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Trade Unions and Human Rights

Abstract

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The first section, "Looking In," reviews the U.S. labor movement's traditional domestic focus and the historical absence of a rights-based foundation for American workers' collective action. The second section, "Looking Out," covers a corresponding deficit in labor's international perspective and action. The third section, "Labor Rights Through the Side Door," deals with the emergence of international human rights standards and their application in *other* countries as a key labor concern in trade regimes and in corporate social responsibility schemes. The fourth section, "Opening the Front Door to Workers' Rights," relates trade unionists' new turn to human rights and international solidarity and the reciprocal opening among human rights advocates to labor concerns. The conclusion of the chapter discusses criticisms by some analysts about possible overreliance on human rights arguments, and offers thoughts for strengthening and advancing the new labor-human rights alliance.

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CHAPTER 9

Trade Unions and Human Rights

Lance Compa

Trade unionists and human rights advocates in the United States pursued separate agendas in the last half of the twentieth century. Labor leaders focused their demands on recognition from employers, collective bargaining, and a greater share for workers of growing national wealth. Tough organizing and hard bargaining were workers' immediate challenges. Trade unionists had little time for learning, invoking, and using international human rights standards to advance their cause. Besides, the United States for many years was such a dominant economic power that a purely domestic agenda sufficed to meet labor's needs.

Where trade union leaders took up international questions, it was mostly part of a Cold War dynamic. The Congress of Industrial Organizations (CIO) purged its left-wing unions in the late 1940s and went on to merge with the more conservative American Federation of Labor (AFL) in 1955.¹ The new AFL-CIO's international advocacy focused on building anticommunist unions in other countries.² Trade unionists' invocations of human rights were usually aimed at violations in the Soviet Union, not at home.

Earlier generations of trade unionists and their supporters developed notions of workers' rights linked to home-grown notions of "industrial democracy" and "Americanism," even among many immigrants who helped to build the labor movement.³ In the 1930s, Senator Robert Wagner and other champions of collective bargaining argued that it would bring industrial democracy and civil rights into the workplace. Union leaders claimed that organizing and bargaining "was the only road to civil rights, civil liberties, and real citizenship."⁴ Wagner's National Labor Relations Act (NLRA) contains a ringing declaration of workers' "right" to organize and to bargain collectively.

But once the 1935 Wagner Act became law and the labor movement tripled its membership in ten years, pointing to basic rights as a foundation for trade unionism faded in importance.

For its part, the modern human rights movement that emerged from the wreckage of World War II rarely took up labor struggles. Although workers' freedom of association and the right to decent wages—even the right to paid vacations—are part of the 1948 Universal Declaration of Human Rights and other international human rights instruments, many advocates saw union organizing and collective bargaining as strictly economic endeavors, not really human rights.

To be fair, human rights advocates had their hands full with genocide, death squads, political prisoners, repressive dictatorships, and other horrific violations around the world. Compared with these, American workers' problems with organizing and collective bargaining were not human rights priorities. Rights groups' leaders and activists might personally sympathize with workers and trade unions, but they did not see labor advocacy as part of their mission.⁵

In the 1990s the parallel but separate tracks of the labor movement and the human rights movement began to converge. This chapter examines how trade union advocates adopted human rights analyses and arguments in their work, and human rights organizations began including workers' rights in their mandates.

The first section, "Looking In," reviews the U.S. labor movement's traditional domestic focus and the historical absence of a rights-based foundation for American workers' collective action. The second section, "Looking Out," covers a corresponding deficit in labor's international perspective and action. The third section, "Labor Rights Through the Side Door," deals with the emergence of international human rights standards and their application in *other* countries as a key labor concern in trade regimes and in corporate social responsibility schemes. The fourth section, "Opening the Front Door to Workers' Rights," relates trade unionists' new turn to human rights and international solidarity and the reciprocal opening among human rights advocates to labor concerns. The conclusion of the chapter discusses criticisms by some analysts about possible overreliance on human rights arguments, and offers thoughts for strengthening and advancing the new labor-human rights alliance.

LOOKING IN

The Commerce Clause Foundation

Adopted by a progressive New Deal congress in 1935 at a time of widespread industrial conflict, the NLRA affirmed American workers' right to organize and bargain collectively. But the rights proclaimed in Section 7 were not really based on a foundation of fundamental rights. Senator Wagner and his legislative drafters thought (perhaps rightly for the historical moment in which they found themselves, without viewing longer-term consequences) that a still-conservative Supreme Court would strike down the act if they

based it on First Amendment freedoms or Thirteenth Amendment free labor guarantees. Instead, they fixed the law's rationale on the Constitution's Commerce Clause giving Congress the power to regulate interstate commerce.⁶

The act's Section 1, *Findings and Policies*, pointed to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce." Section 1 mentions "commerce" thirteen times and contains many other references to the "free flow of goods" and equivalents. There are three references to "rights" of workers. In short, the NLRA was based on the need to remove "burdens on commerce," not the need to protect workers' fundamental rights.

Business forces indeed challenged the NLRA's constitutionality. The Supreme Court upheld the law in its 1937 *Jones & Laughlin Steel* decision (301 U.S. 1), hanging its judgment on the economic hook of the Commerce Clause. The Court mentioned in passing that employees' self-organization is a "fundamental right," saying that, "employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." But the court based its constitutional analysis on the Commerce Clause:

It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. . . . The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control and restrain." That power is plenary . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Trade union organizing and bargaining was now protected by law. Workers' struggles had brought passage of the NLRA; workers' organizing surged under protection of the NLRA. But their protection was rooted in unstable soil of economic policy, not solid ground of fundamental rights. As the Supreme Court said in its 1975 *Emporium Capwell* decision (420 U.S. 50), "These [rights] are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife . . ."

Workers' rights depended on economic policy choices, and the economic system enshrined private ownership and control of property, including the workplace. The Wagner Act itself contained a painful policy choice contrary to basic rights: excluding agricultural workers from its protection, a price for Southern Democrats' support.

Employers' Long March

After passage of the Act and the *Jones & Laughlin* decision, employers mounted a long march through courts, congresses, and administrations to claw back workers' organizing and bargaining space. Their counterthrust

began with an early but little-noticed prize. In the 1938 *Mackay Radio* decision (304 U.S. 333), the Supreme Court said that employers can permanently replace workers who exercise the right to strike.

Striker replacement was not the issue in the case. In fact, the union won the case, because *Mackay Radio* only replaced union leaders who led the strike, a clear act of unlawful discrimination for union activity. However, in what is called *dicta*—tangential asides in a court opinion not bearing on the legal issue—the Supreme Court said:

Although section 13 of the act provides, “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,” it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

For many years afterward, the *Mackay Radio* decision had little effect. Labor advocates did not seek a legislative “fix” of the judge-made striker replacement rule. New organizing continued apace, and employers rarely tried the permanent replacement option when unions were strong and growing. Getting replacements was not easy when respect for picket lines was an article of faith among workers. Employers knew they had to live with their unions after a strike, and did not want to poison the relationship by replacing union members.

The permanent striker-replacement doctrine remained a relatively obscure feature of U.S. law until employers began wielding it more aggressively in the late 1970s and early 1980s. Many analysts attribute this development to President Ronald Reagan’s firing and permanent replacement of 10,000 air traffic controllers in 1981 even though, as federal employees, controllers did not come under coverage of the NLRA and the *MacKay* rule. They were fired as a disciplinary measure under federal legislation barring strikes by federal employees. In fact, the use of permanent replacements began trending upward before Reagan’s action.⁷ But the air traffic controllers’ example served as a signal to employers to use the permanent replacement option in several high-profile strikes in the 1980s and afterward, with intimidating effects on workers and unions.⁸

The permanent-replacement doctrine is not used only against workers’ exercise of the right to strike. In almost every trade union—organizing drive, management raises the prospect of permanent replacement in written materials, in captive-audience meetings, and in one-on-one meetings where supervisors speak with workers under their authority. The permanent replacement threat appears at the bargaining table, too. An industrial relations researcher found that management threatens permanent replacement during collective bargaining negotiations more often than unions threaten to strike.⁹

In the 1990s, trade unions tried to get Congress to prohibit permanent replacements. A majority of the House and Senate supported such a move in the 1993–1994 Congress, when Bill Clinton was president. But a Republican

filibuster in the Senate blocked the needed sixty votes for passage.¹⁰ When Republicans took control of Congress in 1995, hopes for reform faded.

Employer Free Speech

Another court-launched counterthrust to union organizing came with the 1941 *Virginia Electric Power* decision (314 U.S. 469) granting First Amendment protection to employers' anti-union broadsides. After passage of the Wagner Act, the National Labor Relations Board (NLRB) closely scrutinized and limited employers' ability to campaign openly and aggressively against workers' organizing efforts. The board reasoned that such fierce campaigning was inherently coercive, given the imbalance of power in the employment relationship. The Court said:

The [National Labor Relations] Board specifically found that the [company's anti-union bulletin and speeches] "interfered with, restrained and coerced" the Company's employees in the exercise of their rights guaranteed by section 7 of the Act. The Company strongly urges that such a finding is repugnant to the First Amendment.

Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made.

. . .

The Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. . . . It appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful.

The *Virginia Electric Power* decision set the stage for the conservative 1947 Congress to add a new Section 8 (c) to the NLRA, the so-called employer free speech clause insulating employers against any liability for anti-union "views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form . . . if such expression contains no threat of reprisal or force or promise of benefit." Since then, employers and consultants who specialize in combating unions have perfected a science of using captive-audience meetings, videos, props, letters, leaflets, one-on-one "counseling" by supervisors and other tactics to break up organizing efforts.

To take one example among thousands, at an Illinois restaurant where workers launched an organizing drive, the employer guaranteed that if the union came in he would be out of business within a year. In a tape-recorded speech in a captive-audience meeting, the owner stated "If the union exists . . . [the company] will fail. The cancer will eat us up and we will fall by the wayside. . . . I am not making a threat. I am stating a fact. . . . I only know from my mind, from my pocketbook, how I stand on this." In the 1983

NLRB v. Village X decision (723 F. 2d 1360), the federal appeals court found this to be a lawful prediction that did not interfere with, restrain, or coerce employees.

Other Taft-Hartley Thrusts

The employer free speech clause only began the anti-union assault in the 1947 amendments known as the Taft-Hartley Act. In a brilliant marketing ploy, a new clause called “right-to-work” allowed states to prohibit employers and unions from including in their collective bargaining agreement a requirement of dues payments (or a like sum from nonmembers, who can obtain a rebate for amounts not related to collective bargaining) from all represented employees receiving benefits under the contract. More than twenty states have adopted such “right-to-work” laws, which have nothing to do with rights or with work, but much to do with weakening workers’ collective bargaining strength.¹¹

In other provisions, the Taft-Hartley Act prohibited employees at supplier or customer firms from giving any solidarity support to workers on strike against a “primary” employer. This “secondary boycott” ban means that workers can never countervail employers’ mutual support in the form of suppliers and customers continuing business as usual with a primary employer.

