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Employers' Unfair Advantage in the United States of America: Symposium on The Human Rights Watch Report* on the State of Workers' Freedom of Association in the United States

Edited by

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Employers' Unfair Advantage in the United States of America: Symposium on The Human Rights Watch Report on the State of Workers' Freedom of Association in the United States: Editors' Introduction

Sheldon Friedman and Stephen Wood

Ernest Duval, a nursing assistant in a Florida nursing home, was fired in 1994 for participating in a successful union-organizing campaign. Two years later, a judge found the employer guilty of unlawful discrimination and ordered Duval and his co-workers to be reinstated to their jobs. The union ballot had gone in favour of the union, but bargaining had never taken off, as the remaining workers feared for their jobs. Faced with an appeal from the employer, the National Labor Relations Board upheld the administrative law judge's decision in December 1999. On their instruction Duval returned to work, but it seemed to him that management had assigned an employee to constantly watch him and report on any infringements of work rules. He was threatened with the sack. In March 2000 Duval left and filed a new unfair labour practice charge of discrimination for union activity.

This is just one of the case studies of problems experienced by workers when trying to achieve union representation that are reported in *Unfair Advantage*.* It is the Human Rights Watch's first report analysing a country's labour law system for rights violations, and its first report dealing with international labour rights. Founded in 1978, originally as Helsinki Watch to campaign on human rights in Europe and Central Asia, the Human Rights Watch (HRW) has now investigated over 70 countries. HRW produced reports in the mid-1980s dealing with workers' rights violations in Central America, but they were more in the context of overall human rights abuses

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* Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, Washington, DC, 2000.

by death squads and the like. Some recent reports on China have also mentioned workers' rights violations. Since *Unfair Advantage* was issued, HRW has done reports on child agricultural workers and the abuse of domestic workers in the USA. Such reports, which disclose human rights abuses by governments of all persuasions, are its bread and butter, as its goal is to 'hold governments accountable if they transgress the rights of their people'.

Authored by Lance Compa, of Cornell University's School of Industrial and Labor Relations, *Unfair Advantage* documents the USA's violations of international human rights standards for workers. Compa and two researchers developed the case studies on which it is built over an 18-month period in 1999–2000. They cover a wide range of industries and aspects of the unionization process, and the voice of workers plays a pivotal role in them. One steelworker who was permanently replaced while on strike, for example, tells us how he is continually looking at out-of-state licence plates, thinking the driver 'is a replacement worker who took my job' (p. 190).

Compa draws a diagnosis of the ills of the US system that are familiar to industrial relations specialists:

- the all-too-commonplace firing of workers for trade union organizing;
- the many opportunities for employers to campaign against the union and intimidate employees, including the use of mandatory captive audience meetings, surveillance, interrogation of workers by supervisors, and predictions of detrimental outcomes of union organization;
- the lack of access rights for union officials to meet workers at the workplace;
- the way in which the 'bitterness of a representation campaign can poison chances of a mutually beneficial bargaining relationship' (p. 22);
- the determination of most bargaining units as a single group working for a single employer, which exasperates the problems of union organization among non-standard workers;
- the exclusion of certain groups of workers from the right to association, including supervisory and managerial employees, agricultural, domestic, and independent contractors, as well as public-sector employees in 14 states;
- the legality of permanently replacing workers who exercise their right to strike;
- the legal ban on solidarity or secondary action;
- the failure of many (a quarter to a third is the usual range of figures quoted) certified unions to achieve a first bargain.

The nature of the statutory provisions and the inadequate enforcement of the legislation are widely assumed to be the main contributors to the problems facing union workers seeking to achieve union representation in the USA, and the authors of this report are unequivocal about their role. The long delays in the US labour law system confound workers' exercise of the right to organize; elections take a long time to organize, and employers

can file objections that stall the process, with delays and appeals continually frustrating unfair labour practice cases.

Moreover, the role of the state goes far beyond the design and enforcement of labour law, as government officials and the police intervene against workers in union struggles. In one town, we are told (p. 27), the mayor distributed leaflets about the effects of unions on plant closures during a certification election. The sympathetic response of the police to employers disclosing undocumented labour when faced with a union campaign is another prevalent example.

