker voice. The chapter then discusses existing laws facilitating and protecting worker voice, paying particular attention to the problems that arise when they are applied to precarious workers. It concludes by considering recent developments that may point the way toward new strategies and tactics for amplifying worker voice in the context of today's labour market. Although my central case is Ontario, Canada, I draw on a broader literature that indicates the problems experienced here are representative of a more general phenomenon.

2. Growing Labour Market Insecurity

There is now a large body of research that clearly demonstrates the growth of labour market insecurity in the late-twentieth and early twenty-first centuries. The basic contours of the story are well known.⁴ In the

³ MacDowell, L. S. 2012. "The Elliot Lake Uranium Miners' Battle to Gain Occupational Health and Safety Improvements, 1950-1980," *Labour/Le Travail* 69:91-118; Storey, R. 2005. "Activism and the Making of Occupational Health and Safety Law in Ontario, 1960s-1980" *Policy and Practice in Health and Safety* 3:41-68.

⁴ The literature is vast. For a small sample, see: Lewchuk, W., M. Clarke and A. de Wolff. 2011. *Working Without Commitments*. Montreal and Kingston: McGill-Queen's University Press; Standing, G. 2011. *The Precariat*. London: Bloomsbury

aftermath of World War II workers in most western industrial capitalist democracies influenced their national governments to adopt Keynesian and social-democratic policies that partially decommodified labour power. Welfare-state provisions loosened worker dependence on labour markets and, in response, employers in core economic sectors made commitments to employees that went beyond their short-term economic interests. Workers in these sectors could expect to be hired into full-time jobs that would continue until retirement except for economic or disciplinary reasons, and that lay-offs would be governed by notice, seniority and due process protections. Employer-provided pensions and other benefits were also normally part of the compensation package. Many of these workers were unionized, but even those who were not enjoyed forms of security comparable to unionized firms as a union avoidance strategy.⁵ These kinds of arrangements have been appropriately labeled as the standard employment relationship (SER).

Since the early 1970s employers have been retreating from the SER which came to be viewed as a barrier to renewed profitability.⁶ In part, this was accomplished by changing the form of work contract, evidenced by the growth of part-time, temporary and self employment. As well, employers increasingly obtained labour from temporary employment agencies through leasing arrangements that produced a tripartite relationship in which legal responsibility for complying with labor and employment law was divided between the agency and the client. Of course, this has not been the fate of all workers, but even for those with full-time permanent jobs, labour market insecurity was increased by downsizing, outsourcing and contracting out into domestic or global supply chains. As a result, many workers faced the risk that their present job might end and that the jobs they might get in the future would be more demanding, less secure, and lower paid. Finally, there has been a substantial increase in temporary foreign worker programs that enable Canadian to more easily access global labour markets. The workers in the lower skill categories are particularly vulnerable because their

Academic; Vosko, L. 2010. *Managing the Margins*. Oxford: Oxford University Press; and Vosko, L. ed. 2006. *Precarious Employment: Understanding Labour Market Insecurity in Canada*. Montreal and Kingston: McGill-Queen's University Press.

⁵ Storey, R. 1983. "Unionization versus Corporate Welfare: The Dofasco Way," *Labour/Le Travail* 12, 7-42.

⁶ Again, the literature is vast. A few key works include: Kotz, D. M., T. McDonagh., and M. Reich. eds. 2010. *Contemporary Capitalism and its Crises*. New York: Cambridge University Press; and Harvey, D. 2005. *A Brief History of Neo-Liberalism*. Oxford: Oxford University Press.

immigration status is tied to an employment contract with a particular employer.⁷ In short, labour market insecurity was manufactured to create a social structure of accumulation that permitted the owners of capital to extract a greater share of socially produced wealth for their benefit by reducing their commitments to workers.⁸

At the same time, employers also pressed government to abandon the Keynesian and social-democratic policy prescriptions. Internationally, this included entering into free-trade agreements that facilitated the globalization of production, while domestically cutting welfare spending and pursuing labour market policies and laws that facilitated flexible work arrangements to meet employers' requirements, reducing the floor of minimum standards and weakening collective bargaining laws. As well, governments were also pressed to reduce the public sector, often through privatization often entailed substituting lower paying and less secure private sector jobs for the unionized public sectors jobs they replaced. Finally, remaining public sector jobs were subject to private sector management techniques aimed at increasing productivity and reducing labour costs.⁹ As a result, public sectors jobs also became less secure.

The implications of these changes of OHS have been well documented elsewhere.¹⁰ The focus here is on their impact on worker voice in OHS regulation.

⁷ Sargeant, M., and E. Tucker. 2010. "Layers of Vulnerability in Occupational Health and Safety for Migrant Workers: Case Studies from Canada and the UK, Policy and Practice," *Occupational Health and Safety* 7, No. 2:51-73; Fudge, J., and F. MacPhail. 2009. "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour," *Comparative Labor Law and Policy Journal* 31, No. 1:5-46.

⁸ Bieler, A. 2012. "Neo-liberal Globalisation, the Manufacturing of Insecurity and the Power of Labour," *Labor History* 53, No. 2:274-79.

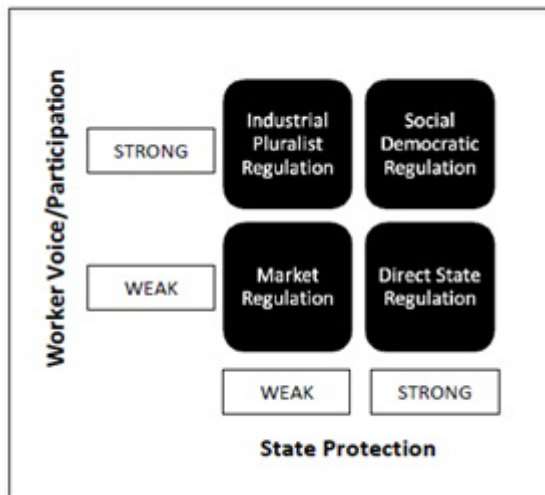
⁹ Huws, U. 2012. "Crisis as Capitalist Opportunity: The New Accumulation through Public Service Commodification," *Socialist Register 2012: The Crisis and the Left* 48, 64-84.

¹⁰ For example, see: Quinlan, M. 1999. "The Implications of Labour Market Restructuring in Industrialized Societies for Occupational Health and Safety," *Economic and Industrial Democracy* 20, No. 3:427-60; Bohle, P., and M. Quinlan. 2008. "Under Pressure, Out of Control, or Home Alone? Reviewing Research and Policy Debates on the Occupational Health and Safety Effects of Outsourcing and Home-Based Work," *International Journal of Health Services* 38, No. 3:489-523; and Quinlan, M., and E. Underhill. 2011. "How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Foreign Workers," *Relations Industrielles/Industrial Relations* 66, No. 3:397-421.

3. Mapping Worker Voice in OHS Regulation

In previous work I mapped different ways in which workers could be written into OHS regimes based on the relative strength of worker participation and direct state protection. My aim was to describe worker the variety OHS citizenship regimes rights in industrial capitalist states. That matrix can readily be adapted to describe models of OHS regulation, as I have done below in Fig.2-1.

Fig. 2-1. Models of OHS Regulation



These models are not just ideal types, but accurately describe different approaches to OHS regulation, and can be used to map the historical trajectory of OHS regulation within a particular jurisdiction and well as to compare regimes in different jurisdictions.¹¹

¹¹ Tucker, E. 2007. "Remapping Worker Citizenship Regimes in Contemporary Health and Safety Regulation," *International Journal of Health Services* 31, No. 1:145-70; Tucker, E. 2003. "The Politics of Occupational Health and Safety in a

For example, the historical development of OHS regulation in Ontario, Canada begins in the mid-nineteenth century when railway and industrial workers sued their employers for compensation as a result of work related injuries. Courts faced with these suits adopted the common law to support a regime of market regulation, by insisting that OHS conditions were to be determined by the contract of employment and not the imposition of legal standards. Freedom of contract was to prevail.

