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Legal Protection of Workers' Human Rights: Regulatory Changes and Challenges in the United States

Abstract
[Excerpt] In a 2002 study, the US Government Accountability Office reported that more than 32 million workers in the United States lack protection of the right to organise and to bargain collectively. But since then, the situation has worsened. A series of decisions by the federal authorities under President George Bush has stripped many more workers of organising and bargaining rights. The administration took away bargaining rights for hundreds of thousands of employees in the new Department of Homeland Security and the Defense Department.18 In the years before the 2009 change of administration, a controlling majority of the five-member National Labor Relations Board (NLRB), appointed by President Bush, denied protection to graduate student employees, disabled employees, temporary employees and other categories of workers.

An October 2006, a NLRB decision was especially alarming for labour advocates. The NLRB set out a new, expanded definition of 'supervisor' under the section of US labour law that excludes supervisors from protection of the right to organise and bargain collectively. This exclusion has enormous repercussions for millions of workers who might now become 'supervisors' and lose protection of their organising and bargaining rights.21 This case is discussed in more detail below in connection with a complaint to the International Labour Organisation (ILO) Committee on Freedom of Association.

Keywords
labor movement, trade unions, human rights, worker rights, labor law, United States, union organizing

Disciplines
Labor and Employment Law | Labor Relations

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Legal Protection of Workers' Human rights: Regulatory Changes and Challenges

The United States

Lance Compa

Introduction

Social and Economic Concerns

Workers in the United States share the social and economic concerns of working people everywhere. Their plight is not the same as two-dollars-a-day poverty in the poorest developing countries, but even before the recession that began in 2008, millions of Americans saw poverty and social inequality increasing as wealth created by workers flowed to owners and investors.[1] Adjusted for inflation, real wages have fallen even while productivity rose. The federal minimum wage was stuck for 10 years at $5.15 per hour, the lowest level, relative to average wages, in *56* years before increasing to *$6.55* per hour in 2006 and $7.25 per hour in 2009—a level still below that of decades earlier, relative to average wages.[2]

Inequality between men and women is also an enduring problem. Women's annual earnings, relative to men's, have moved up more slowly since the early 1990s than previously, and still remain substantially below parity. Women who work full-time throughout the year made 79.9 per cent of men's earnings in 2008. If part-time workers were included, the ratio would be much worse because women are more likely than men to work part-time to meet childcare and other family responsibilities.[3]

Before the 2008 recession, many big manufacturing companies announced large-scale layoffs and plant closures, often linked to 'runaway' production shifts to developing countries.[4] High-technology and service companies are supposed to be a fount of future employment in an

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[1] See eg, Porter, E, 'After Years of Growth, What About Labor's Share?' *Sunday Neiv York Times* (15 October 2006) s 3, 3; Greenhouse, S and Leonhardt, D, 'Real Wages Fail to Match a Rise in Productivity' *New York Times* (28 August 2006) Al; Johnson, JB, 'Making Ends Meet; The Well-off are Better Off, but the Ranks of the Poor are Growing, and Middle- and Low-income Workers Feel Pressure of High Prices' *San Francisco Chronicle* (28 September 2005) Al. For wide-ranging analysis and critique of problems faced by American workers, see Greenhouse, S, *The Big Squeeze: Tough Times for the American Worker* (New York, Knopf, 2008).

[2] See Bernstein, J, 'Nine Year of Neglect: Federal Minimum Wage Remains Unchanged for Ninth Straight Year; Falls to Lowest Level in More than Half a Century' (Economic Policy Institute (EPI) Issue Brief #227, 31 August 2006); Cannell, ME, 'New Floor Set for Wages; *$6-55* an Hour: Latest Increase Revives Debate that Goes Back to Depression' *Atlanta Journal- Constitution* (24 July 2008) IB.

[3] See Institute for Women's Policy Research, 'The Gender Wage Gap: 2008' (IWPR #C350, updated April 2009).

[4] See eg, Content, T, 'Delphi Veterans to be Gone by 2007; Cheaper, Temporary Workers Will Fill in Until Plants Shut Down' *Milwaukee Journal-Sentinel* (30 September 2006) Dl; Williams, FO, 'Mexico Gets American Axle Work: Buffalo Plant Loses Out on Parts for New GM Car' *Buffalo News* (21 September 2006) Al. For book length treatment of the scope and effects of plant closings and layoffs, see Uchitelle, L, *The Disposable American: Layoffs and Their Consequences* (New York, Knopf, 2006).

economy shifting away from a manufacturing base. However, these companies have begun 'outsourcing' jobs in massive numbers, ranging in skills from computer programmers to call centre operators.[5]

A special concern of American workers is health insurance. Without a national health insurance plan, as in most other countries, workers depend on employers for access to private health plans. However, employers are not required to provide health benefits, and many do not. As a result, nearly 50 million people in the United States lack health insurance.[6] In companies that provide insurance, employers are pushing more cost burdens onto employees. Health insurance costs are the biggest single cause of strikes and 'giveback' bargaining in the United States.[7]

The recession that began in 2009 worsened American workers' job security, social protection, and living standards. Official unemployment rose above nine per cent in March 2009 with expectations of more.[8] Beyond that, millions more unemployed and underemployed workers are not counted in the official statistics.[9] Many workers lost their homes,[10] and the health insurance crisis intensified.[11]

The Crisis in Freedom of Association

Like workers everywhere, Americans often seek to defend their jobs and wages by forming and joining trade unions. Polls indicate that some 60 million workers who are not union-represented would like to have a union in their workplace.[12] But in the United States, efforts to form trade unions and bargain collectively meet fierce employer resistance. Employers unlawfully fire workers for trying to form unions in more than one-fourth of union

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[5] See eg, Godinez, V, 'EDS Embraces a World-wise Outlook: Company's CEO Says Outsourcing to Nations like India is "Fact of Life" ' *Dallas Morning News* (16 October 2006) ID; Fillion, R, 'Teletech Expands in Pacific: Outsourcing Firm to Add 2 Call Centers in Philippines' *Denver Rocky Mountain News,* (1 November 2005) 6; Dhillon, A, 'From Hearts to Homes, Outsourcing Goes Upmarket, Today's Offshore Back Office is Filled with Lawyers, Doctors and Even Architects' *South China Morning Post* (15 November 2005) 7.

[6] See Yi, D, 'More US Workers Go Uninsured: Rising Health Premiums are Prompting Firms to Drop Coverage or Employees to Forego it, an Annual Survey Shows' Los *Angeles Times* (27 September 2006) CI.

[7] See eg, Snowbeck, C, 'Health Care's Bite: Push for Employees to Take on More Medical Costs at Root of Contract Disputes' *Pittsburgh Post-Gazette* (8 September 2006) CI; Paine, G, 'Health Insurance is Key to Labor Negotiations: Many Experts Argue it Cannot Be Resolved at the Bargaining Table' *San Francisco Chronicle* (3 September 2006) Fl; D Lazarus, 'Health Costs Will Cause More Strikes' *San Francisco Chronicle* (23 December 2005) CI.

[8] See eg, Hagenbaugh, B and Hansen, B, 'The Future Holds More Job Losses, Survey Says; Unemployment Could Top Out Near 10%' *USA Today* (27 April 2009) IB; Goodman, PS and Healy, J, 'Job Losses Hint At Vast Remaking of US Economy' *New York Times* (7 March 2009) Al; Norris, F, 'In This Recession, More Men Are Losing Jobs' *New York Times* (14 March 2009) B3; Goodman, PS and Healy, J, '660,000 More Jobs Lost; Total Surpasses 5 Million' *New York Times* (4 April 2009) Al; Luo, M, 'Longer Periods of Unemployment for Workers 45 and Older' *New York Times* (13 April 2009) A l l.

[9] See eg, Posada, J, 'Who are the Jobless?; The Real Stories: If You Look Behind the Numbers, You Find the Discouraged, the Involuntary Part-Timers, People Who Don't Fit Neatly into Statistical Categories' *Hartford Courant* (19 April 2009) Al.

[10] Fagan, K, 'Ranks of Newly Homeless Soar as Prospects Plunge; The Economy in Turmoil' *San Francisco Chronicle* (6 April 2009) Al.

[11] Roan, S, 'In an Ailing Economy, the Doctor can Wait; More People, Even the Chronically III, Forgo Preventive Care' *Los Angeles Times* (8 April 2009) Al.