All the weaknesses of the US system have served to create a society in which employers know that if they want their businesses to remain union-free they have every chance of achieving it, while employees are strongly discouraged from initiating organizing drives. The proportion of the US work-force that has no legally protected right to unionize is large (p. 189) and probably growing. (Only this year, the Supreme Court ruled that charge nurses (team leaders in a ward) are 'supervisors', and thus excluded further tens of thousands of employees.) Meanwhile, the illegal reprisals against employees who do enjoy legal protection and have attempted to exercise their right to freedom of association have grown exponentially. According to National Labor Relations Board records cited by HRW, these numbered in the hundreds per year in the 1950s, but the figure of 1998 was more than 23,000. When employer illegality reaches such a level, HRW's conclusion that the law is too weak and is inadequately enforced seems inescapable.

The Report points to the human rights perspective as the solution to the problems of the US system. Its foundation is the reformulation of collective bargaining as a basic right of all human beings, on a par with other human rights such as freedom of religion or freedom from race or sex discrimination. This is contrasted with an assumed current conception of unionization and collective bargaining as only about 'economic disputes involving the exercise of power in pursuit of higher wages for employees or higher profits for employers' (p. 17).

Many of the Report's recommendations have been widely touted before, for example providing for certification without a ballot when 50 per cent of the bargaining unit are union members (as under the UK and the majority of Canadian jurisdictions). But at key points the authors show how their human rights approach stops short of what they see as an outright workers' rights approach, which gives precedence to the workers' right to bargain collectively over employers' rights. For example, the employer's right to appeal NLRB decisions and not to bargain while they are appealing could be curtailed, but 'Human Rights Watch stops short of this policy ... (as) the right to appeal to the civil court is a basic element of due process' (p. 24). Another example is that captive-audience meetings should not be banned but rather, under a principle of proportional access, should be made the central trigger for effecting access for unions: 'equal access for unions should not be automatic. [But] it should be triggered by the employer's use of ... [such] meetings where an employer does not otherwise agree to allow

access' (p. 21). A final example is the Report's view that the temporary replacement of strikers should remain legal but the employer's use of them to replace strikers when the strike finishes should be made illegal.

While the Human Rights Perspective is the foundation of the Report's detailed recommendations, it also provides the basis for its condemnation of successive US administrations. The US failure to ratify the ILO's Conventions 87 and 98 is unfortunate but not that significant, since the Report shows the USA has long acknowledged the obligations applied under it in various fora. These include their championing the ILO's declaration on Fundamental Principles and Rights of Work at a conference in Geneva in 1998 (p. 15). It is the huge failure of US practice to meet these standards that is significant.

As Kenneth Roth, the executive director of Human Rights Watch, commented in *Perpectives*, 'Our findings are disturbing... Loophole-ridden laws, paralysing delays and feeble enforcement have led to a culture of impunity in many areas of US labor law and practice. Legal obstacles tilt the playing field so steeply against workers' freedom of association that the United States is in violation of international human rights standards for workers' (Roth 2001: 19).

Adoption of the Human Rights Perspective is the main change strategy implicit in the book. Viewing collective bargaining as a right of representation, and not simply as an economic negotiation, is presented as the basis for a new dawn: a 'new spirit of commitment by the labor law community and government to give effect to both international human rights and the still-vital affirmation in the United States ... law for full freedom of association for workers' (p. 17) is vital. An immediate ratification of the ILO conventions 87 and 98 would, in the Report's words, 'send a strong signal to workers, employers, labor law authorities, and to the international community that the Unites States is serious about holding itself to international human rights and labor rights standards' (pp. 17–18). The US courts could then take the next step of allowing international human rights standards to inform their analyses and remedies, while unions should likewise include human rights concerns as paramount and employers should appreciate that workers' self-organization is a basic right. All this should kick-start the reform of the US system, presumably along the lines of the Report's recommendations.

A well crafted example of its genre, the Report opens with a methodological note that details the great care with which the underlying research was carried out, followed by a summary (in Chapter 1) of the Report. Chapter 2 crisply records all the Report's major findings on the failings of the US system and offers recommendations for overcoming each. Then follow chapters on the law of workers' freedom of association, Chapter 3 dealing with the international law and Chapter 4 with US law. The last two chapters — the Report's most compelling — present case material illustrating the problems at all stages of the quest for representation. Case studies were chosen for further investigation only when the General Counsel

of the National Labor Relations Board had found such allegations meritorious. In other words, HRW confined itself to the clearly visible tip of the workers' rights violations iceberg. While Chapter 5 concentrates on violations of existing rights and employer behaviour, the final chapter concentrates on legal obstacles to the exercise of freedom of association.