The reality for most workers, whether they were children, women or men, was that they could not meaningfully exercise voice in the labour market by negotiating with their employers over hazardous conditions. The market was neither free nor fair. Worker dissatisfaction gained political traction and this led to the enactment of work safety legislation in the last two decades of the nineteenth century. The enforcement of these safety laws, however, was problematic and the result was a weakly enforced regime of direct state regulation that did not produce levels of safety significantly better than the market. Notwithstanding its deficiencies, this regime was subsequently stabilized by the enactment of no-fault workers' compensation in the first decades of the twentieth century. Not only did workers' compensation provide financial relief to injured workers and their families, but it probably increased the cost of accidents to employers and prompted employers and employer associations to invest in safety improvements. Worker voice, however, remained muted. Individual workers may have acted as informants for inspectors and unions participated in lobbying efforts to strengthen OHS and workers' compensation laws, but in an era when unionization rates in most industries were low, union influence was limited.

After World War II, as part of the embrace of Keynesianism and social democracy, union density increased and some unions became more active in OHS issues. Some collective agreements required a joint health and safety committee (JHSC) and, more generally, arbitrators found that workers had a right to refuse unsafe work without being disciplined for insubordination. This produced a regime of industrial pluralist regulation for a segment of the labour force covered by collective agreements.

Finally, in the last decades of the twentieth century, a new wave of legislation was enacted giving all workers participatory rights and strengthening direct state regulation, particularly with respect to occupational health hazards. These developments moved Ontario in the

direction of social democratic regulation, although of a relatively weak kind.¹² At the time, it was the enhancement of worker voice that was seen as the greatest innovation.

So while the conceptual map was useful for historical and comparative analysis of OHS regimes, like all models it contains certain limitations that have become more apparent in the course of exploring new channels of voice for precarious workers. First, the model assumes that the space for worker voice is in the employer's management system. It does not contemplate worker participation in the enforcement system. Second, it assumes that worker voice will be exercised collectively. These limitations were understandable at the time. Health and safety activists and others were engaged in a political project to enhance collective worker voice at the point of production, the more radical among them arguing that worker control should be the goal.¹³ However, this political project may have reached its limits, especially in the new world of work where worker voice in the workplace is losing strength, making it necessary to explore whether alternative channels for voice, including voice in public enforcement, provide greater opportunities for improving worker safety.

In order to broaden the discussion, here I map the channels of worker voice based on three variables: subject, object and audience. The subject of voice refers to whether we are concerned with individual or collective worker voice. Regulatory regimes in OHS typically provide for both, although in varying degrees. The second variable is the object of voice, which refers to whether worker voice is directed at correcting hazardous conditions in the workplace, whether or not they violate the law, or reforming the laws and policies that determine what practices are legal or accepted by the employer. The third dimension is the audience. Here the question is whether worker voice is directed at the employer or at the state, opening up for discussion the role of worker voice in direct state regulation. The combination of these three variables produces Table 2-1.

¹² Tucker, E. *Remapping Worker Citizenship Regimes in Contemporary Health and Safety Regulation*, *cit.* Also see: Tucker, E. 1990. *Administering Danger: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850-1914*. Toronto: University of Toronto Press; and Tucker, E. 1992. "Worker Participation in Health and Safety Regulation: Lessons from Sweden," *Studies in Political Economy* 37:95-127.

¹³ Poole, M. 1986. *Towards a New Industrial Democracy*. London: Routledge & Kegan Paul.

Table 2-1. Channels of Worker Voice in OHS Regulation

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| Subject | Individual | | | | Collective | | | |
|----------|--|--|--|------------------------|---|----------|----------|--|
| Object | Hazardous Conditions | | Policy | | Hazardous Conditions | | Policy | |
| Audience | Employer | State | Employer | State | Employer | State | Employer | State |
| Examples | Right to Report and Refuse Unsafe Work | Right to Lodge Complaint (Anti-Retaliation Protection) | Individual Consultations, Suggestion Box | Individual submissions | Health and Safety Committee (HSC); Health and Safety Representative (HSR) | HSC, HSR | HSC, HSR | Regulatory Bipartism or Tripartism, Consultation |

While some of these channels are largely theoretical possibilities, most exist in practice. In what follows, I discuss each channel of worker voice, including its legal entrenchment, its use by “standard” workers and its use by precarious or vulnerable workers.

4. Exploring Channels of Worker Voice

4.1. Individual Worker Voice—Hazardous Conditions

Beginning from the left, I start with individual voice raising concerns about hazardous working conditions directly with the employer. By law, individual workers have a right, indeed perhaps a duty, to raise concerns about hazardous workplace conditions with their employer. For example, under Ontario’s *Occupational Health and Safety Act* (OHSA), ss. 28(1)(c) and (d) impose a duty on workers to report to an employer or a supervisor defects in any equipment or protective devices or contraventions of the Act and Regulations.¹⁴ There is also a legally protected right to refuse unsafe work when the worker has reason to believe that the equipment, a physical condition or workplace violence is likely to endanger the worker or another person. Workers are required to report the circumstances of the refusal to a supervisor and the employer, and employers are prohibited from retaliating against workers for acting in compliance with the Act or seeking its enforcement.¹⁵

It hardly bears repeating that this is a fundamentally important channel for worker voice. Workers’ eyes are often the first to see hazardous

¹⁴ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.; [OHSA].

¹⁵ OHSA, *cit.*, ss. 43(3)(4) and 50(1).

situations and if the employer does not adequately resolve reasonable worker concerns about safety, workers should have both the freedom to refuse unsafe work and a right not to suffer adverse consequences for doing so. Yet the existence of legal guarantees is only the first step for making this channel of voice effective. There must also be an institutional infrastructure in place to make these rights meaningful. Workers must not only have knowledge of their rights and of the hazards in their workplaces, but they must also feel secure that they can freely exercise voice without employer or co-worker retaliation.¹⁶

Garry Gray has identified three kinds of inter-related constraints on the individual exercise of safety rights: cultural, personal and structural.¹⁷ Cultural constraints refer to the prevailing set of attitudes, beliefs, symbols, practices and behaviours in local work settings that may discourage individual workers from reporting hazards or refusing unsafe work. For example, if the prevalent view of management is that individual workers should be responsible for avoiding risks that are present, rather than it being the responsibility of the management to remove those risks, then workers are more likely to feel reluctant to report or refuse hazards situations unless there is substantial co-worker support. Personal constraints refer to individual circumstances that may weaken a worker's ability or willingness to exercise safety rights. For example, workers will be more or less knowledgeable about safety risks. They will also be more or less willing to tolerate confrontation depending both on their personal characteristics and on their security at work, which in turn may depend on their place in the workplace hierarchy and their level of job security. Finally, structural constraints refer to the unequal power relations within work places that often make workers reluctant to challenge their employers' authority regardless of their legal rights. The greater the inequality, the more constrained workers are likely to be in acting as protagonists in defense of their own health and safety. Moreover, the structural constraints are also

¹⁶ Johnstone, R., M. Quinlan., and D. Walters. 2005. "Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market," *Journal of Industrial Relations* 47, No. 1:93-116.

¹⁷ Gray, G. C. 2011. "Constraints to Upholding Workplace Safety Laws and Regulations within Organizations," *Droit et Société* 77, No. 1:57-68. Also see: Feldman, Y., and O. Lobel. 2011. "Individuals as Enforcers: The Design of Employee Reporting Systems," in *Explaining Compliance*, eds. Parker, C., and V. Lehmann Nielsen., (UK and Northampton, MA: Edward Elgar, Cheltenham), 263-84.

likely to shape the cultural and personal factors influencing individual exercises of worker rights.

