Evaluating Work: Enforcing Occupational Safety and Health Standards in the United States, Canada and Sweden

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Introduction

Most major policy successes and failures can be captured in simple statistics. In this case, that statistic is 6,000 worker deaths from work related accidents in the United States during the year 2000.[1] While a simple statistic such as this one does not tell the whole story, it does point to an important social issue. It is this statistic and my resulting understanding of the social issues at stake that have led me on a research journey that began as an investigation of the criminal aspects of Occupational Safety and Health Act violations in the United States and evolved into comparative study of occupational safety and health enforcement in the United States, Canada and Sweden.

Given that this paper began with my interest in the problems inherent in the United States occupationalsafety and health system and will en d with my recommendations for changing that system, it is necessary to take a moment to understand the dire situation that the system faces. During my initial foray into the area of occupational safety and health, the breadth and depth of the problem became clear. While death rates are high, enforcement capabilities are low: "OSHA actually has fewer staff today than it did in 1980. The workforce and the number of workplaces have grown, but the agency's resources have not".[2] Furthermore, even when OSHA does inspect facilities where there have been work-related deaths, "in 93 percent of those cases, OSHA declined

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[1] Bureau of Labor Statistics, Fatal Occupational Injuries by Industry and Event or Exposure (2000), *at* http://www.bls.gov/iif/oshwc/cfoi/cftb132.txt (accessed Mar. 6, 2004).

[2] Workers *at Risk: the Dangers on the Job when the Regulators Don't try Very Hard; Labor Vs. Bush; George W. Bush; interview with Margaret Seminario, Director, Occupational Safety and Health, AFL-CIO*, Multinational Monitor, Jun. 1, 2003, at 21.

to seek prosecution".[3] From a total of 2,197 cases inspected by OSHA involving work-related deaths, studied by the same New York Times report that provided the last piece of data, "employers faced $106 million in civil OSHA fines and jail sentences totaling less than 30 years".[4] These dismal statistics provide the backdrop against which the following analysis must be understood.

One would expect thatwith data like this, the United States would fall well behind the rest of the industrial world in the effectivenessof its occupational safety and health protection. Unfortunately, straight statistics, such as these, can be somewhat deceptive without sustained quantitative and/or qualitative analysis of the explanations underlying them This premise is born out by a simple overview of death rates per 100,000 workers in some major developed countries in 2002: Sweden; 1.4, Austria; 4.5, Canada; 7.2, United States 4.0.[5] These basic numbers combined with even the most rudimentary understanding of the differing styles of governance exhibited in each of these geopolitical entities, suggest that there is something to be gained by a more sustained investigation of the determinants of the current occupational health and safety situation in the United States. That is, while Canada's relatively poor performance in these measures conflicts with the general perception of its desire to extend protections to its workers, a greater understanding of these issues might suggest a cogent explanation.

Beyond creating an interesting puzzle for social scientists to solve, the problem presented by the safety and health system in the United States is particularly important for a variety of reasons. Most obviously, anytime a large number of individuals are dying

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[3] David Barstow, *U.S. Rarely Seeks Charges for Deaths in Workplace*, New York Times Dec. 22, 2003 at A1.
[4] *Id.*
[5] LaborSta, International Labor Organization Database, Rates of Occupational Injury by Economic Activity (2002) *at* http://laborsta.ilo.org/ (accessed Mar. 8, 2004).

in what seems to be a systematic and related way, society must respond. The necessity of this response can be seen in movements related to the prevention of drunk driving, the equal provision of healthcare, and the abolition of the death penalty, amongst others. While not everyone will agree with the mechanisms or goals of each of these movements, it is still easy to recognize that the motivating force behind raising each issue is some sense of right and wrong.

These moral ideas about right and wrong constitute values. Values are not some abstract concept devoid of daily meaning. Values shape daily decisions because they color every choice a person makes. Even the etymology of the word legal points to the fundamental importance of these values in the legal system:

> The word *legal* has as its root the Latin *lex*, which meant law in a fairly concrete sense ... The word *lex* did not include the more abstract, ethical dimension of law ... The larger meaning was contained in the Latin *jus* from which we derive the word *justice*. This is not an insignificant semantic distinction: the word of law, whether statutory or judge-made, is a subcategory of the underlying social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to a consensus of ideals[6]

The importance of Williams' statement here cannot be under estimated. The fundamental precept in any inquiry into a law and its outcomes is to always try to identify the particular values underpinning the policy decision. The clearest way to perceive this is to look for places where there are no clear statutory commands and the court has room to maneuver. It is in these cases that the values of the deciders become important. Policymakers and jurists will often rely on their values and assumptions so heavily in these cases that they will not even make a reasoned argument for having them, but will assert them continually and without derivation.

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[6] Patricia Williams, The Alchemy of Race and Rights 138-139 (1991).

The realm of labor relations and occupational safety and health practice in particular demonstrates clearly the relationship between values and policy. The welfare state in general developed out of clear decision on the part of the cultural community in each nation, and in the United States specifically, to value the rights of workers to certain basic guarantees: "The welfare state itself is a socio-political construct, which, since it involves insurance and redistribution, could not exist without the support of strong normative arguments and moral convictions".[7] Furthermore, the vague language with which many laws have been written in each of these countries have allowed the law's interpreters, particularly jurists, to use values to determine policy.

In all cases, these "prevailing ideas about ethics, humanity, law, private property, economics and the nature of the employer-worker relationship not only condition the thinking of these decision-makers, but also provide them with the ultimate standards for judgment".[8] This process therefore works in two directions: values shape legislation and at the same time values shape the interpretation of that legislation.

Although issues surrounding workplace safety and health have not always been at the forefront of domestic political debates, the United States, like most other liberal democracies in the twentieth century, has attempted to regulate this complex area. Regulating the workplace in general, and safety and health specifically, has elicited a number of different approaches and results around the world. Attempting to provide an adequate regulatory structure for the workplace requires deftly balancing a number of

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[7] Vivien A. Schmidt, *Values and Discourse in the Politics of Adjustment, in* Welfare and Work in the Open Economy: Volume I. From Vulnerability to Competitiveness 230 (Fritz W. Scharpf & Vivien A. Schmidt eds., 2000).

[8] James A. Gross & Patricia A. Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers Rights*, 34 Buff. L. Rev. 645, 657-658 (1985).

competing concerns. Two particularly important interests in the workplace are those of management and labor. Policy choices, such as those in the area of safety and health that attempt to balance these interests, often generate strong debates both domestically as well as internationally. These debates are not objective or neutral since the interests that are being balanced correspond directly to the differing values of participants in these debates. In order to negotiate these policy debates that are influenced by values, it is often instructive to compare the policy choices of a variety of countries at different points on the social spectrum in order to evaluate the usefulness of approaches to managing one issue.

In this case, examining the United States, a country that generally favors management interests, Canada, a country that generally favors a hands-off policy, and Sweden, a country that generally favors labor interests, provides a background for comparing occupational safety and health policies. Although the debate surrounding workplace safety and health is expansive, an important part of any discussion is determining the effect of policies on individual workers. After all, any policy centering on workplace safety and health must at least address the goal of improving the day-to-day workplace conditions for an individual worker. Thatconcern i s of primary importance in evaluating a country's approach to agency regulation, worker participation in determining the workplace environment, and a worker's right to refuse unsafe work.

Against a background of the importance of moral concerns, international comparison and policy formulation, I will explore the enforcement of occupational safety and health systems in the United States, Canada and Sweden to investigate safety and health regulation, worker participation, and the right of employees to refuse unsafe work.

I will initially provide a descriptive analysis of the particular safety and health policies along with the historical background necessary to understand these choices. Along these lines, Chapter 1 will be devoted to a review of the development of the welfare state in the United States, Canada and Sweden. Chapter 2 will then breakdown the specifics of the health and safety regulatory systems in each country. Chapter 3 will continue the exploration of the specifics of safety and health policy in each country by focusing on worker participation in each country's system. In Chapter 4, dedicated to a purely descriptive analysis, I will discuss the right to refuse unsafe work in each of the three countries. The conclusion of this paper will be devoted to a more subjective argument about the relationship between values and occupational safety and health policy. In this light, the conclusion will explicate the necessity of a human rights view of workers rights and will then recommend specific policy changes for the United States.

Chapter 1: The Historical Development of the Welfare State in the United States, Canada and Sweden

While the general story surrounding the development of a welfare state may be familiar to most, the specifics of the development of each welfare state play a large role in shaping the policy choices made by that particular welfare state. That is, viewing the emergence of a welfare state as merely the response of a government to the mass poverty and potential unrest that results from industrialization belies the complexity and importance of this particular historical process. It is not, however, the goal of this analysis to provide an overly detailed or particularly nuanced discussion of the development of the welfare state in the United States, Canada, and Sweden. Instead, a discussion of the general evolution of welfare policy in each nation will supply important background in understanding the particular safety and health system choices made by each country as well as the corresponding values embraced by each country. Furthermore, while history helps to explain how current occupational safety and health policy came to be, it is also important for determining the array of options for safety and health policy in the future.

The true birth of the modern welfare state began at the beginning of the twentieth century, as the world was about to tackle some of its most awesome challenges yet:

> At the dawn of this century, perhaps more than ever before, *conscious* choices about how to organize society were being required. And these choices were being posed as the old faiths in traditional authority were losing their grip on the masses. The domestic turmoil of the years leading up to World War I, the uncertainties of the interwar years – allthis is a rich and complex story in every country.[9]

[9] Hugh Heclo, *The Social Question, in* Poverty, Inequality, and the Future of Social Policy: Western States and the New World Order 667 (Katherine McFate et al. eds., 1995).

The policy choices made by each developing welfare state in the twentieth century were varied, but they included many that directly impacted the day-to-day existence of the emerging working class. The occupational safety and health policy choices made in each nation closely mirrored the development of other welfare policies. The emerging traditions embraced in each country helped to determine the range of options available to policymakers. In this chapter, the development of the welfare state in each country will be described by paying particular attention to choices that affected the growing working class population.

United States

Upon landing in the New World, America's first settlers were often confronted with difficult situations. The overall strain of colonization made poverty a regular occurrence in colonial America. True to their Old World heritage, colonial assemblies adopted "poor laws" that were modeled on Elizabethan legislation.[10] By the end of the 1600s, poor relief was being put to full use with growing cities such as Boston hiring full-time administrators.[11] This system of poor relief sustained itself through the American Revolution and to the eve of the Civil War with only minor modification addressing such issues as the appropriateness of workhouses and the need for the relief of the able-bodied poor.[12] The Civil War and the resulting relief needed for the injured, wounded and disabled pushed aside such debates about means-testing for poor relief and instead caused

[10] Walter I. Trattner, From Poor Law to Welfare State: A History of Social Welfare in America 15-17 (1999).
[11] *Id*. at 30.
[12] *See* Joan Hannon, *Poverty in the Antebellum Northeast: The View From New York State's Poor Relief Roles*, 44 J. Econ. Hist. 1007, 1007-1032.

individuals and states throughout the country to mobilize around both public and private relief.[13]

As the post civil war expansion of poor relief began to recede in favor of private charity, the need expressed by the increasing number of people impoverished by industrialization strained the system at the beginning of the twentieth century.[14] However, these drastic increases in poverty caused by the "complex problems associated with rapid industrialization, a market economy, urbanization and immigration" gave reformers a renewed incentive to call for greater public assistance "since poverty was a social rather than individual matter".[15] The resulting increases in public expenditure on poor relief and the upsurge in the economy through the 1920s provided for America's poor up to the eve of the Great Depression in 1929.

