THE HUMAN RIGHTS MOVEMENT AT U.S. WORKPLACES: CHALLENGES AND CHANGES

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The concept of workers' rights as human rights has only recently begun to influence the formation and implementation of labor policy in the United States. In the workplace, the growing human rights movement challenges long-held beliefs and practices in labor relations. The author explores this issue and its implications for U.S. labor policy and practice, focusing specifically on individual versus collective rights, exclusive representation, coverage of the National Labor Relations Act (NLRA), employer resistance to workers' freedom of association, the right to strike, the statutory purposes of the NLRA, and the underpinnings of the traditional U.S. industrial relations system. These challenges also affect U.S. legal isolationism, the role of labor unions, the status and implementation of economic as well as civil and political rights, and the U.S. labor and employment relations research agenda.

For many in the United States and around the world, the right to form labor unions and bargain collectively, the right to workplace safety and health, and the right not to be discriminated against are human rights—not just rights in statutes or collective bargaining contracts subject to shifting political and bargaining power. The subject of human rights has been addressed from many different perspectives, including anthropology, economics, international law, literature, philosophy, political science, psychology, and religion; it is therefore understandable that disagreement exists about their source and scope. Suffice it to say here that human rights are a subset of moral rights that all people possess equally from birth simply because they are human and are embedded in what one scholar has called a "doctrine of simple inherence" (Morsink 2009: 5).

The purpose of human rights is to eliminate or minimize the vulnerability that leaves people at the mercy of others who have the power to hurt them. The notion of workers' rights as human rights has emerged only in the past 15 years and has begun to influence the formation and implementation of labor policy in the United States at every level. The human rights movement at U.S. workplaces is growing, challenging, and being challenged by virtually every orthodoxy in the labor relations field and every practice and rule rooted in that orthodoxy, including the values underlying our labor relations system. In this paper, I identify several specific challenges as well as explore their implications for U.S. labor policy and practice and the workplace human rights movement.

I undertake this matter with some apprehension over my concern for shifting the focus of human rights from those who are suffering the real-life consequences of rights violations—those "who have never had a chance to read poetry or study philosophy, who so far have had to strive alone just to stay warm in winter, to stay alive through the calls for war" (Zinn

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1997: 508)—to the theoretical and abstract musings of academic career and ego-boosting conferences, a kind of academic fiddling while the world burns. In the words of writer Rohinton Mistry (1995: 807), the villain is "anything that would take us away from the crying, challenging flesh and blood of these real people." This is a challenge for human rights around the world.

Individual and Collective Rights

Appeals to rights and justice have been made by all manner of people with all manner of objectives, ranging from the most sublime and noble to the worst evil. Ironically, though some see workers' human rights as threats to the free enterprise system, others see the same rights as concealing a selfish egoism no different than the libertarian individualism central to the unregulated market philosophy. The language of individual rights does encourage people to consider only "my rights," "my house," "my money," "my property," and "my family" (Blau and Moncada 2006: 25-26). No doubt, as Louis Blanc wrote in 1847, claims of rights can and have been used "to mask the injustice of a regime of individualism and the barbarism of the abandonment of the poor" (Henkin, Neuman, Orentlicher, and Leebron 1999: 59) This ego-centric focus of human rights, some have argued, operates to the detriment of worker solidarity and collective action.

If by human rights we mean only insistence on the unencumbered freedom and autonomy of self-interested individuals, it is not surprising that there would be resistance, particularly from those vulnerable to harm. Such a conception of human rights would be atomistic, divisive, confrontational, litigious, and devoid of any sense of community or of obligations and duties to others; those are the consequences of individuality without community. Yet, community without individuality is tyranny. It is not a matter of one or the other but rather the harmonizing of the two (Bellah 1975: 118). People are at once alone and together in life. Their experiences of independence and solidarity are central to their humanity. Contrary to the claim that human rights are all about individual rights, for example, the drafters of the Universal Declaration of Human Rights (UDHR) in Article 23(4) assert the right to form and join trade unions for the protection of workers' interests. In Article 29 of the UDHR, the drafters assert a duty and responsibility to others and the larger society.

The UDHR was addressed not to individuals as isolated and separate persons but as members of the human family. The full development of the human personality—the theme of the UDHR—can occur, according to its drafters, only in collaboration with others in a community of persons interacting with each other in a society characterized by cooperation and co-responsibility that respects the personal dignity and equality of its members (Baum 1996: 21). None of the drafters of the UDHR believed that the unregulated market system would promote or protect human rights.

