

Book Review

Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards, Human Rights Watch
(Human Rights Watch, 2000, 213 pp.)

reviewed by James A. Gross†

It is commonly accepted in the United States that violations of human rights occur elsewhere. This attitude has been a major impediment to admitting or even conceiving the possibility of human rights deficiencies in United States domestic labor law.

Recently, however, Human Rights Watch, a non-governmental organization that among other activities investigates and exposes human rights violations, issued *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, a report finding that "workers' freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers' rights."¹ As the Human Rights Watch report summed it up:

In the United States, millions of workers are excluded from coverage by laws to protect rights of organizing, bargaining and striking. For workers who are covered by such laws, recourse for labor rights violations is often delayed to a point where it ceases to provide redress. When they are applied, remedies are weak and often ineffective. In a system replete with all the appearances of legality and due process, workers' exercise of rights to organize, to bargain, and to strike in the United States has been frustrated by many employers who realize they have little to fear from labor law enforcement through a ponderous,

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1. HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* 8 (2000).

delay-ridden legal system with meager remedial powers.²

The Human Rights Watch report is historically significant for at least two reasons. First of all, it reverses the usual approach of judging other nations' labor laws and practices by using United States labor law (or an idealized version of that law) as the standard. As evidenced by its title, "Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards," the report looks inward at United States labor law and policies (including in-the-field case studies) using internationally accepted human rights principles as standards for judgment. The inward look approach is a valuable new perspective because the human rights standard has not been an important influence in the making or the integrating and applying of United States labor law. The Human Rights Watch report, therefore, is a long overdue beginning toward the promotion and protection of worker rights as human rights.

This report is also historically important because its subject matter is an unprecedented and needed break with the traditional preoccupation of human rights discussions with civil and political rights. Until recently human rights organizations, human rights scholars, and even labor organizations and advocates have given little attention to worker rights as human rights. In this report, therefore, Human Rights Watch also shifts the traditional emphasis from rights violations by the state to rights violations by employers. Yet, while acknowledging, "private employers are the main agents of abuse," the report emphasizes "international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors."³

The report consists in part of an explanation of the methodology and sources used; a summary of its conclusions, and a more detailed discussion of its findings and recommendations concerning discrimination against union supporters, the imbalance in "communication power" between employers and workers in representation campaigns, workers' lack of access to union representatives, forced attendance at captive-audience meetings, the content of employer speech under Section 8(c) of the Act, delays in National Labor Relations Board (NLRB) and court procedures, "outmoded concepts of bargaining units," staff and budget cuts at the NLRB, "surface bargaining," the "exclusion of millions of workers from protection of organizing and bargaining rights," the denial of freedom of association to "subcontracted" and "leased" workers, the "nullification of the right to strike by the permanent-replacement of economic strikers doctrine, the "stifling of solidarity action [or secondary boycotts] by

2. *Id.* at 16.

3. *Id.* at 9.

workers,” and the status of immigrant workers.⁴ As the report acknowledges, there are other important subjects not addressed such as minority unionism, workers’ right not to associate or to disassociate, the distinction in United States law between “mandatory” and “permissive” subjects of bargaining, and secondary picketing for organizational purposes.⁵ Only brief mention is made of the “denial to state and local public employees in many states of the right to bargain” and to strike.⁶

The report contains a section dealing with workers’ freedom of association under international human rights law which includes a review of the principal international and regional human rights instruments, as well as relevant International Labor Organization (ILO) conventions, Organization for Economic Cooperation and Development (OECD) guidelines, and United States commitments to the freedom of association in its own trade laws and agreements such as the North American Free Trade Agreement (NAFTA). Another section on freedom of association under United States labor law spells out the constitutional and statutory “underpinnings” of the law, and describes the basic provisions and policies of the Taft-Hartley Act, how workers exercise the freedom of association under the statute, the law’s collective bargaining provisions, strikes and lockouts under the statute, and the structure, functions, and powers of the NLRB and its regional offices.⁷

Approximately 100 pages of this 213-page report contain case studies of violations of workers’ freedom of association. The cases were chosen to include a range of sectors (services, industry, transport, agriculture, high tech) and a range of workers seeking to exercise their right to freedom of association (high and low skill, blue and white collar, resident and migrant, women and men of different racial, ethnic, and national origin) in different parts of the United States and in different occupations. These cases, the report asserts, “offer a cross-section of workers’ attempts to form and join trade unions, to bargain collectively, and to strike.”⁸ Information was gathered through interviews with workers, NLRB records, university press books that were “based on extensive field research,” law review and social science journal articles, and “credible news accounts.”⁹

These cases are placed into two groups: one where United States law “comports with international standards regarding freedom of association but government enforcement action is not sufficient to protect workers’ exercise of their rights in the face of violations by employers” and a second

4. *Id.* at 19-33.

5. *Id.* at 4-5.

6. *Id.* at 5.

7. *Id.* at 51.

8. *Id.* at 1.