[12] See eg, Reich, RB, 'The Union Way Up: America, and its Faltering Economy, Need Unions to Restore Prosperity to the Middle Class' *Los Angeles Times* (26 January 2009).

organising campaigns.[13] Restrictive legislation, debilitating delays, and weak enforcement create high obstacles to workers' freedom of association in the United States.[14]

In 2008, union 'density' in the US labour force was 12.4 per cent of employed wage and salary earners, down from *35* per cent in the 1950s and 20 per cent in the early 1980s.[15] Most of the millions of unrepresented workers are considered 'at-will' employees under common law doctrine in many states (there is no federal common law of the employment relationship). This means that employers can dismiss them at any time for any reason not prohibited by law, such as anti-discrimination statutes. In sum, workers not covered by collective bargaining agreements do not have the protection of a 'just cause' standard for discipline or dismissal, because 'at-will' is the default rule in the American employment law system.[16]

The reach of federal law prohibiting anti-union discrimination is limited. US labour law excludes millions of workers from statutory protection of the right to organise and collectively bargain. They include agricultural workers, household employees, employees of religious institutions, employees labelled 'supervisors' and 'managers' or 'independent contractors', and more. Under the at-will rule, they have no protection against dismissal for associational activity. If these 'excluded' workers protest abusive working conditions or try to organise a union, employers can fire them with impunity. If they seek to bargain collectively, employers can ignore them. They
have no labour board or unfair labour practice mechanism for redress.

Millions of public employees face similar exclusions from labour law coverage. Many US states deny public employees the right to bargain collectively. For example, North Carolina specifically prohibits collective bargaining between any state, county or municipal agency and any organization of employees. Texas declares it to be against public policy for any state, county or municipal officials to enter into a collective bargaining agreement with a labour organisation. Virginia holds collective bargaining 'contrary to the public policy of Virginia'.

In a 2002 study, the US Government Accountability Office reported that more than 32 million workers in the United States lack protection of the right to organise and to bargain collectively.[17] But since then, the situation has worsened. A series of decisions by the federal authorities under President George Bush has stripped many more workers of organising and bargaining rights. The administration took away bargaining rights for hundreds of thousands of employees in the new Department of Homeland Security and the Defense Department.[18] In the years before the 2009 change of administration, a controlling majority of the five-member National Labor Relations Board (NLRB), appointed by President Bush, denied protection to

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[13] See eg, Schmitt, J and Zipperer, B, 'Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007' (Center for Economic and Policy Research, March 2009).

[14] For information on the systematic failure of US labour law to protect workers' organizing and bargaining rights, see the website of American Rights at Work available at www.araw. org.

[15] United States Bureau of Labor Statistics, 'Union Members in 2008' (28 January 2009).

[16] For a discussion, see Stieber, J, 'Protection against Unfair Dismissal: A Comparative View' (1980) 3 *Comparative Labor Law Journal* 229, stating 'The United States stands almost alone among industrialize

[17] See US General Accounting Office, 'Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights' (Report No GAO-02-835, September 2002).

[18] See LaBrecque, LC, 'DOD Unveils Final Personnel System Rule Covering 650,000 Workers; Unions Plan Suit' Bureau of National Affairs *Daily Labor Report* (28 October 2005) A-8; 'Homeland Security Announces Final Rule Changing Personnel System for Agency' Bureau of National Affairs *Daily Labor Report* (27 January 2005) A-9.

graduate student employees, disabled employees, temporary employees and other categories of workers.[19]

An October 2006, a NLRB decision was especially alarming for labour advocates. The NLRB set out a new, expanded definition of 'supervisor' under the section of US labour law that excludes supervisors from protection of the right to organise and bargain collectively.[20] This exclusion has enormous repercussions for millions of workers who might now become 'supervisors' and lose protection of their organising and bargaining rights.[21] This case is discussed in more detail below in connection with a complaint to the International Labour Organisation (ILO) Committee on Freedom of Association.

The Human Rights Context

'American exceptionalism' to international law is deeply rooted in American legal discourse and culture.[22] Labour and employment law practitioners and jurists rarely invoke human rights instruments and standards on freedom of association, child labour, nondiscrimination, health and safety, wages and hours, migrant workers' rights or other subjects of international human rights law to address failures in US labour law and practice.

Outside a small cadre of specialists interested in comparative and international labour law, most actors in the US labour law system have no familiarity—if they are even aware of their existence—with labour 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, Organisation for Economic Co-operation and Development (OECD) guidelines, trade agreements and other international instruments. The United States has ratified only 14 of the ILO's 186 conventions, and among these only two of the eight 'core' conventions.[23]

When the United States ratified the ICCPR 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

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[19] See *Brown University,* 342 NLRB No. 42 (2004); *Oakwood Care Center,* 343 NLRB No. 76 (2004) (Note that this is not the same 'Oakwood' as that of the supervisor case in n 20 below); *Brevard Achievement Center,* 342 NLRB No. 101 (2004). For a fuller description of these and other National Labor Relations Board (NLRB) decisions weakening workers' rights, see 'Workers Rights Under Attack by Bush Administration: President Bush's National Labor Relations Board Rolls Back Labor Protections' (Report by Congressman George Miller, Senior Democratic Member, Committee on Education and the Workforce, US House of Representatives, 13 July 2006), available at: ttp://edworkforce.house.gov/democrats/pdf/NLRBreport071306.pdf.

[20] See *Oakwood Healthcare, Inc,* 348 NLRB No. 37; *Croft Metal, Inc,* 348 NLRB No. 38; *Golden Crest Healthcare Center,* 348 NLRB No. 39 (October 2, 2006), called the *Oakwood* trilogy.

[21] See Eisenbrey, R and Mishel, L, 'Supervisors in Name Only: Union Rights of Eight Million Workers at Stake in Labor Board Ruling' *Economic Policy Institute* (12 July 2006) available at: www.epi.org/content.cfm/ib225; 'The Potential Impact of NLRB's Supervisor Cases *'Economic Policy Institute* (6 September 2006) available at: www.epi.org/content. cfm/pmll5.

[22] For a collection of essays on this question, see M Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton, Princeton University Press, 2005). See also, Roth, K, 'The Charade of US Ratification of International Human Rights Treaties' (Fall 2000) 1 *Chicago Journal of International Law* 347.

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

the Covenant would not obligate us in any way to ratify ILO Convention 87 or any other international agreement'.[24] 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.[25] As one scholar concluded:

> 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 decision makers 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.[26]

Most lawyers, legislators and judges in the United States ignore international law and look instead to the US Constitution for fundamental rights. But even in this national context, ideas of fundamental rights for workers are often lacking. Labour law scholars and practitioners traditionally see regulating the employment relationship as a series of policy choices unrelated to constitutional rights, unless the Constitution speaks clearly. Some valuable constitutional safeguards for workers can still be found in the First Amendment's protection of speech, protecting peaceful picketing rights, for example. Public employees, in particular, rely on the First Amendment to protect their associational rights and right to petition legislators in states where collective bargaining is outlawed. In general, though, US labour and employment law reflects malleable policy choices, not fundamental rights.

The Wagner Act: A Fateful Choice

US law protecting workers' organising and bargaining is not grounded in fundamental rights. It rests on the commerce clause of the Constitution empowering Congress to regulate interstate business. Congress could conceivably have grounded 'Labor's Magna Carta', as the 1935 Wagner Act has often been called, in fundamental rights provisions of the Constitution like the First Amendment's protection of speech and assembly, the Thirteenth Amendment's affirmation of free labour, and the Fourteenth Amendment's guarantee of equal protection. Such a fundamental rights foundation to labour law might have made it easier now to apply international human rights standards to domestic labour law.

But Wagner Act drafters worried that the Supreme Court would declare the new law unconstitutional. They opted for narrow economic grounds to justify passage, citing the commerce clause and Congress's need to address what the Act's findings called 'forms of industrial strife or unrest...burdening or obstructing commerce ...' The Supreme Court upheld the Wagner Act based on commerce clause arguments that the Act reduced strikes, not that it

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

[25] See 'Second and Third Report of the United States of American to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights' (21 October 2005). The report did mention, without discussion, the Supreme Court's 2002 decision in *Hoffman Plastic Compounds v NLRB, 535* US 137 (2002), discussed in detail below. A failure to mention *Hoffman Plastic* would have signalled either gross incompetence or deliberate omission.

[26] See Estlund, CL, 'The Ossification of American Labor Law' (2002) 102 *Columbia Law Review* 1527.

advanced workers' rights.[27] Professor James Gray Pope has suggested that the Supreme Court was really responding to massive social pressures of workers' organising and strikes, including sit-down strikes, and that 'there is no a priori reason to believe that—had the justices been presented with an argument based on the Thirteenth Amendment instead of the Commerce Clause—they would not have chosen to uphold the Act on that ground'.[28]

The choice of a narrow economic base stressing free flow of commerce, rather than a broader rights-based framework, set US labour law on a path away from human rights as a guiding principle. Ironically, the only genuinely rights-based feature is the 'employer free speech' amendment in the 1947 Taft-Hartley Act, which allows employers to campaign openly and aggressively against workers' self-organisation.[29]

Trade union growth after the Wagner Act masked the implications of choosing economic rather than fundamental rights underpinning to US labour law. But when union membership fell and prevailing values shifted away from industrial democracy and social solidarity toward management control and global competitiveness, free market economic imperatives trumped workers' fundamental rights. Strikebreaking with permanent replacements became widespread.[30]

Without a human rights foundation, employers could argue that workers' organising and bargaining were themselves 'burdens' on the free flow of commerce. Thus, in landmark labour law decisions, the US Supreme Court decided that workers have no right to bargain over an employer's decision to close their workplace because employers need 'unencumbered' power to make decisions speedily and in secret,[31] and that workers have no right to receive written information from trade union organisers in a publicly accessible shopping mall parking lot because the employer's private property rights outweigh workers' freedom of association.[32] As Professor Estlund observes:

> Even when it is operating within the bounds of existing precedent, the Board is hemmed in by Congress and particularly by the federal judiciary, both of which have grown unsympathetic to—even unfamiliar with—the collectivist premises of the New Deal labor law regime as it falls increasingly out of sync with the surrounding legal landscape.[33]

Despite the traditional and still prevalent reluctance of American legal actors to rely on international human rights law, an encouraging movement to do just that has begun taking shape. Labour advocates are more often raising human rights concepts and arguments both in legal arenas and in grass roots activism. For their part, human rights activists and organisations are bringing workers' rights in the United States higher on their own agendas, going beyond an

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[27] See *NLRB v Jones & Laughlin Steel Corp* (1937) 301 US 1.