The human rights concept that every human being has inherent rights and, therefore, dignity is, even at the level of the individual in direct opposition to the market philosophy "that if one has nothing one is nothing" (Goulet 2005: 28) or that persons are worth only what they have to sell (Gross 2010: 12). The latter philosophy is expressed by Ayn Rand's (Rand 1961: 100) protagonist in *The Fountainhead*: "I do not recognize anyone's right to one minute of my life; nor any part of my energy; nor to any achievement of mine; no matter who makes the claim or how large their number or how great their need." Rand's character is espousing an unbridled pursuit of self-interest with no consideration of the morality of those actions on others. In sharp contrast, the morality of human actions and their consequences for or effects on others are inherent in the concept of human rights. The human rights perspective "prioritizes the rights of all" and "demands that we recognize the rights of others" (Blau and Moncada 2006: 26). In other words, the "otherness" obligation of human rights is the basis of human solidarity because it obliges all people not only to avoid violating the rights of others, to protect them from such violations, and to aid them if their rights are vio-

lated, but also to be engaged actively in securing the rights of others. At the workplace, therefore, where the isolated worker is vulnerable and insecure, the otherness obligation of human rights places on workers the moral imperative to unite with their co-workers for the mutual aid and protection of all through organized participation in the decisions that affect their lives.

The liberation of workers, therefore, is a collective struggle. Human rights transforms the nature of the collective struggle. One of human rights' most radical challenges to the unregulated market philosophy is the assertion of economic and social rights. These include the right to social security; the right to work; protection against unemployment; just pay; the right to form labor unions; the right to rest and leisure; the right to a standard of living that provides adequate food, clothing, housing, and medical care; and the right to an education for the full development of the human personality. This makes the collective struggle more than a struggle for wages and working conditions. As a collective act, it secures workers' full and interconnected human rights.

The realization of workers' human rights is dependent on workers coming together to exercise their right of freedom of association. Years before the UDHR, the International Labour Organization (ILO) incorporated into its constitution (and confirmed it in its 1944 Declaration of Philadelphia) the right to freedom of association and collective bargaining, now accepted internationally as human rights. Because of the importance of these rights, the ILO issued Conventions Nos. 87 and 98, setting forth the rights of workers to form unions and engage in collective bargaining. Moreover, it established special machinery, the Committee on Freedom of Association (CFA), to deal with complaints alleging violations of workers' freedom of association. Over the years, the CFA has issued a series of decisions and promulgated principles intended to promote and protect workers' collective action. The CFA has found that in many important respects, U.S. labor law, policy, and practice do not conform to international human rights principles (Gross 2010: 206–08).

The question remains, therefore, as to why the perception persists in the United States that one should have to choose between collective and individual rights when "individual rights and solidarity are mutually reinforcing" (Compa 2009: 39). Notwithstanding this question, there will be majority–minority conflicts of rights and interests in any group. As workplace and human rights expert Lance Compa has written, "making rights subordinate to solidarity starts a slippery slope that can end with rights falling off a cliff" (*Ibid.*).

Exclusive Representation

Human rights challenge one of the unique hallmarks of U.S. labor law, namely, the doctrine of exclusive representation. According to that legal doctrine, a union selected or designated by a majority of the employees in a National Labor Relations Board (NLRB)-designated unit becomes the exclusive representative and negotiator of collective bargaining contracts for all employees in that unit and the exclusive agent for handling their individual grievances with their employer. Exclusive representation raises the potential for conflict between individual and collective rights.

As an illustration, in 1968 a group of African American employees of the Emporium Capwell Company department store claimed that the company was discriminating against them because of their race. The employees rejected their union's decision to process their complaints individually through the contractual grievance procedure and instead sought to meet with the company president to address and resolve the matter. When the company president refused to meet with them, these employees picketed the company and distributed handbills urging customers not to patronize the store. After warnings from the company, two of the protesting employees were fired.

A local civil rights organization—not the union representing the bargaining unit employees at the company—filed an unfair labor practice charge with the NLRB on behalf of the

discharged employees. The contention was "if the primary goal of national labor policy was to eliminate race discrimination [that] goal should trump the principle of exclusivity" (Sharpe, Crane, and Schiller 2005: 255). This case exemplifies the contention with which I began this paper: The right not to be discriminated against is not just a statutory right but also a human right.

The NLRB upheld exclusivity in 1971, finding that requiring the company to bargain with "self-designated representatives of minority groups" while being required to abide by the terms of a collective bargaining contract negotiated by the employees' chosen bargaining representative would undermine the statutory system of bargaining (as cited in Dau-Schmidt, Malin, Corrada, Cameron, and Fisk 2009: 284). In 1973, the Court of Appeals for the District of Columbia reversed the NLRB holding that concerted activity against racial discrimination enjoys such a "unique status" that the protection of minority activity for "full realization of the policy against discrimination" outweighed the interference with the "orderly collective bargaining process" that occurred in this case (*Ibid.*).