9. *Id.* at 1-2.

group where United States law “conflicts with international labor rights standards and thus places legal obstacles in the way of workers seeking to exercise rights to free association.”¹⁰ The report ends with a discussion of these legal obstacles which include the exclusion from labor law protection of agricultural workers, domestic workers, independent contractors, supervisors, managers, and public employees; the right to strike and permanent replacements in United States labor law; and “worker solidarity and secondary boycotts.”¹¹

Article 20 of the Universal Declaration of Human Rights¹² issued by the United Nations in 1948 asserts the right to freedom of association including in Article 23(4) the right to form and join trade unions. Over forty years before the Declaration of Human Rights, the ILO incorporated into its constitution the right of freedom of association. The ILO’s 1948 *Convention Concerning Freedom of Association and Protection of the right to Organize*¹³ asserts the right of workers (and employers) to set up and join organizations of their own choosing and calls upon states to take all necessary measures to ensure that workers (and employers) can exercise freely their right to organize. The ILO’s 1949 Convention No. 98 *Concerning Application of the Principles of the Right to Organize and Bargain Collectively*¹⁴ asserts the right of workers to be free of anti-union discrimination, to organize, and to engage in collective bargaining. Social justice for all countries and all individuals has always been the prime objective of the ILO.

In 1935, the Wagner Act¹⁵ (National Labor Relations Act) established the most democratic procedure in United States history for the participation of workers in the determination of their wages, hours, and working conditions. The Wagner Act was not neutral. The law declared it to be the policy of the United States to encourage collective bargaining and affirmed the right of workers to full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. When the Taft-Hartley Act was passed in 1947,¹⁶ Congress left intact the Wagner Act declaration that it was the policy of the United States to encourage collective bargaining.

The values underlying the Wagner Act are the values most consistent with human rights values. The Human Rights Watch report, for example,

10. *Id.* at 5.

11. *Id.* at 209.

12. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

13. ILO Convention No. 87 (1948).

14. ILO Convention No. 98 (1949).

15. 29 U.S.C. §§ 151-168 (1994).

16. *Id.* at § 151.

calls the freedom of association the “bedrock workers’ right under international law on which all other labor rights rest.”¹⁷ Yet, as the report points out, some provisions of the Wagner Act (expanded in Taft-Hartley) deliberately exclude millions of workers from the protection of their organizing and bargaining rights in open conflict with international norms that affirm the right of “every person” to form and join unions and to bargain collectively. The report cites the exclusion from coverage of agricultural workers, domestic employees, “independent” contractors, supervisory and managerial exclusions, and many employees of state and local governments.¹⁸ These excluded workers, the report emphasizes, “can be summarily fired with impunity for seeking to form and join a union” and, even if not fired, their “requests to bargain collectively can be ignored.”¹⁹ The report underscores the vulnerability of domestic workers “to human rights abuse.”²⁰ It also stresses that many farm workers, particularly migrant workers who fear deportation, are “completely defenseless.”²¹

Human Rights Watch recommends that Congress “bring agricultural workers and domestic workers under NLRA coverage with the same rights and protections as all other covered workers,” as well as “low-level” supervisors and managers “with adequate safeguards against conflicts of interest among groups of employees.”²² In addition, the report urges the enactment of federal and state legislation “to protect public employees’ exercise of the right to bargain collectively and the right to strike, under conditions established in international norms.”²³

When covered workers do attempt to exercise their right to freedom of association in this country, Human Rights Watch found it to be a right “under severe, often buckling pressure” with private employers the “main agents of abuse.”²⁴ The report emphasizes that while “millions of workers are expressly barred from the law’s protection,” certain provision of the law “openly conflict with international norms and create formidable legal obstacles to the exercise of freedom of association.”²⁵

One provision in particular among the 1947 Taft-Hartley amendments to the Wagner Act, Section 8(c) - the so-called employer free speech provision - has legitimized employer opposition to the organization of employees, collective bargaining, and workplace democracy. Although not

17. HUMAN RIGHTS WATCH, *supra* note 1, at 13.

18. *Id.* at 29.

19. *Id.*

20. *Id.* at 38-39.

21. *Id.* at 175.

22. *Id.* at 29.

23. *Id.*

24. *Id.* at 7-9.

25. *Id.* at 10.

mentioned in the report, Senator Wagner warned that:

The talk of restoring free speech to the employer is a polite way of reintroducing employer interference, economic retaliation and other insidious means of discouraging union membership and union activity thereby greatly diminishing and restricting the exercise of free speech and free choice by the working men and women of America. No constitutional principle can support this, nor would a just labor relations policy result from it.²⁶

93 Cong. Rec. A895-A896 (1947)

Human Rights Watch describes representation election campaigns as “highly unequal” battles, “most often marked by mandatory captive audience meetings and mandatory, pressure-filled, one-one-one meetings between individual workers and their supervisors, with the latter coached by consultants on how to present self-organization as risky to employees’ interests.”²⁷ The report also deplores workers lack of access to non-employee union organizers.²⁸

The solution recommended by Human Rights Watch is “more free speech for workers not less free speech for employers.”²⁹ The report recommends, for example, that workers be permitted to receive information from non-employee union organizers “in non-work areas on non-worktime within the workplace.”³⁰ In regard to captive audience speeches, the report recommends that “proportional access should apply” only where employers force workers into captive audience meetings.³¹

The more free speech approach is particularly apt when it comes to granting union organizers access to employees’ places of work because the workplace is the most effective place for the communication of information about unionization. I am less enthusiastic about the more free speech approach when applied to captive audience speeches in particular and employer speech in general. I am convinced as was the first Wagner Act NLRB (which required employers to remain strictly neutral regarding their employees’ organizational activity) that any anti-union statement, no matter how artfully phrased, by employers to employees whose livelihoods depend on those employers is as inherently coercive as is compulsory attendance at an employer’s on-premises anti-union speech. Neither my approach nor the Human Rights Watch recommendations, however, have even a remote chance of adoption given the current legislative, judicial and administrative climate.