The Report deserves widespread attention. If it provides a conduit to politicians and non-specialists for the critical analysis of US industrial relations, then it will have served its purpose. While much of its case material and its story will be familiar ground to industrial relations specialists, it provides a vehicle for generating debate about the fundamentals of employment relations in the twenty-first century. For this reason we invited three US authors — Hoyt Wheeler, Julius Getman and David Brody — to offer their perspective on the Report.

The Editorial Board would welcome further responses, particularly on the issues of (a) the Human Rights Agenda as a change strategy for enforcing workers' rights to unionize and bargain collectively and its role in rejuvenating trade unionism and (b) the role of law and, more generally, the state in the reform of industrial relations.*

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* *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, can be ordered from Human Rights Watch, 350 Fifth Ave., 34th Floor, New York, 10118, USA. The cost is $15, with discounts available for bulk purchases. It is available gratis in its entirety at the web site www.hrw.org/reports/2000/uslabor.

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The Human Rights Watch Report from a Human Rights Perspective

Hoyt N. Wheeler

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 labour policy. The Report states that questions of workers' rights involve fundamental human rights instead of merely 'economic disputes' about wages and profits (p. 17).

One is led by the arguments and findings of the Report to feel that American law ought to be different than it is; yet, like much of the writing on this subject, it fails to provide any philosophical underpinnings, instead relying upon the authority of declarations by international bodies. This paper attempts to address the logical basis for such an 'ought'. It explores the validity and meaning of the view that there are human moral rights to associate with unions and collective bargaining. If these are indeed fundamental human rights, they take precedence over interests such as efficiency and profitability, yielding only — if at all — to other rights of the same level (Werhane 1985: 80).

Human rights in the employment relationship

The international labour standards that the Summary of the Report accuses the USA of violating presuppose that there is some set of universal rights that all workers have, regardless of their national culture. This underlying idea has been seriously called into question in recent years, primarily by some spokespersons of less developed countries who resist having these standards applied to their countries in the context of international trade (Tsogas 2001: 27). Nevertheless, in 1998 the International Labour Organisation (ILO) adopted its Declaration stating that all countries that were ILO members were bound to adhere to certain core principles, including 'freedom of association and the effective recognition of the right to collective bargaining' (ILO 1988: 2).

Should not this settle the matter? Not only the author of the Report, but other scholars (e.g. Adams 2001: 203) believe so, and are frustrated by the

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failure of the USA to act accordingly. A factor contributing to this situation may be that American policy-makers have not been given a sufficiently persuasive rationale for these rights. As noted above, the purpose of this paper is to do this.

In order to provide such a rationale, and thereby establish that it makes sense to accord these rights the status of human rights, it is necessary to make three points: (1) human rights exist; (2) they exist in the employment relationship; and (3) workers' freedom of association and the effective recognition of the right to collective bargaining are included among the human rights in the employment relationship (see Wheeler 1994: 11–12, 16).

Human rights are moral rights which we possess simply because we are human. They can be derived from tradition (Magna Carta), religion (US Declaration of Independence), or secular philosophy (Wheeler 1997: 2; Ritchie 1979: 252–3). The crux of the idea is that human beings are entitled to dignity as persons.

The application of human rights to the employment relationship is the next logical step. The difficulty here is that these rights have traditionally been accepted only *vis-à-vis* government. Mainstream economists tend to view the private-sector workplace simply as a market where a commodity called labour is bought and sold, not as a society where such notions as human rights apply. Policy-makers, ever sensitive to the political power of capital, have shown little inclination to apply a human rights analysis to employment relations.

Yet, if one is concerned with preserving human dignity, it seems clear that failing to extend human rights ideas to the workplace is highly problematic. This is because by its very nature the employment relationship contains the potential for oppression. Employees are obligated to obey persons who are superior to them in the work society. Human nature being what it is (Wheeler 1985: 15–18), unchecked power on the part of the 'top dogs' is highly likely to lead to abuse, and to have devastating effects on human dignity. One proof of this tendency is that societies in which the employment relationship exists find it necessary to enact labour legislation to protect workers from employers.

Freedom of association and collective bargaining

Should freedom of association in unions and collective bargaining be included among the human rights in the employment relationship? This is a bit tricky, since the individual human right involved here is the right to take collective action. Economists in particular tend to think only in terms of individual action (Olson 1971: 2). Yet, this is a seriously inadequate view of human nature. Humans are not solitary beings. We are inherently social, and are fully human only when able to act in concert with our fellow humans (Midgley 1978: 69). So, if our dignity as human beings is to be protected, we must be free to act collectively as well as individually. What's

more, the dividing line between individual and collective rights is anything but clear. Is not the ultimate individual right, the right of free expression, inherently social? It is essentially the right to act as a part of a social group in which one member communicates to another.