[28] See Gray Pope, J, 'The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957' (2002) 102 *Columbia Law Review* 1.

[29] See National Labor Relations Act s 8(c). It says, 'The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.'

[30] See eg, Rosenblum, JD, *Copper Crucible: How the Arizona Miners' Strike of 1983 Recast Labor-Management Relations in America,* 2nd edn (Ithaca, New York, ILR Press of Cornell University Press, 1998).

[31] See *First National Maintenance Corp v NLRB* (1981) 452 US 666.

[32] See *Lecbmere, Inc v NLRB* (1992) 502 US 527.

[33] See Estlund, 'The Ossification of American Labor Law' (2002).

earlier, narrower view that labour rights are distinct from human rights. More on the new human rights focus in US labour advocacy follows the discussion below on legal frameworks for workers' rights.

US Legal Frameworks of Labour and Employment Law[34]

This brief section sketches US labour and employment legislation and enforcement as they appear 'on the books' as background for section III on how they work in practice. Some elements of US law on their face violate international standards—the exclusion of farm workers from protection of the right to organise, for example. Most US labour specialists will be familiar with this information, but it is offered here as a primer for foreign analysts.

Constitutional Underpinnings of US Labour and Employment Law

US labour and employment law is deeply rooted in a national legislative framework generated mainly (but not exclusively) by policy choices rather than human rights. The US Constitution makes no specific mention of workers' right to organise, to bargain collectively, or to strike, nor does it address economic and social rights. However, the commerce clause in article I section 8 of the United States Constitution empowers Congress to 'regulate commerce among the several states'. The commerce clause is the constitutional foundation of most labour and employment laws.

The Statutory Framework for Freedom of Association

Based on the commerce clause, twentieth century legislation set the framework for protection of workers' rights to organise, to bargain and to strike. The Wagner Act of 1935 and the Taft-Hartley Act of 1947 are the most important federal labour laws governing private sector labour-management relations. While they are separate statutes, they overlap and refer to one another in a complex legislative structure. For convenience, scholars and practitioners often call this bundle of statutes simply 'the Act'.

The Wagner Act has often been called the American workers' Magna Carta. Section 7 of the Wagner Act grants private sector workers 'the right to self-organisation, to form, join, or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for mutual aid or protection'.

These 'Section 7 rights' are protected by section 8 of the National Labor Relations Act (NLRA), which defines and prohibits unfair labour practices (ULPs) by employers that violate these rights. ULPs include interference with workers' organising activities (threats of workplace

[34] Note that US labour law scholars and practitioners distinguish 'labour law' and 'employment law' in their discourse. 'Labour law' is usually taken to mean law governing labour management relations in the trade union context (what other countries often call 'collective labour law'). 'Employment law' usually means aspects of labour law outside the trade union organising and collective bargaining context—anti-discrimination laws, health and safety laws, minimum wage and overtime standards, etc—effectively 'individual labour law' in that it normally covers all workers as employees, whether or not they are union-represented.

closure, for example); discrimination against workers for their organising or bargaining activity (firing leaders of an organising effort, for example), and refusal to bargain in good faith with a trade union chosen by a majority of workers in a defined 'bargaining unit' to represent them ('surface bargaining' with no intention of reaching an agreement, for example).

The Wagner Act was not without its own flaws. Section 2, for example, excluded agricultural workers from its protection, an exclusion that still stands. But the overall thrust of the Act was to promote trade union organising and collective bargaining. Mass organising drives in the 1930s and during World War II brought millions of workers into the US labour movement.35[35]

The American business community struck back. In 1947, Congress adopted the Taft-Hartley Act in reaction to workers' organising success after the Wagner Act. Millions of workers joined unions between 1935 and 1947 in mass production industries and other economic sectors around the country. Since 1947, the Taft-Hartley Act has

- excluded independent contractors and supervisors from protection of the right to organizing
- made illegal any form of ‘secondary’ worker solidarity where workers in different enterprises can support each others’ struggles;
- allowed individuals states to enact so-called ‘right-to-work’ laws barring voluntary agreements between workers and employees to require payment of union dues by all represented employees; and
- established an ‘employer free speech’ clause permitting managers to openly and aggressively campaign against worker self-organisation in the workplace.

The Role of the NLRB

The NLRB is the government agency that enforces the NLRA, which covers most workers in the private sector labour force. The Board has many attributes of a 'labour court' found in other countries, though it is an independent executive agency, not part of the judiciary. Knowing how the NLRB works is especially needed for understanding how legal entanglements in the Board and the courts often frustrate workers' freedom of association rights.[36]

The NLRB has three independent branches: the five-member board in Washington, DC; a general counsel also based at NLRB headquarters, and a division of administrative law judges. A network of 33 regional offices carries out NLRB tasks around the country.

The five-member NLRB has two main functions. The first is to set up and oversee representation elections in which workers in a bargaining unit choose whether to bargain collectively with their employer. The second is to serve as an appeal panel reviewing written decisions by administrative law judges in cases involving unfair labour practices.

Acting through the directors and staff in 33 regional offices, the NLRB general counsel conducts investigations of unfair labour practice charges filed by workers, unions or employers.

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[35] See Bernstein, I, *The Turbulent Years: A History of the American Worker, 1933-1941* (Boston, Houghton-Mifflin Co, 1970).

[36] A comprehensive history of the NLRB is found in Gross, JA, *Broken Promise: The Subversion of US Labor Relations Policy, 1947-1994* (Philadelphia, Temple University Press, 1995).

Key steps in the investigation include gathering relevant documents, interviewing and taking statements from workers, employers, and others involved in a case, and evaluating the evidence to decide if charges have 'merit'. If the investigation finds merit in the charge that an unfair labour practice occurred, the general counsel issues a 'complaint' specifying the violations in detail and setting a date for hearing—that is, a trial on the evidence—before an administrative law judge.

Administrative law judges are independent of the Board and of the general counsel. A corps of experienced labour law experts, approximately *75* NLRB judges preside over unfair labour practice hearings in much the same way that civil and criminal court judges preside over non-jury trials (there are no juries in NLRB proceedings).

A party unhappy with an administrative law judge's decision can appeal it to the NLRB in Washington. The Board reviews the evidence, the transcript, and the judge's written decision and opts to uphold it, reverse it, or modify it. The NLRB's own written decision can adopt the judge's ruling without comment or offer the Board's separate reasoning based on its reading of the case record.

Remedies

The NLRB cannot penalise an employer for breaking the law. In a very early case, the Supreme Court rebuked the Board for imposing a penalty against an employer committing an unfair labour practice.[37] The NLRB can only order a 'make-whole' remedy restoring the status quo ante as the remedy for unfair labour practices. The standard remedy for an unfair labour practice is to have the employer post a notice at the workplace promising not to repeat the unlawful conduct.

Discriminatory discharge because of trade union activity is the most common unfair labour practice charge filed with the NLRB. Here the standard remedy includes an order to reinstate victimised workers with back pay. However, any interim earnings fired workers received during the period of discharge are subtracted from the employer's back-pay liability.

In practice, many discriminatory discharge cases are settled with a small back-pay payment and workers' agreement not to return to the workplace. At a modest cost and with whatever minor embarrassment comes with posting a notice, the employer is rid of the most active union supporters, and the organising campaign is stymied.

In the other most common unfair labour practice cases involving charges that employers refused to bargain in good faith with the workers' chosen representative, the remedy is an order to post a notice acknowledging the conduct and to return to the bargaining table and bargain in good faith. There is no further remedy, so the same cycle can repeat itself indefinitely
without an agreement being reached.

[37] *Consolidated Edison v NLRB* (1938) 305 US 197.

Appeal to the Federal Courts

Occasionally, the NLRB makes decisions favourable to workers, finding employer violations and fashioning innovative remedies. For example, in the *First National Maintenance Corp v NLRB* and *Lechmere, Inc v NLRB* cases discussed in the Introduction above,38[38] the Board ruled in favour of workers' right to bargain over workplace shutdown decisions, and in favour of union representatives' access to employees near the workplace. But the Supreme Court overruled the Board in these cases.