In a majority opinion written by Justice Thurgood Marshall in 1975, the Supreme Court upheld the doctrine of exclusive representation. Justice Marshall maintained that employees' Section 7 rights were collective rights and that the law establishes a "regime of majority rule" under which the "complete satisfaction of all who are represented is hardly to be expected" and the individual's power to order his own relationships with an employer is extinguished. Marshall also emphasized, however, that Congress, in giving the exclusive representative this broad power "did not . . . authorize a tyranny of the majority over minority interests" (as cited in Dau-Schmidt et al. 2009: 284) and identified what he considered the "safeguards" for minority interests (*Ibid.*: 286). Justice William O. Douglas, in his dissenting opinion, argued that the law "should not make the individual a prisoner of the union" (*Ibid.*: 289). According to him, the "union is hardly in a position to demand exclusive control" when another statute, Title VII, was involved and that statute "concerns not majoritarian processes, but an individual's right to equal employment opportunity" (*Ibid.*).

Most recently, the U.S. Supreme Court again addressed exclusivity and the relationship of Title VII rights in the context of a collective bargaining agreement. In a 2009 opinion (*14 Penn Plaza* 2009), the Supreme Court ruled that an exclusive bargaining representative could negotiate an agreement with an employer requiring bargaining unit employees to submit all claims of discrimination to binding arbitration under the union-employer contractual grievance procedure. The Court also ruled that such an agreement can waive an individual employee's right to a judicial forum under federal anti-discrimination statutes. Because the argument was not raised in lower courts, the Supreme Court declined to address the claim that the union-employer agreement also allowed the union to deny employees even the arbitral forum because a union can refuse to take a grievance to arbitration as long as that refusal did not violate the union's duty of fair representation.

These decisions neither contest the concept of individual rights nor suggest that only collective rights matter. Instead, they highlight the changes that might have to be made so that U.S. labor policy conforms with human rights principles. The challenge here is not to collective rights and solidarity; it is to determine how, from a human rights perspective, the doctrine of exclusive representation could be applied to achieve the most effective mutuality of collective and individual rights. The point is that the application of a human rights standard confronts an established labor law doctrine and requires that it be reexamined from a human rights perspective.

For example, under current interpretations of the NLRA, a majority of employees—by preferring individual bargaining—can deprive a minority of their human right to exercise their freedom of association and to bargain collectively for themselves through representatives of their own choosing. An international perspective clarifies this issue. As labor law scholar Clyde Summers (1990: 539–40) pointed out, "bargaining collectively with a nonmajority union for its own members . . . is practiced, if not legally required, in almost every

country which has a system of free collective bargaining." The majority rule requirement makes employer resistance to the freedom of association even more effective because an employer has no statutory obligation to bargain unless a union has the support of a majority of the employees in an appropriate bargaining unit or a majority of the employees voting in a representation election.

Other Human Rights Challenges to U.S. Labor Law

Freedom of Association

True liberty is the ability to act successfully on one's choices, not simply the freedom from interference by the state, private organizations, or individuals. In other words, people must have the power to make the claims of their human rights both known and effective. A full human life, therefore, requires participation in the political economic and social life of the human community. That, in turn, requires the exercise of freedom of association. At the workplace, the denial of the freedom to associate leaves workers standing before their employers, not as adult persons with rights, but as powerless children or servants dependent upon the will and interests of their superiors and employers. Servility is incompatible with human rights. Assertions of human rights are made against the state, but human rights are routinely left outside factory gates and office building entrances with barely a murmur of protest.

The UDHR states that "everyone" has the right to freedom of association (Article 20) and "everyone" has the right to form and join trade unions (Article 23(4)). Likewise, Article 22 of the International Covenant on Civil and Political Rights (ICCPR) provides that "everyone" has the right to freedom of association and to form trade unions for the protection of their interests. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) pledges each party to that covenant to ensure the right of "everyone" to form and join trade unions for the protection of economic and social interests (Article 8).

The ILO reaffirmed in the Declaration of Philadelphia the organization's fundamental principles, including the freedom of association and the "solemn obligation" of the ILO to further among the nations of the world "the effective recognition of the right of collective bargaining." ILO Convention No. 87 asserts that workers "without distinction whatsoever" have the right of freedom of association including unionizing. In 1998, the ILO issued its Declaration on Fundamental Principles and Rights at Work, which places on all member countries (including the United States) the obligation "to respect, to promote and to realize in good faith" workers' right of freedom of association and right to bargain collectively. In the United States, moreover, the National Labor Relations Act (NLRA) provides that "Employees shall have the right to self-organization [and] to bargain collectively through representatives of their own choosing." Section 1 of the NLRA declares it "to be the policy of the United States" to encourage collective bargaining.

Commitment to the international principles of human rights would challenge, among other things, the NLRA's exclusion of certain categories of workers from coverage of the Act; court-created limitations on both the subject matter of collective bargaining and the doctrine of permanent replacement of economic strikers; the statutory employer "free-speech" provision that is used to discourage unionization and collective bargaining; and even the core statutory purpose of the law.