The Taft-Hartley Act added supervisors and independent contractors to the list of workers, like agricultural employees, “excluded” from protection of the NLRA. Excluded workers can be fired with impunity for trying to form unions. Since then, Supreme Court and NLRB decisions have amplified the “exclusion” clause, leaving taxi drivers, college professors, delivery truck drivers, engineers, sales and distribution employees, doctors, nurses, newspaper employees, Indian casino employees, “managers” with minimal managerial responsibility, graduate teaching assistants at universities, disabled workers, temporary employees, and others stripped of any protection for exercising rights of association. A 2002 government study found that more than 30 million U.S. workers are excluded from protection of freedom of association rights.¹²

Tectonic Shifts

As decades passed, the economic foundation of workers’ organizing and bargaining rights became vulnerable to the shifting economic landscape. The implicit “social contract” and social cohesion of the New Deal and post-World War II era gave way to the “risk society” and winner-take-all inequality. In the 1930s, the lack of trade union organizing and collective bargaining was defined as a “burden on commerce” justifying the Wagner Act. But by the 1980s trade unions and collective bargaining had become burdens on a market-driven economy. Without a human rights foundation, workers’ freedom of association was vulnerable to market imperatives.

New court decisions reflected the change. In 1981, a time of massive corporate “downsizing” and restructuring, the Supreme Court ruled in the *First National Maintenance* case (452 U.S. 666) that workers cannot bargain

over their livelihoods. Instead, employers can refuse to bargain over decisions to close the workplace because their right to entrepreneurial “speed” and “secrecy” outweighs workers’ bargaining rights. Here is what the Court said:

Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed. . . . Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. . . . Management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies . . . [Bargaining] could afford a union a powerful tool for achieving delay, a power that might be used to thwart management’s intentions . . . We conclude that the harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision.

The Supreme Court could hardly have been more frank in asserting that the smooth functioning of capitalism is more important than workers’ rights. In a similar vein, the Court ruled in the 1992 *Lechmere* decision (502 U.S. 527) that workers have no right to receive written information from trade union organizers in a publicly accessible shopping mall parking lot because the employer’s private property rights outweigh workers’ freedom of association rights. Except where employees are otherwise unreachable, as in a remote logging camp, employers can have union representatives arrested for trespassing if they set foot on even publicly accessible company property to communicate with employees.

In both *First National Maintenance* and *Lechmere*, the Supreme Court overruled NLRB decisions that favored workers and unions. Doctrinally, courts are supposed to defer to the administrative expertise of the NLRB. In practice, however, federal circuit appeals courts and the Supreme Court often make their own judgment on the merits of a case to overrule the NLRB. Professor Julius Getman has described the dynamic thus:

The courts are notoriously difficult to replace or control. The notion that courts would simultaneously defer and enforce was unrealistic. So long as the courts had the power to refuse enforcement, it was inevitable that they would use this power to require the Board to interpret the NLRA in accordance with their views of desirable policy. . . . The judicial attitude towards collective bargaining has increasingly become one of suspicion, hostility, and indifference. . . .

The reason for the courts’ retreat from collective bargaining is difficult to identify, but it seems to rest on a shift in contemporary judicial thinking about economic issues. The NLRA, when originally passed, had a Keynesian justification. Collective bargaining, it was believed, would increase the wealth of employees, thereby stimulating the economy and reducing the likelihood of depression and recession. Today, courts are more likely to see collective bargaining as an interference with the benevolent working of the market, and, thus, inconsistent with economic efficiency most likely to be achieved by unencumbered management decision making.¹³

State Judiciaries and Workers' Rights

Some state courts have shown more sympathy to fundamental rights arguments in defense of workers' interests. For example, the New Jersey Supreme Court found fundamental rights in the 1989 *Molinelli Farms* case (552 A.2d 1003) involving farm workers, who are not protected by the federal NLRA. The court said:

Article I, paragraph 19 of the New Jersey Constitution of 1947 provides in part that "persons in private employment shall have the right to organize and bargain collectively." This appeal concerns the rights and remedies available to migrant farm workers under this constitutional provision. . . . The constitutional provision is self-executing and that the courts have both the power and obligation to enforce rights and remedies under this constitutional provision. . . . Backpay and reinstatement are appropriate remedies to enforce the constitutional guarantee of Article I, paragraph 19 of the New Jersey Constitution.

California's Supreme Court championed workers' right to strike in its 1985 *County Sanitation District No. 2* decision (699 P.2d 835), saying:

The right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community. . . .

The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute . . . whenever a labor organization undertakes a concerted activity, its members exercise their right to assemble, and organizational activity has been held to be a lawful exercise of that right. . . .

If the right to strike is afforded some constitutional protection as derivative of the fundamental right of freedom of association, then this right cannot be abridged absent a substantial or compelling justification.

A concurring opinion said:

It is appropriate that today's affirmation of the right to strike should come so soon after the tragic events surrounding the strike of Solidarity, the Polish labor union. The Solidarity strikers proclaimed that the rights to organize collectively and to strike for dignity and better treatment on the job were fundamental human freedoms. When the Polish government declared martial law and suppressed the union in December 1981, Americans especially mourned the loss of these basic liberties.

The public reaction to the Solidarity strike revealed the strength of the American people's belief that the right to strike is an essential feature of a free society. In an economy increasingly dominated by large-scale business and governmental organizations, the right of employees to withhold their labor as a group is an essential protection against abuses of employer power.

But the California court's decision is far outweighed at the federal level by Supreme Court decisions insisting there is no fundamental right to strike; that strikes can be regulated based on economic policy choices. In its 1926

Dorothy v. Kansas decision (272 U.S. 306), the Supreme Court said (in a decision written by Justice Brandeis, generally considered a progressive):

The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. . . .

Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.

In a decision affirmed by the Supreme Court, a federal district judge ruled in the 1971 *Postal Clerks v. Blount* case (325 F. Supp. 879, aff'd. 404 U.S. 802):

Plaintiff contends that the right to strike is a fundamental right protected by the Constitution, and that the absolute prohibition of such activity . . . constitutes an infringement of the employees' First Amendment rights of association and free speech and operates to deny them equal protection of the law. . . .

At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers. Indeed, such collective action on the part of employees was often held to be a conspiracy. When the right of private employees to strike finally received full protection, it was by statute, Section 7 of the National Labor Relations Act, which "took this conspiracy weapon away from the employer in employment relations which affect interstate commerce" and guaranteed to employees in the private sector the right to engage in concerted activities for the purpose of collective bargaining. It seems clear that public employees stand on no stronger footing in this regard than private employees and that in the absence of a statute, they too do not possess the right to strike.

Devil's Bargain?

In retrospect, setting the National Labor Relations Act on a commercial foundation rather than a foundation of fundamental rights was a bargain with the Devil. Perhaps it was strategically necessary at the time to evade a constitutional trap. But in the more than seventy years since passage of the Act, Congress, the courts, and successive administrations and labor boards based their rulings on the Act's economic premises, not on concepts of workers' basic rights. This meant that they made decisions reflecting views about what furthers the free flow of commerce.

The 1935 Congress had seen *denial* of workers' organizing and bargaining rights as obstructing commerce. Fast-forward to the twenty-first century, where legislative, judicial, and administrative rollbacks of workers' rights have brought the opposite view: organizing and collective bargaining are market-distorting and commerce-burdening activities that must yield to employers' property rights and unilateral control of the workplace.

Can we now rethink and refound American labor law on a human rights foundation, including what can be learned from international human rights and labor rights principles? This is the challenge for advocates of workers' rights as human rights. U.S. trade unionists and their allies are starting to

take up this call. Their efforts are discussed later in this chapter. First, however, a review is offered of how and to what extent U.S. labor law and practice have been influenced by international labor and human rights concerns.

LOOKING OUT

American Exceptionalism

"American exceptionalism" to international law is deeply rooted in American legal discourse and culture.¹⁴ Indeed, this section could be subtitled "with blinders," because until recently U.S. labor law and practice rarely drew on international sources and counterparts. As in other legal fields, labor and employment law practitioners and jurists rarely invoke human rights instruments and standards.

Outside a small cadre of specialists interested in comparative and international labor law, most actors in the U.S. labor law system have no familiarity—if they even are aware of their existence—with labor provisions in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights; ILO Conventions and Declarations; OECD guidelines; trade agreements; and other international instruments. The United States has ratified only fourteen of the ILO's 186 conventions, and among these only 2 of the 8 "core" conventions.¹⁵

"Who needs it?" is a reflexive American response to suggestions that we can learn something about workers' rights from foreign sources. When the United States ratified the International Covenant on Civil and Political Rights in 1992, the then-Bush administration insisted that "ratification of the Covenant has no bearing on and does not, and will not, require any alteration or amendment to existing Federal and State labor law" and that "ratification of the Covenant would not obligate us in any way to ratify ILO Convention 87 or any other international agreement."¹⁶ In its most recent report on the ICCPR, the State Department supplied nothing more than a few desultory paragraphs suggesting "general" compliance with Article 22, the ICCPR provision on workers' freedom of association.¹⁷

As Professor Cynthia Estlund noted:

The official American view is that international human rights are endangered elsewhere, and that American labor law is a model for the rest of the world. The rest of the world may not be convinced that American labor law, old and flawed as it is, is a model for the modern world. But more to the present point, American legal institutions and decisionmakers have thus far been deaf to the claim that international labor law provides a potential model for American labor law, or even a critical vantage point from which to view American labor law.¹⁸

The United States and the International Labor Organization (ILO)

American ambivalence toward the ILO throughout the twentieth century signaled its aversion to international labor influences. The government of

Woodrow Wilson and the American Federation of Labor under Samuel Gompers actually played key roles in creating the League of Nations and the ILO after World War I. Gompers chaired the ILO's founding conference. But the U.S. Senate killed U.S. participation in the League, and the United States remained outside the ILO in its formative years. It finally joined in 1934 in the early months of the Roosevelt administration. Samuel Gompers is much better known today for his famous reply to the query "What does labor want?"—"More"—than his chairing the ILO conference.

The ILO was a forum for Cold War rivalry from the late 1940s to the 1980s. Labor movements from West and East saw each other as linked to capitalist exploiters and communist oppressors. The United States quit the ILO from 1977–1980 over ILO stands on the Arab-Israeli conflict and conditions of workers in occupied territories.

The Clinton administration brought a blip of prominence to the ILO in the 1990s. In 1998, Bill Clinton was the first American president ever to address the ILO's annual conference, and the United States was a strong supporter of the ILO's 1998 "core labor standards" declaration on freedom of association, nondiscrimination, and abolition of forced labor and child labor. The Clinton administration also pumped millions of dollars into ILO child labor programs.

Under Clinton, the United States for the first time acknowledged serious problems with U.S. labor law and practice on workers' organizing and bargaining rights under ILO standards. In its 1999 follow-up report to the core standards declaration, the U.S. government said:

The United States acknowledges that there are aspects of this system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances. . . .

Representation elections as currently constituted are highly conflictual for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial. . . .

The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time. . . . Roughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer. . . . Union representatives often have little access to employees at work, particularly when compared to employers' access . . .

The injunctive relief currently available for illegal terminations that occur during an organizing campaign is "pursued infrequently . . . and is usually too late . . . to undo the damage done." . . . The NLRA does not provide for compensatory or punitive damages for illegal terminations. . . . Remedies available to the NLRB may not provide a strong enough incentive to deter unfair labor practices by some employers during representation elections and first contract campaigns.

Other issues in U.S. law . . . include the lack of NLRA coverage of agriculture employees, domestic service employees, independent contractors, and supervisors. Additionally, there are varying degrees of protection for public sector workers with regard to collective bargaining and the right to strike.