The stock market crash of 1929 and the resulting depression were devastating for America's poor relief system. A system that relied on public expenditure for the most destitute and private charity for many of those capable of employment was overwhelmed by the millions of people impoverished overnight. Many of the country's private relief agencies evaporated, only putting more pressure on the unprepared public system.[16] Unfortunately, states and localities were slow to respond. It was almost two years before New York State, under the leadership of Governor Franklin D. Roosevelt, provided its citizens with the first package of depression era unemployment relief.[17]

Even as the social reformers of the 1920s backed off their calls for personal reform, President Hoover stuck to his belief that public aid would create personal

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[13] Trattner, *Supra* note 10, at 77.
[14] *Id*. at 214.
[15] *Id*.
[16] *Id*. at 273.
[17] *Id*. at 274.

dependency and hence could not be supported, even during the country's darkest economic hour.[18] Fortunately, when Roosevelt was elected President in 1932, he brought with him the system of unemployment relief that had been successful in New York State and copied by over twenty states.[19] The resulting New Deal programs and agencies, modeled after those of New York, provided the backbone of America's economic and social stabilization heading into World War II.

The New Deal clearly defined the beginning of the United States' role as a modern welfare state. For the first time, as the nation lurched forward into the 1940s, the nature of public social assistance had changed from providing only limited relief to the economically disadvantaged to a welfare state that guaranteed protection to the aged, blind, crippled, and mentally challenged, amongst others.[20] However, just as America seemed on the verge of institutionalizing a culture of social welfare, the economic prosperity of World War II and the years that followed brought renewed calls for the reduction in social spending on welfare in favor of private social reform. One of the clearest examples of this was state by state administrative reform which significantly curtailed the support provided by the Aid to Families with Dependent Children (AFDC), a mainstay of the social welfare adopted during the New Deal.[21] The market raised real living standards, fostered greater labor market quality and provided a good degree of income security.[22]

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[18] *Id*. at 277.
[19] *See Id*. at 279-281.
[20] *Id*. at 304.
[21] *See Id*. at 306-309.
[22] John Myles, *When Markets Fail: Social Welfare in Canada and the United State*s, *in* Welfare States in Transition: National Adaptations in Global Economies 120 (Gosta Esping-Andersen ed., 1996).

This same trend in social spending reduction accounted for much of the failure of Lyndon Johnson's Great Society, as well President Nixon's election and the rightward turn in American politics it represented.[23] While the nation suffered though the socially and economically turbulent 1960s and 1970s, the welfare state moved along mostly unchanged. It was not until Ronald Reagan was elected that drastic changes would come again. Reagan, interpreting his victory as a social mandate, attempted to dismantle what was left of the welfare state in whatever ways possible.[24] In conjunction with a sustained effort at deregulation and union busting, Reagan cut spending for "A.F.D.C., child care, school lunch and other nutrition programs, food stamps, subsidized housing, energy assistance, family planning, public and mental health service, alcohol and drug abuse counseling, legal aid, the Jobs Corps, and the like".[25]

While President George H.W. Bush maintained much of the status quo in regard to the social spending levels pursued by Reagan, his eventual successor, Bill Clinton, a New Democrat, did change the social welfare landscape. While Clinton, a fiscal conservative, was willing to increase expenditures on such programs as healthcare, in the end, the most prominent program on which he could corral the necessary majorities in Congress was welfare reform.[26] Despite being a Democrat, Clinton led the welfare to work campaign and in the end abolished AFDC entirely, while instituting a new system, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), that

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[23] Trattner, *Supra* note 10, at 337.
[24] *Id*. at 362.
[25] *Id*. at 365.
[26] *See Id*. 394 397.

placed greater power in the hands of the states while for the first time instituting limits on the longevity of welfare received.[27]

The specifics of the genesis of labor related policy can now be understood against the background of the overall development of the welfare state in United States. While it is not necessary or desirable here to redraft an entire history of labor relations in the United States, a few pieces of basic background regarding the federal government's relationship to labor market will be necessary. One of the first instances of sustained federal government intervention in the labor market occurred during World War I. As the United States became increasingly involved in European affairs, the War Labor Policies Board, created in 1918, regulated the labor market by freezing wages and guaranteeing military contractors profit via a cost-plus system.[28] Next, as part of the New Deal, the federal government passed the Wagner Act in 1935. The Act, also known as the National Labor Relations Act (NLRA), established a number of democratic labor rights, most importantly the right to collective bargaining.[29] Along those lines, the Taft-Hartley Act passed in 1947, as the economy was on an upswing, limited some of the rights guaranteed by the NLRA but maintained its "declaration that it was the policy of the United States to encourage the practice of collective bargaining".[30] The modification of the NLRA in 1947 was part of the very tail end of the New Deal social legislation and in some ways set the stage for the pendulum to swing in the other direction in the second half of the twentieth century.

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[27] *Id*. at 397.
[28] *See* Peter A. Swenson, Capitalists Against Markets: The Making of Labor Markets and Welfare States 167-171 (2002).
[29] *See* James A. Gross, *The Kenneth M. Piper Lecture: The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 Chi.-Kent L. Rev. 351, 351-353 (1998).
[30] *Id*. at 352.

As the country emerged from the Great Depression with its social policy significantly changed, the federal government had cemented its role in the labor market. This role was further reinforced during World War II, when similarly to World War I, the federal government dealt with labor shortages through the controls of the National War Labor Board.[31] Federal government intervention in the labor market during the years after World War II up until the 1980s was characterized by limited intervention, deferring instead to the economic security provided by an expanding economy.[32]

In 1970, the United States passed the centerpiece of its effort to regulate workplace safety and health: The Occupational Safety and Health Act (OSHA). The original intent of the act was to provide "so far as possible every working man and woman in the Nation safe and healthful working conditions".[33] The wording of the act also puts the burden on the employer to provide employees a safe workplace. However, the Act does give most of the power to the federal government to regulate the day-to-day conditions of work and does not rely on individual workplaces to adapt the Act to different situations. Along with many other pieces of legislation that were designed to favor workers, the 1980s focus on deregulation and management autonomy resulted in a lack of enforcement of the standards set forth in OSHA.

In the early 1990s, "even the whiff of 'labor law reform' was sufficient to doom proposals for the reform of the Occupational Safety and Health Act that, among other things, would have mandated the creation of workplace safety and health committees at most workplaces".[34] This failure of the federal government to play a stronger role in the

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[31] *See* Swenson, *Supra* note 28, at 171-175.
[32] *Id*. at 174-180.
[33] *See* Occupational Safety and Health Act, *29 U.S.C.* § *651*(b) (1970).
[34] *See* H.R. 1280, 103d Cong. (1993); H.R. 3160, 102d Cong. (1991).

labor market in the United States as well as in Canada "is now regarded as the reason for the comparative success of both national economies in generating jobs".[35] As a result of this praise which has been heaped upon the limited labor market intervention in the United States, labor law has been almost totally neglected:

> The core of American labor law has been essentially sealed off … both from democratic revision and renewal and from local experimentation and innovation. The basic statutory language, and many of the intermediate level principles and procedures through which the essentials of self organization and collective bargaining are put into practice, have been nearly frozen, or ossified, for over fifty years[36]

It is against this backdrop that any discussion of labor related policy in the United States must take place. The clear shift from a country that responded to a great economic crisis with strong welfare institutions to a country that prides itself on limited market intervention and thus static labor laws, demonstrates the shifting values embodied by the particular policy choices made in the United States over the last century. In order de-ossify labor law in the United States, such values must be understood as a result of a particular national history.

Canada

While Canadian welfare state development and policy has differed from the United States, there are important similarities which help to explain why Canada's labor market institutions are often seen as at least partially paralleling those in the United States. In a similar fashion to their United States counterparts, early Canadian settlers modeled their initial poor relief system on those of the Old World.[37] The first break with the trajectory of American poor relief came in 1867 when Canada established its first

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[35] Myles, *Supra* note 22, at 17.
[36] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1530 (2002).
[37] *See* James J. Rice, Changing Politics of Canadian Social Policy 24 (2000).

constitutional document. This document set the precedent for much of Canadian social welfare policy by giving most of the power in this area to its provinces and not to the federal government.[38] From 1867 until the early twentieth century, Canada underwent a gradual change from relying on private charity and minimal public poor relief targeted at only the poorest of the poor, to a system where provincial governments began to intervene in the public sphere with increasing regularity.[39]

As in the United States, the industrialization of cities forced Canada to deal with the constant possibility of mass unemployment as well as the breakdown of traditional notions of personal responsibility.[40] By the beginning of the 1900s, provincial governments had instituted free public education, public grants to private charity organizations, and the basis for a social security system.[41] However, the attempt to keep charity in the private realm was overwhelmed by market insecurities that dominated the Canadian labor market from 1910 through the beginnings of the Great Depression. These uncertainties caused provinces to take more responsibility for their urban poor by buttressing already existing government provisions for poor relief.[42] Such spending increases were augmented by a new series of programs including, workers' compensation, mothers' pensions, minimum wage laws and old age pensions.[43]

As Canadian provinces were spending more money on poor relief, the Canadian federal government also became more involved in the nation's social landscape. Most of the initial programs instituted by the federal government came as a response to World

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[38] Rice, *Supra* note 37, at 34; J.L Granatstein, *Canadian Social Policy: From Laisser-Faire to Safety Net to …?*, *in* Welfare States in Trouble: Historical Perspectives on Canada and Sweden 125 (Sune Akerman & Jack L. Granatstein eds., 1995).
[39] *See* Rice, *Supra* note 37, at 36-37.
[40] *Id*. at 38.
[41] *Id*. at 39.
[42] *Id*. at 40.
[43] Rice, *Supra* note 37, at 41; Granatstein, *supra* note 38, at 124.

War I. This began with the introduction of veterans' benefits and continued with the provision of assistance to relatives of the deceased. After the Depression and World War II, the Canadian government and the generation it represented realized that everyone was always at risk and hence a stronger welfare state was required.[44] This change in attitude caused a shift of power from localities to provinces in the financing and administration of social welfare programs.[45]

The programs created by this outlook were primarily constructed around social rights guaranteed to citizens. The most prominent and symbolic program that demonstrated this trend was universal healthcare. Universal healthcare was further supplemented by increasing social regulation and programs such as old age insurance.[46] Sustaining many of these new programs required federal government financing of provisional programs in a way that moved the federal government closer to operating a cohesive welfare state.[47] This shift to federal government involvement was the basis for the development of what is known as the Canadian Social Union.[48] Almost as soon at the post World War II social welfare state was installed, the economic crisis of the late 1970s and early 1980s put pressure on Canadian governments to retreat from their social goals, especially in the area of full employment.[49] This pressure caused some reduction in the citizen based guarantees associated with the Canadian welfare state, especially in the labor market, although it did not cause Canada to shift away from its provision of such central elements as healthcare.

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[44] *See* Pat Armstrong, *The Welfare State as History, in* The Welfare State in Canada: Past, Present and Future 54-55 (Raymond B. Blake et al. eds., 1997); Granatstein, *Supra* note 38, at 125.
[45] *See* Rice, *Supra* note 37, at 48-49.
[46] *See* Armstrong, *Supra* note 44, at 55-56.
[47] Rice, *Supra* note 37, at 49.
[48] *See* Sujit Choudhry, *Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy*, 52 Univ. of Toronto L. J. 163, 163-164 (2002).
[49] Rice, *Supra* note 37, at 118; Granatstein, *Supra* note 38, at 130.