Exclusions from Coverage

Contradicting the all-inclusive intent evidenced by use of the word "everyone" in international documents such as the UDHR, Congress in 1935 and again in 1947 excluded many workers from protection of the NLRA, including agricultural workers, domestic workers,

independent contractors, and supervisors. In addition, the NLRB through certain of its case decisions has excluded other large groups of workers, as Human Rights Watch has pointed out, including many "taxi drivers, college professors, delivery truck drivers, engineers, product sellers and distributors, doctors, nurses, newspaper employees, Indian casino employees, employees labeled 'supervisors' and 'managers' who may have minimal supervisory or managerial responsibility, and others" (Human Rights Watch 2000: 173).

Many of these people are the most vulnerable to harm. Domestic and agricultural workers, for example, lack decent wages as well as health care and retirement benefits, live in wretched housing, handle dangerous chemicals, operate dangerous machinery, are subjected to physical and mental abuse, and work long hours often without receiving overtime pay. These groups often include immigrants and men and women of color. Their exclusion from coverage also means that they remain employees-at-will who can be discharged at any time for any reason or no reason. Excluded workers are denied the legal protection they need to transform themselves from powerless at-will employees into organized workers with the legal protection of a collective bargaining contract providing such things as decent wages, sick pay, paid holidays and vacations, medical insurance and—contained in almost every collective bargaining contract—a grievance-arbitration provision prohibiting dismissal without just cause. Because of the interdependency of human rights, denial of the right of freedom of association means not only that many other labor rights become inaccessible but also that the human rights of other individuals, families, and communities can also be violated as a consequence of that denial. The combination of exclusion and employment-at-will has led one scholar to characterize the U.S. employment relation as "one of employer domination and employee subservience," in which employers are endowed with "divine rights over their employees" and the labor market is equated to the "market for fish" (Summers 2000: 65, 85).

Employer Resistance to Freedom of Association

The determined opposition of U.S. employers has been the biggest obstacle to workers' ability to exercise their human and statutory right to organize and bargain collectively. Again, an international perspective clarifies this issue. Any employer opposition to employees' exercise of their right to organize would, in itself, be a violation of workers' human rights of freedom of association (Human Rights Watch 2000: 7–8); "few advanced democratic societies condone open opposition by employers to unionization" (Adams 1992: 94). As Human Rights Watch charged in 2000, the U.S. government is failing its responsibility under human rights standards to protect vulnerable workers from employer violation of their right of freedom of association. Yet, despite the fact that as a member of the ILO the U.S. government is obliged to ensure that workers are free to exercise their right to organize, Congress, in the Taft-Hartley Act (which amended the Wagner Act (NLRA)) not only condoned but facilitated employer resistance to worker freedom of association.

Taft-Hartley's Section 8(c) (commonly known as the employer "free-speech" provision) is a good illustration. It permits employers to engage in anti-union speech, in all forms, as long as the speech contains no threat of reprisal or promise of benefit. Employer anti-union speech at the workplace creates a clash of rights among freedom of association, speech (employers', unions', and workers'), and property. That clash has been resolved by Congress and the courts by giving employer speech and property rights dominance over workers' right of freedom of association. Human rights pose a direct challenge to that hierarchy of rights.

Prior to the Taft-Hartley Act, the NLRB required employers to maintain a strict hands-off neutrality in regard to their employees' organizing efforts. The NLRB reasoned then that, because of the complete economic dependence of the employee upon the employer, any employer anti-union speech or literature was inherently coercive and violative of the

employees' right to self-organization. Since Taft-Hartley, employer "free speech" has become "the primary instrument used by employers to discourage unionization and collective bargaining" (Summers 2000: 88).

Prior to Taft-Hartley, for example, the NLRB held that requiring employees to listen to anti-union speeches on company property during work time, a "captive audience" speech, was a *per se* violation of the law. After Taft-Hartley, captive audience anti-union speeches became lawful, as were employers' denials of union requests for equal time and opportunity to address employees. A union's alternative channels of communication were considered adequate. By contrast, pre-Taft-Hartley NLRB decisions not only permitted non-employee union organizers access to employer property but also took the position that the "place of work [is] recognized to be the most effective place for the communication of information and opinion concerning unionization" (Gross 2010: 75).

In 1956, the Supreme Court held in *Babcock and Wilcox Co.* that employers could bar non-employee union organizers from company property and, in *Lechmere, Inc.* in 1992 it so narrowed the already rare exceptions permitting non-employee access to the point that such access could almost never occur. The ILO's Committee on Freedom of Association (CFA), in response to a union complaint that the *Lechmere* decision would "have a devastating impact on freedom of association rights for workers in the United States," requested the U.S. government "to guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management" (Compa 2006: 26). That recommendation has been ignored.