Doctrinally, courts are supposed to defer to the administrative expertise of the NLRB. In practice, however, appeals courts often make their own judgment on the merits of a case to overrule the NLRB. Professor Julius Getman has described the dynamic thus:

> [T]he 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 NLRA was intended to replace judicial commitment to property rights and instead put the force of law behind the rights of employees to unionize, strike, and bargain collectively. But the common law, like judicial discretion, dies hard ... the judicial attitude towards collective bargaining has increasingly become one of suspicion, hostility, and indifference ...
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> 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.[39]

The Statutory Framework for Anti-Discrimination Legislation

Post-Civil War constitutional amendments eliminating slavery and requiring equal protection of the laws set the foundation for anti-discrimination policies in the United States. Congress immediately enacted a strong laws prohibiting race discrimination, the Civil Rights Acts of 1866 and 1870. But it took a century of civil rights struggle to bring anti-race discrimination principles into an enduring statutory framework. Similarly, organizing efforts by women, older Americans, disabled Americans and other social movements achieved legal recognition of their claims for protection against discrimination based on their characteristics.

The Equal Pay Act of 1963 requires equal pay for men and women performing essentially the same job. The law does not require equal pay for work of equal value. This

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[38] See *First National Maintenance Corp* (1981) 452 US 666 and *Lechmere* (1992) 502 US 527.

[39] See Getman, J, 'The National Labor Relations Act: What Went Wrong; Can We Fix It?' (2003) *45 Boston College Law Review* 125.

'comparable worth' principle has been rejected by state and federal courts in cases where workers sought to win comparable worth through application of existing anti-discrimination laws,[40] and Congress has not acted to adopt comparable worth laws.[41]

Title VII of the Civil Rights Act of 1964 prohibits job discrimination based on race, colour, religion, sex, or national origin.

The Age Discrimination in Employment Act (ADEA) of 1967 prohibits discrimination against workers 40 years of age and older.

The Americans with Disabilities Act (ADA) of 1990 prohibits discrimination against persons with disabilities.

The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing workplace anti-discrimination laws. The EEOC is similar to the NLRB in some respects. It has a five-member board appointed by the president and an independent general counsel. It receives complaints at one of many regional offices around the country, and investigates them to see whether they are 'meritorious' complaints.

However, the EEOC does not have its own enforcement power beyond investigation and conciliation. If the Commission finds merit to a complaint, it can only file a suit on the complainant's behalf in a federal district court. The court becomes the enforcement authority.

The EEOC files such cases rarely, usually when large numbers of employees are involved in a class action, or when a major legal issue is at stake. More commonly, the Commission grants the complainant a 'right-to-sue' letter, whereupon the aggrieved employee must get his or her own attorney to file the case in federal court. In either case, this means that federal district courts and juries decide discrimination claims, subject to appeals to federal circuit courts and to the US Supreme Court.

The boundaries of workers' characteristics covered by federal antidiscrimination laws are those mentioned above: race, colour, religion, sex, national origin, age and disability. Some states and local governments have gone further, extending anti-discrimination protections against workers based on political beliefs, sexual orientation, genetic makeup, marital status, lawful off-work activities, gender identity and other attributes.[42]

This skeletal outline of anti-discrimination laws cannot begin to suggest the complexity of their application by administration agencies and courts, which has prompted an enormous legal literature in books and law review articles. For example, litigation has given rise to distinctions between 'disparate treatment' and 'disparate impact' discrimination; between 'quid pro quo' sexual harassment and 'hostile environment' sexual harassment; between 'reasonable accommodation' of employee rights and 'undue burden' on the employer's business; among standards of judicial review characterised as 'rational basis,' 'strict scrutiny' and an intermediate

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[40] See eg, *County of Washington v Gunther* (1981) 452 US 161, 166. The Supreme Court found that female prison guards were victims of discrimination, but did not accept the comparable worth theory.

[41] For information on the pay equity movement, see the website of the National Committee on Pay Equity, available at: www.pay-equity.org/index.html.

[42] See eg, Dishman, N, 'The Expanding Rights of Transsexuals in the Workplace' (2005) 21 *The Labor Law* (American Bar Association) 121.

'heightened scrutiny' or 'moderate scrutiny'; among shifting burdens of proof in litigation, and many other issues too detailed for treatment here.[43]

The Statutory Framework for Labour Standards Legislation

As noted above, the 'Commerce Clause' empowering Congress to regulate interstate commerce is the constitutional foundation for federal labour standards legislation in the United States. Contrary to a widely held view outside the United States that the American workplace is home to an unregulated *capitalisme sauvage* with no protection for workers, an extensive regulatory regime governs wages, hours and conditions in the workplace. Federal employment law sets nationwide minimum standards, but state governments are also important actors, since they can adopt state laws above federal minimum standards.

The Fair Labor Standards Act (FLSA) of 1938 provides for a federal minimum wage ($7.25 per hour as of July 2009), overtime pay requirements (150 per cent of pay after 40 hours in a week), and child labour laws (setting age 16 as the basic age for admission to employment, and age 18 for employment in industrial settings). The US Department of Labour and counterpart state agencies are the main enforcement bodies for wage, hour and child labour laws, first through an administrative procedure, then by recourse to federal courts when cases are not resolved administratively.

Almost 20 states and many municipalities have set minimum wage levels higher than the federal minimum wage.[44] In fact, a remarkable 'living wage movement' has taken shape around the United States pressing for state and local action to raise minimum wages, and can point to many successes.[45]

The Occupational Safety and Health Act (OSHA) of 1970 imposes a general duty on all employers to provide a safe and healthy workplace for workers. In addition to this 'general duty clause', specific standards are set for hazardous materials and safety rules. The US Occupational Safety and Health Administration (also called OSHA), an agency of the Labour Department, sets standards and enforces the Act through administrative action, backed up by federal court orders.

The Social Security Act of 1935 created a mandatory, universal retirement pension system that is now the mainstay of retired workers' income, with average benefits about $1500 per month. The Social Security Act also provides monthly income to workers of any age who become permanently disabled, and to the families of workers who die.

The Social Security Act also established the unemployment insurance system providing weekly unemployment benefits. Workers who lose employment 'through no fault of their own' can receive 50 per cent of their regular weekly pay for six months, up to a capped maximum amount (normally the average wage in the state).

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[43] A useful overview and discussion of these issues can be found in Rutherglen, G, *Major Issues in the Federal Law of Employment Discrimination,* 4th edn (Federal Judicial Center, 2004), available at: www.fjc.gov/library/fjc_catalog.nsf/.

[44] A list of higher minimum wage states and their minimum wages is available at: www. dol.gov/esa/minwage/america.htm. For information on municipal minimum wage laws, see Sonn, PK, 'Citywide Minimum Wage Laws: A New Policy Tool for Local Governments' (Policy Brief, Brennan Center for Social Justice, May 2006), available at: www.brennancenter. org/resources/books.html#aj.

[45] Information on the living wage movement is available at: www.livingwagecampaign.org/.

Although not created by federal law, workers' compensation statutes in every state provide for medical care and wage replacement benefits (usually two-thirds of regular pay) for workers who become disabled from job-related injuries or illnesses, or benefits to the families of workers who die on the job. Administrative commissions in each state enforce workers' rights to unemployment insurance and to workers' compensation, subject to review by state courts.

US Labour and Employment Law in Practice

Freedom of Association

Interference with Organising

The reality of US labour law enforcement falls far short of the Wagner Act's goals. A culture of near-impunity has taken shape in much of US labour law and practice. Any employer intent on resisting workers' self-organisation can drag out legal proceedings for years, fearing little more than an order to post a written notice in the workplace promising not to repeat unlawful conduct. Many employers have come to view remedies like back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organising leaders and derail workers' organizing efforts. Enervating delays and weak remedies invite continued violations.

Discrimination against Union Supporters

Firing or otherwise discriminating against a worker for trying to form a union is illegal but commonplace in the United States. In the 1950s, workers who suffered reprisals for exercising the right to freedom of association numbered in the hundreds each year. In the 1960s, the number climbed into the thousands, reaching slightly over 6,000 in 1969. By the 1990s and continuing today, more than 20,000 workers each year were victims of discrimination for union activity.[46]

An employer determined to get rid of a union activist knows that all that awaits, after years of litigation if the employer persists in appeals, is a reinstatement order the worker is likely to decline and a modest back-pay award. For many employers, it is a small price to pay to destroy a workers' organising effort by firing its leaders.

Employers can force workers to attend captive-audience meetings in work time. They can fire workers for not attending the meetings. They can impose a 'no questions or comments' rule at captive-audience meetings, and discipline any worker who speaks up.

Most often, these meetings include exhortations by top managers that are carefully scripted to fall within the wide latitude afforded employers under US law to deter workers from choosing union representation.