The development and decline of Canadian government intervention in the labor market responded to many of the same social trends present in the development of the overall Canadian welfare state. Even as early as the beginning of the twentieth century, Canadian provinces began to inspect factories in order to prevent the spread of industrial diseases.[50] Also, the post World War II increase in social welfare programs included significant labor market regulation. Many of these programs were established in the years following World War II but were continually tinkered with through the 1980s. The most obvious examples of these were Unemployment Insurance and Pension Plans.[51] These more general labor market programs were complemented by targeted regulations such as minimum wage laws and initial health and safety regulations.[52]

In contrast to the United States, Canada has much more decentralized approach to regulating the workplace. Instead of focusing most of the power in the hands of the Federal Government, Canadian provinces have the ability to develop their own safety and health systems with only general instructions from federal legislation. The provinces have provided a fairly consistent set of standards that are patterned after the safety and health legislation passed in Saskatchewan in 1972. One of the important pieces of federal legislation that overlaps with provincial regulation is the Canada Labour Code of 1985. The intricate safety and health system produced by this strongly federal welfare state will be further discussed in the following chapters.

At the end of the 1970s, the pressure that was placed on the Canadian government to respond flexibly to the demands of the business sector caused a loosening of traditional

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[50] Rice, *Supra* note 37, at 39.
[51] *See* Armstrong, *Supra* note 44, at 58-59.
[52] *Id*.

Canadian goals of full employment and robust unemployment insurance.[53] Despite the changes this pressure has engendered, "rising labour market inequality in Canada has been offset by social transfers", even though there has been a "sharp rise in demand for transfers".[54] This however marks the fact that Canada has moved away form its initial citizenship design of social welfare to one much more focused on income transfers.[55] In this way, although Canada has undergone a similar path of welfare state development to the United States, since the Canadian commitment to furnishing certain guarantees based upon citizenship has mitigated the impact of recent pressure to limit its provision of income inequality and social rights.

Sweden

Sweden, an often heralded example of the efficacy of a strong welfare state, developed very differently from the United States and Canada. Sweden is generally seen as the natural inheritor of the welfare state mantle initially attributed to Bismarck's unemployment insurance policies in Germany.[56] While this initial impression has some validity, the story of the Swedish welfare state must be primarily understood in terms of its commensurate development with Swedish social democracy.[57] The Swedish welfare state went beyond the citizenship model embraced in Canada: "The goal is equality of income … and equality of access to social services of the highest standard".[58] This commitment to ultimate income equality would determine much of Sweden's contemporary welfare state policy.

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[53] Rice, *Supra* note 37, at 117-118.
[54] Myles, *Supra* note 22, at 117.
[55] *Id*. at 118.
[56] *See* Sven E. Olsson, Social Policy and Welfare State in Sweden 12-15 (1990).
[57] *Id*. at 20.
[58] Schmidt, *Supra* note 7, at 256.

While often described as the most advanced welfare state in the world, Sweden was not always a shining star. During the nineteenth century, Sweden was a relatively poor country without any economic power.[59] Given the country's decentralized agricultural economy, without large landholders, there had been limited public funded "poor relief" aimed at maintaining work discipline before the country's industrialization in the late 1800s.[60] However, although Sweden was not wealthy, it never experienced the agricultural feudalism of most of Europe, and it traditionally valued education, as evidenced by early and continued high literacy rates throughout the country.[61]

Sweden's industrialization did not begin until the relatively late date of the 1870s, while much of its workforce had already left for the prosperity of North America.[62] Despite its slow move toward economic modernization, Sweden was one of the first nations to respond to Germany's social insurance system, passing its first social insurance bill as early as 1884.[63] This initially bill, along with its many corollaries that would be passed through the 1910s, "paralleled the democratic breakthrough, the extra-parliamentary struggle for universal and equal suffrage as well as the growth of social or popular mass movements".[64] The most important of these changes was the mass popular movements which culminated in the establishment of a political party advocating Social Democracy in 1889.[65] The expansion of the basic goals of social democracy, such as political equality and worker democracy, dominated the Swedish political landscape through the 1920s.

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[59] Olsson, *Supra* note 56, at 43.
[60] *Id*. at 108.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id*. at 47.
[65] *Id*. at 74.

However, just as the rest of the world felt the fall-out from the Great Depression in 1929, so too did Sweden. This left Sweden at a cross-roads: small adjustments to the status quo would no longer be accepted. Both the right and the left in Sweden demanded radical changes.[66] The beginnings of the modern Swedish welfare state are most clearly traced to an important intellectual move in the 1930s, "which ushered in the active labor market policy together with social insurance, a wide sphere of 'socialized consumption' …, important agricultural subsidies and regulations …. and international high tax levels".[67] During World War II, Sweden developed national boards aimed at coordinating the wartime response on the part of labor and management. These boards provided the basis for post-war institutional cooperation at a national level.[68]

Similarly to the United States and Canada, Sweden used the relative peace of the post World War II world to develop rapidly. For Sweden this time period allowed it to institutionalize its position as a dominant industrial power: "Swedish Industry underwent major technical and economic development after the Second World War".[69] The rapid industrial growth combined with high taxation rates left over from the war years combined to allow the Swedish government to direct more funds toward social programs and redistribution. These changes began with housing and employment programs and the extension of entitlement and improvement programs to all levels of society by the early 1970s.[70] Swedish expenditures on government programs stayed at levels similar to initial post-war levels, until the 1970s when they "increased more rapidly than in other OECD

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[66] *Id*. at 82.
[67] *Id*. at 21.
[68] *See Id*. at 110-111.
[69] Fact Sheets on Sweden: Occupational Safety and Health 1 (Mar. 2002), Swedish Institute, *at* http://www.si.se/english/factsheets/safety.html (accessed Mar. 10, 2004).
[70] Olsson, *Supra* note 56, at 115.

countries".[71] However, when the world economy lurched during the oil shocks of the 1970s, Sweden's social welfare mix proved vulnerable. While the country refused to change its structural commitment to its social democratic tradition, it was forced to devalue its currency three times during the late 1970s.[72]

The early 1990s were a turbulent time in Sweden's political and economic history. Sweden's failure to alter its economic structure during the 1970s caused its economy to overheat in the early 1990s, which consequently forced drastic cutbacks in public expenditures.[73] Sweden had maintained a standard of living commensurate with the best in the developed world up until 1989, but by 1993 Sweden's standard of living began to fall below countries such as Italy and Austria.[74] The most important success of the Swedish welfare state during the middle of the twentieth century was its ability to almost entirely eliminate poverty.[75] Thus, the social provisions of the Swedish welfare state that developed as a result of the emergence of social democracy in Sweden had a profound effect on the daily fabric of the country.

The history of labor market policies in Sweden was also primarily determined by the rise of social democracy in Sweden. Corresponding to the beginnings of social democracy in the late 1800s, the union movement became a force to be reckoned with in Swedish economic and political life at the end of the nineteenth century.[76] As early as the

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[71] Richard B. Freeman et al., *Introduction*, *in* The Welfare State in Transition: Reforming the Swedish Model 8 (Richard B. Freeman et al. eds., 1997).
[72] Mats Benner and Torben Bundgaard Vad, *Sweden and Denmark Defending the Welfare State*, *in* Welfare and Work in the Open Economy: Volume II. Diverse Responses to Common Challenges 418 (Fritz W. Scharpf & Vivien A. Schmidt eds., 2000).
[73] *Id*.
[74] Freeman, *Supra* note 71, at 7.
[75] *Id*. at 12.
[76] Olsson, *Supra* note 56, at 74-75.

1920s, Sweden had instituted the eight-hour day.[77] Also, the active labor market policy of the 1930s created state employment agencies, state subsidies of unions, housing programs, and maternity benefits, amongst other programs.[78] After World War II, the favorable economic conditions encouraged an institutionalized wage bargaining system throughout the country and also caused an overwhelming increase in private and public sector unionization.[79]

The economic expansion after World War II increased the economic standard of living but also caused a decline in working conditions throughout Swedish industry: "new hazardous materials were introduced in many industries, the work was accelerated, and many jobs that had previously required professional workers lost status due to automation".[80] This led to a period of industrial strife during the 1960s where strikes and lockouts became more prevalent than they had been for 40 years.[81] As a response to this industrial unrest, much of Swedish labor law was reformed in the 1970s, including occupational safety and health law.[82] The Work Environment Act of 1977 sets a broad framework for regulation, which divides responsibilities for workplace safety and health in general terms. The legislation itself, along with the agency it authorizes, creates broad health and safety standards. However, instead of specifying a laundry list of punishments for potential violations, the Act encourages mutual resolution between employers and employees. In this way, the Swedish approach emphasizes the enforcement of a set of

[77] *Id*. at 109.
[78] *Id*. at 110.
[79] Olsson, *Supra* note 56, at 115; Benner & Bundgaard Vad, *Supra* note 72, at 403.
[80] Fact Sheets on Sweden: Occupational Safety and Health, *Supra* note 69, at 1.
[81] *Id*.
[82] *Id*.

necessary health and safety standards in combination with cooperative resolution to most issues.

Just as the troubles of the late 1980s and early 1990s caused a retraction in the amount of money spent on social programming, they also negatively affected Swedish commitments to labor market policies. Despite the cutbacks the economic crisis of the 1990s forced in Sweden, it maintained relatively generous unemployment programs, even if the commitment to total wage equality faded away.[83] While there is and will continue to be large-scale debate about the efficacy of the Swedish welfare state, especially in relationship to its performance in recent decades, there is no doubt that Sweden sought and obtained its lofty goals of income inequality throughout the greater part of the twentieth century. One thing is for sure, Sweden's ambitious social welfare policy created a society that was much more willing to accept daily regulation of the workplace by the federal government than the societies that emerged in the United States and Canada during the same period.

Conclusion

Despite the disparate histories of the development of the welfare states in the United States, Canada and Sweden, all three countries have a history of responding to an economic and cultural crisis by institutionalizing methods of support for the average workingperson. The generosity and continuity of this support often varied with specific historical circumstance, exact issue and of course culture. Assessing whether or not there was something about each country's culture that predetermined the outcome of these historical processes or whether the historical processes determined the cultural context of welfare state development is a difficult if not impossible task. Fortunately for this study,

[83] Schmidt, *Supra* note 7, at 260; Olsson, *Supra* note 56, at 33.

the exact relationship between these two processes is less important than the understanding thattogether they played a large role in producing the present-day realities of the welfare state in all three countries. Only such an acknowledgement allows a full understanding of the mechanisms by which existing occupational safety and health systems operate and most importantly what changes are possible within the current institutional and cultural context.

Chapter 2: Regulatory Schemes

The first major choice that a country faces in constructing a workplace safety and health regime is the extent and form of regulation and enforcement by a government agency. The scope of the agency's mandate has important consequences for individual workplace environments. Often the authority that is vested in a regulatory agency trades off with the propensity for disputes to be resolved where they occur. Instead, a culture of dependence that focuses on external actors to resolve workplace disputes can develop as a result of the authority of the agency. On the other hand, without strong regulatory enforcement it is difficult to guarantee, with any certainty, that the standards set forth in legislation are subsequently are followed.

These choices blend into the discussion of other aspects of occupational safety and health and enforcement. For example, safety committees, groups of workers at particular plants responsible for maintaining safe working conditions, are deferred to in safety and health systems that favor a less intrusive regulatory scheme. Balancing the potential for dependency with the necessity of guaranteed enforcement is a critical part of creating a successful regulatory structure for a country's occupational safety and health system. The specific choices made in balancing these competing concerns often directly reflect the historical development of the welfare state in each country. In any event, the choices surrounding the structure of the main safety and health regulatory agency in each country provide the building block for the entire safety and health enforcement system in each country. This section will examine the structure of each country's regulatory agencies and then investigate the success of each agency in regulating safety and health conditions in the workplace.