Under United States labor law an employer may hire replacement workers in an attempt to continue operations during a strike. . . . This provision of

United States labor law has been criticized as detrimental to the exercise of fundamental rights to freedom of association and to meaningful collective bargaining.¹⁹

The Clinton administration's movement toward more openness to the ILO and willingness to engage in self-criticism under ILO standards ended with the Bush government. The Bush administration missed several obligatory self-reporting deadlines. The reports it finally sent reverted to an old formula, declaring that U.S. law and practice are "generally in compliance" with ILO norms and conceding no difficulties.

In 2005, the AFL-CIO filed a complaint to the ILO charging the administration with violating Convention No. 144 on tripartite consultation, one of the few ILO conventions ratified by the United States. Under the convention, the United States commits to regular consultations with employers' and workers' representatives on ILO matters. The AFL-CIO's complaint charged that functioning of the Tripartite Advisory Committee on International Labor Standards (TAPILS), a long-standing government-business-labor group that reviews ILO conventions for potential U.S. ratification, "has virtually ground to a halt during the last three years." The complaint pointed out that "For the first time since 1991 the U.S. Government did not convene a full meeting of the Consultative Group in preparation for the International Labor Conference."²⁰

LABOR RIGHTS THROUGH THE SIDE DOOR

Workers' Rights in the Generalized System of Preferences

The United States has resisted external influence of international labor rights standards, but it has insisted on including "internationally recognized worker rights" (the statutory language) in trade laws and trade agreements affecting commercial partners. Labor rights clauses first appeared in the mid-1980s in trade laws governing developing countries' preferential access for their products exported to the United States, beginning with the Generalized System of Preferences (GSP). This program allows developing countries to send products into the United States free of tariffs and duties applied to the same products from more developed countries. The goal of the GSP program is to give poorer countries a commercial advantage to boost their economies. The European Union, Japan, and other industrial powers maintain similar GSP programs.

A 1984 amendment to the U.S. GSP plan requires countries to be "taking steps" to implement "internationally recognized worker rights" defined as:

1. the right of association;
2. the right to organize and bargain collectively;
3. a prohibition on the use of any form of forced or compulsory labor;
4. a minimum age for the employment of children; and
5. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

In fact, this is a mishmash of international standards. They are not based on UN human rights instruments, ILO norms, or any other consensus international authority.²¹ For example, conspicuous by its absence is the right to nondiscrimination at work, one of the ILO's defined "core" labor standards. There is no definition of "acceptable," nor of what constitutes "taking steps" for purposes of administering the statute. In fact, one court said exasperatedly:

The worker rights provision . . . states that the President "shall not designate any country . . . (7) if such country *has not taken or is not taking steps* to afford internationally recognized workers rights." (emphasis added) . . .

GSP contains no specification as to how the President shall make his determination. There is no definition of what constitutes "has not taken . . . steps" or "is not taking steps" to afford internationally recognized rights. Indeed, there is no requirement that the President make findings of fact or any indication that Congress directed or instructed the President as to how he should implement his general withdrawal or suspension authority.

Given this apparent total lack of standards, coupled with the discretion preserved by the terms of the GSP statute itself and implicit in the President's special and separate authority in the areas of foreign policy there is obviously no statutory direction which provides any basis for the Court to act. The Court cannot interfere with the President's discretionary judgment because there is no law to apply.²²

In spite of such flaws, labor rights provisions in the GSP clause had serious consequences for labor rights violators. In 1986 labor rights advocates filed petitions under the GSP labor rights clause challenging Chile's beneficiary status because of the military government's abuses against workers.²³ They worked closely with Chilean unionists and human rights monitors to amass the information supporting the charges of systematic labor right violations. The United States suspended Chile from GSP beneficiary status in February 1988.

The GSP cutoff jolted Chilean economic and political elites. Business interests formerly comfortable with military rule and suppressed labor movements now faced economic sanctions just when they hoped to expand their exports to the United States. Some joined calls by labor, human rights, and other democratic forces for an end to the dictatorship and a return to more democratic rule.²⁴ In a plebiscite in October 1988 the Chilean people voted to do just that, supporting a "No" vote when asked if they wanted General Pinochet to continue as the head of government.²⁵ In 1991, with a new, democratically elected government in place, the most abusive features of the labor code removed, and an end to physical violence against trade union activists, Chile's GSP benefits were restored.²⁶

A dramatic turn of events in Guatemala made the GSP labor rights petition a pivotal issue for the future of constitutional order in that Central American country. On May 25, 1993 President Jorge Serrano dissolved the Guatemalan parliament and Supreme Court, and suspended constitutional rights.²⁷ He warned against "destabilizing" protest activity by trade unionists and grassroots organizations.

An impending decision on Guatemala's GSP status proved to be a critically important policy tool for the United States in pressing for the restoration of constitutional governance. The State Department issued a statement that "unless democracy is restored in Guatemala, GSP benefits are likely to be withdrawn."²⁸

U.S. press analysis pointed out the leverage in the GSP decision:

But perhaps more damaging to the local economy and Mr. Serrano's cause could be the call by US labor rights groups to revoke Guatemalan industry's tariff-free access to the US market for certain products. . . . Guatemala's labor practices are already under review by the US Trade Representative's office. . . . Given Serrano's suspension of the right of public protest and strikes, analysts expect US Trade Representative Mickey Kantor to consider terminating Guatemala's trade benefits.²⁹

The *New York Times* also cited the impending labor rights decision as critical to Serrano's fate. It reported on the day before his abdication that "businessmen have panicked at a threat by the United States to withdraw Guatemala's trade benefits under the Generalized System of Preferences."³⁰

Serrano's autogolpe collapsed. On June 5, the reconvened Guatemalan Congress elected Ramiro Deleon Carpio, who had been the independent human rights special counsel and a leading human rights advocate in Guatemala, as the new president of the country.³¹ The following day, after Serrano's flight into exile, a *New York Times* analysis concluded:

Why Mr. Serrano launched his palace coup in the first place . . . was never entirely clear. But the reasons for his downfall were clearer. Most important, it seems, was the concern of business leaders that Guatemala's rising exports to the United States and Europe could be devastated if threatened sanctions were imposed. Within hours of an American threat to cut Guatemala's trade benefits, business leaders who in the past had supported authoritarian rule began pressing government and military officials to reverse Mr. Serrano's action.³²

Post-GSP Labor Rights Clauses in U.S. Trade Laws

The labor rights amendment in the GSP fixed into U.S. law and policy both the principle of a labor rights-trade linkage, and the practice of applying it. Passage of the GSP labor rights amendment in 1984 was followed by over a half-dozen other amendments where the United States injected labor rights conditionality into trade relationships with other countries:

- In 1985, Congress added a labor rights provision to legislation governing the Overseas Private Investment Corporation (OPIC), which provides political risk insurance for U.S. companies investing overseas. Under the new labor rights clause, such insurance can only be provided in countries "taking steps to adopt and implement laws that extend" internationally recognized workers' rights, using the five-part definition from the GSP law. Determinations made in the GSP petition and review process are also applied to OPIC beneficiaries.

- In 1988, Congress made the labor rights–trade linkage a principal U.S. negotiating objective in “fast track” legislation authorizing the president to undertake multilateral trade negotiations.
- In the same Omnibus Trade Act of 1988, a labor rights amendment to Section 301 used the five-part GSP definition to make systematic workers’ rights violations by *any* trading partner an unfair trade practice against which the United States could retaliate with economic sanctions.
- In 1990, a Caribbean Basin Initiative renewal bill adopted the GSP labor rights formulation. The same clause was applied to the Andean Trade Preference Act of 1991.
- In 1992, Congress swiftly enacted a bill barring the Agency for International Development (AID) from expending funds to help developing countries lure U.S. businesses to countries where workers’ right are violated. Passage of the AID labor rights bill followed hard-hitting exposés on TV newsmagazines shortly before the 1992 elections, in which producers posing as businessmen recorded U.S. AID officials touting anti-union blacklists and anti-labor repression as attractive features of the Central American *maquila* zones.
- In 1994, Congress turned labor rights attention to the World Bank, the International Monetary Fund (IMF), and other international financial institutions. Congressmen Bernard Sanders of Vermont and Barney Frank of Massachusetts secured an amendment to the law governing U.S. participation in those bodies that requires American directors to use their “voice and vote” to screen loan proposals for their effects on workers’ rights.
- In 1997, Congress amended the Tariff Act of 1930, which already prohibited imports produced by prison labor, by adding a child labor provision. The new law declared that the same ban applies to products made by forced or indentured child labor.
- In 2000, Congress passed the African Growth and Opportunity Act (AGOA), which authorized the president to designate a sub-Saharan African country as eligible for trade preferences if he determines that the country has established or is making continual progress toward the protection of internationally recognized worker rights, using the GSP’s five-part definition.

Trade Agreements

In 2002, Congress passed the Trade Act of 2002 specifying that provisions on “internationally recognized worker rights”—the five-part definition in the GSP labor rights clause and other U.S. statutes—are a “principal negotiating objective” of the United States in trade agreements with commercial partners. Congress tweaked the GSP formula, adding elimination of the “worst forms of child labor” to the child labor clause. However, Congress again failed to include nondiscrimination among the “internationally recognized worker rights.”

Recent trade agreements with Jordan, Chile, Singapore, Morocco, Australia, and Central American nations require signatories, including the United States, to “effectively enforce” national laws protecting what the

United States calls “internationally recognized workers rights.” Beyond that, though, they also incorporate the ILO core labor standards declaration with a “strive to ensure” obligation stating:

The Parties reaffirm their obligations as members of the International Labor Organization (“ILO”) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights . . . are recognized and protected by domestic law.³³

The most extensive subject matter treatment of workers’ rights in trade agreements is contained in the North American Agreement on Labor Cooperation (NAALC), the supplemental labor accord to the North American Free Trade Agreement (NAFTA). Going beyond the five-part definition in other U.S. trade agreements and beyond the ILO’s core standards formulation, the NAALC sets forth eleven “Labor Principles” that the three signatory countries commit themselves to promote. The NAALC Labor Principles include:³⁴

- freedom of association and the right to organize,
- the right to bargain collectively,
- the right to strike,
- prohibition of forced labor,
- prohibition of child labor,
- equal pay for men and women,
- nondiscrimination,
- minimum wage and hour standards,
- occupational safety and health,
- workers’ compensation, and
- migrant worker protection

The NAALC signers pledged to effectively enforce their national labor laws in these subject areas, and adopted six “Obligations” for effective labor law enforcement to fulfill the principles. These obligations include:³⁵

- a general duty to provide high labor standards;
- effective enforcement of labor laws;
- access to administrative and judicial forums for workers whose rights are violated;
- due process, transparency, speed, and effective remedies in labor law proceedings;
- public availability of labor laws and regulations, and opportunity for “interested persons” to comment on proposed changes;
- promoting public awareness of labor law and workers’ rights.

In all these initiatives, the United States’s implicit assumption is that labor rights violations are a problem in *other* countries. They are a form of “social dumping” by foreign countries and firms gaining cost advantage by abusing workers, thus gaining a commercial edge against U.S.-based producers.

American firms reacted with shock and anger when trade unions and NGOs began filing complaints against them under the NAALC—against General Electric and Honeywell for violating workers' organizing rights in Mexico, against Sprint for violating the same rights of workers in the United States, against the Northwest U.S. apple industry for violating rights of migrant Mexican workers in Washington state, and many more.