In the face of these constraints, it is not surprising that a growing body of research is finding that even among workers in a SER the voice channels of hazard reporting and, even more so, of work refusals are obstructed. Beginning with hazard reporting, Gray's ethnographic study of workers in an Ontario factory reported they were often silent about recognized hazards in their workplace.¹⁸ Two other surveys also found significant worker reluctance to report. The first, a survey of unionized workers in south western Ontario, found that close to one-half did not report a significant hazard and one-third expressed concerns that reporting hazards or injuries would negatively affect their future employment.¹⁹ This result was confirmed by a second survey of Ontario workers in the Toronto-Hamilton corridor. It found that about one-third of respondents reported that raising a health and safety issue at work would negatively affect future employment.²⁰ The study also reported that when responses were disaggregated between workers who reported that they were exposed to hazardous conditions and those who were not, close to two-thirds of those who were exposed to hazards reported that raising concerns would negatively affect their future employment. Presumably this discrepancy is explained by the fact that workers who are actually exposed to hazardous working conditions thought more concretely about the consequences of reporting than those who were not.

When we turn to the question of work refusals, which of course entails going beyond reporting and defying the employer who still requires the work to be done, it is expected that workers will be more reluctant to exercise voice, notwithstanding legal guarantees against retaliation. Research confirms this expectation even among workers in an SER. As with

¹⁸ Gray, G. C. 2002. "A Socio-Legal Ethnography of the Right to Refuse Dangerous Work," *Studies in Law, Politics and Society* 24, No. 2:133-69.

¹⁹ Hall, A. 2010. "To Report or Not to Report Injuries: Worker Rationales and Workplace Constraints," Paper presented at the LOARC Teach-in, Internal Responsibility Thirty Years Later: Not Yet Healthy and Still Not Safe, McMaster University, Hamilton, Ontario, May 2010; Hall, A., and S.S. Phillips. 2011. "Injury and Hazard Reporting in the Context of Precarious Employment," Paper presented at the Canadian Sociological Association Meeting, St. Thomas University/University of New Brunswick, New Brunswick, May 2011.

²⁰ Lewchuk, W. "The Limits of Voice: Who is Afraid of their Health and Safety Rights?," Paper presented at the Voice at Work North American Meeting, Osgoode Hall Law School, York University, March 2012.

reporting, the right to refuse will only be exercised when there are institutional arrangements in place to support its exercise. In Ontario, the overwhelming majority of work refusals are by unionized workers who have the security of a collective agreement that provides them with protection against arbitrary discharge and discipline and the support of a union that has the resources to bring a grievance or a labour board complaint on their behalf.²¹ Yet unionization alone is not enough to provide workers with security. When complaints about retaliation are made, labour boards and arbitrators have tended to interpret narrowly the scope of the right to refuse work as subordinate to the employers' right to manage. As a result, workers may find it difficult to vindicate their legal rights. Even with the support of their unions. But other structural constraints may be even more powerful. Unionized workers are not immune from economic lay-offs or plant closings so that during periods of economic contraction workers may be extremely reluctant to engage in militant or disruptive behaviour and may find little support from their co-workers, even if the circumstances warrant a legal work refusal.²²

To this point, our discussion of reporting and refusing hazards by individual workers to the employer has focused on workers in SERs. That is, we have focused on the kind of workers who were in the contemplation of policy makers when these rights were enacted in the 1970s. Yet from the beginning commentators noted the limits of worker voice in the internal responsibility or safety management systems that were being constructed to comply with the law and since that time the structural constraints under

²¹ Tucker, E. 1986. "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism," in *Essays in Labour Relations Law*, ed. England, G., (Don Mills, ON: CCH) 219-262; O'Grady, J. 2000. "Joint Health and Safety Committees: Finding a Balance," in *Injury and the New World of Work*, ed. Sullivan, T., (Vancouver: University of British Columbia Press) 162-97.

²² Harcourt, M., and S. Harcourt. 2000. "When Can an Employee Refuse Unsafe Work and Expect to be Protected from Discipline? Evidence from Canada," *Industrial and Labor Relations Review* 55, No. 4:684-703; Renaud, M., and C. St-Jacques. 1988. "The Right to Refuse in Quebec: Five Year Evolution of a New Mode of Expressing Risk," *International Journal of Health Services* 18, No. 3:401-17; Walters, V. et al. 1995. "Judgments of Legitimacy regarding Occupational Health and Safety: A Report on a Canadian Study" in *Corporate Crime: Contemporary Debates*, Pearce, F., and L. Snider, (Toronto: University of Toronto Press) 284-301; Gray, G. C. *Ethnography, cit.* The precipitous decline in strike rates in most advanced capitalist economies further attests to this phenomenon. See: Dribbusch, H., D. Lyddon, K.I. Vandaele, and S. Van der Velden, eds., 2007. *Strikes Around the World, 1968-2005*. Amsterdam: Aksant.

which those systems operate have tended to undermine the conditions for effective worker voice generally.²³

It is not surprising, therefore, that when we examine the individual voice channel for precarious workers a small but growing body of research has found that it is unlikely to be effective. First, a prerequisite for reporting or refusing is that the worker is aware of the hazard. Temporary workers, contract workers or self-employed workers whose tenure at any particular work location is liable to be short are less likely to have an opportunity to gain local knowledge about the particular hazards in their present worksites and many employers will not be inclined to invest adequately in training to provide it directly. For example, Aronsson's study of contingent workers in Sweden found that non-permanent workers more frequently reported feeling they lacked sufficient work-environment knowledge and training than permanent workers and that their non-permanent status made it more difficult for them to raise concerns and get their viewpoint heard.²⁴

Second, almost by definition, precarious workers are less secure than those in an SER. As a result, their perceived cost of exercising OHS rights is likely to be higher, reducing the likelihood they will do so. Lewchuk's study, referred to earlier, found that workers with only moderate security were more than twice as likely as workers with high security to express the fear that reporting an OHS concern would negatively impact future employment, while workers in the high precarity category were seven times more likely to express this fear.²⁵

If precarious workers are less able to recognize hazards and are more fearful that raising OHS concerns will negatively impact future employment, then we can also safely assume that work refusals will be rare indeed. To my knowledge, however, there are no empirical studies that have specifically examined work refusals by precarious workers, although in Gray's ethnography he reports that when he refused unsafe work management replaced him with a young female university student from another department who, as a temporary worker, presumably had less understanding of the danger and was less secure in her job.²⁶

²³ See: Haines, T., and V. Walters. 1988. "Workers' Use and Knowledge of the 'Internal Responsibility System': Limits to Participation in Occupational Health and Safety," *Canadian Public Policy* 14, Mo. 3:411-23.

²⁴ Aronsson, G. 1999. "Contingent Workers and Health and Safety," *Work, Employment and Society* 13, No.3:439-60.

²⁵ Lewchuk, W. *op. cit.*

²⁶ Gray, G. C. *Socio-Legal, op. cit.*, 154-58.

4.2 Collective Workplace Voice—Hazardous Conditions

Because of the deficiencies of individual voice for workers generally, let alone precarious workers, health and safety reforms of the 1970s and 80s put greater emphasis on creating institutional arrangements for collective worker voice to foster communication between workers and employers and between workers and OHS officials. Here our focus is on JHSCs and HSRs, beginning first with their place in the employer's safety management system.

Again, taking Ontario as our example, with some exceptions the OHSA currently requires the establishment of an JHSC at workplaces where twenty or more workers are regularly employed and the appointment of an HSR in a workplace with fewer than twenty but more than five regularly employed workers. If the workers are represented by a trade union, then the union appoints the HSRs or the worker representatives on JHSCs (who will also be called HSRs). Otherwise they are to be elected by the workers with non-managerial functions. HSRs play a crucial role in communicating OHS concerns to the employer. By law, HSRs are entitled to training on paid work time, they are entitled to get OHS information from the employer and they have a duty to conduct periodic examinations of the workplace. HSRs can make recommendations to the employer directly, or to the JHSC, which then makes recommendations to the employer and the employer must respond in writing to these recommendations. HSRs also assist individual workers. For example, during a work refusal (which is an individual and not a group right), HSRs are to be called to participate in the internal investigation of the refusing worker's concern.²⁷

In one form or another, these arrangements exist in most advanced industrial economies and while differences are salient in terms of their effectiveness it is not my concern here to enter into that discussion.²⁸ Rather, I want to emphasize that the common goal of these reforms was to require the employer to establish a participatory OHS management system in which worker representatives would bring worker concerns to the attention of the employer and be involved in their prompt and appropriate resolution; in short, an effective channel for collective worker voice to the employer.