United States

The regulatory structure of the United States clearly reflects the nation's post New Deal focus on minimal labor market intervention. In the United States, the Occupational Safety and Health Act gives the Secretary of Labor and hence the Occupational Safety and Health Administration (OSHA) the primary responsibility of enforcing safety and health regulations. The Act itself provides some workplace standards as well as giving OSHA the power to create its own standards subject to certain restrictions. The OSH Act gives the Secretary of Labor the authority to promulgate and enforce occupational safety and health standards while it gives the Occupational Safety and Health Review Commission (OSHRC) the ability to review the Secretary's standards when protested by individual employers.[84] Thus, where the Act itself does not create safety and health standards in every workplace area, it does attempt to guarantee the fairness of any standards by mandating a structural review process of the Secretary of Labor's decisions with respect to workplace standards. While in general a typical regulatory agency, OSHA does diverge from the norm in its division of rulemaking and enforcement authority from its adjudicative functions.

The Act also guarantees enforcement of these standards through random inspections of workplaces along with targeted inspections in exceptional cases. In cases where an employee at a workplace calls for an inspection the Act prohibits retaliation against the employee on behalf of the employer. Cases of retaliation along with other violations of the Act are subject to monetary penalties. The centralization of authority in

[84] Samuel D. Elswick & Richard A. Bales, *No Harm, No Foul: The OSHRC's Authority to Label an OSH Act Violation de minimis and the Require No Abatement*, 22 N. Ill. U. L. Rev. 383, 389 (2002).

the hands of OSHA is a clear choice on behalf of the United States to attempt to primarily control the workplace environment through governmental instruments.

In order for the previously stated lofty purpose of the Occupational Safety and Health Act to be met, a strategy that primarily relies on a regulatory agency for enforcement requires OSHA to be extremely efficient and well-managed. Unfortunately this strategy often fails and, as is the case with a large variety of legislation, the statutory intent and provisions of the Act do not necessarily correspond directly with the day-to-day reality in the workplace.[85] One of the most basic reasons for this is the failure of Congress to back-up its ambitious enforcement regime with adequate funding: "enforcement is ineffective because there are only about four thousand OSHA Compliance Officers to inspect and ensure the safety of 92 million employees in approximately 6 million workplaces".[86] These budgetary shortfalls that existed in the early 1990s were only compounded by President Clinton's 1995 Regulatory Reinvention Initiative. Clinton demanded that OSHA reduce bureaucracy and create partnerships with private enterprises.[87] In the end, these regulatory changes were only attempts by the Clinton administration to pacify the 104th Congress who wanted "to limit [OSHA's] regulatory power and reduce its impact on the private sector".[88] These reductions in budgetary commitments have had a significant effect on the ability of OSHA and its inspectors to do their job.[89] It is clear that the resulting reduction in odds of inspection

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[85] *See* Gross, *Supra* note 85, at 352-358
[86] Brett R. Gordon, *Comment: Employee Involvement in the Enforcement of the Occupational Safety and Health Laws of Canada and the United States*, 15 Comp. Lab. L. 527, 535 (1994).
[87] *See* Robert G. Vaughn et al., The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers, 35 Geo. Wash. Int'l L. Rev. 857, 961 (2003).
[88] *See Id*. at 960-961.
[89] Michelle Gorton, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 Envtl. L. 811, 831 (2000).

must reduce the force of the deterrent against safety and health violations that the Act is supposed to create.

Furthermore, perhaps as a result of the overall inability to police each workplace, instead of sanctioning employers when there are workplace violations, the goal of inspectors has been to have employers comply with regulations without having to penalize them.[90] This reluctance to issue violations further diminishes any deterrent effect by giving employers an almost guaranteed way out of any violation if by chance they are caught. The one potential recourse employees have in this highly centralized system is to trigger inspections by issuing complaints. However, despite the Act's prohibition of employer retaliation against employees for filing a complaint with OSHA, employees are reluctant to act for fear of employer retaliation.[91] This hesitation combined with the small deterrent effect of OSHA inspections significantly undercuts the Act's intent to provide all employees safe and healthy conditions of work.

Canada

Although Canada has a decentralized form of regulation, with each province having different laws, the type and enforcement of workplace standards are relatively similar throughout the country. In general, each province as well as the federal government sets certain minimum requirements called the CANOSHA regulations.[92] The regulations set forth by the federal government apply only to employees in federal jurisdictions, such as federal territories and military bases, while the individual provinces have exclusive jurisdiction over employees inside each province. Enforcement of these regulations is ensured byrespective federal and provincial government inspections that

[90] Gordon, *Supra* note 86, at 535.
[91] *Id*.
[92] *See* Canada Occupational Safety and Health Regulations, 120 C. Gaz. 1105 (March 13, 1986).

are generally random but often targeted as a result of a complaint by a safety committee or an employee's refusal to work. The Canadian approach to safety and health, which combines decentralized authority with minimum standards, creates the need for strong enforcement while relying on workplace committees to aid the mechanisms of enforcement.

Although the overall Canadian regulatory scheme resembles that of the United States, the differences in legislative approaches have important consequences for the practical enforcement of workplace standards. First, the federal and provincial governments in Canada have committed more financial resources toward enforcement and hence the chance of inspection is higher than in the United States. However, similarly to the United States, inspectors prefer to let individual workplaces resolve any violations and do not rely heavily on punishment for violations: "The predominant view in government has been that inspectors should only intervene when they are satisfied that a joint committee cannot resolve the matter".[93] These joint-committees, whose structure will be discussed in the next chapter, are thus integral actors in the enforcement drama. This critical aspect of the Canadian health and safety system exhibits the hands-off approach of Canadian inspectors in trying to convince the employer to comply with regulations; they encourage safety committees and employers to reach mutual agreement.[94] This, along with the ability of safety committees to call for an inspection facilitates strong decentralization in the authority to regulate the workplace and ultimately aides the government in enforcing workplace standards.

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[93] John O'Grady, *Joint Health and Safety Committees: Finding a Balance, in* Injury and the New World of Work 194 (Terrence Sullivan ed., 2000).
[94] Gordon, *Supra* note 86, at 533.

Sweden

Although the overall Swedish approach to occupational safety and health diverges significantly from the United States and Canada, the country's regulatory scheme is actually very similar in structure to that of the other two counties. The Work Environment Act of 1977 sets a broad framework for regulation, which divides responsibilities for workplace safety and health in general terms. The legislation itself, along with the agency it authorizes, creates broad health and safety standards. However, instead of specifying a laundry list of punishments for potential violations, the Act encourages mutual resolution between employers and employees. The Work Environment Act of 1977 was tightened in 1991 to increase employer responsibility and to expand the areas covered under the act to include more work processes and more types of workers disabilities.[95] In this way, the Swedish approach continues to emphasize the enforcement of a large set of necessary health and safety standards while using cooperative methods of resolution wherever possible.

Although Sweden's legislative approach to workplace safety and health regulation is not too different from that of the United States and Canada, the Swedish legislation is even more effective. Sweden has made a stronger commitment than either of the other two countries to fulfilling the mandates set forth in the Work Environment Act. The Swedish Work Environment Authority (SWEA) has over 750 employees in its central offices, over 400 inspectors in each regional office, and conducts at least 33,000 inspections of 260,000 workplaces each year.[96] Additionally, more than 45% of inspections result in written citations for improvement, and thus only 20 cases a year

[95] Fact Sheets on Sweden: Occupational Safety and Health, *Supra* note 69, at 1.
[96] *Id*. at 2.

result in any court appearances.[97] SWEA is committed to doing everything possible to facilitate the safest workplaces possible. For example, the Swedish Inspectorate is constantly trying to improve its workplace coverage: "The public prosecutor and the Health and Safety Inspectorate have joined forces to combat breaches of Sweden's health and safety legislation … The new joint approach incorporates special case officers in the police force and the public prosecutor's service and introduces a more flexible work method".[98] Of course, solutions like this are only complementary to the greater rate of funding and respect the enforcement agency receives from the Swedish legislature.

However, after the initial passage of the Work Environment Act in 1970, Swedish inspectors' desire to avoid conflict in the workplace as part of an overall system of industrial peace caused them to employ some of the same hands-off policies as utilized in the United States and Canada. Fortunately, in Sweden's constant attempt to adapt its enforcement mechanism it has begun to utilize more forceful measures:

> Inspectors also have the power to issues a written order to correct a violation … such orders in the past were issued only rarely. In practice, Swedish inspectors usually gave verbal instructions … without resorting to any legally binding formal enforcement mechanism. However, a shift is taking place with the inspectorate becoming increasingly willing to use coercive measures when it identifies troublesome workplaces. These measures include the use of injunctions or prohibitions in order to achieve necessary modifications to the work environment. Significantly, the percentage of inspections leading to issuing of improvement orders has increased appreciably, due partly to improved procedures for prioritization and selection of inspection projects.[99]

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[97] *Id*.
[98] *Co-operation to Stop Violations of the Work Environment Act*, Worklife Jan. 12, 2001, at http://www.prevent.se/english/artiklar/1396.shtml.
[99] Work, Health and Safety: Industry Commission Inquiry Report 223 (Sept. 1995), *available at* http://www.pc.gov.au/ic/inquiry/47workhe/finalreport/index.html.

A unique and innovative approach to selection along with a willingness to issue penalties when necessary underpins Sweden's comparative success in enforcing its health and safety legislation.

Conclusion

While in some ways a discussion of the regulatory component of the occupational safety and health systems and the corresponding realities in these three countries does not reveal a great deal about the effectiveness of each enforcement regime, it does point toward the important elements of each country's overall enforcement. In the United States, for example, the primacy of the regulatory agency in enforcing safety and health violations creates very little room for other elements of the United States' system to aid in enforcement. On the other hand, the decentralization of the Canadian approach combined with the deferral of much of enforcement policy to the workplace means that additional knowledge of the workplace committee structure in Canada is necessary before judging the Canadian system's effectiveness Sweden's strong regulatory enforcement, however, sets the stage for an important exploration of how such an agency can be successful in a country that has historically valued participatory decision-making at all levels of working life. In then end, while an essential building block of any safety and health enforcement system, agency regulation does not guarantee the success of such a system.

Chapter 3: Worker Participation

A system of occupational safety and health cannot be effective if it depends solely on a set of government standards in combination with government enforcement. The task is simply too large. In order to be effective, regulations and government enforcement must be complemented by other mechanisms for policing the workplace. One of the main ways of achieving this goal is by relying on those with the greatest interest in the day-to-day conditions of employment: employees. The addition of employees to the regulatory system takes many forms, anything from the ability to sue employers to direct participation in standard setting. Along with the choice about enforcement mechanisms, worker participation also reflects employees' ability to control their own workplace environment.

The extent to which employees are able to control the workplace exhibits a government's trust and attitude toward workers. A government that relies mostly on a regulatory agency and vests very little power in employees exhibits a partially paternalistic attitude towards workers. The desire to avoid paternalism must be balanced with a desire to guarantee consistent conditions across the country. Even if committees are allowed by some governments, careful attention must be paid to whether of not the committees are independent of managerial control. These structural concerns are also value choices. While the importance of these value choices in general and in safety and health specifically will be addressed later, it is crucial to acknowledge, even at this descriptive stage, that these choices are clearly interconnected with the type of structural choices made. These choices affect both the effectiveness of enforcement and the control each employee feels over the conditions of the workplace. This section will once again

describe the current legislation in this area and then match that legislation with contemporary outcomes.

United States

In the United States, the Occupational Safety and Health Act envisions a minimal amount of employee involvement in regulating workplace safety and health. The Act provides workers the right to file a complaint with OSHA and accompany an OSHA official's inspection of the workplace. One could argue that this choice just displays confidence in OSHA's ability to prevent workplace violations without much employee involvement. On the other hand, in the context of the limited amount of funding for OSHA, the choice to involve employees only at the most basic level might also suggest the government's mistrust of employee motives. Many have thought that employees would waste time worrying about the conditions of employment when they could be working, or possibly raise costs for businesses by requesting unnecessary improvements in health and safety. When in the early 1990s some legislators attempted to amend OSHA to require workplace committees, employers opposed the changes because they feared the possibility of new union organizing[100] Occupational Safety and Health reform that envisions workplace safety and health committees has been more successful at the state level where a number of states have mandated the existence of such committees.[101] While there have been some moves toward greater worker involvement in occupational safety and health enforcement, the current system does not envision employees having a major role to play in enforcing workplace standards.