U.S. corporate executives and attorneys think the Agreement has been hijacked by trade union radicals to attack company conduct throughout North America, and demand an end to contentious complaint procedures where unions and their allies brand companies as workers' rights violators. An executive of the Washington state apple industry said "unions on both sides of the border are abusing the NAFTA process in an effort to expand their power . . . NAFTA's labor side agreement is an open invitation for specific labor disputes to be raised into an international question . . . and could open the door to a host of costly and frivolous complaints against US employers."³⁶

Corporate Social Responsibility and Codes of Conduct

Workers' rights as human rights also penetrated labor discourse in the United States in the 1990s through initiatives on corporate social responsibility and codes of conduct. As with trade-labor linkage, the focus was outward, on conditions for workers in supply chain factories abroad producing for U.S.-based multinational companies. But growing concern for workers' rights abroad inevitably prompted closer scrutiny of workers' rights at home.

Beginning in the mid-1980s, journalists and NGOs delivered conscience-shocking accounts of child labor, forced overtime, hazardous conditions, beatings and firings of worker activists, and other abuses in factories supplying Nike, Reebok, Levi's, Wal-Mart, and other iconic American retail brands. Such exposés shook executives away from their earlier, arrogant position that these problems were not their business because they occurred among subcontractors.

First, many brand-name companies developed their own "internal" codes of conduct. Reebok, Levi's, Nike, J.C. Penney, and others, for example, announced that supplier firms in their global production chain would have to abide by their internal company codes or face loss of orders. The brands said they would take responsibility themselves for monitoring and enforcing their codes.

Levi Strauss & Co. and Reebok Corp. were in the forefront of this movement for internal, corporate-sponsored codes of conduct. They reviewed the UN's Universal Declaration of Human Rights, ILO Conventions, and other international human rights instruments in formulating their codes. They established monitoring and enforcement systems with detailed questionnaires on practices in foreign supplier plants, surprise visits by auditors, and reviews by company officials charged with enforcing the code.³⁷

Most of these company-sponsored codes refer to UN human rights instruments and ILO core conventions in defining their standards. Reebok, for example, calls its code "The Reebok Human Rights Production Standards"

and features the Universal Declaration of Human Rights on its Web site. It goes on to say, "The Reebok Human Rights Production Standards are based on the relevant covenants from the International Labor Organization and on input from human rights organizations and academics. . . . We post them in each factory, along with contact information for our local human rights staff."

Internal company codes have inherent weaknesses. Sourcing from hundreds, even thousands of factories around the globe, even the most diligent corporate socially responsible-conscious company could not guard against labor abuses in every one of its supplier factories. Critics could always find supplier plants with terrible problems. They argued that management would sooner cover up abuses than expose them to public scrutiny. The demand for independent monitoring and verification, independent of corporate control, became irresistible.³⁸

A new generation of codes called "multi-stakeholder" initiatives emerged. Companies, unions, human rights groups, community and development organizations, and other NGOs participate in formulating a code of conduct. These multi-stakeholder codes of conduct on workers' rights contain provisions on monitoring, verification, certification of supplier factories, enforcement mechanisms, and transparency. Among the most prominent U.S.-based groups are the Fair Labor Association (FLA), Social Accountability International (SAI), and the Worker Rights Consortium (WRC).³⁹

The FLA combines major United States apparel companies, many universities, and some NGO participants in its code of conduct, monitoring, and certification system. The FLA accredits external monitors and certifies companies that meet its standards, using a statistical sampling methodology. Social Accountability International (SAI) administers a code called Social Accountability 8000 (SA8000), with standards and a system for auditing and certifying corporate responsibility in supplier chain facilities.

The WRC grew out of the anti-sweatshop campaigns of United States university students concerned about conditions of workers producing apparel and other products bearing their universities' logo. The consortium verifies that university-licensed apparel is manufactured according to its code of conduct. The WRC operates a complaints-based monitoring system, responding to reports of workers' rights abuses in factories supplying the university-logo market.

Most of these stakeholder codes assert "rights" as their foundation. SAI, for example, went so far as to trademark a brand of its own: *Human Rights @ Work*TM. Its declared goal is "Making Workplace Human Rights a Vital Part of the Business Agenda." SAI goes on to say, "Social Accountability International (SAI)'s mission is to promote human rights for workers around the world . . . to help ensure that workers of the world are treated according to basic human rights principles."

Sharp differences have arisen among these groups and their codes, including rivalries, jealousies, and criticisms aimed at one another. Under some plans, monitoring, verification, and certification are carried out by "social auditing" firms, some of them new divisions of traditional financial auditing companies like Price Waterhouse. In others, NGOs are involved in monitoring. The codes

have different degrees of transparency and public reporting of their findings. Some contain “living wage” provisions, while others do not. To overcome such problems, these and other stakeholder groups organized a unified program called the Joint Initiative for Corporate Accountability and Workers Rights (Jo-In), with a pilot project in Turkey.⁴⁰

The Hypocrisy Gap

Labor rights in trade agreements and codes of conduct have had mixed results, reflecting serious problems of monitoring and enforcement. Analyzing these problems and results is not the point here. The point is, rather, that the focus on workers’ human rights in labor clauses of trade agreements and in corporate codes of conduct injected more rights-consciousness into American labor discourse throughout the 1990s. The penetration was perhaps less in the labor movement itself. Many union activists condemn NAFTA and other trade agreements’ lack of “teeth” to enforce workers’ rights. Most unions also maintain an ambivalent attitude toward corporate social responsibility and corporate codes of conduct. They are concerned that these initiatives are meant to replace strong trade unions and effective government enforcement of labor laws.⁴¹ But the codes of conduct movement awakened new sensibilities to workers’ rights in many other segments of civil society that rallied to the labor rights banner.

In their “side door” campaigns for workers’ rights in other nations, American trade unionists and their allies became more conversant and more comfortable talking about, and acting upon, workers’ rights as human rights. The focus was on workers’ rights overseas. But as the lens sharpened, the more it reflected back. What about workers’ rights at home? Growing awareness and concern for labor rights in trade arrangements and in corporate codes of conduct inexorably widened a “hypocrisy gap” between official positions, both of the U.S. government and of U.S. business, and the reality of workers’ rights violations in the United States. In turn, this gap created ample new space for human rights and labor rights advocates to put U.S. law and practice under a spotlight of international standards.

OPENING THE FRONT DOOR TO WORKERS’ RIGHTS

Some Frame-Setting Cases

The most significant injection of international human rights principles into U.S. law came outside the labor context, in the Supreme Court’s 2005 decision in *Roper v. Simmons* (543 U.S. 551). The Court ruled that the execution of minors (i.e., who committed capital crimes when they were below age eighteen) is unconstitutional under the “cruel and unusual punishment” clause of the Fifth Amendment. The Court said:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the

juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. . . .

It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

The challenge now is to bring a similar openness to international human rights standards to labor law and practice in the United States. Without trying to overstate the case, it is fair to say that international human rights law appears to be having a nascent “climate-changing” effect on American labor law, practice, and discourse, bringing them closer to a human rights framework.

A growing cadre of scholars and practitioners familiar with comparative and international labor law are bringing into U.S. discourse labor provisions in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; ILO Conventions and Declarations; and other international instruments.

Human rights law started making inroads in U.S. labor-related jurisprudence first in litigation on behalf of workers in countries outside the United States. Human rights strictures against forced labor and ILO findings on forced labor in Burma were central elements of a lawsuit brought against the California-based Unocal Corporation in federal court. The case ultimately was settled before going to trial with millions of dollars in recompense to victims of forced labor violations.⁴²

Once plaintiffs overcame procedural hurdles and the case moved toward trial before a jury, Burma was an easy case substantively. The Burmese military junta committed beatings, rapes, torture, and murder to force villagers to work on the pipeline project. Even for a U.S. court that rarely takes up international human rights law issues, defining these abuses as violations of universal human rights standards on torture and forced labor was no problem.

Whether workers’ freedom of association in trade union activity rises to the same level is not so clear in U.S. law. This was the issue facing the court at the motions stage in a 2003 decision in the case of *Rodriguez v. Drummond Coal Co.*, (256 F. Supp. 1250). The case involved wrongful death claims by families of murdered Colombian mineworker union leaders under the Alien Tort Claims Act.

Called as an expert witness, Professor Virginia Leary, a long-time advisor to the ILO, supported the view that workers’ freedom of association achieved the level of a *jus cogens* norm in international law. Her testimony helped convince a federal judge to move the case toward trial. The judge denied the U.S.-based coal company’s motion to dismiss the case, saying:⁴³

Although this court recognizes that the United States has not ratified ILO Conventions 87 and 98, the ratification of these conventions is not necessary to

make the rights to associate and organize norms of customary international law. As stated above, norms of international law are established by general state practice and the understanding that the practice is required by law. . . .

This court is cognizant that no federal court has specifically found that the rights to associate and organize are norms of international law for purposes of formulating a cause of action under the ATCA. However, this court must evaluate the status of international law at the time this lawsuit was brought under the ATCA. After analyzing “international conventions, international customs, treatises, and judicial decisions rendered in this and other countries” to ascertain whether the rights to associate and organize are part of customary international law, this court finds, at this preliminary stage in the proceedings, that the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants’ motion to dismiss.

At this writing the Drummond case is still in litigation. But the judge’s ruling contains the core principle that workers’ rights in international human rights instruments are justiciable in U.S. courts.

The same principle arose in a mirror-image case making *American* workers’ rights justiciable in a *foreign* court under international labor standards. In 2002, the Norwegian oil workers union (NOPEF) sought judicial permission under Norwegian law to boycott the North Sea operations of Trico Corp., a Louisiana company that allegedly violated American workers’ rights in an organizing campaign in the Gulf Coast region. Trico’s North Sea arm was the company’s most profitable venture, and a boycott could have devastating economic effects.

A key issue in the case was whether U.S. labor law and practice conform to ILO norms. Under Norwegian law, compliance with ILO Conventions 87 and 98 was the hinge on which the boycott’s legality turned. The Norwegian court’s finding that U.S. law failed to meet international standards would let the NOPEF boycott proceed.

NOPEF and Trico’s Norwegian counsel each called expert witnesses from the United States to testify whether U.S. law and practice violate ILO core standards on freedom of association. Just before the U.S. experts’ testimony, NOPEF settled the case with Trico’s promise to respect workers’ organizing rights in Louisiana.⁴⁴ The boycott trigger was deactivated. Still, the Trico case signaled a remarkable impact of ILO core standards within the United States. Similar cases could arise in the future as trade unions increase their cross-border solidarity work.⁴⁵

In an innovative class action lawsuit combining claims of workers in Wal-Mart supplier factories in China, Bangladesh, Indonesia, Swaziland, and Nicaragua with claims by American employees of Wal-Mart, the International Labor Rights Fund (ILRF) put workers’ human rights standards before a California court. Here is how the ILRF fashioned the complaint on behalf of U.S. workers:

The California Plaintiffs

Plaintiff Kristine Dall was enjoying the pay and benefits attributable to her membership in Local 324 of the United Food and Commercial Workers Union (UFCW). She was working in an environment in which workers’ basic rights were respected, and she was being paid a liveable wage. . . .