²⁷OHSA, *cit. ss.* 8, 9 & 43(4).

²⁸Nichols, T., and D. Walters. 2007. *Worker Representation and Workplace Health and Safety*. Basingstoke: Palgrave MacMillan.

There is now a large literature on the effectiveness of HSRs and JHSCs that can be briefly summarized. It is well established that merely mandating JHSCs and HSRs is not sufficient to create effective channels for collective worker voice, although a strong legislative steer is necessary. The effectiveness of JHSCs and HSRs depends on the presence of a number of other inter-related conditions including an effective system of external inspection and control, senior management commitment to OHS and participatory arrangements, worker representative access to information and training, and a degree of worker economic security and power.²⁹

There is also ample, although not uncontroverted evidence that a trade union presence increases the effectiveness of collective worker voice in OHS. To the extent this is found it may be because a union presence helps strengthen the other conditions supporting worker voice. For example, unions may provide valuable OHS training and reduce the cost of obtaining access to information. They may also provide worker representatives with greater job security. Finally, in a unionized workplace the employer maybe more used to and accepting of participatory arrangements in relation to shop-floor matters like OHS. But of course, the mere presence of a union is no guarantee collective worker voice will be effective. Unions may not make OHS a priority, they certainly cannot protect the bargaining unit against economic lay-offs or plant shutdowns, and employers may actively resist union involvement in decision-making rather than accept it. Indeed, some recent research has found that in the face of declining union densities and power, and growing employer resistance to collective bargaining, the channels for collective worker voice, even for workers in SERs in unionized sectors, are becoming blocked.³⁰

²⁹ E.g. Walters D. and T. Nichols, *op cit.*, 117; Liu, H., et al. 2010. "The Pennsylvania Certified Safety Committee Program: An Evaluation of Participation and Effects on Work Injury Rates," in *American Journal of Industrial Medicine* 53, No. 8:780-91; Granzow, K., and N. Therberge. 2009. "On the Line: Worker Democracy and the Struggle Over Occupational Health and Safety," *Qualitative Health Research* 19, No. 1:82-93; Eaton, A., and T. Nocerino. 2000. "The Effectiveness of Health and Safety Committees: Results of a Survey of Public Sector Workplaces," *Industrial Relations* 39, No. 2:265-90. For recent reviews of the literature, see Carlan, N., A. Forrest, A. Hall, and A. Sears. 2006. "Making a Difference: Knowledge Activism and Worker Representation in Joint OHS Committees," *Relations Industrielles/Industrial Relations* 61, No. 3:408-34.

³⁰ For example, Gunningham, N. 2008. "Occupational Health and Safety, Worker Participation and the Mining Industry in a Changing World of Work," *Economic and Industrial Democracy* 29, No. 3:336-61.

In light of these findings, it is not surprising that researchers are generally pessimistic about the prospect of collective workplace voice for precarious workers. First, there are some basic questions around how or whether precarious workers of various kinds even fit into the statutory scheme for collective representation. Some arrangements are more problematic than others. In respect of independent contracting, in Ontario and many other jurisdictions employers owe a duty to protect workers, not just employees, so that an employer does not avoid OHS obligations by having independent contractors performing work on the employer's premises. Moreover, if those contractors are "regularly employed" then they are to be counted for the purposes of calculating whether a JHSC or an HSR is required. Just recently the Ontario Court of Appeal held that the term "regularly employed" should be given an expansive meaning so that a company that dispatched owner-operators was required to have a JHSC.³¹

The application of the law to temporary agency workers is more problematic. The agency is considered the employer for the purposes of workers' compensation but the client is also the employer for the purposes of OHS. If temps are regularly employed by the client then they will count toward calculating whether an HSR or a JHSC is required, but the agency itself will not be required to have HSRs or a JHSC, even though it may have hundreds or even thousands of employees because they are not regularly employed at the agency's workplace.³²

Beyond the question of mismatches between statutory provisions and precarious working arrangements lies the issue of the effectiveness of participatory arrangements even when they are required. As we noted, research has pointed to three significant factors associated with successful collective voice in workplace OHS: worker knowledge, worker

³¹ *Ontario (Labour) v United Independent Operators Limited*, 2011 ONCA 33, 90 C.C.E.L. (3d) 171.

³² For a more detailed discussions of mismatches between statutory provisions and labour market changes, see Lippel, K. 2006. "Precarious Employment and Occupational Health and Safety Regulation in Quebec," in *Precarious Employment: Understanding Labour Market Insecurity in Canada*, ed. Vosko, L., (Montreal and Kingston: McGill-Queen's University Press), 241-55; Lippel, K., et al. 2001. "Legal Protections Governing the Occupational Safety and Health and Workers' Compensation of Temporary Employment Agency Workers in Canada: Reflections On Regulatory Effectiveness," *Policy and Practice in Health and Safety* 9, No. 2:69-90; Johnstone, R., M. Quinlan., and D. Walters. 2005. "Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market," *Journal of Industrial Relations* 47, No. 1:93-116.

empowerment and employer commitment. As we have already noted, researchers consistently report that precarious workers are less likely to have OHS knowledge and more likely to feel vulnerable to suffering adverse consequences for raising OHS concerns. Moreover, precarious workers face considerable obstacles to collective action. Not only are there serious questions about when so-called self-employed workers qualify as employees for the purposes of collective bargaining law, but other groups of precarious workers whose employment status is not in question encounter other legal problems, including the question of who is the employer for collective bargaining purposes.³³ Of course, collective action outside the structure of formal unions is possible, and we will return later to discuss some developments in this regard, but these arrangements generally do not provide workers with the ability to act collectively at the workplace level. Finally, we might ask whether it is likely that employers who choose to meet their labour requirement through precarious workers will be committed to participatory management structures. To ask the question is to answer it; employers who adopt these arrangements are motivated to reduce, if not eliminate, commitments to workers, and so it would be surprising to find them embracing participatory approaches to OHS management.³⁴

4.3. Individual Worker Voice and the State—Hazardous Conditions

An alternative to raising concerns about hazardous conditions with the employer is to raise them with state officials, typically with health and safety inspectors. We consider individual complaints first. Historically, individual worker complaints were the first channel of worker voice after protective legislation was enacted in the nineteenth century. In the early years of OHS regulation, complaints were often made in writing, under pseudonyms, to prevent employers from identifying the source.³⁵ Under

³³ Fudge, J., E. Tucker, and L. Vosko. 2003. "Changing Boundaries of Employment: Developing a New Platform for Labour Law," *Canadian Journal of Labour and Employment Law* 10, No. 3:361-98; Cranford, C., J. Fudge, E. Tucker, and L. Vosko. 2005. *Self-Employed Workers Organize: Law, Policy and Unions*. Montreal and Kingston: McGill-Queen's University Press.