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[100] Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 Cornell Int'l L. J. 373, 431 (2000).
[101] *See* Matthew W. Finkin, Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees, 5 U. Pa. J. Lab. & Emp. L. 75, 93-94 (2002).

These legislative choices, as well as the outcomes of such choices, must be seen against a backdrop of the failure of labor law and specifically worker representation in the United States. The relevant labor laws and the unions that work under them have failed to allow for effective representation of workers at almost every level of the national polity: "There is a large 'representation gap' between the desire for and the supply of collective representation in workplace governance. The labor laws have failed to deliver an effective mechanism of workplace representation, and have become nearly irrelevant, to the vast majority of private sector American workers".[102] This failure has not been a result of worker's ambivalence to such representation. In particular, workers do want to participate in determining their workplace safety and health situations. To evidence this desire, Richard Freeman and Joes Rodgers' survey of workers in What Workers Want finds that eighty-five percent of workers felt that workplace committees would be a good way to enforce occupational safety and health standards.[103] The inability of unions and federal labor law to meet workers' demands to be represented in relation to safety and health concerns have marginalized worker participation in determining the day-to-day conditions of work they face.

Despite the minor role given to employees in regulating the workplace, the right to file a complaint and accompany an inspection provides some check against egregious violations of safety and health standards. Unfortunately, even these rights have proved seemingly ineffective. First, in many workplaces there is no posted information about the rights of employees under the Act. Also, it is common practice to exclude employees from OSHA inspections. Even when a complaint is issued by an employee, the settlement

[102] Estlund, *Supra* note 36, at 1528.
[103] Richard Freeman & Joel Rodgers, What Workers Want 136 (1999).

of the issue rarely involves the employee and is normally negotiated by the inspector and the employer.[104] Finally, although employees have the right to file complaints with OSHA, they rarely exercise this right as a result of lack of information and threats of employer reprisal.[105] Once again, some argue that the lack of employee involvement in regulation is a result of effective enforcement on the behalf of OSHA. However, after examining the number of workplace injuries and deaths along with the small odds of inspection, it is clear that in losing out on their ability to participate in enforcement, workers are losing out on their opportunity to improve the conditions of their workplace.

In lieu of direct workplace representation, there is one other potential avenue for employee participation in the occupational safety and health enforcement process. This participation comes under section 11(c) of OSHA which protects whistleblowers.[106] The term whistleblower "is derived from the act of an English bobby blowing his whistle upon becoming aware of the commission of a crime".[107] In the context of occupational safety and health enforcement, "a whistleblower is a worker who finds evidence of a serious violation of law on the part of the employer or its agents, and who takes specific, active steps to bring that violation to the attention of authorities".[108] Even though most people believe that whistleblowers deserve protection, there is the possibility that such protection can be abused as an illegitimate cover for individuals that deserve to be fired for other, justifiable reasons. While a more sustained analysis of the status of specific judicial remedies in whistle blowing cases in not possible here, whistleblowers have been

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[104] Gordon, *Supra* note 86, at 546.
[105] Julie E. Korostoff et. al., *Comment: Rethinking the OSHA Approach to Workplace Safety: A Look at Worker Participation in the Enforcement of Safety Regulations in Sweden, France and Great Britain*, 13 Comp. Lab. L. 45, 46 (1991).
[106] Monique C. Lillard, *Exploring Paths to Recovery for OSHA Whistleblowers: Section 11(C) of the OSHAct and the Public Policy Tort*, 6 Empl. Rts. & Employ. Pol'y J. 329, 330 (2002).
[107] *Id*. at 331.
[108] *Id*.

remarkably successful in winning court cases related to occupational safety and health.[109] However, even though protection of whistleblowers does provide some hope for workers' participation in safety and health enforcement, the limited scope of protections against the termination of whistleblowers by employers, and the meager court resources and time available to address this issue temper any hope that such protection provides a panacea for worker participation.

Aside from the individual participation allowed under the federal system of occupational safety and health, thirteen states do mandate the existence of workplace safety committees.[110] In these states, committees at unionized workplaces that tend to be independent of managerial control and thus much more successful in promoting worker interests than those at non-unionized workplaces.[111] Unfortunately, employer fears that unions might use workplace safety and health committees as platforms for further workplace organizing in the workplace, have prevented most states from adopting and/or implementing workplace committee requirements in unionized workplaces.[112] Furthermore, even when committees exist in unionized workplaces they are given only an advisory capacity in all but three states.[113] This failure represents the overall refusal of the safety and health enforcement system in the United States to allow workers to participate in determining conditions of work. Instead, the only widely available avenues for workers to participate in safety and health enforcement come in the form often ineffective and always personally risky individual legal action.

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[109] *Id*. at 329-386.
[110] *See* Finkin, *Supra* note 101, at 89-91. *See* Gregory R. Watchman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 Cornell J.L. & Pub. Pol'y 65, 76-78 (1994).
[111] Finkin, *Supra* note 101, at 90; Watchman, *Supra* note 110, at 96.
[112] *See* Finkin, *Supra* note 101, at 90-91.
[113] *Id. at* 94.

Canada

In contrast to the United States, Canada relies heavily on employees to participate in the regulation of safety and health in the workplace. This part of the Canadian occupational safety and health system began during the 1950s and 1960s in the unionized mining industry, where joint committees were required by collective bargaining agreements and given the power to enforce health and safety standards.[114] As the system has become institutionalized across Canada's provinces, a number of common provisions have been established. First, all enterprises with twenty or more employees must have a safety committee of at least two people. At least half of the members of a safety committee must be non-managerial employees. Safety committees are responsible for a series of tasks that promote accommodation of safety and health standards including: making recommendations to employers, providing employees with information, establishing training programs, inspecting facilities each month and keeping records of safety and health related injuries. Despite this wide range of duties, the safety committee has only an advisory role and cannot force an employer to implement its recommendations. Only if an employer and committee fail to reach an agreement on a safety and health issue only then can government officials be called in to settle the dispute. However, in some ways these committees do vary by province, with Ontario and Quebec being the most strongly committed to the role of joint committees.[115] Some variances across provinces include the extent to which committees are mandatory, the

[114] O'Grady, *Supra* note 93, at 164.
[115] Watchman, *Supra* note 110, at 78; *See* O'Grady, *Supra* note 93, at 162-197.

requirements for a worker to participate on a committee, and the relationship of the committee to inspectors.[116]

This two-pronged approach of inspectors and safety committees enhances both worker participation and enforcement in occupational safety and health practice. With the ability of an institutionalized force, like safety committees, to oversee the workplace, inspectors can be alerted to the most pressing safety and health concerns. Also, when inspectors arrive at a workplace there is already a dialogue between employees and employers that guarantees worker participation and creates a situation that is much more amenable to negotiation and resolution. Although it may appear that employees have no recourse in the event that an employer decides not to implement a safety committee's recommendations, in practice safety inspectors generally defer to a safety committee's findings.[117] Therefore employees are able to participate in determining the conditions of employment through day-to-day management of the workplace as well as in deciding the outcome of any violation.

In terms of success in reducing occupational safety and health threats, most workplaces comply adequately with committee requirements, and empirical evidence points to the success of workplace committees in reducing injuries and deaths throughout Canada.[118] Importantly, one study found that committees allow Canadian inspectors to rely on employee participation in the safety and health system in place of inspections.[119] Similarly, studies confirm that there are three factors that significantly affect the performance of safety committees: management support for committees, access to

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[116] *See* O'Grady, *Supra* note 93, at 163-164.
[117] Gordon, *Supra* note 86, at 534.
[118] *See* O'Grady, *Supra* note 93, at 176-188.
[119] *See* Carolyn Tuohy & Marcel Simard, The Impacts of Joint Health and Safety Committees in Ontario and Quebec: A Study Prepared for the Canadian Association of Administrators of Labour Law (1993).

information, and committee training.[120] While the efficacy of safety committees in reducing workplace injuries does vary according to the extent that provincial laws ensure these three factors, safety committees are an important component of the overall safety and health enforcement regime throughout Canada. In contrast to the United States, the Canadian system of worker participation does ensure workers a voice in determining their daily conditions of employment.

Sweden

The Swedish system of worker participation in safety and health issues at the workplace gives groups of employees at individual workplaces more choice about the manner in which their workplace is managed than in either the United States or Canada. The Swedish Work Environment Act of 1977 mandates safety committees at every workplace with 50 or more employees. In workplaces that have fewer than 50 employees, the Act mandates some form of representation, even if it is only in the form of a regional safety and health representative.[121] There are about 90,000 total safety and health delegates, about one quarter of which are replaced yearly. Of these 90,000, 1,500 are regional representatives whose only job is to represent a group of safety and health committees in matters that cannot be decided at the individual workplace level.[122]

The union or majority of employees votes for the employee representatives to the committee. The size and specific function of each committee is determined by each workplace. If the committee fails to reach a decision any member of the committee can refer the case to the government for inspection. The Work Environment Act also

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[120] *See* O'Grady, *Supra* note 93, at 191-193.
[121] David Walters, Health and Safety in Small Enterprises: European Strategies for Improving Management 122 (2001).
[122] Fact Sheets on Sweden: Occupational Safety and Health, *Supra* note 69, at 2.

guarantees employee representatives protection from any discrimination or harassment as a result of membership in the committee. Worker participation is not merely complementary to regulatory enforcement. Instead, "measures of worker participation are fundamental to the ethos of the Swedish legislative approach".[123] Therefore, the Swedish system places a strong emphasis on the ability of individual workplaces to determine safety and health standards and management systems.

The application of the protections and privileges that employees have in the workplace are regularly applied throughout Sweden. Safety committees often participate in the planning and development of safety programs, organize training, and are even consulted regarding new plant work and location decisions.[124] Some might fear such an expansive reach for an employee driven organization on account of the possibility of choosing inefficient systems geared at benefiting employees while cutting profits. The Swedish experience proves otherwise: "safety committees play an important role in influencing work conditions, and in general, that authority has been well-utilized".[125] The result of such intimate contact between employees and employers regarding important decisions is the ability of inspectors to focus primarily on the most pressing cases without needing to be concerned with the safety conditions at most workplaces. Since safety committees provide a sizable check against such violations, safety inspectors are willing to fine those who violate safety and health standards. Thus, the Swedish system is able to reinforce norms against safety and health violations by relying on worker participation in the form of safety committees to help defend against a wide range of possible violations.

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[123] Walters, *Supra* note 121, at 122.
[124] Korostoff, *Supra* note 105, at 55.
[125] Work, Health and Safety: Industry Commission Inquiry Report Australian Productivity Commission, *Supra* note 99, at 216.

Safety and health committees serve to enhance SWEA's enforcement of occupational safety and health standards, while at the same time relying on the Swedish regulatory agency to conduct necessary random inspections and penalize employers when necessary.