Under US law, employers and anti-union consultants they routinely hire to oppose workers' organising have refined methods of legally 'predicting'—as distinct from unlawfully

[46] See Annual Report of the National Labor Relations Board for relevant years, available at: www.nlrb.gov.

threatening—workplace closures, firings, wage and benefit cuts, and other dire consequences if workers form and join a trade union. A 'prediction' that the workplace will be closed if employees vote for union representation is legal if the prediction is carefully phrased and based on objective facts rather than on the employer's subjective bias.[47]

This fine distinction in the law is not always apparent to workers or, indeed, to anyone seeking common-sense guidance on what is allowed or prohibited. Unfortunately for workers' rights, federal courts have tended to give wide leeway to employers to 'predict' awful things if workers vote for a union.

Delays

Delays in the US labour law system arise first in the election procedure. NLRB elections take place at least several weeks after workers file a petition seeking an election. In many cases, the election can be held up for months by employers who challenge the composition of the 'appropriate bargaining unit'.

An employer can also file objections to an election after it takes place, arguing that the union used unfair tactics. It takes several months to resolve these objections. However, even when the NLRB rules in workers' favour and orders the company to bargain with the union, the employer can ignore the Board's order. This forces the NLRB to launch a new case on the refusal to bargain, often requiring years more to resolve in the courts. In many cases, workers who voted in favour of union representation years earlier must wait for bargaining to begin while employees' appeals are tied up in court.

Long delays also occur in unfair labour practice cases. Most cases involve alleged discrimination against union supporters or refusals to bargain in good faith. Several months pass before the cases are heard by an administrative law judge. Then several more months go by while the judge ponders a decision. The judge's decision can then be appealed to the NLRB, where often two or three years go by before a decision is issued. The NLRB's decision can then be appealed to the federal courts, where again up to three years pass before a final decision is rendered. Thus, many fired workers who win reinstatement orders from administrative judges and the NLRB still wait many years for clogged courts to rule on employers' appeals.

Surface Bargaining

Even after workers form a union and bargaining begins, employers can continue to thwart workers' choice by bargaining in bad faith—going through the motions of meeting with the workers and making proposals and counterproposals without any intention of reaching an agreement. This tactic is called 'surface bargaining'. The problem is especially acute in newly organised workplaces where the employer has fiercely resisted workers' self-organisation and resents their success.[48]

Non-standard Workers

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[47] The distinction between threats and predictions was set out by the Supreme Court in *NLRB v Gissel Packing Co* (1969) 395 US 575.

[48] For discussion, see Dannin, E, 'From Dictator Game to Ultimatum Game ... and Back Again: The Judicial Impasse Amendments' (2004) 6 *University of Pennsylvania Journal of Labor & Employment Law* 241.

Many employers can use subcontracting arrangements and temporary employment agencies to avoid any obligation to recognise workers' rights of organisation and collective bargaining. This problem afflicts workers in the apparel manufacturing industry, in janitorial services, in high-technology computer services, and other sectors characterised by layers of subcontracting arrangements. Prime contractors often simply cancel the contracts of subcontractors whose employees form and join unions. The result is widespread denial of workers' freedom of association.[49]

Striker Replacements

Under US labour law, employers can hire new employees to permanently replace workers who exercise the right to strike. This doctrine runs counter to international standards recognising the right to strike as an essential element of freedom of association. Considering the US striker replacement rule, the ILO's Committee on Freedom of Association determined that the right to strike 'is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally' and that permanent replacement 'entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights'.[50]

Employment Law Failures

Just as in the case of laws meant to protect freedom of association, the existence of a wide range of employment laws is no guarantee of their substantive protection or their effective enforcement.[51] An increasingly conservative federal judiciary has issued decisions vitiating many protections against discrimination under Title VII, ADEA, ADA and other statutes. Contrary to international standards, US law has never recognized the principle of equal pay for work of equal value. The law requires equal pay only for equal work, meaning substantially the same job.[52]

The federal minimum wage was frozen at $5.15 per hour for 10 years until Congress acted to raise it to $7.25 in 2009. Based on full-time work, the federal minimum wage yields a monthly income of $1,258 and an annual income of $15,080. This is substantially below the federal poverty level of $21,200 for a family of four. About 15 million workers labour at the minimum wage or slightly above the minimum wage, and about 30 million employees work for less than $10 per hour, still below the official poverty level.[53]

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[49] For a discussion of this problem in the garment sector, see Lung, S, 'Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers' (2003) 34 *Loyola University Chicago Law Journal* 291.

[50] See International Labour Organisation (ILO), Committee on Freedom of Association: Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) para 92, Report No 278, Case No 1543 (1991).

[51] For a comprehensive analysis and critique of failures in effective enforcement of employment law, see Bernhardt, A, Boushey, H, Dresser, L and Tilly, C, *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market* (Cornell University Press, 2008).

[52] See Mooney Cotter, A, *Gender Injustice: An International Comparative Analysis of Equality in Employment* (Ashgate Press, 2004).

[53] See 'Minimum Wage: Facts at a Glance' (Issue Brief, *Economic Policy Institute,* August 2008), available at www.epi.org/publications/category/wages_and_living_standards/P20/.

Minimum wage law violations are widespread. A leading non-governmental organisation that focuses on employment standards notes,

> growing numbers of employers routinely violate our nation's core workplace standards by not paying the minimum wage or overtime, calling workers 'independent contractors' to deny them basic protections ... At the same time, workers' ability to respond is often constrained—by outdated government enforcement systems, fear of retaliation for speaking up, and lack of immigration status.[54]

A 2009 report by the US Government Accountability Office (GAO), a non-partisan congressional auditing authority, confirmed this analysis. The report found widespread enforcement failures by the Department of Labour's Wage and Hour Division, which is supposed to investigate and remedy violations of minimum wage, overtime and child labour standards.[55] Most analysists converge on estimates that between two and three million workers in the United States are actually paid less than the legal minimum wage, and more than three million are misclassified by their employers as independent contractors when they are really employees, allowing employers to avoid minimum wage and overtime pay requirements.[56]

The universal term used by workers in the United States for overtime pay is 'time- and-a-half'. Time-and-a-half after 40 hours is the only substantive overtime requirement under US labour law. The United States is practically unique in the world in not having any legislated limits on overtime work (except in specialised occupations like airline pilots and long-distance truck drivers). Most other countries limit the amount of overtime that can be demanded of an employee without consent, but US employers are under no such constraints. Employers can terminate workers who refuse overtime in any amount—incidental, reasonable, excessive or intolerable. Only workers with a collective bargaining agreement can limit or condition overtime demands.[57]

Managers, supervisors, professionals, and other 'administrative' employees are exempt from overtime pay requirements, as are independent contractors. [58]In practice, many employers improperly place employees in these categories to extract unpaid labour from them.[59] Many employers, most notoriously Wal-Mart, the giant retail chain, pressure their 'non-exempt' employees (ie hourly employees who are clearly entitled to overtime pay) to work during unpaid lunch and rest breaks.[60] These abuses sometimes give rise to lawsuits for back

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[54] See National Employment Law Project, 'Enforcement of Workplace Standards' at www.nelp.org/index.php/site/issues/category/enforcement_of_workplace_standards.

[55] Greenhouse, S, 'Labor agency is failing workers, report says' *New York Times* (24 March 2009) A16.

[56] See Bobo, K, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid—and What We Can Do About It* (New York, New Press, 2009).

[57] For a comprehensive review of overtime regulation in the United States, see Linder, M, *Moments Are the Elements of Profit: Overtime and the Deregulation of Working Hours under the Fair Labor Standards Act* (Iowa City, Iowa, Fanpihua Press, 2000).

[58] See Camille Hebert, L, 'The Fair Labor Standards Act: Updating the "White-Collar" Employee Exemptions to the Fair Labor Standards Act' (2003) 7 *Employee Rights and Employment Policy Journal 51*.

[59] For comprehensive discussion and analysis, see Goldstein, B, Linder, M, Norton, LE, and Ruckelshaus, CK, 'Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment' (1999) 46 *UCLA Law Review* 983.

[60] See eg, Chang, A., 'Wal-Mart settles suits by workers: Dozens of class actions had accused the firm of violating rules on wages and breaks' Los Angeles Times (24 December 2008) CI; From Tribune News Services, "Wal-Mart settles suits in work-time dispute: Retail giant agrees to pay employees up to $640 million" Chicago Tribune (24 December 2008) C29.

overtime pay,[61] but many employers get away with such violations because workers are unaware of their rights or afraid of reprisals if they file wage claims with government authorities.