³⁴ Lewchuk, W. et al., *op. cit.*

³⁵ Tucker, E. *Administering Danger, cit.*

present law, because of its emphasis on the development of internal responsibility systems, individual workers are not under a duty to report violations to an inspector, but only to their employer. Indeed, in the first years of enforcement activity under this new regime, the government's desire to make the internal responsibility system work led the Ontario Ministry of Labour to discourage worker OHS complaints to government until they had gone through the internal responsibility system.³⁶ In more recent years, the Ministry has shifted its priorities and has expanded its enforcement role. In any event, workers are legally free to make complaints to government and, as noted above, individual workers are protected against retaliation for seeking enforcement of the Act. The Act also requires inspectors communicate with workers. Where there are no worker representatives (discussed *infra.*), inspectors are required to "endeavour to consult" with a reasonable number of individual workers when conducting a physical workplace inspection.³⁷

Yet the fact that workers have the right to raise OHS concerns with government and government inspectors have a duty to consult with workers when conducting inspections does not guarantee that this channel of worker voice will be open. As is the case with reporting hazards to employers, workers must be aware of the existence of the hazard and feel secure before they will exercise their right to report to government. David Weil and Amanda Pyles constructed a very useful model to explain the factors that influence individual reporting behaviour based on the perceived benefits and costs to the individual of doing so. Costs include both information costs (acquiring information about hazards and legal standards) and the potential costs of retaliation, while the benefit is improved health and safety. While we are strictly concerned with individuals, Weil and Pyles also note that the benefit of improved health and safety is likely to be a public good in the sense that it will benefit a larger group of workers. This creates the potential for under utilization of the individual right to complain because of free-rider problems. Individuals may choose not to incur the costs of complaining in the hope that another worker who is exposed to the same hazard will do so.³⁸

³⁶ Laskin, J. K. and G. G. McKenzie. 1987. "Report on the Administration of the Occupational Health and Safety Act," Ontario: Ministry of Labour; Smith, D. 2000. *Consulted to Death*. Winnipeg: Arbeiter Ring Publishing.

³⁷ OHSA, *cit.*, s. 54(4).

³⁸ Pyles, A., and D. Weil. 2005. "Why Complain: Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace," *Comparative Labor Law and Policy Journal* 27:59-92.

Empirical studies of individual complaints to enforcement officials are scarce. Indeed, I have found only one that examines OHS complaints to government. Weil and Pyles' study of complaint behaviour by US workers between 2001 and 2004 found that the incidence of worker complaints was exceedingly low - 17 complaints for every 100,000 workers. Although rates between industries varied considerably, there was little correlation between injury complaint rates, injury levels (especially among industries with high injury rates) and compliance rates. Industries with high injury and non-compliance rates often had low complaint rates.

To my knowledge there are no studies specifically examining the propensity of precarious workers to raise OHS concerns with government officials.³⁹ However many of the same factors that inhibit workers from voicing OHS concerns to their employers would also be operative here. Precarious workers are less likely to be aware of site-specific hazards and, if move between different industries or occupations, of more general hazards. They are less likely to receive adequate training. Additionally, they are likely to feel more vulnerable to suffer adverse employment consequences if they complain and less supported in challenging retaliatory actions. Finally, to my knowledge, OHS inspectors in Canada have not been instructed to seek out and consult with precarious workers during scheduled OHS inspections.⁴⁰

4.4. Collective Worker Voice and the State—Hazardous Conditions

JHSCs and HSRs not only have a role to play in raising OHS concerns with the employer; they are also empowered to engage with the external responsibility system of the state. For example, in Ontario OHSA provides that HSRs are entitled to accompany inspectors during their inspection visits on paid time. Copies of any order issued by the inspector are to be provided to the HSR. Where the inspector issues a stop-work order, a condition of the employer being able to resume the stopped work is that an HSR signs off on

³⁹ Lewchuk's study, *op. cit.* did not distinguish between complaints to inspectors and complaints to the employer, so to some extent his findings might provide some empirical evidence for the hypothesis that precarious workers are less likely to complain to OHS inspectors.

⁴⁰ Australian inspectors are required to take account of temporary and agency workers when undertaking workplace consultations. See Johnstone R. et al., *op. cit.*

a report that the employer has complied with the order.⁴¹ In Australia, five of nine health and safety statutes empower HSRs to issue provisional improvement notices and four give HSRs power to direct that dangerous work cease.⁴² These are powers reserved to state enforcement officials in most jurisdictions. Beyond formal statutory arrangements, HSRs also can play an important role in initiating complaint investigations. In an older study, I found that in Ontario complaint inspections disproportionately occurred at unionized workplaces. While in part this may be because unionized workers perform more hazardous work than non-unionized workers, it is also likely that HSRs in unionized workplaces were more willing to make complaints that triggered inspections than HSRs in non-union workplaces. An American study by Weil reached a similar conclusion. He found that worker voice in unionized firms resulted in those firms being more frequently inspected, facing greater scrutiny on those inspections and paying higher fines if found to be in violation than non-unionized workplaces.⁴³ However, the union advantage should not be overstated in an era of growing economic insecurity for all workers. Worker representatives will be reluctant to complain to inspectors about hazardous conditions if they fear it may result in lay-offs or shutdowns.

In light of what has already been said about the weakness of collective work voice for precarious workers in communicating with their employers, there is little to add regarding its role for engaging the state. Although I am not aware of empirical studies that examine how well collective voice mechanisms operate for precarious workers in attracting state protection, it is likely that mismatches between statutory provisions and precarious work arrangements, decreased ability to make effective use of JHSCs and HSRs, and greater vulnerability more generally conspire to undermine this channel of worker voice.

⁴¹OHSA, *cit.*, ss. 54(3), 57(7) and 57(10).

⁴²Johnstone, R. 2012. "Decriminalisation of Health and Safety at Work in Australia," National Research Centre for OHS Regulation Working Paper No. 86, Canberra, Australia: National Research Centre for OHS Regulation.

⁴³Tucker, E. 1995. "And Defeat Goes On: An Assessment of the Third Wave of Health and Safety Regulation," in *Corporate Crime: Contemporary Debates*, eds. Pearce, F., and L. Snider, (Toronto: University of Toronto Press), 245-67; Weil, D. 1991. "Enforcing OSHA: The Role of Labor Unions," *Industrial Relations* 30, No. 1:20-36.

4.5. Individual and Collective Worker Voice—Workplace and State OHS Policy

In this section, I am only briefly mentioning individual voice for the obvious reason that individual voice in respect of OHS policy is not a well developed channel or, for that matter, one that is likely to develop. For example, in Ontario employers are not legally required to consult with individual workers on matters of OHS policy. Of course, some employers may solicit individual worker involvement in OHS management, but there is no evidence that it happens generally, either in large establishments or in smaller workplaces where collective worker voice is not required and where researchers have found there are significant challenges to promoting individual employee participation.⁴⁴ As well, individual worker voice in government OHS policy development is also not a major feature of contemporary OHS regulation. Certainly, individual workers are free to make submissions to government during consultations on regulatory and policy matters, but outside of occasional commissions of inquiry that hold local hearings government typically does not build institutional mechanisms to encourage or facilitate individual worker voice. Indeed, where collective worker voice was historically weak, such as in agriculture, and employers objected to permitting third-parties such as worker advocacy groups to speak for unorganized workers, worker voice virtually disappeared from government investigations.⁴⁵

On the other hand, collective worker voice in OHS policy development at both the workplace and state level has been, to varying degrees, actively promoted. As we noted earlier, in contemporary OHS legislation there was an underlying commitment to the development of worker voice within the firm that did not sharply distinguish between reporting hazards and making recommendations for improved OHS performance. For example, in Ontario HSRs and JHSCs were given a mandate to make recommendations to the employer and later employers were required to respond to their

⁴⁴ For example, Eakin, J., F. Lamm, and H. Limborg, 2000. "International Perspective On The Promotion Of Health And Safety In Small Workplaces," in *Systematic Occupational Health and Safety Management*, eds. Frick, K., P. Langaa-Jensen, M. Quinlan, and T. Wilthagen, (Oxford, UK: Elsevier Science), 227-47.