Plaintiff Kristine Dall suffered a concrete reduction in her pay and benefits that is directly attributable to Wal-Mart's comparative advantage of being able to offer low prices because it produces, or causes to be produced, many of its products outside the United States under conditions that violate the local laws where the good are produced, generally accepted international norms, and the specific provisions of Wal-Mart's own "Code of Conduct." . . .

The California Plaintiffs . . . are seeking to enforce important rights affecting the public interest . . . Defendant Wal-Mart's fraudulent and deceptive practices as alleged herein constitute ongoing and continuous unfair business practices . . . Such practices include, but are not limited to, the knowing use of suppliers who fail to adhere to minimum standards of labor and human rights . . . Wal-Mart has aggressively advertised that it has a code of conduct, that it complies with labor laws, international standards and its Code of Conduct, and that it generally treats its workers well. These statements and assertions were made to the general public by Wal-Mart officials and agents who knew that the statements and assertions were false.⁴⁶

This case is still in procedural stages at this writing, but if Wal-Mart's motions for summary judgment and motions to dismiss are rejected and the case moves toward trial, the implications of international labor and human rights standards for U.S. workers will take on new significance.

Human Rights Organizations Make the Turn

Human rights organizations took the first step toward convergence with trade union advocates on an international labor rights agenda for American workers. For example, Amnesty International USA created a Business and Human Rights division with extensive focus on workers' rights. Oxfam International has broadened its development agenda to include labor rights and standards, and its Oxfam America group created a Workers' Rights program to take up these causes inside the United States. In 2003, Oxfam launched a "national workers' rights campaign" on conditions in the U.S. agricultural sector. In 2004 the group published a major report titled *Like Machines in the Fields: Workers Without Rights in American Agriculture*.⁴⁷

Perhaps most notably, Human Rights Watch (HRW) published three path-breaking reports in 2000–2001 on workers' rights in the United States under international human rights standards. The reports covered child labor in American agriculture, conditions of immigrant household domestic workers, and U.S. workers' freedom of association.⁴⁸

Fingers to the Bone declared:

United States law and practice contravene various international law prohibitions on exploitative and harmful work by children, including standards set by the Convention on the Rights of the Child. The United States appears to be headed toward noncompliance with the 1999 ILO Worst Forms of Child Labor Convention as well, which will enter into force for the U.S. in December 2000. It requires that member governments prohibit and eliminate "the worst forms of child labor." The United States is off to a dubious start in this regard, having claimed that it is already in full compliance with the convention and that no change to law or practice is necessary.

Hidden in the Home said:

Because changing employers is difficult if not impossible, workers often must choose between respect for their own human rights and maintaining their legal immigration status. . . . Many workers choose to endure human rights violations temporarily rather than face deportation. . . .

The special visa programs for domestic workers are conducive to and facilitate the violation of the workers' human rights. The U.S. government has not removed the impediments that deter domestic workers with special visas from challenging, leaving, or filing legal complaints against abusive employers; has failed to monitor the workers' employment relationships; and has failed to include live-in domestic workers in key labor and employment legislation protecting workers' rights.

Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards forged new links with the American labor movement. This book-length HRW report garnered significant attention upon its release in August 2000. International, national, and local commentary featured the report's findings, based on exhaustive case studies, showing that the United States' fails to meet international standards on workers' organizing and bargaining rights.⁴⁹

Most often cited were these passages:

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. . . .

Researching workers' exercise of these rights in different industries, occupations, and regions of the United States to prepare this report, Human Rights Watch found that freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it. . . . Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association.

Private employers are the main agents of abuse. But international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. In the United States, labor law enforcement efforts often fail to deter unlawful conduct. When the law is applied, enervating delays and weak remedies invite continued violations. . . . As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.

After that initial response, *Unfair Advantage* shifted to sustained use as an authoritative reference point in U.S. labor law and human rights discourse, becoming the standard source for labor advocates reaching out to new constituencies in a language of human rights, not just labor-management relations.⁵⁰ For example, *Scientific American* published a feature on *Unfair Advantage* for its million-plus readership one year after the report came out.⁵¹ At its National Convention in June 2002, Americans for Democratic Action (ADA) presented the first annual Reuther-Chavez Award to Human Rights Watch for its U.S. labor report.⁵²

ADA called *Unfair Advantage* “an exhaustive analysis of the status of workers’ freedom to organize, bargain collectively, and strike in the United States, written from the perspective of international human rights standards. It is the first comprehensive assessment of workers’ rights to freedom of association in the U.S. by a prominent international human rights organization.” In presenting the award, ADA noted that “Human Rights Watch, in preparing and releasing *Unfair Advantage*, has given us what we hope will be enduring evidence in the struggle to regain fair advantage for workers in the U.S.”⁵³

Unfair Advantage has also become a point of reference in the scholarly community. Many U.S. labor law teachers have added the book as a supplemental law school text. So have professors in human rights, political science, sociology, government, industrial relations, and other academic fields. The American Political Science Association gave a “best paper” award at its 2001 APSA Annual Meeting to “From the Wagner Act to the Human Rights Watch Report: Labor and Freedom of Expression and Association, 1935–2000.”⁵⁴

The *British Journal of Industrial Relations* devoted two issues of a Symposium to the Human Rights Watch report. Symposium editors Sheldon Friedman and Stephen Wood attracted contributions from leading labor law, labor history, and industrial relations scholars in the United States, Canada, and Britain. In the Symposium, University of South Carolina business school professor Hoyt. N. Wheeler said, “It is by explicitly taking a human rights approach that the Human Rights Watch report makes its most important contribution to the understanding and evaluation of American labor policy.” University of Texas law school professor Julius Getman called *Unfair Advantage* “a powerful indictment of the way in which U.S. labor law deals with basic rights of workers.”

McMaster University business school professor Roy J. Adams called publication of *Unfair Advantage* “an important event because of the new perspective that it brings to bear on American labor policy.” University of Essex human rights professor Sheldon Leader termed the report “an important document . . . that should help us see what difference it makes to connect up the corpus of principles in labor law with the wider considerations of human rights law.” K.D. Ewing, a law professor at King’s College, London, said:

In what is perhaps a novel approach for an American study, the report is set in the context of international human rights law . . . ‘where workers are autonomous actors, not objects of unions’ or employers’ institutional interests’ [quoting from the report] . . . The approach of the HRW report and the methodology that it employs have a universal application; they are particularly relevant for the United Kingdom . . .⁵⁵

James Gross concluded:

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 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.⁵⁶

In 2005, HRW continued its program on workers' rights in the United States with a major report on violations in the U.S. meat and poultry industry. In 2007, a massive new report titled *Discounting Rights Wal-Mart's Violation of US Workers' Right to Freedom of Association* on workplace rights violations of Wal-Mart employees in the United States put that company under a human rights spotlight.⁵⁷

Blood, Sweat and Fear made these findings on workers' human rights in the meat and poultry industry:

Workers in this industry face more than hard work in tough settings. They contend with conditions, vulnerabilities, and abuses which violate human rights. Employers put workers at predictable risk of serious physical injury even though the means to avoid such injury are known and feasible. They frustrate workers' efforts to obtain compensation for workplace injuries when they occur. They crush workers' self-organizing efforts and rights of association. They exploit the perceived vulnerability of a predominantly immigrant labor force in many of their work sites. These are not occasional lapses by employers paying insufficient attention to modern human resources management policies. These are systematic human rights violations embedded in meat and poultry industry employment. . . .

Health and safety laws and regulations fail to address critical hazards in the meat and poultry industry. Laws and agencies that are supposed to protect workers' freedom of association are instead manipulated by employers to frustrate worker organizing. Federal laws and policies on immigrant workers are a mass of contradictions and incentives to violate their rights. In sum, the United States is failing to meet its obligations under international human rights standards to protect the human rights of meat and poultry industry workers.

In both meatpacking and Wal-Mart, trade unions and activist communities seized on the reports as major resources in their campaigns to reform practices in those industries and companies. The United Food and Commercial Workers *Justice@Smithfield* campaign for workers at the Smithfield Foods hog-slaughtering plant in Tar Heel, North Carolina, makes extensive use of the report, and features it in a campaign video and on its Web site. Smithfield's violations of workers rights, including firings, beatings, and false arrests of union supporters, were a central case study in the HRW report.

New Initiatives and New Organizations

The new convergence of labor and human rights communities is reflected in a variety of new campaigns and organizations with a labor-human rights mission. The AFL-CIO has launched a broad-based "Voice@Work" project which it characterizes as a "campaign to help U.S. workers regain the basic human right to form unions to improve their lives." Voice@Work stresses international human rights in workers' organizing campaigns around the

country. In 2005, the labor federation held more than 100 demonstrations in cities throughout the United States, and enlisted signatures from eleven Nobel Peace Prize winners, including the Dalai Lama, Lech Walesa, Jimmy Carter, and Archbishop Desmond Tutu of South Africa supporting workers' human rights in full page advertisements in national newspapers.⁵⁸

In December 2006, the AFL-CIO marked International Human Rights Day with a two-day Strategic Organizing Summit meeting for trade union organizers. Materials to participants declared that "International Human Rights Day is the anniversary of the ratification of the United Nations Universal Declaration of Human Rights, which recognizes as a basic human right the freedom of all workers to form unions and bargain together." The conference launched a campaign for passage of the Employee Free Choice Act (EFCA) in the Congress following Democratic gains in the 2006 midterm elections.

The EFCA would incorporate international labor rights principles into U.S. law on union organizing.⁵⁹ A key Senate sponsor said, "The right to organize and join a union is a fundamental right recognized in the United Nations Declaration of Human Rights. Yet, the United States violates this fundamental principle every day because our current laws don't adequately protect employee rights."⁶⁰

Labor and community organizations created Jobs with Justice (JwJ) "with the vision of lifting up workers' rights struggles as part of a larger campaign for economic and social justice," as JwJ describes its mission. JwJ focuses on building local coalitions to protect workers' organizing efforts when local employers engage in union-busting tactics that violate workers' rights. A signature JwJ initiative is the creation of local Workers Rights Boards, usually composed of elected officials, religious leaders, civil rights leaders, and other respected figures who conduct public hearings exposing employers' aggressive interference with workers' organizing efforts. In recent years JwJ has broadened its work to campaign for national health care, local government accountability for economic development, and global workers' rights.⁶¹

In 2004, trade unions and allied labor support groups created a new NGO called American Rights at Work (ARAW). ARAW launched an ambitious program to make human rights the centerpiece of a new civil society movement for U.S. workers' organizing and bargaining rights. ARAW's twenty-member board of directors includes prominent civil rights leaders, former elected officials, environmentalists, religious leaders, business leaders, writers, scholars, an actor, and one labor leader (AFL-CIO President John Sweeney). The group's "International Advisor" is Mary Robinson, former United Nations High Commissioner for Human Rights.⁶²

Less directly connected to organized labor, but with rights at work an important part of its agenda, the National Economic and Social Rights Initiative (NESRI) took shape the same year with the mission of incorporating principles of the UN Covenant on Economic, Social, and Cultural rights into U.S. law and practice. NESRI is devoted to "working with organizers, policy advocates and legal organizations to incorporate a human rights perspective into their work and build human rights advocacy models tailored for the U.S."⁶³

Along with NESRI, the RFK Center for Human Rights has helped the Coalition of Immokalee Workers in campaigns stressing human rights for agricultural workers in Florida. The Coalition's efforts brought a series of successful slavery prosecutions against labor traffickers in the state, and won improvements in wages and working conditions for field workers in a sustained campaign against Taco Bell and its parent Yum Brands, Inc.⁶⁴ In general, many organizations are turning to international human rights arguments in defense of immigrant workers in the United States.⁶⁵

The National Employment Law Project (NELP) includes an immigrant worker project under the rubric "workers rights are human rights—advancing the human rights of immigrant workers in the United States." NELP has been a leader in filing complaints on immigrant workers' rights violations in the United States to the Inter-American Commission and Inter-American Court of Human Rights.⁶⁶

Working with Mexican colleagues, NELP sought an Inter-American Court Advisory Opinion on U.S. treatment of immigrant workers. The petition was prompted by the Supreme Court's 2002 *Hoffman Plastic* decision stripping undocumented workers illegally fired for union organizing from access to back-pay remedies. In its opinion, the Court said that undocumented workers are entitled to the same labor rights, including wages owed, protection from discrimination, protection for health and safety on the job, and back pay, as are citizens and those working lawfully in a country.