Conclusion

With an understanding of worker participation in occupational safety and health decisions in the United States, Canada, and Sweden, it is now possible to understand the full structural mechanism for enforcing occupational safety and health standards in each country. Worker participation combined with regulatory agency enforcement constitute the two main components of any safety and health enforcement regime. While in the United States weak regulatory enforcement is followed by even weaker mechanisms for worker participation, Sweden and Canada choose to rely more heavily on their workers to aid in the safety and health enforcement regime. The centralization of the Swedish regulatory and worker participation schemes, along with the robust support for each go a long way towards explaining why Sweden has one of the lowest rates of occupational safety and health fatalities and injuries in the world. While the decentralization of Canada's approach makes understanding why it does not achieve such low rates difficult to determine, a comparison between the Swedish and American experience provides reasonable evidence that worker participation is not the central problem in Canada. As much as an evaluation of worker participation and regulatory schemes shows, it does not yet provide a full understanding of the cultural aspects of occupational safety and health systems. Understanding culture and its varied relationship to history in contemporary policy necessitates a further analysis of the right to refuse unsafe work, and finally of the values associated with specific occupational safety and health policy choices.

Chapter 4: The Right to Refuse Unsafe Work

The right to refuse unsafe work can have the greatest single effect of any safety and health provision on an individual worker. It seems obvious that in a situation when an employee faces imminent death the employee should be allowed to stop working. However, there are many contentious issues involved in deciding in which cases an employee has the right to stop working without penalty. Of course, employees do not want to have to work in situations in which they feel threatened. However, employers are just as adamant that employees should not be able to stop working without management approval. Like many other choices in safety and health, this one requires deciding whether and to what extent power should be decentralized. Whatever actor is given power over these decisions, be it a particular level of government or a workplace committee, the main question becomes deciding precisely under which circumstances an employee should be allowed to refuse unsafe work. It is also critical to decide in what manner a refusal to work can take places. Disagreement about the relative importance of management and worker rights gives rise to a situation where employees often believe they should be able to stop work whenever they want, and many employers believe employees should be forced to work now and grieve later. Once again, the choices that each country makes are critically important for the day-to-day conditions of work that employees face. As in the previous chapters, focusing on particular safety and health enforcement provisions, this chapter will examine each country with respect to the legislation and outcomes in the area of the right to refuse unsafe work.

United States

In the United States, the Occupational Safety and Health Act does not specifically guarantee employees a right to refuse unsafe work. Instead, it allows employees to file complaints with OSHA and gives OSHA the subsequent ability to stop work if necessary. However, in further legislation Congress has given employees the "right to refuse unsafe work in cases where the employee has a reasonable belief that performance of the work constitutes imminent danger of death or serious physical injury".[126] Although not central to this analysis and with parts problems of its own, the National Labor Relations Act does provide workers the right to refuse unsafe work in situations where the worker is either covered by a collective bargaining agreement or deemed to be part of protected, concerted activity.[127] In both of these cases the legislation is sufficiently ambiguous and also relatively explicit in allowing courts to interpret the exact conditions under which an employee has a right to refuse work. The vague language and deference to OSHA and the courts in enforcing any right to refuse unsafe work exhibits a legislative approach that leans toward protecting employer interests at the expense of immediate employee interests.

Not surprisingly the result of this vague legislation has been to create very few circumstances in which employees can refuse unsafe work and even fewer circumstances where they do refuse unsafe work.[128] Employees have rarely met the reasonable belief, immanent danger, and death standard.[129] Addition, employees often fear retaliation for

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[126] *See* Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety & Health Act of 1970, 29 C.F.R. 1977.12(b)(2) (1992).
[127] *See* John B. Flood, *Revisiting the Right to Refuse Hazardous Work Amidst the Anthrax Crisis of 2001*, 5 U. Pa. J. Lab. & Emp. L. 545, 562-563 (2003).
[128] *Id*. at 539-540.
[129] *Id*. at 539.

exercising their right to refuse unsafe work even though retaliation is prohibited under OSHA.[130] The disappointingly restrictive legislation and subsequent interpretation, along with the threat of retaliation, create a situation where the small chance of winning a court case coupled with the large risk of losing pay as a result of challenging the employer make it almost always undesirable for employees to refuse unsafe work.[131]

These conclusions have been cemented by a series of court cases. First, in Whirlpool Corp. v. Marshall, the Supreme Court ruled that OSHA had the right to regulate employees'ability to refuse unsafe work because the purpose of the Occupational Safety and Health Act was to protect employees.[132] Unfortunately, lower courts have often refused to enforce specific OSHA mandates in this area. Courts argue that without direct evidence of prior accidents, the possibility that employees have another motive in refusing to work along with the possibility that employers will correct the situation expeditiously diminishes the necessity of protecting the refusal of unsafe work.[133] In this way, the judicial system has failed to uphold the right of individual employees to immediately refuse unsafe work, and instead has suggested that employees work first and grieve later.

While not necessarily a testament to legislative effectiveness, arbitration decisions in the area of safety and health do have an important effect on workers' ability to refuse work in the United States. Private arbitrators, partly because there are few mechanisms for review of arbitral decisions, almost entirely disregard the presumption in favor of workers set forth in OSHA, and instead defer to their own theories about the assumption

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[130] *Id*. at 540.
[131] *Id*.
[132] Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).
[133] Flood, *Supra* note 127, at 571.

of risk.[134] A comprehensive study by Gross and Greenfield reveals that "it is the employee who must carry the burden of ultimate persuasion by establishing the sufficiency of his or her reason for refusing the work assignment".[135] This presumption against employees in arbitration decisions mirrors the presumption set forth in court decisions interpreting OSHA. Although the intent of the safety and health legislation in the Untied States was clearly not to create a strong right to refuse unsafe work, it is difficult to imagine that legislators did not intend to at least provide some basic protections for workers refusing to do unsafe work.

Canada

In contrast to the United States, the Canadian system of workplace safety and health favors a significant employee right to refuse unsafe work. Although there are slight differences across provinces, there is an almost uniform reasonable cause standard for refusing unsafe work. Once an employee invokes the right to refuse unsafe work, an employer can take immediate remedial action and fix the problem. If the employee still refuses to work a government safety officer is called in to inspect the workplace premises. In most provinces there is explicit protection against employer retaliation even if the government safety officer finds no reasonable cause or immediate danger.[136] The extensive protection against employer retaliation combined with the right to refuse unsafe works sets a very strong tone in favor of employees in potentially unsafe work environments.

These strong legislative commands have been backed up by safety and health jurisprudence throughout Canada. In determining when an employee can exercise the

[134] *See* Gross, *Supra* note 8, at 657-658.
[135] *Id*. at 649.
[136] Gordon, *Supra* note 86, at 538.

right to refuse unsafe work one court has explicitly stated that objective proof is not necessary.[137] Once the standard of proof does not require an employee to show potential harm with absolute certainty, it becomes almost entirely up the employee to determine when conditions warrant a refusal to work. That is, Canadian workers have the ability to offer justifications for their actions that do not require them to prove beyond any doubt that the workplace was unsafe, but only that their choice not to work based upon some reasonable expectation that they were about to perform unsafe work. The Canadian Labor Relations Board has afforded employees the utmost protection from any form of retaliation by declaring, "it is not unreasonable to be wrong if one is acting in good faith. Absent an ulterior motive, absolute protection is afforded".[138] These decisions are of course not made lightly. The courts have indeed reflected on the possible damage that allowing such an expansive interpretation of the right to refuse unsafe work might do to management interests: "We appreciate the Employer's right to manage the workplace. However, the employee has an obligation to refuse unsafe work when he believes an imminent danger exists".[139] These decisions therefore create a positive right for employees to refuse unsafe work on their own terms and not management's terms. The combination of strong legislative language and court interpretations in favor of the right to refuse unsafe work create a Canadian workplace environment where employees feel free to stop work when there is immanent danger.

[137] Re: Alberta v. Ross [1996] A.J. No. 655 (Action No. 9503 15111).
[138] Re:Halifax-Dartmouth Industries and Shipbuilding Workers, 35 Lab. Arb. Cas. (3d) 129, 135 (1988).
[139] Alberta Occupational Health & Safety Council (Appeals Division, S. Ruffo, Chair), May 3, 1995.

Sweden

The Swedish Work Environment Act combines the right to refuse unsafe work with a form of worker participation. The legislation mandates one or more safety delegates be appointed at all workplaces with five or more employees. The safety delegates are appointed by the local employee organization. If no such organization exists, the delegates in adopted by the majority of the employees at the workplace. The safety delegates are given extensive rights and privileges including training, time off with pay, protection from discrimination, and, most importantly, the right to stop hazardous work. As a result, it is the safety delegate's responsibility to monitor working conditions and to act to remedy unhealthy situations whenever possible. In providing employees with a strong institutionalized figure to oversee safety and health conditions and stop work when necessary, the Swedish system takes some the pressure off individual employees in refusing unsafe work.

Some worry that a system which relies on safety delegates to stop unsafe work threatens management's ability to run an efficient workplace. However, the results have shown that safety delegates use their privileges only when necessary and rarely abuse the right to stop work.[140] Specifically, in 1979 the peak in number of cases of refusal to work came only one year after the passage of the Act.[141] Since then the number of cases filed has declined dramatically thanks to the joint decision-making process envisioned by the safety and health representative system: "The right to suspend work was used most frequently during the first few years after the act took effect ... The decline in number of cases is probably attributable to joint decisions by both employers and employees to

[140] Work, Health and Safety: Industry Commission Inquiry Report Australian Productivity Commission, *Supra* note 99, at 216.
[141] Fact Sheets on Sweden: Occupational Safety and Health, *Supra* note 69, at 2.

suspend work, thereby obviating the need to call in the Labor Inspectorate".[142] Once again the Swedish experience shows that vesting power in employees or their representatives does not sabotage management interests. The intent of the Work Environment Act to create a situation where employees and employers jointly determine working conditions with minimal government interference is exhibited in the effective and nonconfrontational use of the right to refuse unsafe work.

Conclusion

While policies guaranteeing the right to refuse unsafe work might seem like a separate issue from decisions related to regulatory structure and worker participation, in the end, all three decisions are remarkably interlinked. The failure of the United States to protect an employee's right to refuse unsafe work makes sense in the context of system that centralizes enforcement in the hands of an underfunded regulatory agency and does not give workers any collective participation in determining their day-to-day working conditions. On the other, the decisions of Canada and Sweden to provide a strong and enforceable right to refuse unsafe work parallels both countries' decisions to give workers a large amount of power in determining their conditions of work. Besides corresponding to other elements of the regulatory structure in each country, the decision to allow an employee to refuse unsafe work displays something important about the values of each country. For example, the situations in the United States where public and private judicial bodies are skeptical of the intentions of the employee in a refusal to work case display a particularly cynical attitude towards workers. As the historical analysis of the development of the welfare state indicates, this mistrust is pervasive, especially at the

[142] Database on Small and Medium Enterprises, Occupational Safety and Health (1996), *at* http://sme.cier.edu.tw/SME/IND-EU/SWEDEN/SAFETY.HTM (accessed Mar. 6, 2004).

policymaking level, in the contemporary cultural context of the United States. While this assertion certainly seems to be true, before decrying the value of choices of United States policy, one must engage in a critical reflection of the place of values in policy as well as a specific justification of a set of values from which to view policy choices.

Conclusion: Workers' Rights as Human Rights and Policy Recommendations for the United States

Instead of plunging directly into particular policy recommendations, it is important to understand the current situation facing anyone demanding change in existing labor laws. To put it simply, the situation is dire. Existing labor laws and their limited protections have largely withered away under the power of employer interests: "It will come as no surprise to anyone with a passing familiarity with labor law that it is old, in many ways anachronistic, and unusually resistant to change … I know of no other major legal regime … that has been so insulated from significant change for so long".[143] The challenge is great and that only makes more evident the need for a renewed cultural debate about the related issues. Unpopular reforms "can be achieved only through discourse that seeks to demonstrate that reform is not only necessary, by giving good reasons for new policy initiatives, but also appropriate, through the appeal to values".[144] In this light, no policy recommendations are likely to be implemented without a vigorous defense of the values and economic rights that provided the foundation for the initial expansion of the welfare state in the United States. This section of the paper will begin with such a defense, followed by specific policy recommendations for the United States' occupational safety and health enforcement system.