The question then becomes whether the particular form of collective action known as collective bargaining is necessary in order for human beings to have dignity at work. I suggest that for this purpose the term 'collective bargaining' be very broadly defined. It should, I believe, be seen as meaning the collective assertion of power by employees to influence the employer's actions regarding employment. (The definition of protected activity set out in Section 7, National Labor Relations Act (NLRA), approximates this.) Adopting such a definition makes sense, given the wide variety of forms of collective action.

The historic rationale for collective bargaining, that it substitutes the power of workers in solidarity with one another for the 'feeble strength of one' (Chapin 1915), is still a solid one. Experience has shown a need to permit workers to aggregate their strength in order to have some balance in a relationship that is inherently conflictual. The 'tensions' (Barbash 1984: 5, 16) that are necessarily present in the relationship require that workers have some ability to influence wages, hours and conditions of work. As a practical matter, few employees have the requisite individual bargaining power. On the other hand, collective bargaining has shown itself to be a democratic process capable of preserving human dignity, and serving worker rights and interests, while still being compatible with employer needs for efficiency and profitability.

Consequences of viewing collective bargaining as a human right

What are the practical effects of seeing collective workers' rights as human rights? The primary impact is on the way that law is made. Labour law in the American system has always involved balancing rights and interests. Particularly in recent years, the weight given to worker collective rights has been relatively slight.

Several areas of the law discussed in the HRW Report would be affected if these collective action rights were viewed as human rights. As have many critics of American labour law, the Report speaks of the problems caused by lack of union organizer access to the employer's property, the employer's right to replace strikers permanently, and the broad free speech rights of employers. If workers' rights to organize were truly viewed as fundamental rights, the weight given to their right to receive information about a union would nearly always overwhelm the employer's right to deny organizers entry to its property to distribute union literature. If the right to strike were treated as a fundamental human right, it would outweigh the employer's interest in hiring permanent replacements for strikers. Also, the workers' right to organize would be on a par with the employer's right to free speech, requiring an accommodation of these two fundamental rights as equals.

The employer's right of free speech is an intriguing question that is touched upon by the Report. As for free speech, the Report recommends more speech for both the employer and the workers. But this is problematic (see Adams 2001). What is needed here is a balancing of these two vital human rights. Given the subordinate relationship of employees to managers, there is potential for coercion in anything managers say about unions. Therefore, managers' rights to express their opinions should be construed extremely narrowly in order to avoid infringing upon the workers' rights to freedom of association and collective bargaining.

One impediment to giving effect to workers' collective rights is the heavy weight that American law gives to property rights — particularly those involving real property. This underlies the rules on limiting union access to employees, as the main limitations have to do with what occurs on the employer's property. While there is no question that the liberty to use one's property is an important right, it should not trump workers' rights to engage in collective action. Once again, a balance needs to be struck.

As this brief discussion indicates, the balancing of rights and interests by the National Labor Relations Board and the courts takes on a very different complexion if the workers' side of the equation is considered to involve a fundamental human right. Virtually the only place where the employer's side would have a right of the same nature would be where employer free expression is involved. Property rights would rarely rise to this level. This would properly build into American law a bias in favour of human rights over property rights. Given the strong public interest in having a democratic society and, I believe, democratic institutions in the workplace, the workers' rights of free association and collective bargaining should prevail in most circumstances.

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A Useful Step

Julius Getman

Unfair Advantage is a powerful indictment of the way in which US labour law deals with basic rights of workers. The authors, led by long-term legal and human rights advocate Lance Compa, begin by making the case quite convincingly that the rights of workers to form, join and support unions and to strike on behalf of their common goals are basic human rights — aspects of the right of free association and self-determination. They then argue that under the US legal system these rights in practice are made so weak that for most workers they are meaningless. Readers unfamiliar with the working of the US labour law system may be surprised at these conclusions, since judges' legislators and members of the National Labor Relations Board regularly assure us that the rights to strike and organize are guaranteed by the National Labor Relations Act (henceforth the Act).

They are literally correct. The Act quite clearly proclaims the very rights that the HRW Report finds to be regularly violated. Section 7 of the Act declares that workers have a right to organize, to bargain collectively and to engage in concerted activity for mutual aid and protection. Section 13 reaffirms the importance of the right to strike. According to the statutory language set forth in Section 8, any employer conduct that threatens, coerces, retaliates against or interferes with exercise of Section 7 rights violates the Act. The National Labor Relations Board established by the Act has the responsibility for enforcing the rights guaranteed in Section 7, by conducting secret ballot elections to determine whether employees desire union representation and by enforcing the unfair labor practice provisions of Section 8.