While it is not comparable to the situation in many developing countries, child labour is still a problem in some employment sectors in the United States. It is most acute in agriculture, especially where migrant workers bring their children into the fields to help with piecework production.[62] But the problem is also widespread in retail stores and fast food restaurants, where 14 and 15-year-old employees (who are legally permitted to work in such establishments) often work past the maximum daily or weekly hours limit.[63]

Because of eligibility requirements for a sustained 'attachment' to the labour force, fewer than half of unemployed workers actually receive weekly unemployment insurance benefits.[64] Part-time, temporary, and other 'non-standard' workers rarely qualify for benefits.[65]

Many workers also fail to receive workers' compensation benefits for job related injuries and illnesses because they have to prove the job-relatedness of their condition. This is difficult in cases where an injury is not obvious, as in back injuries and repetitive motion injuries, and in illnesses with long latency periods before symptoms occur. In most of these cases, employers challenge workers' claims, arguing that their conditions are not work related. Many workers simply give up their claims rather than go through a long legal battle that might take years to resolve.[66]

A Special Note on immigrant Workers

Millions of immigrant workers have entered the US labour force in recent years. In the 2000 census, about 12 per cent of the US population were foreign-born, more than 32 million people, compared with eight per cent of the population in 1990. More than half were from Latin America, and of these more than two-thirds came from Mexico and Central America.

Estimates put the number of undocumented workers in the United States at more than eight million, possibly as many as 12 million.[67] Nearly 60 per cent of them are migrant workers from Mexico. Many have been in the country for years working long hours for low pay in demanding, dirty and dangerous jobs.[68]

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[61] See eg, Waldmeir, P, 'US Workers Lose Faith in the Dogma that Overwork is Good for the Soul; Employers are Facing a Growing Number of Lawsuits over Pay and Hours' *Financial Times* (9 June 2006) 6.

[62] See the Human Rights Watch report, 'Fingers to the Bone: United States Failure to Protect Child Farmworkers' (1999), available at: www.hrw.org/reports/2000/frmwrkr/.

[63] See eg, Greenhouse, S, 'Wal-Mart Agrees to Pay Fine in Child Labor Cases' *New York Times* (12 February 12 2005) Al.

[64] The Upjohn Institute maintains an ongoing research project on unemployment insurance in the United States, with information available at www.upjohninst.org/uicenter.html#wp.

[65] See National Employment Law Committee, 'Part-Time Workers and Unemployment Insurance' (Fact Sheet, March 2004), available at: www.nelp.org/ui/initiatives/part_time/ parttimeui0304.cfm.

[66] For a comprehensive history and analysis, see Spieler, EA, 'Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries' (1994) 31 *Houston Law Review* 119.

[67] See Passel, JS, 'Size and Characteristics of the Unauthorised Migrant Population in the US: Estimates Based on the March 2005 Current Population Survey' (Pew Hispanic Center, 7 March 2006), available at: http://pewhispanic.org/reports/report.php?ReportID=61.

[68] See eg, Human Rights Watch, 'Blood, Sweat, and Fear: Workers' Rights in US Meat and Poultry Plants' (December 2004), available at: www.hrw.org/reports/2005/usa0105/.

Many undocumented workers shrink from exercising rights of association or from seeking legal redress when their workplace rights are violated for fear of having their legal status discovered and being deported. Their uncertainty has been exacerbated in the aftermath of the 11 September 2001 events.[69] Fully aware of workers' fear and sure that they will not complain to labour law authorities or testify to back up a claim, employers have little incentive against violating their rights—sometimes with fatal consequences.[70]

A New Opening to International Human Rights Standards

Freedom of Association

Confronted with the challenges outlined above, workers' rights supporters in the United States are starting to consider international human rights standards as a new source of protection for workers under US law. So far, this new turn in labour advocacy in the United States aims mainly at freedom of association standards. Advocates argue that the United States is obligated under international human rights law to respect workers' freedom of association in its labour laws and labour law enforcement, and to protect workers' freedom of association against violations by employers.

The United States has acknowledged its international responsibility to honour workers' freedom of association by signing the Universal Declaration of Human Rights and by ratifying important human rights instruments, in particular the ICCPR.[71] Although it has not ratified ILO Conventions Nos 87 and 98 on freedom of association, the United States acknowledges its responsibility, by virtue of ILO membership, to comply with those Conventions. These commitments are underscored by US support for the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.[72]

US Commitments to Labour Rights and Trade

US trade laws and labour rights clauses in international trade agreements, promoted and signed by the United States, articulate workers' rights. The United States has affirmed obligations to honour workers' freedom of association in its preferential trade programmes and in laws governing US involvement in the World Bank, the International Monetary Fund, and other multilateral bodies. The same labour clauses also address certain economic and social

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[69] See Garcia, RJ, 'Labor's Fragile Freedom of Association Post-9/11' (2006) 8 *University of Pennsylvania Journal of Labor & Employment Law* 283.

[70] See eg, Franklin, S, 'Illinois Study Finds Deaths, Serious Injuries Increase Even as Overall Workplace Fatalities Decline' *Chicago Tribune* (6 November 2005) CI.

[71] See Universal Declaration of Human Rights, General Assembly (GA) Res 217A (III) (1948) UN Doc A/810) 71; International Covenant on Civil and Political Rights, GA Res 2200A (XXI) (1966) UN GAOR Supp (No 16) 52, UN Doc A/6316.

[72] See ILO Convention No 87: Freedom of Association and Protection of the Right to Organise (1948); Convention No 98: Right to Organize and Collective Bargaining (1949). In 1975, the ILO's Committee on Freedom of Association determined that member countries are 'bound to respect a certain number of general rules which have been established for the common good ... among these principles, freedom of association has become *a customary rule above the Conventions'.* See Fact Finding and Conciliation Commission on Chile (Geneva, ILO, 1975) para 466.

rights, requiring prohibitions on child labour and 'acceptable conditions' on wages, hours, and workplace health and safety.[73]

US trade agreements with Jordan, Chile, Singapore, Morocco, Australia, and Central American nations incorporate ILO core labour standards declaration with a 'strive to ensure' obligation stating:[74]

> The Parties reaffirm their obligations as members of the International Labor Organisation ('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.

These agreements further require parties, including the United States, to effectively enforce their national laws on 'internationally recognised worker rights', defined as:[75]

- the right of association;
- the right to organize and bargain collectively
- prohibitions on forced labour and child labour; and
- accpetbale conditions of work with respect o minimum wages, hours of work, and occupational safety and healh.

'Internationally recognised' is in quotes because the US statutory definition of these rights is an idiosyncratic formulation resulting from legislative compromises, not grounded in United Nations (UN) or ILO instruments. Acting on its own, the US congress calls these five standards 'internationally recognised worker rights' in US trade laws and trade agreements.[76]

NAFTA and the NAALC

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 labour accord to the North American Free Trade Agreement (NAFTA). Going beyond the ILO's core standards formulation, the NAALC sets forth 11 'Labour Principles' that the three signatory countries commit themselves to promote. The NAALC Labour Principles include:[77]

- freedom of association and the right to organize;
- the right to bargain collectively;
- the right to strike;

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[73] See eg, the labour rights amendment in the US Generalised System of Preferences (GSP), 19 USC.A. § 2461 *et.seq.* The GSP programme permits a developing country to export goods to the United States on a preferential, duty-free basis as long as they meet the conditions for eligibility in the programme.

[74] These agreements and their labour chapters are all available on the website of the US Trade Representative at www.ustr.gov. Among them, only the US-Jordan Free Trade Agreement makes labour rights guarantees binding and enforceable through trade measures. The others lack an effective enforcement mechanism.

[75] Note that nondiscrimination is *not* included in the US statutory definition of TRWR'. For extended discussion, see Compa, L and Vogt, JS, 'Labor Rights in the Generalized System of Preferences: A 20-Year Review' (2001) 22 *Comparative Labor Law and Policy Journal* 199.

[76] For a stinging critique on this point, see Alston, P, 'Labor Rights Provisions in US Trade Law: Aggressive Unilateralism?' in L Compa and SF Diamond (eds), *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press, 2001).

[77] North American Agreement on Labor Cooperation (NAALC) Annex 1, Labor Principles.

- prohibition of forced labour;
- prohibition of child labour;
- equal pay for men and women;
- non-discrimination;
- minimum wage and hour standards;
- occupational safety and health;
- workers' compensation; and
- migrant worker protection.

The NAALC signers pledged to effectively enforce their national labour laws in these subject areas, and adopted six 'Obligations' for effective labour law enforcement to fulfill the principles. These obligations include:[78]

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

In sum, the United States has acknowledged its international responsibility to honour workers' rights by signing and ratifying human rights instruments, by accepting obligations under ILO standards in connection with instruments it has not ratified, and by committing itself in trade agreements with labour protections to effectively enforce US laws protecting workers' rights.

International Human Rights Standards' Effect on US Law

There is still reason for hope. International human rights law is moving slowly into the ken of lawyers, legislators, and judges in the United States. The most significant positive development outside the labour context was the Supreme Court's decision in 2005 that the execution of minors (ie who committed capital crimes when they were below age 18) is unconstitutional under the 'cruel and unusual punishments' clause of the Eighth 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

[78] Ibid art 2, Obligations.