The gravity of the human rights challenge is confirmed by organized businesses' opposition to the U.S. ratification of ILO Conventions Nos. 87 and 98. Because the Constitution provides that treaties become the law of the land, ratification of multilateral treaties such as ILO conventions would incorporate those conventions into domestic law, superseding any existing statutes that were inconsistent with those conventions. In addition, courts would be obliged to give effect to treaty provisions.

Article 11 of ILO Convention No. 87 was of particular concern to Edward Potter, the author of the still-definitive statement of organized businesses' opposition to ratification, because, as he explained, Article 11 "lays down an obligation for the state to take measures to prevent *any* interference with such rights *without qualification*, that is, interference by individuals, by organizations, or any public authorities" (Potter 1984: 43; emphasis in original). Potter advised employers that employer free speech under Section 8(c) of the NLRA would be illegal under Convention No. 87 and that that Section 8(c) would have to be repealed if the Convention was ratified (*Ibid.*: 6, 43–5). Potter, who until recently represented the United States Council for International Business (USCIB), the lead employer organization for international affairs, also warned that the "differences between U.S. labor law and Conventions Nos. 87 and 98 are not merely technical but involve substantial differences" (*Ibid.*: 88).

The Right to Strike

Potter concluded that "several aspects" of U.S. law and practice concerning workers' right to strike "may be" inconsistent with the ILO's interpretation of Convention No. 87. The ILO considers the right to strike to be "an intrinsic corollary of the right of association" whereas in the United States most strikes are prohibited in the public sector and, in the private sector, it is lawful for employers to hire *permanent* replacements for employees who exercise their right to strike over wages, hours, and working conditions. Permanent replacement of so-called "economic strikers" is not set forth in the statute. Rather, *in dictum* in a 1938 decision (*MacKay Radio and Telegraph* 1938) the U.S. Supreme Court endorsed that practice, and in doing so ignored Section 2(3) of the Act, which defines employees as including strikers, as well as Section 13 of the Act, which states that nothing in the Act "shall be construed so as either to interfere with or impede or diminish in any way the right to strike" (29 U.S.C. para.

151–169 (sec. 163) 1988). In its typically diplomatic language, the ILO's CFA in 1991 noted that the permanent replacement of economic strikers meant that the essential right to strike was not fully guaranteed (as cited in Gross 2010: 207). The permanent replacement of economic strikers is not only inherently destructive to the right to strike but also intimidating to workers who would otherwise exercise their freedom of association by seeking to organize (Compa 2006: 27).

The Subjects of Bargaining

The significance for human rights of the statutory recognition of the right of freedom of association for purposes of collective bargaining depends, in great part, on what subjects are negotiable. In their application and interpretation of the NLRA, the U.S. Supreme Court and the NLRB have effectively freed employers from the obligation to bargain about some of the most important entrepreneurial decisions with the greatest impact on working conditions and wages as well as on the existence of jobs. For example, in interpreting the NLRA, the U.S. Supreme Court has created a distinction between mandatory and non-mandatory ("permissive") subjects of bargaining. On the basis of value-laden dicta and speculation about the inviolability of management rights, the Court has defined *out* of the mandatory subjects category what the court considers to be "managerial decisions which lie at the core of entrepreneurial control" (Fibreboard Paper Products Corp., 1964: 223). No such distinction is drawn in the statute and, in fact, Congress rejected proposals that would have excluded certain subjects from bargaining.

Decisions at the core of entrepreneurial control can also be at the core of workers' human rights and their interests, but the Supreme Court has made it clear that employers' concerns matter more. A narrow definition of the subjects of bargaining is another employer device for ignoring union recognition (Hyde 2005: 296). In addition, it is clear from these decisions that management rights, production, and hierarchical control have been given priority over workers' rights. A commentator on one of these U.S. Supreme Court decisions summed up the consequences for workers' rights:

> The maintenance workers of a Brooklyn nursing home voted to be represented by a union. As a consequence, within four months they were on the streets. They had no union, no jobs, and no right to bump or transfer into another job. From this sad story, the United States Supreme Court would, four years later, fashion a narrative of rights and freedom. Not the rights and freedom of the workers, whose very names have been lost to history. Rather, the maintenance contractor who employed them turned out to be free, to have the right, not to meet at all with their union, nor any substantive obligation to them, and the same was true of the nursing home itself. (*Ibid.*: 281)