I believe that workers' rights in general, and in the case of occupational safety and health in particular, constitute human rights. Although a full discussion of the basis for all human rights is beyond the scope of this work, it is necessary to develop a coherent picture of human rights from which workers' rights in the occupational safety and health

[143] Estlund, *Supra* note 36, at 1531.
[144] Schmidt, *Supra* note 7, at 231.

area can be claimed as human rights. Basic conceptions of rights view such rights as claims upon individuals and/or the state.[145] Human rights are said to be universal because they are derived from the existence of an individual as a human being and are seen as an end.[146] Furthermore, human rights must be enjoyed by all individuals to the same extent.[147] These human rights have traditionally been attached to basic civil and political liberties, such that an individual is not impeded from obtaining a basic degree of freedom.[148] The basic definition of human rights thus has given rise to a distinction between positive and negative rights. Negative rights, of which all human rights were traditionally seen to be, require restraint on the part of some individual or state.[149] Positive rights, on the other hand, required an individual or state to perform a particular duty.[150] With this conception of human rights as necessarily negative rights, it was difficult to see how affirmative guarantees for workers could be fundamental human rights since they were positive rights.

Fortunately, the argument for viewing workers' rights as examples of human rights is convincing. The central argument here is that "economic rights are indeed true human rights … because they are inherently connected to civil and political rights".[151] To prove this claim it is taken for granted that civil and political rights are human rights.[152] The difficult part of this argument comes in showing that economic rights are in fact interconnected to civil and political rights. Since economic rights have traditionally been understood as only positive rights it must be shown that economic rights are necessary to

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[145] Darryl M. Trimiew, God Bless The Child That's Got Its Own: The Economic Rights Debate 13 (1997).
[146] Michael J. Perry, The Idea of Human Rights: Four Inquiries 5 (1998).
[147] *Id*. at 58 59.
[148] Trimiew, *Supra* note 145, at 18.
[149] *Id*. at 19.
[150] *Id*.
[151] *Id*. at 3.
[152] *Id*. at 4.

the negative rights associated with civil and political freedom.[153] To begin with, if a right is essentially a claim then the claim is at least partly predicated upon the ability of the agent to make a claim. This means that an individual must also be able to resist being wrongfully coerced into not being able to choose in a civil and political context.[154]

In order to link economic rights to civil and political rights, it must be proved that economic rights are necessary for an individual agent to exercise political and civil choices without coercion. This can in fact easily be demonstrated by reflecting on the importance of economic needs. As human agents have permanent, basic economic needs such as the requirement for adequate food, shelter and clothing, economic needs must have attached economic rights.[155] This assertion is bolstered by an individual's need for a certain minimum amount of personal security to survive each day.[156] Therefore, without an individual's basic economic rights an individual will not have the minimum amount of personal security necessary to exercise any political or civil freedoms without coercion. That is, bereft of even the basic requirement of food, shelter and clothing, individuals cannot be expected to resist even the most meager economic inducement to relinquish their political and civil human rights.

Some will argue that economic rights in fact have nothing to do with freedom. However, that is just semantics: "It is not a freedom to do anything, or for anything. Rather it is a freedom from being coerced into doing things".[157] Furthermore, states often take away some measure of freedom in order to enforce basic welfare rights by codifying

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[153] *Id*. at 26.
[154] *Id*. at 171.
[155] *Id*. at 173.
[156] *Id*. at 180.
[157] *Id*. at 154.

laws that limit freedom.[158] Therefore, freedom by itself is not a right, but only when it is connected with some civil or political good. Also, a right can only exist if there is not a strong economic disincentive against invoking it. Even if a right were codified through legislation, if invoking that right would be too economically costly for an average person then it would not be guaranteed in any important way.[159] Finally, safety and health concerns are an important example of economic rights. Human safety and health, as protected at the workplace, are intimately associated with the expression of fundamental human rights:

> Given that the major determinants of health status are societal in nature, it seems evident that only a framework that expresses fundamental values in societal terms, and a vocabulary of values that links directly with societal structure and function, can be useful to the work of public health. For this reason, modern human rights … seeking to articulate the societal level preconditions for human well-being, seems a … useful framework.[160]

That is, human health is harmed without basic personal security in the workplace.

Understanding the relationship between individual and social choice is one of the further difficulties in describing any account of human rights. In deciding what kind of rights a state should guarantee individual citizens, it is not just a question of what each individual desires, but rather it is a question of understanding what kind of rights and risks are appropriate for society in general: "Individual choice is the domain of rationality, whereas social choice is the domain of reasonableness".[161] Along these lines, some might say that occupational safety and health related injuries are randomly distributed, and that it is luck that determines which individuals are negatively affected.

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[158] *Id*. at 179.
[159] *See* Peter Dorman, *International Labor Standards: The Economic Context*, 11 MSU-DCL J. Int'l L. 125, 128-129.
[160] Jonathan M Mann, *Public Health and Human Rights*, 25 Hum. Rts. 2, 2 (1998).
[161] Gregory C. Keating, Pressing Precaution Beyond the Point of Cost-Justification, 56 Vand. L. Rev. 653, 677 (2003).

Ignoring the fact that these outcomes are often not randomly distributed, they still constitute an injustice because "the difference between misfortune and injustice frequently involves our willingness and or capacity to act or not to act on behalf of the victims".[162] These social choices in favor of a safe and healthy work environment must also be enforced in order for a state to fulfill its duty.[163] Once the responsibility for guaranteeing the human rights embodied in a safe and healthy workplace is understood as primarily social, it becomes clear that welfare state policies must definitively outline these rights while providing effective means for their enforcement.

Against such a line of thought, many argue that the economic costs of effective enforcement outweigh any benefits accrued from such protection. Initially, this claim is belied by an understanding of economic rights as inalienable human rights. Beyond this basic skepticism, dealing with economic cost arguments requires separating claims that occupational safety and health enforcement costs workers economically from the claim that enforcement costs employers too much. The most plausible of all of these economic cost arguments is that without dangerous jobs, workers would be forced to take lesser jobs or no jobs at all. The first economic problem with this argument is that the workers who take these risks are clearly paid less than executives who take no health risks on a daily basis: "the pool of labor for many hazardous jobs consists of poorly educated and low-skilled workers who accept the risks for low pay".[164] Also, this economic analysis creates a false choice for workers where they clearly have no choice. Although it is true that workers could in theory quit unsafe jobs at any time, in a practical situation where the only alternative is for their families to starve, the option of quitting cannot seriously

[162] Judith Shklar, The Faces of Injustice 2 (1990).
[163] *Id.* at 18.
[164] Gross, *Supra* note 29, at 375.

be considered: “even if they do have that knowledge, given the extremely desperate circumstances most of them find themselves in, it probably would not affect their practices all that much … the more general economic and social conditions of these workers are contribution factors to outcomes”.[165] Finally, this economic perspective assumes a form of perfect information that simply does not exist. Poorly educated workers are often not given adequate information about the risks associated with their jobs, and, even if they were, no human being could be expected to mathematically compare serious injury to an hourly wage. In this way, economic arguments about job availability emanate from flawed economic assumptions.

These arguments, however, also betray a value choice that degrades human beings to mere resources capable of efficient management by the higher power of the employer. This view ignores the severity of a situation where there are “10,000 traumatic deaths a year and tens of thousands of traumatic injuries”.[166] Certainly no member of society would choose to allow a loved one to be subjected to such a horrific situation. Reducing individuals to part of an efficiency equation where human life can be compared to wages cannot easily be separated from forms of human bondage. The only clear divide is the supposed choice workers have over their employment.

The company cost argument proposes an even more egregious violation of any framework of economic rights. Unfortunately it is argument that has been most persuasive in contemporary America is the company cost argument. This argument relies on traditional cost-benefit analysis and economic theories about Pareto optimality, under which a company should produce its goods in the most efficient way possible. This form

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[165] Dorman, *Supra* note 159, at 201.
[166] Ralph Nader, *Occupational Safety and Health: Policy Options and Political Reality*, 31 Hous. L. Rev. 1, 4 (1994).

of cost-benefits analysis ignores any concept of fairness. First, injuries in the workplace are devastating and cannot be undone. This means that fairness must be maintained "at the time the risk is imposed, not after it issues the injury".[167] Also, because of the irreparable nature of these injuries, the harm incurred cannot be compared to normal benefits. Thus, cost-benefit analysis incorrectly equates a large number of trivial losses for a group of people to one devastating loss for a single individual.[168] That is, an individual's health is essential to human agency whereas the small amount of financial benefits attributable to each individual in a large group is not.[169] This reply does not even imply the full rights analysis from above; rather, fairness is a consideration about how a given a set of costs and benefits should be weighed, and does not have to exclude any accounting for economic costs like a strict rights analysis might.

Additionally, because of the social choice issue here it is impossible to rationalize costs as merely a fact of life. Instead, social choice necessitates a reasonableness that does not allow society to doom its individual members.[170] In response to this point about social choice and responsibility, it can be argued that society cannot be responsible for every risk an individual faces each day. This focus on background risk ignores the unfair dispersion of such risk along with the tremendous significance of an occupational safety and health accident for an individual.[171] Furthermore, a cost-benefit analysis cannot adjudicate this conflict because its attempt to attribute a dollar figure to human life is not only offensive but impossible.[172] In the end, all of these cost-benefit based arguments fail

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[167] Keating, *Supra* note 161, at 660.
[168] *See Id*. at 660-661.
[169] *Id*. at 676.
[170] Adam Babich, *Too Much Science in Environmental Law*, 28 Colum. J. Envtl. L. 119, 136 (2003); *See* Keating, *Supra* note 161, at 677-678
[171] Keating *Supra* note 161, at 701.
[172] Babich, *Supra* note 170, at 155-156; Granatstein, *Supra* note 38, at 423.

because "it is evident when we can alleviate suffering, whatever its cause, it is passively unjust to stand by and do nothing. It is not the origin of the injury, but the possibility of preventing and reducing its costs, that allows us to judge whether there was or was not unjustifiable passivity in the face of disaster".[173] The shift in focus from economic considerations revolving primarily around cost to revolving primarily around rights and concurrent considerations of justice, places an emphasis on understanding the values embraced by each welfare state in making occupational safety and health policy.

The individual policy choices made by each welfare state come in the larger context of international human rights law. Until recently even the most liberal human rights organizations have not taken economic rights nearly as seriously as more traditional human rights.[174] Despite this, workers' rights have long been recognized as human rights in the international sphere. Both the 1948 United Nations' Declaration of Human Rights and the 1992 International Covenant on Civil and Political Rights, to which the United is a party, recognize the interdependence of economic and political rights.[175] However, an international consensus on what specific economic rights were human rights was not formalized until the International Labor Organization (ILO) adopted the Declaration on Fundamental Principles and Rights at Work in 1998. Unfortunately, this document excluded occupational safety and health from the definition of important workplace human rights. Instead, the ILO's declaration enumerated four rights as "core" worker rights: freedom of association and the right to collective bargaining; elimination of forced or compulsory labor; abolition of child labor; and

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[173] Shklar, *Supra* note 162, at 81.
[174] James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights, in* Workers' Rights as Human Rights 2 (James A. Gross ed., 2003).
[175] *Id.* at 5.

elimination of discrimination in employment.[176] This decision to exclude safety and health from the list of "core" worker rights ignored the vast array of historical documents, political developments, and comprehensive arguments pointing towards the need to include safety and health as a fundamental workers' right.[177] The failure of the international community to codify the right to safety and health as a basic workplace right creates ample space for the differing policies and attitudes of nations seen in this area.