> 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.[79]

This element of the Court's opinion provoked a furious response by right-wing judges Antonin Scalia and Clarence Thomas. Thomas said the majority used international law sources to 'impose foreign moods, fads, or fashions on Americans'. Like-minded right-wing members of Congress have introduced legislation to prohibit federal courts from using any international law sources in considering US cases.[80]

In the labour context, international standards have some effect in US court cases filed on behalf of workers in countries outside the United States. Human rights strictures against forced labour and ILO findings on forced labour 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 labour violations.[81]

In a case involving killings of union leaders at an American mining company's operations in Colombia, Professor Virginia Leary, a long-time advisor to the ILO, gave expert testimony on workers' freedom of association under international human rights standards. Her testimony helped convince a federal judge to move the case toward trial. The judge denied the US-based coal company's motion to dismiss the case, saying:[82]

> 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

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[79] See *Roper v Simmons* (2005) 543 US 551.

[80] See Cleveland, S, 'Is There Room for the World in Our Courts?' *The Washington Post* (20 March 2005) B4.

[81] See Lifsher, M, 'Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline; A Deal Ends a Landmark Case Brought by Villagers who said Soldiers Committed Atrocities,' *Los Angeles Times* (22 March 2005) CI.

[82] See *Rodriguez et al v Drummond* Co. (2003) 256 F. Supp. 1250. At trial, the jury found in favour of the defendant corporation, convinced by the company's arguments that it was not complicit in the murders. See Whitmire, K, 'Alabama Company Is Exonerated in Murders at Colombian Mine' *New York Times* (27 July 2007) CI. However, the jury's verdict does not vitiate the judge's finding that freedom of association is a paramount principle of international law.

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.

In a foreign lawsuit with potentially dramatic effect in the United States, US labour law faced examination under ILO standards in a Norwegian court. 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 organising 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 US labour law and practice conform to ILO norms. NOPEF and Trico's Norwegian counsel each called expert witnesses from the United States to testify whether US law and practice violate ILO core standards on freedom of association. The Norwegian court's finding that US law failed to meet international standards would let the NOPEF boycott proceed.

Just before the US experts' testimony, NOPEF settled the case with Trico's promise to respect workers' organising rights in Louisiana.[83] The boycott trigger was deactivated. Still, the Trico case signalled 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.[84]

A Changing Climate

The challenge now is to move the application of human rights standards from workers abroad whose rights are violated, to workers in the United States. We are still in an early stage of this process, where international human rights law appears to be having a nascent 'climate changing' affect on American labour law, bringing it closer to a human rights framework.

One signal came in the United States' 1999 report to the ILO under the 1998 Declaration's follow-up procedure. The United States, for the first time, acknowledged serious problems with US labour law and practice on workers' organising and bargaining rights under ILO standards. That was a move by the Clinton administration; the Bush administration later reverted to a standard formulation that US law and practice are 'generally in compliance' with ILO standards.

US labour law scholars 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. Professor James A Gross, for example, has developed a creative proposal to bring international human rights jurisprudence into US labour arbitration practice.[85] Professor Philip Harvey argues compellingly for application of the UN's economic, social and cultural

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[83] See Amber, M, 'US Company Agrees in Norwegian Court To Inform Employees of Organizing Rights' *BNA Daily Labor Report* (12 November 2002).

[84] For extensive analysis of cross-border solidarity efforts, see Atleson, J, 'The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity' (2004) 52 *Buffalo Law Review* 85.

[85] See Gross, JA, 'Incorporating Human Rights Principles into US Labor Arbitration: A Proposal for Fundamental Change' (2004) 8 *Employment Rights & Policy Journal* 1.

rights covenant to the right to employment in the United States.[86] Social scientists are also adopting a human rights approach to labour issues.[87]

Human rights advocates give new prominence to international labour standards in analysing workers' rights in the United States. Human Rights Watch published two major studies in 2000 on US workers' freedom of association and on child labour in American agriculture. In 2005, the group followed with a major report on workers' rights violations in the US meat and poultry industry,[88] and in 2007 with another book-length report on violations of workers' organising rights by Wal-Mart.[89] A new student movement that began against sweatshops in overseas factories has adopted a human rights and labour rights approach to problems of workers in their own campuses and communities, often citing international labour rights norms for guidance.[90]

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has launched a broad-based 'Voice® Work' campaign stressing international human rights in support of workers' organizing campaigns around the country. Every 10 December, International Human Rights Day, Voice® Work mobilises mass demonstrations around the county.[91] This movement has taken legislative shape in the proposed Employee Free Choice Act (EFCA), which has gained support from many members of Congress. Using Human Rights Watch's reports in its justification, the EFCA would incorporate international labour rights principles into US law on union organising.[92]

Some unions have begun issuing human rights reports on specific organizing campaigns. They find that charging employers with violations of international human rights, not just violations of the NLRA, gives more force to their claims for support in the court of public opinion. The Teamsters union, for example, has launched a human rights campaign against Maersk-Sealand, the giant international shipping company, for violating rights of association among truck drivers who carry cargo containers from ports to inland distribution centres. The company has fired workers who protest low pay and dangerous conditions, and threatened retaliation against others if they continue an organising effort.[93]

Similar violations by a large Catholic hospital chain in Chicago prompted another report, explaining how the employer's actions violated both international human rights standards and

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[86] See Harvey, P, 'Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously' (2002) 33 *Columbia Human Rights Law Review* 363.

[87] See eg, Swidorski, C, 'From the Wagner Act to the Human Rights Watch Report: Labor and Freedom of Expression and Association 1935-2000' (March 2003) 25 *New Political Science 55.*

[88] See Human Rights Watch, 'Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards; Fingers to the Bone: United States Failure to Protect Child Farmworkers; Blood, Sweat, and Fear: Workers' Rights in the US Meat and Poultry Industry'; all available at the Human Rights Watch website at www.hrw.org.

[89] See Human Rights Watch, 'Discounting Rights: Wal-Mart's Violations of US Workers' Right to Freedom of Association' at www.hrw.org.

[90] See eg, Bell, M, 'UM's Low-wage Workers to Get Pay Raise, Benefits' *Orlando Sentinel* (18 March 2006) B5; see also information on Harvard students' 'living wage' campaign for the university's low-wage employees available at: www.hcs.harvard.edu/~pslm/livingwage/portal. html.

[91] See eg, Greenhouse, S, 'Labor to Press for Workers' Right to Join Unions' *The New York Times* (9 December 2005) A18; Grant, A, 'Labor Supporters Take to Streets; Week of Demonstrations Meant to Rev Up US Union Movement' *Cleveland Plain Dealer* (10 December 2005) C2; Idell Hamilton, T, 'Labor Union Advocates Rally for Better Workers' Rights' *San Antonio Express-News* (11 December 2005) 5B.

[92] More information is available at: www.aflcio.org/joinaunion/voiceatwork/efca/.

[93] See 'Workers' Rights Violations at Maersk: Actions by US divisions of Maersk-Sealand in Light of International Human Rights and Labor Rights Standards' (3 September 2004), available at: www.teamster.org/divisions/port/pdfs.

principles of Catholic social doctrine.[94] The Teamsters union and the Service Employees International Union collaborated to present a human rights report at the May 2006 annual general meeting of First Group Pic, a multinational British firm. The report detailed workers rights violations by its US subsidiary, First Student, Inc, a school bus transportation company with a record of aggressive interference with workers' organising efforts.[95]

In 2004, trade unions and allied labour support groups created a new non-governmental organisation (NGO), 'American Rights at Work' (ARAW), with an ambitious programme to make human rights the centrepiece
of a new civil society movement for workers' rights.[96] Less directly connected to organised labour, but with labour rights an important part of its agenda, the National Economic and Social Rights Initiative (NESRI) took shape the same year with the express mission of incorporating principles of the UN Covenant on Economic, Social and Cultural rights into US law and practice.[97] Many scholars and organisations are turning to international human rights arguments in defence of immigrant workers in the United States.[98]

Using the ILO

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

This part reviews trade unionists' use of international human rights complaint mechanisms to put domestic labour disputes under international scrutiny. The American labour movement's new interest in international human rights law is reflected in its increasing use of ILO complaints and international human rights mechanisms. Advocates understand that these mechanisms do not provide enforceable orders. The ILO does not have international labour marshals to compel compliance with decisions of the CFA, for example. But Committee decisions provide authoritative vindication of their claims to workers' rights as human rights.

Hoffman Plastic

In 2002, the AFL-CIO filed a complaint to the ILO CFA, challenging the Supreme Court's *Hoffman Plastic Compounds, Inc v NLRB* decision.[99] In *Hoffman,* the Supreme Court had held, in a 5-4 decision, that an undocumented worker, because of his immigration status, was not

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[94] See 'Freedom of Association and Workers' Rights Violations at Resurrection Health Care: Report and Analysis under International Human Rights and Labor Rights Standards' (August 2004), available from AFSCME Council 31 at: www.afscme31.org.

[95] See 'Freedom of Association and Workers' Rights Violations at First Student, Inc' (May 2006).

[96] Available from the American Rights at Work (ARAW) website at:www.araw.org for detailed information on the group's programme and activities.

[97] See the National Economic and Social Rights Initiative (NESRI) website at: www.nesri.org.