When representing the USCIB, Potter cautioned employers that ratification of ILO Convention No. 98 could eliminate the distinction between mandatory and non-mandatory subjects of bargaining. That would broaden the scope of bargaining to recognize unions' right to bargain about what are now off-limit employer "prerogatives." In the words of the NLRB 40 years ago, the scope of collective bargaining should be confined only "by the range of *employees' vital interests*" (as cited in Gross 2010: 89). Collective bargaining is not merely a way for workers to become rich—a very narrow definition of what the NLRB meant by "employees' vital interests." These interests include the human rights they are entitled to exercise at their workplaces. Narrowing the scope of bargaining also makes it less and less possible for workers to get their human rights into binding and enforceable collective bargaining contracts—another reason why employers have opposed ratification of ILO Conventions Nos. 87 and 98. The fact that there are other mechanisms for achieving workplace human rights does not change the fact that collective bargaining is the key way for U.S. employees to exercise their freedom of association. Although it has the potential for protecting and promoting human rights, collective bargaining is being diminished even

when workers are able to exercise that form of freedom of association (for another view see Wheeler 1994, 2001).

Conflicting Statutory Purposes

Proponents of the Taft-Hartley Act (and opponents of the Wagner Act) failed to prevent the inclusion in Taft-Hartley of the Wagner Act statement that it was the policy of the United States to encourage collective bargaining. They did succeed, however, in adding provisions to Taft-Hartley that undermined the previously stated intent, particularly a Declaration of Policy section that mentions only the rights of individual employees and an addition to Section 7, affirming workers' right to refrain from self-organization and collective bargaining.

The concept that was added to Taft-Hartley—the federal government as a neutral grantor of employee free choice between individual and collective bargaining, indifferent to the choice made—is inconsistent with the Wagner Act concept of the federal government as a promoter of collective bargaining, which was retained in Taft-Hartley. By including both concepts of the government's role, the Act is at cross-purposes with itself, and different members of the NLRB can apply quite different policies by choosing between these conflicting statutory purposes and still claim conformance to Congressional intent. The same law has been read as promoting collective bargaining and promoting resistance to it. The resultant radical swings in labor policy directly affect workers' and unions' ability to organize and affect employers' efforts to resist organization as well as retain their relative bargaining power. The human rights challenge is to eliminate this contradiction in the law in a way that would bring the Act into conformity with human rights standards.

The Traditional U.S. Industrial Relations System

Meeting the challenges of human rights would require a much more radical departure than just bringing U.S. labor law into conformity with human rights standards. For example, implementation of such rights at the workplace would also challenge the still-dominant theory of labor-management relations commonly known as industrial pluralism—attributed to "Wisconsin School" pioneer John R. Commons. Industrial pluralism posits collective bargaining as its main labor relations problem-solving device. Through bargaining, compromises establish systems of work rules set forth in collective bargaining contracts, laws, and principles and practices that govern workplaces. These "working rules" create worker rights insofar as they give individuals some degree of control over not only material objects but also potentially "intangible items such as a claim to a job, access to a market, a political liberty, a *human right* or a social convention" (Kaufman 2007: 15; emphasis added).

In this system, therefore, rights are determined by bargaining and compromise as well as by power because the relative bargaining power of negotiators will rarely, if ever, be equal—particularly the relative bargaining power of workers and their employers. As one industrial relations scholar put it, it is power that determines "whose interests count in the economy and who reaps the rewards and bears the cost of economic activity" (Kaufman 2007: 16). In that view, rights in the traditional U.S. industrial relations system are conventional rights that depend on the agreement of the parties involved as well as on the negotiating parties' relative power in obtaining and maintaining those rights. In that sense, might makes rights and rights are always relative and always vulnerable to changing circumstances and always dependent on what is mutually agreeable on a case-by-case basis. This traditional system is suitable to the resolution of conflicts of *interests* between the negotiating parties.

The basic conflict between this freedom of contract industrial pluralism and the concept of workers' rights as human rights, however, is that pluralists negotiate the existence of human rights at the workplace. *Human rights are non-negotiable.* They are rights that no government, employer, union, or any other body has the legislative or moral authority to grant

or deny. They are possessed by every person equally by virtue of being a human being and not by virtue of being a member of a union powerful enough to negotiate them into an enforceable collective bargaining contract. The only use of power that is legitimate is that which promotes and protects human rights. Contractual provisions resulting from collective bargaining are not necessarily just simply because they are in accord with the objectives of the negotiators in the same way that laws are not necessarily just simply because they are in accord with a majority's objectives. When a contractual agreement is reached, moreover, its benefits and protections apply only to the parties to the contract.

Given the imbalance of bargaining power between labor and management, it is possible that no agreement or contract will be reached. The NLRA does not guarantee any substantive rights to workers; in the main, it contains only procedures governing organization and collective bargaining. If workers are able to organize, the Act provides them only with the opportunity to negotiate an agreement with their employers. Employers, in turn, are obliged to negotiate in good faith with their employees' designated representative. Good faith bargaining does not require that an agreement be reached or even that a concession be made. Even in a case in which for eight years an employer repeatedly flouted its bargaining obligation and illegally intended to frustrate the reaching of an agreement, the Supreme Court ruled that the NLRB was "without power to compel a company or a union to agree to any substantive provisions of collective bargaining agreement" because the Act is grounded in freedom of contract and the results of the bargaining "contest" must be left to the "bargaining strength of the parties" (H.K. Porter Co. 1970).