⁴⁵ Tucker, E. 2006. "Will the Vicious Circle of Precariousness be Unbroken?: The Exclusion of Ontario Farm Workers from the Occupational Health and Safety Act," in *Precarious Employment: Understanding Labour Market Insecurity in Canada*, ed. Vosko, L. (Montreal and Kingston: McGill-Queen's University Press), 256-76.

recommendations with either a timetable for implementing them or reasons for not implementing.⁴⁶ However, there were substantial disagreements over the scope of worker voice. Worker activists were pressing to expand to give worker representatives decision-making power, but employers insisted the role of worker voice was only consultative. The matter came to a head in Ontario in the late 1980s and employers won the debate. Moreover, since that time, at least one survey found that senior managers in 2001 thought that worker involvement was less important than they did in 1990.⁴⁷ Nevertheless, institutional channels for collective worker voice in workplace OHS management remain and may also be supported by other programs and policies that give employers credit for worker participation, such as accreditation.

Collective worker voice in the development of state OHS policy has long been present and has played a particularly important role in the reforms of the 1970s and 1980s when a militant workers' health and safety movement was keeping government on the defensive.⁴⁸ The Ontario government responded by adopting tripartite and even bipartite institutional arrangements for setting OHS standards and overseeing OHS training. However, the high water mark of collective worker voice was reached in the early 1990s and was rolled back by a deeply conservative government. More recently, a Liberal government has been much more open to consultation with organized labour but has not shown any interest in reviving corporatist co-regulation, let alone giving workers decision-making powers.

We have already discussed the research on the effectiveness of collective workplace voice in regard to hazardous conditions for both standard and precarious workers, but that analysis applies with equal force to workplace OHS policy. Indeed, it is arguable that, other things being equal, collective worker voice with regard to hazardous conditions is likely to be stronger than with regard to policy insofar as hazardous conditions are likely to also violate the law and therefore could be drawn to the attention of

⁴⁶ OHSA, *cit.*, s. 8 (12)(13).

⁴⁷ Tucker, E. *And Defeat Goes On: An Assessment of the Third Wave of Health and Safety Regulation*, *op cit.*; Gelhart, S., L. Lohfield, and H. Shannon. 2005. "Have Companies Improved Their Health and Safety Approaches Over the Last Decade? A Longitudinal Study," *American Journal of Industrial Medicine* 47, No. 3: 227-36.

⁴⁸ Storey, R., and E. Tucker, 2005. "All that is Solid Melts into Air: Worker Participation in Health and Safety Regulation in Ontario, 1970-2000," in *Worker Safety Under Siege: Labor Capital and the Politics of Workplace Safety in a Deregulated World*, ed. Mogensen, V. (New York: Sharpe, Armonk), 157-86.

an inspector who could issue an order. Policy matters that go beyond implementing regulatory requirements cannot be taken further by worker representatives, depriving them of an important source of power to influence employer decision-making.

Finally, although there is not a large literature examining the effectiveness of collective worker voice in shaping state OHS policy, resource mobilization theory has provided some useful insights for thinking about the conditions under which interventions are more likely to be successful.⁴⁹ First, the social structure of accumulation shapes the success of worker mobilizations in a variety of ways. In a context in which governments and employers accept trade unionism and the legitimacy of state protection against dysfunctional labour market outcomes, OHS activists are much more likely to successfully influence OHS regulation, especially if hazardous conditions have materialized in work-related deaths, injuries and diseases. As well, because of their greater employment security and access to institutional resources, activists will be better able to mobilize indigenous resources to support their campaigns. Second, the strategic position of particular groups of workers in the economy provides another important power resource. Groups of workers that can credibly threaten to disrupt profit-making will not only gain the ear of their employers, but also the state. Third, the structure of political alignments at any given time will also influence the power of workers to have their concerns addressed. When working class votes or the support of a labour friendly party is vital to maintaining power, mainstream parties will be more likely to accede to worker demands. Finally, the strategic choices made by a movement, including the way they frame their demands and whether that frame resonates with broadly shared discourses, may also significantly influence its success.

This analytic framework has been applied to explain why a vibrant OHS movement successfully campaigned to reform OHS regulation from the late 1960s to the late 1980s. It arose at a time when the Canadian state and, to a lesser degree, Canadian employers were still committed to a cooperative, if not quite a corporatist, philosophy and practice of governance. Trade union

⁴⁹ Storey, R. 2005. "Activism and the Making of Occupational Health and Safety Law in Ontario, 1960s – 1980," *Policy and Practice in Occupational Health and Safety* 1:41-68; Buechler, S.M. 2000. *Social Movements in Advanced Capitalism*. New York: Oxford University Press; Jenkins, J.C. 1985. *The Politics of Insurgency: The Farm Worker Movement of the 1960s*. New York: Columbia University Press, New York; Jenkins, J.C. and C. Perrow. 1977. "Insurgency of the Powerless: Farm Worker Movements (1946-1972)," in *American Sociological Review* 42:249-68.

density was still relatively high and, even though the labour movement had an ambiguous relationship with OHS activists because their militancy challenged the leadership's implicit acceptance of managerial control, the fact of unionization provided significant job security and access to some resources. The core of the health and safety movement was in mining and manufacturing, sectors that played an important role in Ontario's economy and that could be disrupted by the actions of a militant minority. Political alignments were beginning to fragment as a long-serving Progressive Conservative government struggled to hold power, forming a minority government from 1975 to 1977 and then losing power to a Liberal minority government in 1985. Finally, the OHS movement was very effective in framing their demands in terms that had broad resonance. The claim that "Our health is not for sale" had particular traction in a country in which the commodification of health and health care was widely condemned.⁵⁰

Collective worker voice in Ontario government OHS policy peaked in the early 1990s with embrace of regulatory bipartism, which saw the creation of labour-management structures to oversee health and safety training and the setting of exposure limits to hazardous substances. The election of a conservative government in 1995 brought that to an abrupt end and labour was largely excluded from policy processes until the election of a Liberal government in 2003. That government created a variety of sectoral councils and recently established a Prevention Council on which four labour representatives and one non-union worker representative sit with four employer representatives, an independent expert and a representative of the compensation board.⁵¹

In Alberta, there has also recently been a move to bring workers' voices back into the OHS policy process. Jason Foster reports that, despite its relatively weak position (Alberta has the lowest union density in Canada), the labour movement was able to make modest gains through its participation in two OHS working groups established by the government to advise on regulatory reforms. He attributed their success to the structure of

⁵⁰ Storey, R., and E. Tucker, *op. cit.*; MacDowell, L. S *op. cit.*

⁵¹ Tucker, E. *Politics, op. cit.*; Ministry of Labour. 2012. *New Council to Advise on Workplace Health and Safety*, Ministry of Labour. http://www.labour.gov.on.ca/english/news/2012/nr_prevcouncil20120809.php (accessed 18 January 2013).

the process, which required consensus, and the narrowness of the recommendations that emerged.⁵²

These developments suggest that despite the weakening of the conditions for effective collective worker in the state, there is some scope for engagement in social dialogue on OHS and that modest gains can be made or, at the very least, hostile employer demands can be blunted. But it is also likely that union demands for stronger OHS regulation are likely to be moderated by the fear that strong state action would trigger an employer backlash that could potentially cost jobs.

The ability of precarious workers to shape state OHS policy is even more limited. Not only do they face the structural constraints that all workers experience, but they are particularly vulnerable by virtue of their strategic location which limits their ability to credibly threaten to disrupt the economy. Their power would have to derive from associational strength, and that is extremely weak. Thus it is not surprising that, for the most part, they do not enjoy direct representation on bipartite or tripartite bodies and depend on the labour movement to speak on their behalf. The appointment of a member to represent non-union workers to the Ontario Prevention Council is an exception, albeit one that might indicate growing public awareness of the problem of precarious employment and OHS and portend a greater willingness on the part of the labour movement to support direct representation for these workers, provided that it does not come at the expense of the labour movement's delegation. Moreover, there is still widespread rejection of the legitimacy of commodifying health and health care and this is an important ideological resource that, perhaps, can still be used.