Thus, the statutory language suggests a robust system of regularly protected employee rights. And the framers of the Act's provisions visualized that the system they created would make these rights a living reality. Yet, utilizing original field research and previously published scholarly writing, the Report shows that the legal system in operation is a far cry from the system that the Act's framers contemplated.

Take the case of an enterprise in which a great majority of the employees signified a desire for union representation by signing authorization cards

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designating the union as their bargaining representative. As my own research shows, the signing of cards is a reliable indication of employee choice (Getman *et al.* 1976: 132–3). However, even if the employer has no doubt about the union's majority, it may refuse to grant recognition and insist upon an election in which the employees must vote for or against union representation. The law gives the employer a variety of ways to delay such an election and it can use the time gained to dissipate the union's support. It can hold 'captive audience' meetings, in which it gathers all or some of the employees together to hear the case against the union as prepared by a management lawyer or consultant. Almost invariably, such meetings involve efforts by the employer to play upon worker fears that voting for a union will lead to retaliation. The employer may hold a series of such meetings during what would otherwise be working time, and it may involve its supervisors in making similar arguments in one-on-one or small-group meetings with the workers. The union is given no right of reply. Indeed, in almost every case the employer can keep the union organizer off its premises and limit the activity of union supporters to non-working time.

As a practical matter, the employer can discharge union supporters on some or other pretext with little fear of having to pay a serious price for thereby violating a basic free choice policy of the Act. Reinstatement and back pay, which is the sole remedy for discriminatory discharge, has turned out to be inadequate. There are so many steps between the filing of a charge and an enforceable court order that the representation election will be long over and the employee is likely to be employed elsewhere. Also, there is a good chance that a finding of discriminatory discharge made by the Board's field investigators will be set aside. The courts generally have been reluctant to order employees reinstated when there is any hint in the record that the employer acted for legitimate reasons. Employer counsel, aware of this judicial tendency, have become quite adept at picking targets that will permit them to argue that the discharge would have occurred even had the employees not been union supporters and leaders. In any case, even if an unfair labour practice is found by the Board and enforced by the courts, the discharged employees are likely either not to return or to leave soon after being reinstated. Thus, the employer's practical costs for violating basic employee rights are the payment of a small amount of back pay.

The Act tells employers that they must bargain in good faith, but it provides no mechanism for requiring agreements when employers adamantly refuse. Thus, if the employees choose unionization by secret ballot, the employer by refusing agreement can still vitiate their choice, and, as the Report shows (p. 28), attempts to negotiate a first contract frequently fail. Because the law permits hard bargaining, it is difficult to establish a violation. If an employer is found to have bargained in bad faith, the Supreme Court has held that the Board may not remedy its violation by ordering the employer to accept contract language that it has not agreed to. Thus, in most cases the remedy is no more than requiring the employer to post a notice promising not to commit the same illegal act in the future.

The only way to force an employer to accept an agreement under the US system is through the use of the strike weapon. Employees have the legal right to strike in order to force the employer to come to an agreement. But they exercise this right at great risk — they may be permanently replaced by the employer. In recent years employers' willingness to use this tactic has resulted in increasing reluctance by unions to use the strike weapon. Thus, for employees seeking to exercise basic labour rights, the human tragedy of job loss lurks at every key point, threatening another basic right — the right to work.

How did such a toxic system develop from a statute that details in the broadest possible language the rights of employees? No one really knows, and the Compa study does not undertake to explain the deeper causes of our one-sided system. Part of the answer, however, must lie with the shameful performance of the courts in dealing with the broad and general language of the Act. In almost every key decision, the courts opted to favour property rights over the rights of workers. I refer to this judicial habit as the 'Capitalist Exemption'. This powerful but unstated basis for decision in the US law may roughly be defined as the regular willingness of the courts to ignore the wording and policies contained in the NLRA in order to make sure that a statute aimed at replacing the unregulated market and traditional rights of property does not succeed in doing so. It is the only way that I can explain such decisions as *NLRB* v. *Mackay Radio* 304 US 333 (1938), giving employers the right to replace striking workers permanently, and *Lechmere Inc*. v. *NLRB* 502 US 527 (1992), which denies the Board the authority to permit union organizers to enter company car parks. The courts' solicitude for capital and their patronizing approach to workers seems also to be based on their ignorance. In an earlier essay I compared the judicial role in today's labour relations system to that of British generals in the First World War who ordered their soldiers into fruitless and deadly combat assaults without knowledge of the circumstances that they faced:

> The flaws that corrupted the British military are all evident ... in labor law, where hubris and hierarchy supported by erroneous theory have helped to create a system as misguided in many areas as the battle plans of the British military. Judges, Labor Board members, and arbitrators regularly make decisions with little understanding of the circumstance in which they are to be applied. ... Almost nothing in the professional experiences of lawyers and judges is likely to give them understanding of the practical consequences of legal decisions defining the rights of workers or unions. (Getman 1998: 1349)

Who are the victims of this unfair system? As the Report stresses, the primary victims are workers guilty of no misconduct, who behave precisely as the framers of the Act contemplated, and lose their jobs as a result. But other workers — those who understand the risk and refrain from organizing and striking — are also victims, as is the labour movement, which is weakened and often made cautious by the law's failure to protect basic rights. And the entire society, which needs a strong vigorous and democratic labour movement,

is made less just by the unfairness of the law at a time when the widening pay gap between executives and workers cries out for a strong, vigorous voice for workers.

The Report contains a series of recommendations all designed to provide greater protection for employees and to give unions a greater opportunity to organize, bargain and strike. It urges tougher and quicker penalties against employers who discharge union supporters, recommends giving union organizers something closer to equal access to the employees, and urges greater monitoring of employer speech, speedier board processes, first contract arbitration and greater use of Gissel bargaining orders (which remedy serious unfair labour practices by ordering an employer to bargain with a union that no longer has majority support). It calls for enlarging the definition of 'employee', reducing the scope of the secondary boycott provisions of the NLRA, and 'prohibiting the permanent replacement of workers who exercise the right to strike' (p. 31).

I favour all but one of these proposals. The recommendation calling for greater oversight of employer speech and greater use of Gissel bargaining orders seems to me misguided tactically. I don't think that closer monitoring would significantly change the impact of employer speech, and the courts have made manifest their hostility to a doctrine that, based on conjecture, completely reverses the results of the election campaign. In those few instances where Gissel orders are upheld, the union is not in a position to bargain effectively. Moreover, doctrines limiting employer speech have a way of being applied with greater impact against unions.

Adoption of the recommendations would have the salutary effect of protecting employees. Whether they would lead to a great increase in the rate of unionization is uncertain. What they would do, I believe, is set the stage for growth of organized labour if coupled with a new burst of rank-and-file-led activism.

How do we get from here to there? Not a single one of the recommendations in the Report would have a chance of being enacted by our current Congress or Labor Board. Only a few, such as the striker replacement recommendation, would even have the capacity to rouse the passionate support of current union members. And the Democratic Party leaders, the traditional allies of labour, seem increasingly willing to ignore failures and injustices of the market. The changes called for by the Report will happen only if public opinion changes dramatically.

It is not clear whether or how that will happen. This Report is a useful first step, not because its recommendations are new — many were contained in the proposed Labor Reform Act of 1976 proposed by then US Labor Secretary Ray Marshall. Nevertheless, the Report is likely to be the start of a significant effort to get the public to understand that the rights to organize, bargain and strike are basic human rights, and that when they are violated the result is often human tragedy and suffering. When, for example, workers are permanently replaced during a strike, their lives are likely to be fundamentally changed. They will lose along with their job their sense of self, of

their union and of their community. The more scholars can equate workers' rights with human rights, the sooner public opinion will come to understand the need for the type of fundamental reform urged by Lance Compa and his associates.

It would be wise, however, not to overestimate how effective such scholarly efforts can be in a struggle for the heart and mind of the American public. We have a long way to go, and the other side has strong weapons — money, right-wing journals and powerful organizations. To win out against such powerful forces, it is necessary to show the human faces and hearts behind the stories mentioned in the Report. Wherever possible, the voice of organized labour must be the voice of its rank-and-file members. This insight, obvious though it may be, is frequently ignored by labour leaders anxious to be visible and out front in fighting for the rights of their members. In short, this Report represents a short but needed step in a long but crucially important process.