The human rights challenge to the pluralist underpinnings of the U.S. industrial relations system makes it clear that workers cannot rely exclusively on collective bargaining to secure their human rights at the workplace. At best, negotiated contracts do not cover all workers, nor do they provide covered workers with equally strong or even adequate protection of their rights. Because of this, we need to generate innovative thinking such as taking a national, comprehensive approach to workers' human rights. A national Workers' Bill of Human Rights, for example, could be enforced and implemented not only "top down" by courts and administrative agencies but also to a great extent by "bottom up" workplace bodies such as works committees and other organized labor organizations involved in planning and decision-making.

In such a system, collective bargaining would not be tasked with the impossible ideal of achieving workers' rights, particularly the unity of workers' human rights, which expresses the universality, interdependence, and equality of all human rights. Instead, collective bargaining would be one vehicle, and potentially one of the most important vehicles, for worker participation at the workplace and for implementing and enforcing workers' rights in each unique work environment.

Some Great Transformations

In *The Great Transformation*, Karl Polanyi (1944: 256) wrote that "no mere declaration of rights can suffice: institutions are required to make rights effective." As true as that is, the human rights challenge demands more. It demands in total what Polanyi described as the re-embedding of the economy in social relations—that is, having the economy exist for people rather than having people exist and be resources for the economy. That great transformation cannot occur without a fundamental change in the values underlying our economic system, what Martin Luther King described as a "radical revolution of values" that would begin a "shift from a thing-oriented society to a person-oriented society," that would "cause us to question the fairness and justice of many of our past and present policies," and that would "develop an overriding loyalty to mankind as a whole" (as cited in Gross 2010: 214).

The challenge is to power and control. Because there can be no economy, market-driven or otherwise, without government, the question is not whether there should be regulation

or no regulation but rather how much and what kind of regulation—as well as who benefits and who is burdened by that regulation. No society of any sort is possible without power and constraint. The challenge is not to get rid of control but to find a new kind of control that will promote and protect human rights at workplaces and everywhere else for everyone. Unrestricted private enterprise can violate human rights as effectively as any state. Freeing property from state control does not free people from the tyranny of property or the tyranny of being left alone when in need of help or from the coercive power of the unregulated market.

As Polanyi (1944: 257) put it, "to be against regulation is to turn against reform." The anti-regulatory free market doctrine maintains, conversely, not only that if left alone the market can best deal with economic problems but also that government "intervention" is either the cause of economic problems or will make them worse. Beginning with the presidency of Jimmy Carter, Democratic as well as Republican administrations have waged an intense and unrelenting attack on government regulation. Congresses, Democratic and Republican, have made a key standard of performance the number of rules eliminated, government positions cut, resources reduced, or functions contracted out. Politicians of all stripes now run for office against "big government" (Cooper 2009). (The magnitude of the challenge puts into perspective the minimalist nature of the Employee Free Choice Act proposal and the dismissive rejection of even that limited proposal reveals the entrenched nature of our "free" market system and market philosophy.)

Despite fatalistic commentaries about the futility of trying to change the way things are, history shows that no one ideology dominates forever. There are many reasons for that, but one is the ability of challengers to redefine a policy issue and thereby create new perspectives on old issues. These new perspectives come about, at least in part, by challenging the values on which the prior resolution of the old issues have been based (Gross 2010: 3–4).

Change could begin, as Summers advocated years ago, by judicial administrative agency and by arbitral decision-makers obtaining and using their knowledge of foreign law systems "as a source for discovering and testing alternative ways to resolve perceived deficiencies in American Labor Law" (as cited in Bellace 1990: 617). More recently, Supreme Court Justice Ruth Bader Ginsburg (2005: 578), quoting the authors of the Declaration of Independence, called for '"a decent Respect to the Opinions of [human] kind"' [*sic*] in which judicial and quasi-judicial decision-makers learn from international legal sources, particularly on matters concerning human rights.

Canadian politician and intellectual Michael Ignatieff (2005: 8) used the phrase "legal isolationism" in reference to U.S. judges' resistance to using human rights precedents from around the world even as guides. Yet, opposition to this isolationism is growing, even from within the Supreme Court (Blumenson 2010). Consequently, some in the House of Representatives have introduced resolutions barring the use of foreign legal authorities as, among other things, threats to U.S. sovereignty. One House member submitted a bill making citation of foreign law an impeachable offense, and a writer called for Justice Anthony Kennedy's impeachment because citing foreign law, as Justice Kennedy had done, "upholds Marxist-Leninist, satanic principles" (Farber 2006: 7).