4.6. Summary

The basic argument presented is that worker voice in OHS can have an important role to play, but only under certain conditions. Those conditions were present for some workers in a SER at the time when worker participation was legislated in the mid-1970s, but not for all. Since that time, those supporting conditions have become less common, particularly for precarious workers. These conclusions are now widely shared among

⁵² Foster, J. 2011. "Talking Ourselves to Death? The Prospects for Social Dialogue in North America – Lessons from Alberta," *Labor Studies Journal* 36, No. 2:288-306.

researchers, so the main contribution of this section is in the distinction it makes between different channels of worker voice and its exploration of the conditions for effective voice that are particular to each channel. By understanding the ways in which these different channels operate, we can better assess where and how to address the voice deficit that particularly afflicts precarious workers. This is the task of the final section.

5. Worker Voice in the New World of Work

What, if anything, can be done to protect and enhance worker voice in the new world of work? There are no simple solutions to a problem that is deeply rooted in structural conditions that cannot be changed in the short-term. So clearly, there is no point in calling for a restoration of the post-war accord, such as it was, and the labour market arrangements and institutions that it supported. Although the growth of precarious employment may slow, as may the decline in union density, there is little reason to believe that in the near future either trend will be stopped, let alone reversed.⁵³ Given this challenging reality, it might be helpful to roll the discussion back one level by asking which channels of worker voice are most likely to be opened and made effective.

To date, much of the literature has focused on enhancing worker voice in the employer's OHS management system. For example, Walters and Nichols generally recommend enacting more comprehensive and stronger regulations requiring consultation and, for small workplaces, emulating the Swedish system of regional health and safety representatives.⁵⁴ I will return to these recommendations shortly, but I want to suggest that a more promising channel of worker voice for precarious workers is in the area of state enforcement. I take this view because I think that the prospects for effective regulated self-regulation for precarious workers are dim and that

⁵³ Noack, A. M. and L. Vosko. 2012. "Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context," Report prepared for the Ontario Law Commission, Vulnerable Worker Project, Toronto: Ontario Law Commission. This report shows remarkable stability in the overall structure of the Ontario labour market from 1999 to 2009.

⁵⁴ Nichols, T. and D. Walters *op. cit.*, 147-52.

despite the obstacles there is more scope for gains to be made by strengthening state enforcement and workers' voices in that endeavour.

The basis for this view is more fully developed in another paper critiquing new governance approaches to OHS regulation.⁵⁵ Essentially, I argue there that OHS regulation is beset by regulatory dilemmas that arise because of conflicts between safety and profit. Of course safety and profit do not always conflict and compliance strategies are most likely to succeed in its absence. But conflict is common and when it is regulatory dilemmas will limit the space for cooperation, except under certain conditions. Erik Olin Wright has argued that mutually beneficial class compromise is sometimes possible, but only when workers have sufficient organizational and political strength to take OHS out of competition by requiring all employers to maintain high standards.⁵⁶ Historically this situation has been difficult to achieve, and perhaps was best realized in the Nordic countries during the 1970s and 80s.⁵⁷ However, under conditions of globalized production and weakened worker organization, employers have retreated from cooperative arrangements. As a result, a primary focus on building self-regulation with worker voice risks a regression toward neo-liberal regulation that valorizes market-driven outcomes.

The turn toward worker voice in enforcement has been most apparent in recent writing on the enforcement of employment standards, where scholars have identified substantial compliance deficits.⁵⁸ Since people working at the bottom of the labour market are almost by definition precariously employed, researchers writing in this vein have had to confront the new realities of the labour market more starkly than those writing about OHS, where a greater variety of workplace situations are found and where the SER still exists in some places. Moreover, for precarious workers,

⁵⁵ Tucker, E. *In press*. "Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom" in *Safety or Profit?: International Studies in Governance, Change and the Work Environment*, eds. Walters, D., and T. Nichols. (London: Palgrave).

⁵⁶ Wright, E. O. 2000. "Working-Class Power, Capitalist Class Interests, and Class Compromise," *American Journal of Sociology* 105, No. 4:957-1002. Also, see Tucker, E. 2010. "Renorming Labour Law: Can We Escape Labour Law's Recurring Dilemmas?," *Industrial Law Journal* 39, No. 2:99-138.

⁵⁷ Tucker, E. 1992. "Worker Participation in Health and Safety Regulation: Lessons from Sweden," *Studies in Political Economy* 37:95-127.

⁵⁸ E.g., Bernhardt, A., et al. 2009. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Law in America's Cities*. <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1> (accessed 29 January 2013).

enhancing voice in an internal responsibility system for ensuring compliance with applicable employment standards is not a sensible policy response. In most workplaces there is no institutionalized internal responsibility system that workers can access. Therefore, public regulation and enforcement must be prominent in any regulatory strategy and worker voice in enforcement is a component of a multi-pronged approach to its improvement.⁵⁹

Jennifer Gordon and Janice Fine have been particularly helpful in focusing attention on the role of worker voice in public enforcement.⁶⁰ They understand that a major problem facing vulnerable workers is that they confront numerous barriers to exercising individual voice by making complaints either to their employers or to state regulators even though they are legally protected against employer retaliation for doing so. Moreover, direct collective voice is unlikely since these workers are overwhelmingly unorganized and are unlikely to gain union representation in the near future. Therefore, Fine and Gordon focus on third-party or community-based enforcement, which draws upon the resources of third-party worker representatives, like unions and workers' centres, to gather and provide information to inspectors and to file complaints. Based on a number of case studies of innovative enforcement programs in the United States, Fine and Gordon argue that for these arrangements to be successful, they must be formalized, sustained, vigorous and well-resourced.

Their proposal partially resembles the Swedish regional safety representative model discussed earlier insofar as it introduces a third party into the workplace to facilitate worker voice, but it differs in at least two important ways. First and foremost, the focus of their proposal is not to give

⁵⁹ The work of David Weil has been particularly influential. E.g., Weil, D. 2011. "*Improving Workplace Conditions through Strategic Enforcement*," Report to the Wage and Hour Division, United States Department of Labor, <http://www.dol.gov/whd/resources/strategicEnforcement.pdf> (accessed 29 January 2013). In addition to worker voice, Weil emphasizes the importance of examining industry and supply chain structures to identify powerful actors and tools to motivate them to influence the behaviour of downstream actors. Also, see McCluskey, M., et al. 2012. "The Next OSHA: Progressive Reforms to Empower Workers," Center for Progressive Reform White Paper No. 1207, http://www.progressivereform.org/articles/Next_Generation_OSHA_1207.pdf (accessed 29 January 2013).

⁶⁰ Fine, J., and J. Gordon. 2010. "Strengthening Labour Standards Enforcement Through Partnerships with Workers' Organizations," *Politics and Society* 38, No. 4:552-585.

workers voice in the firm's internal responsibility system, but rather to open up communication between workers and state enforcement officials. As well, the Swedish scheme only allows regional health and safety representatives to access unionized firms. The system works to the extent that union coverage is the norm and worker participation is accepted. But even in Sweden, the continued effectiveness of this approach is in doubt. Changes in the Swedish industrial relations system and the structure of its labour market, including the growth of more precarious forms of employment are undermining regional safety representation.⁶¹ In a North American context, where private sector union coverage is very low generally, and likely to be minimal where large numbers of vulnerable workers are employed, and the idea that workers are entitled to a voice in workplace decision-making is alien, it is extremely unlikely that the Swedish model would succeed. For these reasons, Fine and Gordon properly focus on a community-based model that aims to enhance worker voice in public enforcement, independent of union membership.

Of course, opening this channel of worker voice is not an easy row to hoe either. It requires collective workplace agents or institutions with both the commitment and resources to undertake this role, and state cooperation.⁶² There are some jurisdictions in which trade unions historically have played an active role in enforcing employment and health and safety standards. For example, in Australia, under the awards system, unions took the lead in ensuring that employers complied with standards. To fulfil this role, they enjoyed a right of access to workplaces, the power to inspect relevant documentation and standing in court to seek recovery of wages and penalties for breaches.⁶³ Currently, in New South Wales,

⁶¹ Frick, K. 2009. "Health and Safety Representation in Small Firms: a Swedish Success under Threat," in *Workplace Health and Safety – International Perspectives on Worker Representation*, eds. Walters, D., and T. Nichols, (Basingstoke: Palgrave Macmillan), 154-67.