In terms of occupational safety and health enforcement, the choices by the United States, Canada and Sweden betray very different value choices. Canada and Sweden, to varying degrees, do embrace workers rights as human rights. The Canadian system's tradition of guaranteeing income security and healthcare to all of its citizens makes it no surprise that it also upholds human rights in the workplace by allowing workers to participate in decisions regarding health and safely in the workplace and to refuse unsafe work in almost all situations. Sweden does even better. With such a strong desire to guarantee workers' basic economic rights, Swedish occupational safety and health policy combines effective regulatory enforcement, strong worker participation in a primarily union setting, and the right to refuse unsafe work to protect workers' abilities to exercise economic as well as civil and political rights at every level.

On the other hand, in the United States, there is almost no desire to be accountable for economic rights in the workplace or anywhere else. In general, "international human rights, including labor rights, have made almost no discernable mark upon American domestic law".[178] What is most disturbing about this is that the

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[176] *See* Emily A. Spieler, *Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right, in* Workers' Rights as Human Rights 82-83 (James A. Gross ed., 2003).
[177] *See Id.* at 86-88.
[178] Estlund, *Supra* note 36, at 1588.

United States' official view is that it is a positive model for economic rights throughout the world.[179] It is difficult not to react to such statement with a high degree of cynicism. The failure of the United States to sufficiently fund an occupational safety and health enforcement regime, not to mention its lack of workers participation in safety and health decisions and its failure to provide a right to refuse unsafe work, makes it one of the worst violators of economic rights in the developed world. These decisions stem primarily from a value system which favors management control and profit over the protection of workers rights. The results of an analysis of United States occupational safety and health enforcement in the context of a robust understanding of economic rights as human rights are terrifying and render policy recommendations for reform all the more urgent.

Instead of discarding every aspect of the current safety and health enforcement regime in the United States, it is useful to evaluate the extent of its failure so that potential areas of improvement can be found. Some argue that in fact workplace and injuries and death have declined since OSHA's creation in 1970. While there is some initial validity to this statement, any decline in injuries or deaths cannot be attributed to OSHA because these rates were already declining before its creation: "To credit OSHA with all of the post-1970 drop in fatalities is similar to a physician's taking credit for the health of the patient whom the doctor did not start treating until two years after the patient began recovering".[180] Instead, the decline in injuries and fatalities came primarily

[179] *Id.* at 1587-1588.
[180] Thomas J. Kniesner & John D. Leeth, CATO Handbook for Congress: 105th Congress: 36. Occupational Safety and Health Administration (1998), *at* http://www.cato.org/pubs/handbook/hb105-36.html (accessed Mar. 6, 2004).

from technological change and a move toward more white-collar jobs.[181] In fact, "the vast majority of studies has found no statistically significant reduction in the rate of workplace fatalities due to OSHA".[182] Given previous statistics describing the appalling injury and death rates still associated with occupational injury in the Untied States, even if OSHA had contributed to recent declines, it would still require a drastic overhaul.

The failure of the passage of the 1970 Occupational Safety and Health Act to significantly reduce the number of workplace injuries and fatalities cannot easily be blamed on a set of discrete factors. However, individual choices about the type of enforcement, worker participation, and right to refuse unsafe work certainly contribute to a system where employees are often left out of decisions affecting the day-to-day conditions of the workplace. Many will object to any attempt to transfer the successful approaches of other countries to the United States' unique cultural and political setting. While there is certainly some validity to this point, the same claim could be made for administering national legislation in a federalist system. Empirically, national occupational safety and health legislation has been successful in countries with divergent values in different geographical areas.[183] Similarly, even though the United States consists of 50 states, some with very different values, it is not impossible to envision a coherent national agenda in favor of stronger workplace protections for workers. One obstacle is the overall divergence in values exhibited in both legislation and outcomes in the United States, Canada and Sweden. Perhaps reevaluating the potential consequences of importing different workplace safety and health systems can contribute to an overall reevaluation of the values that are reflected in individual policy choices.

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[181] *Id*.
[182] *Id*.
[183] Schmidt, *Supra* note 7, at 232.

At this point, an astute reader will notice that advancing recommendations for the United States based upon success in Canada seems puzzling given that its rate of injuries and death as a result of occupational safety and health accidents was much higher than that same rate in the United States. Importantly, these overall statistics do not disprove the sustained analysis of particular provisions of enforcement in Canada. Without accounting for possible reporting differences in the data used, there are a number of explanations that make the disparity in outcomes and supposed effectiveness makes sense. First, the Canadian system is decentralized. This means that while robust safety and health committees in some provinces diminish safety and health accidents, high rates in other provinces without such systems might offset the potential overall gains. Specifically, most provinces give committees only advisory roles at the workplace and thus fall into a similar trap to the United States of relying to heavily on agency enforcement. Also, while Canada may not reduce the absolute number of injuries or accidents in the workplace, its promotion of the right to refuse unsafe does display an important respect for workers rights as human rights. Finally, as even a basic understanding of statistical methods indicates, these overall statistics are meaningless without holding other factors constant. For example, it is possible that the expanse of Canadian territories or the particular industries that dominate Canada might make limiting occupational accidents more difficult. In any event, without such statistical analysis proving that the particular factors examined here are actually contributing to the problems in Canada, it would be foolish to disregard the potential lessons of the specific successes of these programs for the United States.

In the case of enforcement of the standards and regulations created by OSHA it is clear that something must be changed. The sheer enormity of the task of monitoring all of the workplaces in the United States with a dearth of staff and funding calls for change. Both Canada and Sweden have attempted to meet this challenge, and have partially succeeded by divesting some of the power located in the government to individual employees or their representatives. These schemes risk allowing potentially unqualified individuals to control the way safety and health standards are enforced. However, in the experience of Canada and Sweden, often employees or their representatives serve a complementary function in directing inspectors to the most urgent cases in need of inspection while resolving many disputes at individual workplaces. Even without factoring in enforcement via workplace representatives, European countries have one inspector for every 10,000 workers whereas in the United States there is one inspector for every 55,976 workers.[184] The decision as to what exact form of employee representation is needed depends largely on the surrounding labor relations climate. In Canada, like the United States, there is comparatively less unionization than Sweden, so it is necessary to have very specific directives for ensuring the institutionalization of cooperation about safety and health in the workplace. In Sweden, however, the overall climate of cooperative labor relations lends itself to less specific legislation, which can rely on preexisting patterns and relationships between labor and management to negotiate any disputes. In this particular context, that reliance has resulted in stronger protections for workers as well as reduced workplace accidents.

The promotion of employee control over enforcing and even managing safety and health systems creates a vital impetus for innovation and change. When employees have a

[184] *See* James L. Nash, *Is OSHA Underfunded?*, 64 Occupational Hazards 14, 14-15 (2002).

greater level of control and protection in exercising that responsibility they are more likely to report any problems. Based upon experience in the United States with state required and voluntary safety and health committees (SHCs), Gregory Watchman concluded that "SHCs can be adapted to a wide range of workplaces and that they reduce workplace fatalities, injuries, and illnesses. SHSs also improve labor-management relations by allowing workers and management to work toward a mutual goal and by offering a more cooperative alterative to OSHA inspections and enforcement".[185] Additionally, experience indicates that such safety and health committees save money, particularly in states such as Oregon that encourage committees in unionized workplaces.[186] While informative, Watchman's lone study in this area needs to be updated and pursued with a more rigorous, perhaps even statistical, analysis. The results of such sustained comparative analysis between the different programs that already exist in states or even the different programs that exist in Canadian provinces could well provide many of the answers to the questions raised by this paper.

But perhaps of greater importance, when employees feel they are being taken seriously on issues that so directly impacts their lives, they are more likely to voice their opinions on safety and health systems in the workplace. This type of dialogue on an issue as important to the day-to-day conditions of work as safety and health has the potential to open up dialogue on other issues. In the United States, more often than not, employees feel like they are in an adversarial relationship with their employers, partially because whenever they feel they are being mistreated, their statutory recourse is always to a regulatory agency and subsequently litigation. Although, an employee who attempts to

[185] *See* Watchman, *Supra* note 110, at 71-72.
[186] *Id.* at 86.

engage an employer with a set of recommendations for change will not always succeed, the added force of government legislation and inspectors requiring the employer to at least listen gives the employee the protection from employer reprisals while possibly opening up channels of communication. The difference between an approach that values employees and their right to determine their conditions of work, and one that centralizes power in the hands of the government and employers, is most clearly shown in the right to refuse unsafe work.

Instead of giving employees the right to refuse unsafe work with full protection, the United States has virtually condoned unsafe conditions by forcing employees to work in dangerous situations and perhaps complain about it afterwards. This focus on the courts as a means of adjudicating the claims of individual employees after the fact gives employees no protection when they need it most. A decision like this reflects so little trust in employees and their ability to determine what constitutes unsafe conditions that it seems the government would rather have employees die than have a few employees stop work unnecessarily. Based upon the results in Canada and Sweden, it is obvious that employees take their ability to refuse work seriously and rarely misuse the authority. Given the deference many people in authority and otherwise enjoy when any life is at stake, it is a wonder that when an individual employees feel their life is threatened they are punished for acting in self-defense and refusing to work.

Given this discussion, it is clear that the United States needs to add an element of worker participation to its occupational safety and health enforcement system. Instead of attempting to immediately mandate workplace committees at all locations throughout the United States, Congress would be well suited to view programs like those in Oregon as

pilot programs that are worthy of expansion. Such expansion could take place through federal financial incentives for state occupational safety and health programs that increase worker participation. Optimally, Congress would simultaneously begin to require safety and health committees in workplaces with the most workplace safety and health problems. Industries such as auto, mining and steel would serve as excellent starting points because of their tradition of collective bargaining and worker organization. The issue of the right to refuse work could then be negotiated at a workplace level before it was brought to national attention. As a result of these processes, the extent to which the United States mirrors Canada and Sweden in both the effectiveness and desire for workplace committees would become clear. With that information, Congress could expand, alter, scale-back or eliminate these programs.

With all of the discussion about worker participation and worker involvement at the workplace, some will surely point to modern forms of human resource management and/or unionization as means of increasing such participation and involvement. While astute, these suggestions ignore the fundamental bases of the argument advanced here. It is precisely the fact that employer driven human resource management and employee supported unions have not provided meaningful protection and participation at work that intervention is required. Even if unions were willing to provide such participation and protection, the current levels of unionization would render such change relatively meaningless. Additionally, on the whole unions have shown no signs of changing themselves from organizations primarily concerned with wages and benefits to organizations primarily concerned with human rights such as the right to safety and health. As for human resource management, even an individual with a casual interest in

labor history will acknowledge that a healthy dose of skepticism is due any employer driven program claiming to promote meaningful participation and protection for workers. Furthermore, the entire previous discussion indicates that it is the large structures and corresponding cultural orientation that seem to determine the depth and breadth of worker participation and protection in the workplace. That is, without a structural commitment to the goal of worker participation, employers in the United States have shown no desire to provide meaningful worker participation or protection. Finally, if the arguments advanced about worker's rights as human rights are taken seriously, then workplace safety and health considerations cannot be left up to employers' whims but must be secured by effective government enforcement coupled with meaningful worker participation.

The United States has long had a labor relations culture that does not favor placing power in the hands of employees but prefers to centralize it in the hands of the government and its emissaries. This approach is often debated and certainly has its merits in some situations. However, in a situation like workplace safety and health where enforcement is underfunded and enforcement so closely impacts the day-to-day lives of individual employees, the system seems fatally flawed. Perhaps importing the exact methods of other countries such as Canada and Sweden is not the answer. However, an eye to those countries does reveal that the policy choices made by governments do matter for individual employees and their workplace conditions. Each decision has the power to begin to change the way employees are perceived and build bridges that other countries have used to further the success of many of their labor relations policies.