The Court said that despite their irregular status, "If undocumented workers are contracted to work, they immediately are entitled to the same rights as all workers. . . . This is of maximum importance, since one of the major problems that come from lack of immigration status is that workers without work permits are hired in unfavorable conditions, compared to other workers."

The Court specifically mentioned several workplace rights that it held must be guaranteed to migrant workers, regardless of their immigration status:

In the case of migrant workers, there are certain rights that assume a fundamental importance and that nevertheless are frequently violated, including: the prohibition against forced labor, the prohibition and abolition of child labor, special attentions for women who work, rights that correspond to association and union freedom, collective bargaining, a just salary for work performed, social security, administrative and judicial guarantees, a reasonable workday length and in adequate labor conditions (safety and hygiene), rest, and back pay.

Finally, the Court declared that its consultative decision should be binding on all members of the Organization of American States, whether or not they have ratified certain Conventions that formed the basis of the opinion. It based its decision on the nondiscrimination and equal protection provisions of the OAS Charter, the American Declaration, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the Universal Declaration of Human Rights. The United States has not acted on the Court's advisory opinion.⁶⁷

Also advocating for rights of immigrant workers are nearly 200 "workers centers" throughout the United States. These are private, locally based service and education centers, often housed in or supported by churches.

They assist immigrants with problems of discrimination, nonpayment of wages, and other violations. Many stress the human rights nature of their efforts.⁶⁸

The National Workrights Institute (NWI) was founded in 2000 by the former staff of the American Civil Liberties Union's National Taskforce on Civil Liberties in the Workplace. NWI describes itself as "a new organization dedicated to human rights in the workplace, with a declared strategy of selecting "a small number of issues where there is both the potential of creating substantial long range improvement in workplace human rights and a current opportunity for constructive engagement." The group focuses on electronic monitoring in the workplace, drug testing, genetic discrimination, lifestyle discrimination, and law and practice on wrongful discharge.⁶⁹

Reaching out to the religious community, Interfaith Worker Justice (IWJ) is a national coalition of leaders of all faiths supporting workers' rights under religious principles. IWJ places divinity students, rabbinical students, seminarians, novices, and others studying for careers in religious service in union-organizing internships. Through a national network of local religious coalitions, it also sponsors projects for immigrant workers, poultry workers, home-care workers, and other low-wage employees. IWJ gives special help when religious-based employers, such as hospitals and schools, violate workers' organizing and bargaining rights.⁷⁰

A new student movement that began against sweatshops in overseas factories has adopted a human rights and labor rights approach to problems of workers in their own campuses and communities, often citing human rights as a central theme. Students at many universities held rallies, hunger strikes, and occupations of administration offices to support union organizing, "living wage," and other campaigns among blue-collar workers, clerical and technical employees, and other sectors of the university workforce.⁷¹

This section could be amplified with yet more examples of new organizations, or new projects within long-established groups, taking up U.S. workers' rights as human rights. The point here is to affirm that the human rights and labor communities no longer run on separate, parallel, never-meeting tracks. They have joined in a common mission with enhanced traction to advance workers' rights.

Trade Union Human Rights Reports

The new human rights mission in the labor movement is reflected in the use unions are making of human rights reports in specific organizing campaigns. Trade unionists find that charging employers with violations of international human rights, not just violations of the National Labor Relations Act or the Fair Labor Standards Act, gives more force to their claims for support in the court of public opinion. The Teamsters union, for example, launched a human rights campaign against Maersk-Sealand, the giant Denmark-based international shipping company, for violating rights of association among truck drivers who carry cargo containers from ports to inland distribution centers. The company fired workers who protested low pay and dangerous conditions, and threatened retaliation against others if they continued their organizing effort.

The union's report said:

The responsibility of multinational corporations to recognize international human rights is becoming an important facet of international law. . . . A review and analysis of recent actions by Maersk's U.S. divisions reveal a systematic pattern of reprisals against owner-drivers who seek to exercise basic rights of association. . . . Cases examined in this report arose across the length and breadth of the United States—Baltimore, Maryland, Memphis and Nashville, Tennessee, Houston, Texas and Oakland, California.

Specific circumstances differ, but the underlying pattern is similar. Truck drivers dependent on Maersk's U.S. divisions . . . sought collective dialogue with Maersk companies. Company officials responded not with dialogue but with threats, harassment and dismissal of workers and leaders. These actions violate international human rights and labor rights norms for workers.

The report went on to present detailed case studies of Maersk's labor rights violations. It concluded:

Maersk officials claim that as independent contractors, not employees, their drivers are not covered by the National Labor Relations Act and can be dismissed for union activity with impunity. The company also maintains that drivers are also subject to antitrust laws and can be threatened with lawsuits for violations.

But the often artificial distinction between employees and contractors is irrelevant to a human rights analysis. The Universal Declaration of Human Rights says everyone has the right to freedom of association and the right to form trade unions. UN covenants and ILO conventions and declarations on freedom of association apply to *all* workers, not some workers.

Among the report's recommendations were these on human rights:

Maersk and its U.S. divisions should undertake internal training programs for managers on international human rights and labor rights norms affecting workers.

Through press statements, by direct written communications to Maersk drivers, and in meetings with all Maersk workers (without regard to legal distinctions as to employee or contractor status), Maersk should declare publicly its commitment to respect international human rights and labor rights standards, including a policy of non-reprisals against any workers who exercise rights of assembly, association and speech in connection with their employment. . . .

Failing the implementation of these recommendations, the International Brotherhood of Teamsters and the International Transport Federation should consider filing complaints in one or more international human rights and labor rights venues, such as the International Labor Organization's Committee on Freedom of Association or the NAFTA Labor Commission; under the OECD's Guidelines for Multinational Enterprises, or with the European Court of Justice.⁷²

This was not just a report that sat on shelves. The union printed thousands of copies for distribution to affiliates of the International Transport Federation (ITF), the global trade union for workers in the transport sector. In 2004, workers protested at the Danish embassy and at consulates around the United States, distributing copies of the report.⁷³ In 2005, union leaders went to the corporation's annual shareholders meeting in Copenhagen giving

copies to investors and to the Danish media, with significant attention.⁷⁴ In 2006, the union introduced a shareholders resolution, common at American companies' annual meetings but a novelty for Maersk, calling on the company to adopt international labor rights standards as official company policy.⁷⁵

Similar violations by a large Catholic hospital chain in Chicago prompted a human rights report by the American Federation of State, County, and Municipal Employees (AFSCME) on how the employer's actions violated both international human rights standards and principles of Catholic social doctrine. This report said:

The actions of RHC management demonstrate a systematic pattern of interference with workers' organizing rights and reflect a failure to meet human rights principles and obligations. . . . Management signals a fundamental misunderstanding of the nature of the rights at stake when it says that it respects "the right of unions to represent employees if employees so choose." This mistakenly defines "the right of unions" as the right in question, rather than the right of workers to freely form and join unions and to bargain collectively, which is the core international human rights standard.

Focusing on union rights rather than worker rights is management's basis for launching an aggressive campaign of interference against RHC workers' organizing efforts. Management asserts that it is battling the union, not battling its own employees. However, workers are the ones who suffer management harassment, intimidation, spying, threats and other violations of rights recognized under international human rights law. . . .

RHC workers have the right under international human rights law to freedom of association and organization by forming and joining a trade union to seek collective representation before management. RHC has a corresponding obligation to honor this right and respect its exercise. Instead, RHC has responded with an aggressive campaign against workers' organizing rights in violation of rights recognized under international human rights law.⁷⁶

This report too served as a tool for union organizing in the workplace and for organizing support in local political, religious, and human rights communities.⁷⁷

The Teamsters union and the Service Employees International Union (SEIU) collaborated to present a human rights report at the May 2006 annual general meeting of First Group PLC, a multinational British firm. The report detailed workers rights violations by its U.S. subsidiary, First Student, Inc., a school bus transportation company with a record of aggressive interference with workers' organizing efforts. Rather than quote from the report, this excerpt from a related news article reflects its use:

The head of Britain's biggest transport company promised yesterday to "stamp out anti-union behaviour" by senior managers at a key U.S. subsidiary amid unrest among the organisation's shareholders.

Martin Gilbert, the chairman of First Group, told the company's annual meeting the organisation was taking the issue "very seriously" after a number of institutional shareholders voted for a "human rights" motion in defiance of the board's wishes.

First Student, which operates more than 20,000 yellow school buses in the United States, has been accused of harassing and intimidating union activists. . . .

The group launched an investigation into the allegations of anti-union behaviour and will report back to shareholders in the autumn.

Outside the meeting, members of the Transport & General Workers' Union handed out copies of a report on First Student's labour relations policies concluding that First Student violated international human rights standards on workers' freedom of association.

A spokesman for First said the group was not anti-union and "never had been". The board believed its present code of ethics covered the points made in the motion which called for the company to abide by standards laid down by the UN's International Labour Organisation. However, directors would consider whether policies should be brought more in line with ILO principles.

The group would ensure there were formal training programmes in place for U.S. managers to ensure they abided by group policies.⁷⁸

Using International Instruments

The American labor movement's new interest in international human rights law is also reflected in its increasing use of ILO complaints and international human rights mechanisms. While recognizing that the ILO Committee on Freedom of Association (CFA) cannot "enforce" its decisions against national labor law authorities and courts, U.S. unions are turning to the Committee for its authoritative voice and moral standing in the international community. They believe that Committee decisions critical of U.S. violations of workers' organizing and bargaining rights can bolster movements for legislative reform to reverse anti-labor decisions by the NLRB and the courts.

In 2002, the AFL-CIO joined with the Mexican *Confederación de Trabajadores de México* (CTM) to file a CFA complaint against the Supreme Court's *Hoffman Plastic* decision. The Supreme Court's five-to-four ruling held that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally fired for union organizing. The five-justice majority said that enforcing immigration law takes precedence over enforcing labor law.

The four dissenting justices said there was not such a conflict and that a "backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent."

The union federations' ILO complaint said:

The *Hoffman* decision and the continuing failure of the U.S. administration and Congress to enact legislation to correct such discrimination puts the United States squarely in violation of its obligations under ILO Conventions 87 and 98 and its obligations under the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*. From a human rights and labor rights perspective, workers' immigration status does not diminish or condition their status as workers holding fundamental rights. . . .