⁶² On the importance of labour market institutions, see Weil, D. 2005. "Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets," in *Emerging Labor Market Institutions for the 21st Century*, eds. Freeman, R., J. Hersch, and L. Mishel, (Chicago: University of Chicago Press), 13-44.

⁶³ Hardy, T., and J. Howe. 2009. "Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Government Standards," *Australian Journal of Labour Law* 22:306-336.

Australia, authorized union representatives have the right to investigate suspected OHS offences and this has led to about 20 private prosecutions.⁶⁴

Historically, trade unions in Ontario played a similar although less extensive role under the *Industrial Standards Act* (ISA), prior to its repeal. They sat on Advisory Committees, which were established in part to monitor employer compliance with applicable schedules. However, these committees lacked formal enforcement powers.⁶⁵

Outside of the niches where the ISA applied, union resources were spent servicing their bargaining units, not enforcing decrees or sectoral agreements. However, recently, some unions are showing increased interest in assisting unorganized precarious workers without first becoming their certified bargaining agents. For example, the United Food and Commercial Workers have not only tried to unionize agricultural workers, but have supported the creation of ten support centres across Canada that provide advice and assistance on a variety of employment related matters. The Alberta Federation of Labour has also been active in providing support services for temporary foreign workers through its Advocate program.⁶⁶ How much support unions can or will provide remains to be seen, especially at a time when union densities are falling.

A second candidate to fulfil the institutional role of enhancing worker voice in enforcement is worker centres. These centres have been growing in the United States and Canada. Fine discusses a number of examples where worker centres that established formal partnerships with government to enforce minimum standards laws. They have been able to do this in part by framing their claims in moral terms that resonate with widely shared values and in part by working in communities with large immigrant populations concentrated in particular industries.⁶⁷

⁶⁴ Also see Johnstone, R. "*Decriminalisation*," *op. cit.*

⁶⁵ Laskin, B. 1963. "Report of the Committee of Inquiry into the Industrial Standards Act," Ontario: Committee of Inquiry Into the Industrial Standards Act.

⁶⁶ Hanley, W. 2012. "The Roots of Organizing Agricultural Workers in Canada," in *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, Faraday, F., J. Fudge, and E. Tucker, (Toronto: Irwin), 57-80; Flecker, K., 2011. "*Model Program – Or Mistake*," Report of the Canadian Labour Congress, North York. www.canadianlabour.ca/sites/default/files/pdfs/model-program-or-mistake-2011-en.pdf (accessed 29 January 2013).

⁶⁷ Fine, J. 2011. "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States," in *Relations Industrielles/Industrial Relations* 66, No. 4:604-30. Also, see Fine, J. 2006. *Worker Centers: Organizing Communities at the Edge of the Dream*. Ithaca: Cornell University Press.

To my knowledge, workers' centres in Canada have not established formal roles in enforcement, despite some successes influencing public policy and obtaining commitments from the government to increase their enforcement efforts, particularly for vulnerable workers.⁶⁸ In Toronto, for example, the Workers' Action Centre has been an effective advocate for temporary agency and other vulnerable workers.

A third candidate is legal and occupational health and safety clinics. Although to my knowledge there is no history of clinics playing such a role, there is an existing institutional infrastructure that could be developed to involve them in enforcement. On the legal side, there is the Workers' Health and Safety Legal Clinic in Toronto, Ontario, that is funded by Legal Aid Ontario. Its mandate is to provide legal services to non-unionized workers who have health and safety concerns. As well, there is a network of occupational health and safety clinics across the province of Ontario that provide OHS services to workers. Because their current focus is primarily to identify OHS hazards and provide information to workers, employers and the public, enhancing worker voice in enforcement might be seen as counter-productive, but it may be possible to build on this institution.⁶⁹

Whether these or other institutions to enhance workers' collective voice in OHS enforcement can be developed is an open question. With the exception of protections against non-payment of wage, workers obtained OHS regulation before other minimum standards, for the reason that it was widely perceived as unjust for workers to be exposed to excessively hazardous conditions. The OHS movement of the 1970s and 1980s was very successful in framing their claims in moral terms that rejected the legitimacy of commodifying workers' health.⁷⁰ As we noted, in the regulatory regimes that were created in the late twentieth century, worker voice was emphasized, but it was primarily located in the internal responsibility system, which was to be the principal site for improving OHS management and securing compliance with OHS standards. Since that time, there has been a shift in Ontario away from a compliance approach that emphasizes the promotion of self-regulation through the internal responsibility system toward direct enforcement of state standards. Expanding the role of worker voice in regulatory enforcement would be

⁶⁸ Workers Action Centre, online <http://www.workersactioncentre.org/> (accessed 29 January 2013).

⁶⁹ Toronto Workers' Health and Safety Legal Clinic, online <http://www.workers-safety.ca/>; Occupational Health Clinics for Ontario Workers (OHCOW), online <http://www.ohcow.on.ca/> (accessed 29 January 2013).

⁷⁰Storey, R. *Activism*, *op. cit.*

consistent with this change of emphasis. Moreover, it might also be possible to argue that community-based enforcement, at least in selected areas where conventional inspection systems are particularly weak, would increase state capacity at relatively low cost.

Is this possible? There is a window of opportunity in Ontario. On Christmas Eve 2009, four migrant workers died when the scaffold they were working on collapsed. In the aftermath, the Ontario government appointed an expert advisory panel, chaired by Tony Dean. Among the eleven priority recommendations in the Dean report was to establish a special committee under s. 21 of the OHS Act to provide the Minister of Labour with advice on the protection of vulnerable workers.⁷¹ Unfortunately, as of the time of writing, the committee has not yet been struck, but the government remains committed to carrying out this recommendation and it may provide some space within which to promote new and experimental approaches to enforcement for this group. In August 2012 the Law Commission of Ontario issued its Interim Report on Vulnerable Workers, which made a number of recommendations to address the problems vulnerable workers face. In particular, it recommended that the government identify the sectors where vulnerable workers are concentrated (agriculture, hospitality and cleaning, workplaces with temporary agency staffing) and prioritize them for proactive inspection. As well, it recommended that temporary foreign workers in all sectors be a priority. It did not, however, make any recommendations for enhancing worker voice in OHS enforcement, although it did suggest making provision for third-party complaints with respect to employment standards violations.⁷²

In conclusion, we can only speculate about the contribution that voice might make to the protection of vulnerable workers from hazardous working conditions. We know that under certain conditions voice can be an important component of an effective system of OHS regulation. We also know that the changing political economy is undermining the conditions for worker participation at the firm level and the capacity and commitment of

⁷¹ Dean, T., and Expert Advisory Panel on Occupational Health and Safety. 2010. "Report and Recommendations to the Minister of Labour," Report to the Minister of Labour, Ontario. http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf, (accessed 29 January 2013), rec. 29; For a thorough discussion of the report and its background, see Lewchuk, W. in press. "The Limits and Possibilities of the Structures and Procedures for Health and Safety Regulation" in Nichols, T. and D. Walters, *Safety or Profit, op. cit.*

⁷² Law Commission of Ontario. 2012. "*Vulnerable Workers and Precarious Work: Interim Report*" Toronto: Law Commission of Ontario.

states to directly regulate of hazardous working conditions. In these circumstances, probably the most that can be done is to identify multiple pressure points on governments and firms and to enhance the channels of worker voice where and whenever it is possible to do so. Worker voice rights, whether in the workplace, the state or intermediate institutions, have never been granted without struggle. In this context, pressuring government to provide workers a stronger voice in public OHS enforcement is a strategy that should be tried.

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