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Labour Rights as Human Rights: A Reality Check

David Brody

There is an old saying about not looking gift horses in the mouth. The Human Rights Watch report on labour rights in America is truly a gift to all those working people struggling for, and being denied, full freedom of association. The USA lectures the world about human rights, not least about the sanctity of freedom of association, yet its own practices fall sadly short of the international norms it champions. In so far as it instills the shame that, more than anything else, might spark labour law reform, this Human Rights Watch report performs a great service. However, the fact that labour people will find so much to agree with does not mean they should read into it virtues it does not have: they should not fail, so to speak, to inspect the teeth of this admirable gift horse. The author Lance Compa is meticulous in delineating American labour law as it currently operates, and exact in specifying how it should be altered to conform to international norms. He writes in a hallowed tradition that American intellectual historians have dubbed 'formalism', in which the argument moves from first principles to prescribed actions. My scepticism really recapitulates the objection of progressives a century ago (including those illustrious founders of modern industrial relations, the Webbs and John Commons) that first principles are not a good guide to action.

Consider the representation election, which is the basis in American law on which unions become certified as bargaining agents. Compa notes that some unions are turning against the election, but he is not inclined to explore the merits of that stance. He is satisfied that a 'human rights analysis' can produce the correct remedy. 'Human Rights Watch advocates more free speech for workers, not less free speech for employers' (p. 20). Let me suggest what is problematic about this principled statement. First, it posits a false equality: employer speech is the more powerful, and is inherently coercive. This is not an original thought. The authors of the Wagner Act understood it all too well and did their best to have employers barred from the unionizing process — that, in fact, was how the National Labor Relations Board (NLRB) at first administered the law. Second, the HRW

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position is insensitive to the ways in which representation elections go against the grain of American trade unionism as a movement-building institution. Organizers in the field know what they are up against: viable membership comes after the election, not before; the organizing tempo is dictated by the calendar of an administrative/judicial proceeding, one of course all too readily manipulated by employers; and the drain on union resources can be enormous. That a formally democratic process might be at odds with workers' freedom of association seems to fall below the screen of 'human rights analysis'.

Even viewed strictly as a rights question, the representation election involves besetting cross-currents that HRW analysis finds hard to capture. The representation election is in the law as part of a grand transaction intended to validate the right of workers to collective bargaining. The unions accepted a certification procedure that was alien to their voluntaristic traditions in exchange for state-mandated collective bargaining that would force recalcitrant employers to the table. But the employer's duty to bargain in American labour law is trumped by its liberty of contract, which is why, despite the best efforts of the NLRB, a third of all newly certified unions today never achieve first contracts and why, on top of everything else, workers are turning against the representation election.

This rights conflict, of course, is there for all to see. As Compa himself notes, free collective bargaining is a 'paramount principle', against which his proposed remedy, first-contract arbitration, would have to be considered 'extraordinary' (p. 28). What I want to argue, however, is that this visible conflict is only a manifestation of the true bent of American labour law, making it probably irreconcilable with international norms, as Human Rights Watch understands them. Getting at that embedded truth requires an excursion into the law's history, about which, I have to say, Compa is incurious. Otherwise he would never have chosen, as he explicitly does, to exclude from his survey the question of workers' right not to associate (p. 4).

Underlying this is the principle that stands at the very core of American labour law: free labour, defined as the worker's absolute freedom to leave a job. So paramount was this right that it was enshrined constitutionally in the 14th Amendment, which prohibited not only slavery, but also involuntary servitude. Liberty of contract in employment came to rest on the at-will doctrine that was a corollary of free labour. It was in defence of liberty of contract, so understood, that *Adair* v. *U.S.* (1908) struck down a provision in the Erdman Act (1898) making dismissal of railroad workers for union membership a criminal offence. In his dissent, Justice Holmes offered no principled counterstroke, but only a plea for a minor exception protecting the right to organize — 'a very limited interference with liberty of contract, no more' — justified on grounds of public policy and within Congress's authority to make. Holmes's dissent is the legal stratagem by which the Wagner Act got past Adair (which remains to this day authoritative on at-will doctrine). Although freedom of association is framed there in the

language of rights, enforcing those rights derives only from the assertion of public policy in the law that collective bargaining is to be encouraged (which is why, for a start, we have 'unfair labour practices' that are remedial and carry no criminal or civil penalties). The beginning point for understanding American collective bargaining law is that it does not, and never did, rise to the principled level contemplated by human rights advocates today.