By eliminating the back pay remedy for undocumented workers, the *Hoffman* decision annuls protection of their right to organize. The decision grants license to employers to violate workers' freedom of association with impunity. Workers have no recourse and no remedy when their rights are violated. This is a clear breach of the requirement in Convention 87 to provide adequate protection against acts of anti-union discrimination.⁷⁹

In November 2003, the Committee on Freedom of Association issued a decision that the *Hoffman* doctrine violates international legal obligations to protect workers' organizing rights. The Committee concluded that "the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination."⁸⁰

The ILO Committee recommended congressional action to bring U.S. law "into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the *Hoffman* decision."

In June 2005, the International Federation of Professional Technical Employees (IFPTE), together with the AFL-CIO and the global union federation Public Services International (PSI), filed a CFA complaint on behalf of locally engaged staff at the British Embassy in Washington, D.C., after embassy officials refused to bargain with employees' choice of IFPTE as their union representative.⁸¹ The embassy said that it need not recognize the employee's choice because locally hired workers were "engaged in the administration of the state," taking them outside protection of ILO standards based on earlier Committee decisions. IFPTE argued:

The Committee well knows that the definition of "public servants engaged in the administration of the state" does not reach locally engaged staff of an embassy. Locally engaged staff do not make diplomatic or equivalent policy. It is worth noting that most of the diplomatic staff posted to the Embassy are in fact represented by a UK public servants' union. *A fortiori*, locally engaged staff have the right to form and join a trade union for the defense of their interests under application of ILO principles and standards reflected in Conventions Nos. 87 and 98 as well as in the Declaration on Fundamental Principles and Rights at Work.

At this writing, the CFA is still considering the complaint, awaiting further information from the parties.⁸²

In October 2006, the AFL-CIO filed a CFA complaint against the NLRB decision in the so-called *Oakwood* trilogy, in which the NLRB announced an expanded interpretation of the definition of "supervisor" under the National Labor Relations Act.⁸³ Under the new ruling, employers can classify as "supervisors" employees with incidental oversight over co-workers even when such oversight is far short of genuine managerial or supervisory authority.

In its complaint to the ILO, the AFL-CIO cited Convention No. 87's affirmation that

Workers and employers, without distinction whatsoever, shall have the right to establish and . . . to join organizations of their own choosing without previous authorization. The federation argued that "In violation of the Convention, the NLRB's *Oakwood* trilogy creates a new distinction in U.S. labor law denying freedom of association to employees deemed "supervisors" under the new test for supervisory status.

In connection with Convention No. 98's requirement that "Workers shall enjoy adequate protection against acts of anti-union discrimination" the

AFL-CIO asserted that the NLRB's *Oakwood* trilogy "strips employees in the new 'supervisor' status of any and all protection. Employers may fire them with impunity if they do not relinquish union membership or if they participate in union activities. Employers can even force these employees, under pain of dismissal, to participate in management's anti-union campaigns."

The AFL-CIO complaint pointed to principles established by earlier CFA cases from other countries involving the status of workers deemed "supervisors":⁸⁴

- The expression "supervisors" should be limited to cover only those persons who genuinely represent the interests of employers;
- Legal definitions of "supervisors" or other excluded categories of workers should not allow an expansive interpretation that excludes large numbers of workers from organizing and bargaining rights;
- Employees should not be "excluded" to undermine worker organizing or to weaken the bargaining strength of trade unions;
- Changing employees' status to undermine the membership of workers' trade unions is contrary to the principle of freedom of association;
- Even true supervisors have the right to form and join trade unions and to bargain collectively, though the law may require that their bargaining units be separate from those of supervised employees.

The AFL-CIO called on the Committee to "lend its voice and its moral standing to support workers' freedom of association in the United States," and concluded:

Finally, we ask the Committee to send a direct contacts mission to the United States to examine the effects of the NLRB's *Oakwood* trilogy. Such direct contact with workers, union representatives, employers and their representatives, and labor law authorities will provide the Committee with "on the ground" understanding of the issues. Direct contacts will better inform the Committee's analysis by giving life to its review of documents in the case. A direct contact mission will have the added benefit of bringing dramatic public attention to the work of the Committee on Freedom of Association in a country and a labor law community that, lamentably, know little about the ILO and the authoritative role of the Committee on Freedom of Association.

The United Electrical, Radio, and Machine Workers of America (UE) is an independent union known for its progressive politics and internal democracy. Traditionally a manufacturing sector union, the UE began an innovative organizing campaign among low-paid public sector workers in North Carolina, a state that prohibits collective bargaining by public employees. Using state and local civil service procedures, the union has won several grievances and wage increases for workers.

In 2006 the UE convinced the International Commission for Labor Rights, a new NGO composed of labor lawyers and professors from around the world, to hold a public hearing in North Carolina to hear firsthand from union supporters about violations of their organizing and bargaining rights. Labor experts from Canada, Mexico, Nigeria, India, and South Africa joined the hearing.

The ICLR issued a report finding “significant violations of internationally recognized labor standards in the public sector in North Carolina, which were strongly correlated to the absence of collective bargaining rights.”⁸⁵

In 2006 the UE filed a complaint with the ILO Committee on Freedom of Association charging that North Carolina’s ban on public worker bargaining, and the failure of the United States to take steps to protect workers’ bargaining rights, violate Convention No. 87’s principle that “all workers, without distinction” should enjoy organizing and bargaining rights, and Convention No. 98’s rule that only public employees who are high-level policymakers, not rank and file workers, be excluded.

Alongside the ILO complaint, the UE turned to the Inter-American Commission for Human Rights with a request for a “thematic hearing” under IACHR procedures on the conflict between North Carolina’s prohibition on collective bargaining and freedom of association protections in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Inter-American Democratic Charter.⁸⁶

Joined by twenty-four other unions in the United States, Mexico, and Canada, the UE also filed a complaint under NAFTA’s labor side agreement in October 2006 arguing that North Carolina’s ban on public employee bargaining violated NAALC labor principles on freedom of association. That was not the only use of NAFTA’s labor accord to defend workers’ rights in the United States. In 2001, supported by the NYU Law School immigration law clinic, the Chinese Staff and Workers’ Association (CSWA), the National Mobilization Against SweatShops (NMASS), local worker support groups Workers’ Awaaz and Asociación Tepeyac, and several individual workers filed a NAALC complaint on the breakdown of New York state’s workers’ compensation system. The complaint led to consultations among the U.S. and Mexican labor departments and New York state authorities on finding ways to accelerate claims processing, a key aspect of the complaint.⁸⁷

In 2003, the Farmworker Justice Fund, Inc., and Mexico’s Independent Agricultural Workers Central (CIOAC) filed a complaint under the NAALC on behalf of thousands of migrant agricultural workers in North Carolina holding H-2A visas for temporary agricultural labor.⁸⁸ The Farm Labor Organizing Committee (FLOC) was engaged in an organizing campaign among those workers, and a boycott of Mt. Olive Pickle Co., a major North Carolina agricultural employer. The complaint gained widespread support in Mexico and helped the union win a breakthrough collective agreement in 2004.⁸⁹

In 2005, the Northwest Workers’ Justice Project, the Brennan Center for Justice at NYU Law School, the National Immigration Law Center (NILC), the Idaho Migrant Council, the Northwest Treeplanters and Farmworkers United (PCUN), and six Mexican organizations filed a complaint for H-2B temporary migrant workers in the Idaho timber industry. The submission pointed to forced labor, subminimum wages, discrimination, safety hazards, and other violations of NAALC labor principles.⁹⁰

As these cases and complaints suggest, the readiness of workers’ rights advocates to use international labor instruments and mechanisms has expanded exponentially in the past ten years. Some unions are now laying the ground

for a next stage: using trade agreements signed by the United States to put U.S. workers' rights violations under international scrutiny in a trade context.

New Labor Scholarship

Another "climate-changing" effect is taking place among U.S. labor and human rights scholars. Many are incorporating human rights norms and ILO core standards in their analyses, not just domestic discourse based on the commerce clause and other economic considerations. Here are three examples involving workplace health and safety, labor arbitration, and the right to work (in its true sense, not the anti-union "right-to-work" fraud).

Many American analysts view occupational health and safety protections and workers' compensation for workplace injuries as strictly economic benefits dependent on a country's level of development or a company's ability to pay for them, not as basic rights. Professor Emily Spieler, a leading expert on worker health issues, noted:

The apparent underlying assumptions are that working conditions, including occupational safety, are context driven, difficult to define, and contingent on local levels of economic development and productivity. . . . This approach relegates subminimum wages, excessive hours, and sometimes brutally dangerous conditions to a lower level of importance in human rights discourse; it ratifies the view that labor is a commodity that is fully subject to market forces, no matter how abusive the resulting working conditions.⁹¹

Professor Spieler pointed out that workplace health and safety was the subject of the first international labor rights treaty, a 1906 accord banning manufacture and export of white phosphorus matches deadly to workers who produced them. Since then, authoritative international human rights instruments include workplace health and safety and compensation for workplace injuries as fundamental rights. In a powerful analogy driving home her point, Professor Spieler argues:

In view of the egregious health and safety hazards in some workplaces . . . postponing the improvement of health and safety until market forces can effect change is analogous to postponing the release of political prisoners who may die in prison until a despotic government is replaced through democratic elections. It is in fact the right to life that we are talking about when we talk about work safety.⁹²

Professor Spieler's carefully constructed argument for workplace health and safety as a human right does not rest at the level of a general proposition. She focuses on three more detailed standards for affording the right:

- Workers' right to information on workplace hazards;
- Workers' right to be free from retaliation for raising safety concerns or for refusing imminently dangerous work;
- Workers' right to work in an environment reasonably free from predictable, preventable, serious risks.

According to Professor Spieler's analysis, "human rights violations occur when employers' deliberate and intentional actions expose workers to preventable, predictable, and serious hazards. The fundamental right to be free from these hazards should be guaranteed."⁹³

As well as a renowned labor scholar—the leading historian of the National Labor Relations Board and analyst of workers' rights as human rights—Professor James A. Gross is a nationally prominent labor arbitrator. Among other responsibilities, he was a standing arbitrator for Major League Baseball and the Players' Union for many years.

Professor Gross has developed a creative proposal to bring international human rights jurisprudence into U.S. labor arbitration practice. He says:

The focus of this article is on the application of human rights standards to labor arbitration in the United States. . . . A worker was discharged for refusing to work under a furnace that had several glass leaks and electrode cooling problems. . . . The arbitrator decided, "the Company has a business it must run in an efficient and productive manner . . . recognizing the dangers associated with any kind of maintenance work in a large facility of this nature, . . . the Company must be able to assign employees to such work."

The proposition that management rights must take precedence over all else should not obscure a more humane value judgment, namely that nothing is more important at the workplace than human life and health. That is a human rights standard, not a management rights standard. . . .

It is only recently that many union leaders and members have come to understand workers' rights as human rights. As unions come to perceive themselves as human rights organizations promoting and protecting such fundamental human rights as the right to freedom of association and collective bargaining, safe and healthful workplaces, and discrimination-free treatment, there will be a necessary carry-over to the grievance-arbitration process. . . .