As legal scholar Eric Blumenson (2010: 4) has pointed out, "the use of foreign law is as old as our Supreme Court, only its use to advance human rights is new." Others have noted that the most intense criticism of the citation of foreign law has been directed at Supreme Court decisions that "vindicate rather than constrict human rights" (*Ibid.*: 5). In this situation, the ones who want to change an American judicial tradition of citing foreign law "are the radicals here" (Farber 2006: 25) and the disagreement over how to respond to the rise of a global human rights consensus is open to the application of new perspectives based on human rights values and principles. This is precisely what is meant by challenging values and changing perspectives.

The challenges of human rights are not limited to "top-down" agents of change; they include "bottom-up" agents as well. Unions are challenged to transcend the narrow self-interest of business unionism both to act on behalf of all workers (including the unemployed) and to promote the unity, well-being, and humanity of all people. Human rights challenge unions, for example, to develop a new vision that will take them beyond what C. Wright Mills called "mere pork chop contentment" (as cited in Lichtenstein 2001: xxvi). Unions are also challenged to be a great force for human rights and to act and understand themselves to be non-governmental human rights organizations promoting such rights as freedom of association and safety and health, proposing and supporting legislation that benefits all workers and their families, working on behalf of the unemployed and the poor, striving for a system in which the economy is designed to provide fully human lives for all, and opposing invidious discrimination.

A human rights perspective also lays down challenges to the "governed" and the consent they give to those who govern them. Knowledge is a form of power because it can be (and is) used to maintain the *status quo* as well as to change it (Zinn 1997: 501). The more ill-informed people are about their own rights, the more easily they can be misled as well as fooled and intimidated. It is important that workers know what their human, statutory, and contractual rights are in order to raise their consciousness, give them a rights context in which to assess their situations, see what they have in common with fellow workers, and ultimately form and exert a collective will to fight for those rights.

Article 26 of the UDHR requires education that strengthens "respect for human rights" and proclaims that "every individual and every organ of society . . . shall strive by teaching and education" to secure the universal and effective recognition and observance of those rights. The United Nations' World Programme for Human Rights Education calls for it "to be relative to the daily lives of learners" and to engage all people in dialogue about how to transform abstractions about human rights into "the reality of their social, economic, cultural and political conditions" (United Nations General Assembly 1996). This level of education implements Eleanor Roosevelt's understanding that unless human rights have meaning in the neighborhood, school, factory, farm, or office, they have little meaning anywhere (as cited in Lauren 2003: 288). Surveys indicate, however, that more than 90% of the people in the United States have never heard of the UDHR (Flowers 2000: 35–41).

Another challenge is that teaching about rights in the United States, even human rights, is focused on civil and political rights. Yet, as Articles 22 and 26 of the UDHR indicate, economic, social and cultural rights are also indispensable for the free and full development of the human personality. Human rights are holistic; that is, they express the universality, interdependence, and equality of all human rights. The position on the conception of economic human rights has fluctuated from President Franklin Roosevelt's 1944 Economic Bill of Rights (Congressional Record) to the Ronald Reagan administration's rejection of claimed economic rights as rights of any sort (Mower 1987: 39–40). The conception of economic rights as human rights as contrary to U.S. values poses a serious challenge to human rights education.

At the university level, the historian Howard Zinn (1997: 504) has written, "there is no question then of a 'disinterested university,' only a question about what kind of interests the university will serve." In addition, a human rights focus challenges the current research and teaching agenda in the field of industrial and labor relations. As I have written elsewhere:

> Pursuing the challenges posed by the workers' rights as human rights movement as well as human rights education at the university level would broaden the industrial and labor relations agenda and open the way for new approaches to that research. This could make the study of industrial relations truly interdisciplinary because it requires understanding and applying history, law, philosophy, ethics, economics, religion, and the international and comparative aspects of all those disciplines. This will also require broadening the methods of industrial relations research beyond quantitative techniques and, therefore, will open for examination subjects previously not considered because they were not

quantifiable. It will also reintroduce concepts such as justice and injustice to a field that has come to disparage the "normative" as unscientific and subjective—ill-befitting the objective, value-free social science. (Gross 2009 : 38).

Significant changes are needed for workers' human rights to be respected and enforced at U.S. workplaces. The injustices that occur at work are not merely misfortunes that beset workers. Nor are they inevitable or unavoidable. Injustices are caused by the deliberate choices of those with the power to make those choices. Human rights challenge how that power has been exercised and thus demand extensive and fundamental change. Without radical changes in policies, practices and values, human rights holds out a cruel false hope to those who suffer the consequences of rights violations.

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