What level it might achieve was, of course, fiercely contested. The fact that the National Labor Relations Act's passage in 1935 coincided with a great unionizing movement enabled it to function initially as a facilitator of 'self-organization' — the first, as it happens, of labour's enumerated rights in the law. This was the basis on which Wagner hoped to forestall employers' free speech claims: they had no more right to a say when workers organized than workers did when employers organized. But once the union drives subsided, Wagner's progressive conception of the law foundered. Anti-union employers made an emboldening discovery: the NLRB could be resisted and, in the South, even intimidated. They were unerring about how the law could be ideologically turned — hence the Taft–Hartley language reaffirming the worker's right 'to refrain from any and all [concerted] activity' — and unerring at identifying its core vulnerability. This was the representation election, whose presence in the law (which I have tried to explain elsewhere — Brody 1997) was deeply at odds with Wagner's conception of freedom of association as a process of self-organization. Hence the many-sided Taft–Hartley assault: unions became subject, like employers, to unfair labour practices; elections, hitherto at the NLRB's discretion, became mandatory; and, in the name of free speech, employers became campaign participants. The mandated collective bargaining structure remained intact, but the dynamic animating it was no longer self-organization. Under Taft–Hartley, the worker had become just a voter making a choice between individual and collective bargaining.

What the law means today is the product of half a century of case law interpreting Taft–Hartley, or more precisely, within the ambit of the representation election, balancing 'free choice' by workers against the free speech and property rights of employers. The 'unfair advantage' that Compa finds so at odds with international norms — interrogations, captive audience meetings, the exclusion of organizers from company property, the intimidating atmosphere — all arise from a weighing of rival rights, case by case, by the NLRB and the courts over many decades. This outcome, grotesque though it is, is not in the least arbitrary: it comes out of American judicial process in all its majesty and expresses the true hierarchy of rights in American law (amply signalled by Taft–Hartley's treatment of the secondary boycott, which is the one unfair labour practice that carries real and serious penalties).

Equally intractable is the American violation that Compa regards as most flagrant: namely, that of the right of every worker to freedom of association. The official position is that the USA meets that standard; the fact that some workers are not covered by the federal law 'means only that they do not have access to the specific provisions of the NLRA ... for enforcing their

rights to organize and bargain collectively' (p. 43). Although Compa scoffs at this State Department statement — the 'only' in it means that the rights of uncovered workers 'can be violated with impunity' — it in fact accurately renders the long-established view in American law that freedom of association exists, and the constitutional requirement is met, when it is not impeded by the state. In US statutory history, as I have said, protection from employer interference has been granted as a matter not of right, but of public policy, and has been doled out piecemeal, initially only to railroad workers and then, in the Wagner Act, excluding agricultural, domestic and family workers. Agricultural workers lost out mainly because of Senator Wagner's calculation that his bill needed southern Democratic support. Equally pragmatic was the treatment of supervisory employees, who were originally covered and then, under Taft–Hartley, excluded. This was because employers convinced Congress that the unionization of foremen was fatally eroding managerial control over production.

The fraught question of striker replacement turns out to have been originally also a coverage question. The right of employers to hire and (if they beat the union) retain strike-breakers was itself not at issue: the only question was whether strike-breakers who became permanent placements would be defined as employees for purposes of the law. In the terms on which the debate was framed, Compa would logically have sided with the strike-breakers, since his position is that the rights of every worker deserve protection. That was, indeed, an argument made at the time on behalf of strike-breakers. In deciding, after some debate, for their inclusion, the authors of the Wagner Act had a different consideration in mind: they were anxious that the new law not be seen as interfering with free collective bargaining. Thereafter striker replacement was uncontroversial, so much so that Mackay in 1938 disposed of it by *obiter dictum*. If the issue is no longer framed in terms of statutory coverage, it still resides in the same realm of pragmatic judgement. Saying that human rights are at stake does not hurt, but the compelling question, at least in American experience, is more mundanely whether striker replacement impedes free collective bargaining, which, under current conditions, most certainly it does.

In 1998, Compa tells us, the German firm Continental AG permanently replaced 1450 strikers at its North Carolina tyre plant. Asked how he could justify tactics he would not dream of using at home, the CEO replied, in effect: this is America, not Germany (pp. 206–7). The labour movement will do better minding this global businessman than Lance Compa. Yes, in so far as his report shames Americans, that is to the good. They will respond to an effective rights argument, which to my mind means disaggregating the enumerated rights in the law and targeting specifically the right to organize (see Brody 1998). And in this globalizing age the international obligations that the USA undertakes can begin to matter. (Compa reports some glacial recent movement.) Beyond that, American unionists are on their own. 'Human rights analysis' should not deflect them from the hard thinking it will take to negotiate a way through, or around, a legal system that, at its

core, is not favourably disposed to the collective action of workers. To put a gloss on our German CEO's words: this is America, not the world.

References

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