26. 93 CONG. REC. A895-96 (1947).

27. HUMAN RIGHTS WATCH, *supra* note 1, at 19.

28. *Id.* at 20.

29. *Id.*

30. *Id.*

31. *Id.* at 21.

The Human Rights Watch report also objects to the law's or, more precisely, the Supreme Court's constraints on the right to strike. The report concludes that the court-sanctioned power of employers to replace permanently workers who exercise their statutory right to strike over wages, hours and working conditions "runs counter to international standards recognizing the right to strike as an essential element of the freedom of association" — international norms that "do not authorize permanent replacements."³² In its report, Human Rights watch urges Congress to enact legislation prohibiting the permanent (but not temporary) replacement of workers who exercise their right to strike.³³

To confront long delays in the United States labor law system that "confound workers' exercise of the right of freedom of association," Human Rights Watch recommends rapid elections and faster resolution of election disputes.³⁴ The report, does not recommend elimination of the right of appeal to a civil court, however, but advocates legislation creating a legal standard for court review similar to the standard for reviewing labor arbitration awards "which are rarely disturbed by the courts."³⁵ In an effort to protect the rights and interests of contingent workers, contract workers and others working in new occupations and industries, the report proposes an expansion of the current concept of "bargaining unit" to "allow workers in novel, employment relationships to merge their interests with those in similar jobs with other employers."³⁶

The report also includes a separate set of recommendations to protect the human rights of immigrant workers because, as the report puts it, "Human Rights Watch found workers' rights violations with particular characteristics affecting immigrant workers in nearly every economic sector and geographic area examined."³⁷ Finally, Human Rights Watch recommends a substantial strengthening of remedies for violations of the law including a "debarment law" denying government contracts to repeat violators of employees' rights to organize, bargain collectively and strike and first-contract arbitration where in a previously unorganized workplace an employer is found to have bargained in bad faith with the newly formed union.³⁸

The findings and recommendations of the Human Rights Watch report constitute a powerful indictment of United States labor law and policy but are not revelations of previously unknown violations and deficiencies. The

32. *Id.* at 31.

33. *Id.*

34. *Id.* at 24.

35. *Id.* at 25.

36. *Id.*

37. *Id.* at 33.

38. *Id.* at 28.

report's human rights standard does provide a vastly different perspective that has the potential to change the way we think about and react to the state of labor law in this country. It attempts to redefine the moral choices underlying policy formulation and rule-making.

Over the years, I have come to the conclusion that disagreements over the sources of rights (worker, union, management, and government) have always been at the core of debates concerning labor policy and practice, yet the nature and influence of the values underlying these debates made have been neglected, if not ignored, subjects. If promoted and discussed nationally, the Human Rights Watch report could educate our judiciary, members of administrative agencies such as the NLRB, labor arbitrators, and other decision-makers about internationally recognized human rights principles, and could challenge these decision-makers' isolation and provincialism. The report could also be used to educate the United States public about human rights principles and the rights of workers. Human rights education needs to occur at all levels from elementary school through college or university. The Human Rights Watch report could be a basic tool not only in human rights education, but also in understanding workers' rights as human rights.

Union leaders and union members also need to become educated in human rights principles. Unions must be more than merely another self-interest group protecting their members regardless of the cost to others. Unions need to understand and promote themselves as human rights organizations because they exist to secure freedom of association, collective bargaining, safe and healthful workplaces, and discrimination-free workplaces.

The report, if brought into law school classrooms, has the potential to influence the way labor law is taught. It would challenge the "if you know the rule you know the law" approach too often used by forcing identification and evaluation of the sources of the rights embodied in those rules, the moral choices those rules constitute, the alternative sources of rights available, and the implications of adopting those alternatives for the distributions of benefits and burdens of society. That would get us closer to *understanding* the law rather than merely *knowing* the rules.

If the report is to have an effect, however, it must be made to amount to more than an entertaining academic debate or a mere difference of opinion among advocates for particular values or moral choices. The report is about moral choices we have made in this country. These moral choices are about, among other things, the rights of workers to associate so they can participate in the workplace decisions that affect their lives, their right not to be discriminated against, and their right to physical security and safe and healthful working conditions. The choices we have made and will make in regard to those matters, as I have written often, will determine

what kind of a society we want to have and what kind of people we want to be. Human rights talk without action is hypocrisy. This report could be an important first step toward action.