Unions can also pursue human rights clauses in contract negotiations with employers. Human rights clauses in collective bargaining agreements could become as common as management rights clauses. Since traditional labor arbitrators limit workers' rights to those set forth in collective bargaining agreements, they will have to consider workers' human rights if those rights are written into contracts. . . .

There can be no true workplace justice without recognizing and respecting those rights of human beings that are more compelling than any other rights or interests at the workplace. That will occur only when U.S. labor arbitrators come to utilize human rights standards in their decision-making.⁹⁴

Professor Philip Harvey argues compellingly for application of the UN's economic, social, and cultural rights covenant to the right to employment in the United States:

The right to work is expressly recognized in Article 23 of the Universal Declaration [and] in the International Covenant on Economic, Social and Cultural Rights . . . domestic advocacy of the right to work has occasionally been quite strong in the United States, and federal legislation stemming from this advocacy has succeeded in imposing, with one significant difference, essentially the same substantive obligations on the United States government that would flow from ratification of international human rights agreements recognizing the right to work. The difference is that ensuring access to work is not recognized

as a human right in this legislation, but merely a desirable policy goal competing for attention with other policy goals. . . .

In sum, the United States has imposed a statutory obligation on itself to secure the right to work that is substantially equivalent to the obligation that would follow from ratification of the International Covenant on Economic, Social and Cultural Rights. The only significant difference is that the statutes establishing this duty do not expressly recognize access to work as a human right.

We shall see that important consequences may flow from this distinction, but at this point I merely want to emphasize that the right to work claim has achieved some recognition in American law, despite the United States' strong resistance to accepting international human rights obligations beyond those already mandated by the nation's Constitution. Whether this recognition will grow with time is difficult to predict, but participants in employment policy debates in the United States should feel some obligation to address the legal mandates that do exist in this area under both international and domestic law.⁹⁵

CONCLUSION

Reason for Caution

None of this is meant to overstate the impact of the new labor-human rights alliance in the United States. In fact, some labor supporters caution against too much emphasis on a human rights argument for workers' organizing in the United States. They maintain that a rights-based approach fosters individualism instead of collective worker power; that demands for "workers' rights as human rights" interfere with calls for renewed industrial democracy; that channeling workers' activism through a legalistic rights-enhancing regime stifles militancy and direct action. Labor historian Joseph McCartin says:

Because it puts freedom ahead of democracy, rights talk tends to foster a libertarian dialogue, where capital's liberty of movement and employers' "rights to manage" are tacitly affirmed rather than challenged. Arguing in a rights-oriented framework forces workers to demand no more than that *their* rights be respected alongside their employers' rights. . . .

I am not suggesting that today's labor advocates should abandon their rights-based arguments. These have undeniable power, speak to basic truths, and connect to important traditions—including labor's historic internationalism. Rather, I am arguing that the "workers' rights are human rights" formulation alone will prove inadequate to the task of rebuilding workers' organizations in the United States unless we couple it with an equally passionate call for democracy in our workplaces, economy, and politics.⁹⁶

Historian Nelson Lichtenstein argues:

Two years ago HRW published *Unfair Advantage: Workers' Freedom of Association in the United States Under Human Rights Standards*, which is certainly one of the most devastating accounts of the hypocrisy and injustice under which trade unionists labor in one portion of North America. . . .

This new sensitivity to global human rights is undoubtedly a good thing for the cause of trade unionism, rights at work, and the democratic impulse. . . . [But]

as deployed in American law and political culture, a discourse of rights has also subverted the very idea, and the institutional expression, of union solidarity. . . . Thus, in recent decades, employer anti-unionism has become increasingly oriented toward the ostensible protection of the individual rights of workers as against undemocratic unions and restrictive contracts that hamper the free choice of employees. . . . without a bold and society-shaping political and social program, human rights can devolve into something approximating libertarian individualism.⁹⁷

Historian David Brody suggests that a human rights analysis too willingly accepts the view that collective bargaining is gained through a bureaucratic process of government certification rather than through workers' direct action. "That a formally democratic process might be at odds with workers' freedom of association," he writes, "seems to fall below the screen of 'human rights analysis.'"⁹⁸

These are healthy cautions from serious, committed scholars and defenders of trade unions and workers' rights. They contribute to a needed debate about the role and effectiveness of human rights activism and human rights arguments in support of workers' rights. All three historians agree that human rights advocacy is important for advancing the cause of social justice; that one need not make an "either-or" choice.

Reason for Hope

Conditions have ripened for raising the human rights platform to advance workers' rights in the United States. International labor law developments are fostering new ways of thinking and talking about labor law in the United States—a necessary condition for changing policy and practice.

Arguing from a human rights base, labor advocates can identify violations, name violators, demand remedies, and specify recommendations for change. Workers empowered in organizing and bargaining campaigns are convinced—and are convincing the public—that they are vindicating their fundamental human rights, not just seeking a wage increase or fringe benefits enhancement. Employers are thrown more on the defensive by charges that they are violating workers' human rights. The larger society is more responsive to the notion of trade union organizing as an exercise of human rights rather than economic strength.

This is not meant to overstate the case for human rights or to exaggerate the effects of the human rights argument. Labor advocates cannot just cry "human rights, human rights" and expect employers to change their behavior or Congress to enact labor law reform. U.S. labor law practitioners need first to learn more about international labor standards. Then they have to make international law arguments in their advocacy work before the NLRB and the courts. The simple step of regularly including international labor law standards, citations, and arguments in their briefs will begin to educate labor law authorities and the judiciary on the relevance of international human rights law to American labor law.

Change will be incremental. Labor and human rights advocates still confront general unawareness in the United States of international human rights

standards and of the International Labor Organization's work in giving precise meaning to those standards. Advocates still have an enormous educational challenge of making them more widely known and respected.

Trade unions' use of international instruments and mechanisms and human rights groups' labor rights reporting contribute to this educational effort. At the same time, they change the climate for workers' organizing and bargaining by framing them as a human rights mission, not a test of economic power between an employer and a "third party" (employers' favorite characterization of unions in organizing campaigns).

A human rights emphasis also has alliance-building effects. Human rights supporters and human rights organizations are a major force in civil society, one that historically stood apart from labor struggles, seeing them not as human rights concerns but as institutional tests of strength. Now the human rights community is committed to promoting workers' rights, bringing an important addition to labor's traditional allies in civil rights, women's, and other organizations. We cannot foresee in detail how this new alliance will proceed, but it has surely succeeded in reframing the debate, redefining the problems, and reshaping solutions to protect workers' rights as human rights in the United States.

Labor advocates' human rights focus is still new. It is not a magic bullet for organizing or bargaining success; there are no magic bullets for workers in this society. Still, many unions are finding the human rights theme one that resonates and advances their campaigns: the UFCW in that hog-slaughtering plant in North Carolina, AFSCME in its hospital workers' organizing campaign in Chicago, Teamsters in the drive to help port truck drivers stand up to big container shippers; SEIU in its campaign to organize school bus drivers, and many others. Perhaps in years ahead, with some victories to show from a human rights base in its organizing and bargaining campaigns, the labor movement and its allies can advance a rights-centered public policy agenda raising economic and social rights under international human rights standards.

NOTES

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4. For this citation and a discussion of this period and its references to industrial democracy and rights, see Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, NJ: Princeton University Press, 2002).

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6. For extensive analytical treatment of this point, see James Gray Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957," *Columbia Law Review* 102 (2002): 1.

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8. For two gripping accounts of strikes broken by permanent replacement, see Jonathan D. Rosenblum, *Copper Crucible: How the Arizona Miners' Strike of 1983 Recast Labor-Management Relations in America* (Ithaca, NY: Cornell University Press, 1998), and Julius Getman, *The Betrayal of Local 14: Paperworkers, Politics, and Permanent Replacements* (Ithaca, NY: Cornell University Press (1998). See also Steven Greenhouse, "Strikes Decrease to 50-Year Low as Threat of Replacement Rises," *New York Times* (January 29, 1996), p. A1.

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10. See Helen Dewar, Frank Swoboda, "Republican-Led Filibuster Kills Striker Replacement Bill in Senate," *The Washington Post* (July 14, 1994), p. A7.

11. Workers in right-to-work states earn on average \$7,000 a year less than workers in states where employers and unions can agree to "union security" clauses. See Center for Policy Alternatives, "Right to Work for Less," *Policy Brief*, available online at www.stateaction.org/issues/issue.cfm/issue/RightToWorkForLess.xml.

12. See U.S. General Accounting Office, *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights*, GAO-02-835 (September 2002).

13. See Julius Getman, "The National Labor Relations Act: What Went Wrong; Can We Fix It?" *Boston College Law Review* 45 (December 2003): 125.

14. For a collection of essays on this question, see Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005). See also Kenneth Roth, "The Charade of U.S. Ratification of International Human Rights Treaties," *Chicago Journal of International Law* 1 (Fall 2000): 347.

15. The United States has ratified Convention No. 105 on forced labor and Convention No. 182 on worst forms of child labor. The United States has not ratified Convention No. 29 on forced labor, No. 87 on freedom of association, No. 98 on the right to organize, No. 100 on equal pay, No. 111 on nondiscrimination, and No. 138 on child labor.

16. See Appendix B, Senate Foreign Relations Committee, Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 25 (1992), reprinted in 31 I.L.M. 645, 660 (1992).

17. See *Second and Third Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, October 21, 2005. The report did mention, without discussion, the Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB*, discussed in detail below. A failure to mention *Hoffman Plastic* would have signaled either gross incompetence or deliberate omission.

18. See Cynthia L. Estlund, "The Ossification of American Labor Law," *Columbia Law Review* 102 (2002): 1527.

19. See International Labor Organization, Follow-Up Reports to 1998 Declaration on Fundamental Principles and Rights at Work, United States report, "Freedom of Association and the Effective Recognition of the Right to Collective Bargaining," 1999.

20. See AFL-CIO, "Comments of the AFL-CIO on the Report by the Government of the United States of America, in Accordance with Article 22 of the Constitution of the International Labor Organization, on the Measures Taken to Give Effect to the Provisions of the Tripartite Consultation (International Labor Standards) Convention, 1976," on file with AFL-CIO legal department.

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22. See *International Labor Rights Education and Research Fund v. George Bush, et al.*, 752 F. Supp. 495, 1990.

23. See Petition to the United States Trade Representative, Labor Rights in Chile (1986); Petition to the United States Trade Representative, Labor Rights in Chile (1987)(filed by the UE and the AFL-CIO)(on file with USTR).

24. Paul Adams, "Suspension of Generalized System of Preferences from Chile — The Proper Use of a Trade Provision," *George Washington Journal of International Law & Economics* 23 (Winter 1990): 501.

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35. *North American Agreement on Labor Cooperation*, Article 2, Obligations.

36. See Evelyn Iritani, "Mexico Charges Upset Apple Cart in US," *The Los Angeles Times* (August 20), p. D1.

37. For extensive discussion of internal company codes, see Lance Compa and Tashia Hinchliffe-Daricarrere, "Enforcing International Labor Rights Through Corporate Code of Conduct," *Columbia Journal of Transnational Law* 33 (1995): 663.

38. See Mark B. Baker, "Private Codes of Conduct: Should the Fox Guard the Henhouse?," *University of Miami Inter-American Law Review* 24 (1993): 399; Robert J. Liubicic, "Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives," *Law & Policy in International Business* 30 (1998): 111; David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law," *Virginia Journal of International Law* 44 (Summer 2004): 931.

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