[98] See eg, Alexander, LD, 'Fashioning a New Approach: The Role of International Human Rights Law in Enforcing Rights of Women Garment Workers in Los Angeles' (2003) 10 *Georgetown Journal of Poverty Law and Policy* 81.

[99] *Hoffman Plastic Compounds* 535 US 137 (2002).

entitled to back pay for lost wages after he was illegally fired for union organising. The five-justice majority said that enforcing immigration law takes precedence over enforcing labour law.[100]

The union federations' ILO complaint argued that eliminating the back pay remedy for undocumented workers annuls protection of workers' right to organise, contrary to the requirement in Convention No 87 to provide adequate protection against acts of anti-union discrimination.[101]

The AFL-CIO's complaint was successful: in November 2003, the CFA announced that the *Hoffman* doctrine violates international legal obligations to protect workers' organising 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'.[102]

The ILO Committee recommended congressional action to bring US 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'.[103]

Targeting the United Kingdom-on behalf of US workers

A similar reliance on international mechanisms is evident in a decision by the International Federation of Professional Technical Employees (IPFTE), together with the AFL-CIO and the global union federation Public Services International (PSI), to file a CFA complaint on behalf of locally-engaged staff at the British Embassy in Washington, DC after embassy officials refused to bargain with employees' choice of IFPTE as their union representative.[104] The embassy said that it need not recognise the employees' 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 that locally engaged staff have the right to form and join a trade union for the defence 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.

Once again, the unions' reliance on CFA paid off: in March 2007, the CFA issued an opinion fully supporting the unions' position. The Committee said that 'all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights' and that 'the Embassy should negotiate with the [union] in respect of the

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[100] 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.'

[101] See 'Complaint presented by the AFL-CIO to the ILO Freedom of Association Committee' (AFL-CIO, October 2002).

[102] See *Complaint against the United States (Case No 2227)* (2003) Report of the Committee on Freedom of Association No 332.

[103] Ibid.

[104] See 'Complaint against the Government of the United Kingdom presented by the Association of United States Engaged Staff (AUSES), the International Federation of Professional and Technical Employees (IFPTE), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Public Services International (PSI)' (23 June 2005).

terms and conditions of employment of the locally engaged staff'.[105] The UK Government accepted the ruling and entered into bargaining with the employees' chosen union.[106]

Supervisory Exclusion Case

In October 2006, the AFL-CIO filed another CFA complaint, this time against the NLRB's decision in the so-called *Oakwood Trilogy.* In *Oakwood,* the NLRB announced an expanded interpretation of the definition of 'supervisor' under the NLRA.[107] 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 relied on the ILO Conventions, arguing that the NRLB's decision on the definition of supervisors contravened 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.' In its March 2008 decision, the Committee found that the criteria for supervisory status laid out in the *Oakwood* trilogy 'appear to give rise to an overly wide definition of supervisory staff that would go beyond freedom of association principles' and urged the US Government 'to take all necessary steps, in consultation with the social partners, to ensure that the exclusion that may be made of supervisory staff under the NLRA is limited to those workers genuinely representing the interests of employers'.[108]

TSA Airport Screeners Case

In November 2006, the ILO CFA issued a decision in a complaint filed by the AFL-CIO and the American Federation of Government Employees (AFGE) against the Bush administration's denial of collective bargaining rights to airport screeners. The administration argued that the events of 11 September 2001 and concomitant security concerns made it necessary to strip Transportation Security Administration (TSA) employees of trade union rights accorded to other federal employees.

The Committee said that the Government's de-recognition violated employees' rights and urged it to bargain over terms and conditions of employment 'which are not directly related to national security issues with the screeners' freely chosen representative'.[109]

North Carolina Public Employees Case

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[105] See *Complaint against the United Kingdom (Case No 2437)* (March 2007) Report of the Committee on Freedom of Association No 344, *Report in which the Committee requests to be kept informed of developments.*

[106] Author email exchange with Julia Akins Clark, General Counsel, International Federation of Professional and Technical Engineers (18 March 2008).

[107] See *Oakwood Healthcare, Inc* 348 NLRB No. 37; *Croft Metal, Inc,* 348 NLRB No. 38; *Golden Crest Healthcare Center* 348 NLRB No. 39 (October 2, 2006), called the *Oakwood* trilogy.

[108] See *Complaint against the United States (Case No 2524)* (March 2008) Report of the Committee on Freedom of Association No 349, *Report in which the Committee requests to be kept informed of developments.*

[109] See *Complaint against the United States (Case No 2292)* (November 2006) Report of the Committee on Freedom of Association No 343, *Report in which the Committee requests to be kept informed of developments.*

In 2006, the United Electrical, Radio and Machine Workers of America (UE), an independent union known for its progressive politics and internal democracy,[110] followed the AFL-CIO's lead and filed a complaint with the ILO CFA. The complaint charged that North Carolina's ban on public worker bargaining, and the failure of the United States to take steps to protect workers' bargaining rights, violated Convention No 87's principle that 'all workers, without distinction' should enjoy organising and bargaining rights, and Convention No 98's rule that only public employees who are high-level policymakers, not rank and file workers, should have the right to bargain.

In April 2007, the Committee ruled in the union's favour and urged the US Government

> to promote the establishment of a collective bargaining framework in the public sector in North Carolina ... and to take steps aimed at bringing the state legislation, in particular through the repeal of NCGS §95-98 [the statute prohibiting collective bargaining by public employees], into conformity with the freedom of association principles ...[111]

This decision prompted North Carolina state legislators to introduce, for the first time in decades, legislation that would grant collective bargaining rights to state and local employees.[112] The legislation is pending and advocates recognise that achieving it is difficult, but they count getting such a bill onto the legislative agenda as an important policy advance, and credit the international attention through the ILO case and other international mechanisms for reaching this point.[113]

Conclusion

The movement toward a human rights and labour rights approach to workers' rights in the United States does not mean changes in US law will follow quickly, even with the change of administration in January 2009. Decisions of the ILO and other international bodies have no binding effect in US labour law. Advocates can only use them to buttress legal arguments based in conventional law, or in campaigns for reform legislation.

Some labour supporters remain skeptical of a human rights argument for workers' organising 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

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[110] Traditionally a manufacturing sector union, the United Electrical, Radio and Machine Workers of America (UE) began an innovative organising 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.

[111] See *Complaint against the United States (Case No 2460)* (2007) Report of the Committee on Freedom of Association No 344.

[112] See North Carolina General Assembly, House Bill No 1583 (April 2007).

[113] Author interview with Robin Alexander, Director of International Affairs, United Electrical Workers (20 March 2008).

through a legalistic rights-enhancing regime stifles militancy and direct action. Labour 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 rightsbased 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' organisations in the United States unless we couple it with an equally passionate call for democracy in our workplaces, economy, and politics.[114]

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.[115]

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. He writes, '[t]hat a formally democratic process might be at odds with workers' freedom of associationseems to fall below the screen of "human rights analysis".'[116]

Labour lawyer Jay Youngdahl insists that

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[114] McCartin, J, 'Democratizing the Demand for Workers' Rights: Toward a Re-framing of Labor's Argument' (Winter 2005) *Dissent.*

[115] Lichtenstein, N, 'The Rights Revolution' (Spring 2003) *New Labor Forum*

[116] Brody, D, 'Labor Rights as Human Rights: A Reality Check' (2001) *39 British Journal of Industrial Relations* 601.

> the replacement of solidarity and unity as the anchor for labor justice with 'individual human rights' will mean the end of the labor movement as we know it .... Elevating human rights to the dominant position within labor ideology will eviscerate support for the common concerns of all workers that is the keystone for labor solidarity.[117]

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 rightsarguments 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.

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

Arguing from a human rights base, labour advocates can identify violations, name violators, demand remedies, and specify recommendations for change. Workers are empowered in organising and bargaining campaigns, convinced that they are vindicating their fundamental human rights, not just getting a wage increase. 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 organising 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. 'Human rights' is still an abstraction for most workers. Labour advocates cannot just cry 'human rights, human rights' and expect employers to change their behaviour or Congress to enact labour law reform.

Changes will be slow in coming and incremental. Labour and human rights advocates still confront general unawareness in the United States of international human rights standards and of the ILO's work in giving precise meaning to those standards. Advocates have an enormous educational challenge of making them more widely known and respected.

The new focus on workers' rights as human rights contributes to this educational effort. At the same time, it changes the climate for workers' organising and bargaining by framing them as a human rights mission, not a test of economic power between an employer and a 'third party' (employers' favourite characterisation of unions in organising campaigns).

A human rights emphasis also has alliance-building effects. Human rights supporters and human rights organisations are a major force in civil society, one that historically stood apart from labour struggles, seeing them not as human rights concerns but as institutional tests of strength. Human rights NGOs are an important addition to labour's traditional allies in civil rights, women's, and other organisations that help create a favourable stream where workers and their unions can swim more freely.

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[117] Youngdahl, J, 'Solidarity First: Labor Rights Are Not the Same as Human Rights' (Winter 2009) *New Labor Forum.*