

Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards

August 2000, Human Rights Watch

I. SUMMARY

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions.

*-International Covenant on Civil and Political Rights (ratified by the United States in 1992)
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection.*

—National Labor Relations Act (passed by Congress in 1935)

I know the law gives us rights on paper, but where's the reality?

—Ernest Duval, a worker fired in 1994 for forming and joining a union (speaking in 1999)

Every day about 135 million people in the United States get up and go to their jobs in service, industry, agriculture, non-profit, government and other sectors of the enormous and complex American economy. The rate of new job creation in the United States—almost twenty million in the 1990s—is the envy of many other countries.

Under a wide-angle lens the American economy appears strong. Unemployment is low, and wages are inching up after years of stagnation. In focus, though, there are alarming signals for Americans concerned about social justice and human rights. A two-tier economy and society are taking shape. Income inequality is at historically high proportions.¹ Worker self-organization and collective bargaining, engines of middle-class growth and social solidarity in the century just ended, have reached historically low proportions. Although trade unions halted a declining membership trend in 1999, slightly increasing the absolute number of workers who bargain collectively, the percentage of the workforce represented by unions did not increase.²

Many Americans think of workers' organizing, collective bargaining, and strikes solely as union-versus-management disputes that do not raise human rights concerns. This report approaches workers' use of these tools as an exercise of basic rights where workers are autonomous actors, not objects of unions' or employers' institutional interests. Both historical experience and a review of current conditions around the world indicate that strong, independent, democratic trade unions are vital for societies where human rights are respected. Human rights cannot flourish where workers' rights are not enforced. Researching

workers' exercise of these rights in different industries, occupations, and regions of the United States to prepare this report, Human Rights Watch found that freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it.

Labor rights violations in the United States are especially troubling when the U.S. administration is pressing other countries to ensure respect for internationally recognized workers' rights as part of the global trade and investment system. For example, many developing countries charge that U.S. proposals for a working group on labor rights at the World Trade Organization (WTO) are motivated by protectionism, not by a concern for workers' rights. U.S. insistence on a rights-based linkage to trade is undercut when core labor rights are systematically violated in the United States.

This report occasionally touches on rights of association outside the context of trade unionism. One example is the right of workers to seek legal assistance for work-related problems. Most of Human Rights Watch's investigation, however, deals with workers' attempts to form unions and bargain with their employers. Forming and joining a union is a natural response of workers seeking to improve their working conditions. It is also a natural expression of the human right, indeed the human need, of association in a common purpose where the only alternative offered by an impersonal market is quitting a job.³

Without diminishing the seriousness of the obstacles and violations confronted by workers in the United States, a balanced perspective must be maintained. U.S. workers generally do not confront gross human rights violations where death squads assassinate trade union organizers or collective bargaining and strikes are outlawed.⁴ But the absence of systematic government repression does not mean that workers in the United States have effective exercise of the right to freedom of association. On the contrary, workers' freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers' rights.

The cases studied in this report are not isolated exceptions in an otherwise benign environment for workers' freedom of association. They reflect a broader pattern confirmed by other researchers and borne out in nationwide information and statistics. In the 1950s, for example, 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 more than 20,000 workers each year were victims of discrimination leading to a back-pay order by the NLRB-23,580 in 1998.⁵ The frequency and growing incidence of workers' rights violations should cause grave concern among Americans who care about human rights and social justice.

Policy and Reality

Workers in the United States secured a measure of legal protection for the right to organize, to bargain collectively, and to strike with passage of the Norris-LaGuardia Act of 1932 and the Wagner Act of 1935, the original National Labor Relations Act (NLRA).⁶ These advances came after decades of struggle and sacrifice from the time, a century before, when trade unions were treated as a criminal conspiracy. The NLRA declares a national policy of "full freedom of association" and protects workers' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."⁷ The NLRA makes it unlawful for employers

to "interfere with, restrain, or coerce" workers in the exercise of these rights. It creates the National Labor Relations Board (NLRB) to enforce the law by investigating and remedying violations. All these measures comport with international human rights norms regarding workers' freedom of association.

The reality of NLRA enforcement falls far short of its goals. Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association.

Private employers are the main agents of abuse. But international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. In the United States, labor law enforcement efforts often fail to deter unlawful conduct. When the law is applied, enervating delays and weak remedies invite continued violations.

Any employer intent on resisting workers' self-organization 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 and grant back pay to a worker fired for organizing. In one case cited here, a worker fired for five years received \$1,305 back pay and \$493 interest.⁸ 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 organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.

Moreover, some provisions of U.S. law openly conflict with international norms and create formidable legal obstacles to the exercise of freedom of association. Millions of workers are expressly barred from the law's protection of the right to organize. U.S. legal doctrine allowing employers to permanently replace workers who exercise the right to strike effectively nullifies the right. Mutual support among workers and unions recognized in most of the world as legitimate expressions of solidarity is harshly proscribed under U.S. law as illegal secondary boycotts. Labor laws have failed to keep pace with changes in the economy and new forms of employment relationships creating millions of part-time, temporary, subcontracted, and otherwise "atypical" or "contingent" workers whose exercise of the right to freedom of association is frustrated by the law's inadequacy.

Workers' Voices

"I know the law gives us rights on paper, but where's the reality?" asks Ernest Duval, a certified nurse assistant at a Florida nursing home. Duval and several coworkers were unlawfully fired in 1994 for activities like wearing buttons, passing out flyers, signing petitions, and talking with coworkers about banding together in a union at their workplace in West Palm Beach. In 1996 a judge found their employer guilty of unlawful discrimination and ordered Duval and his coworkers reinstated to their jobs. In 1999 they were still out of work despite an NLRB order upholding the judge's ruling.⁹ The employer continued to appeal these decisions, now to federal courts where years' more delay is likely. Meanwhile, the firedworkers remain off the job, and their coworkers are frightened into retreat from the organizing and bargaining effort.

"We know our job, we love our job, we love our patients, but management doesn't respect us," Marie Pierre, another nursing home assistant, told Human Rights Watch.¹⁰ Pierre served as a union observer at two representation elections in 1998 and 1999 at a nursing home in Lake Worth, Florida. The union won

both elections, but Pierre was fired in December 1999 for speaking Creole with coworkers. The company has refused to accept election results, appealing them to the NLRB and raising the prospect of years more of appeals before the courts.

"They don't let us talk to Legal Services or the union. They would fire us if we called them or talked to them," said a farmworker in North Carolina to an Human Rights Watch researcher examining freedom of association among H-2A migrant laborers.¹¹ The H-2A program grants migrant workers a temporary visa for agricultural work in the United States. They labor at the sufferance of growers who can fire them and have them deported if they try to form or join a union.

A continent's breadth away, an apple picker in Washington State told Human Rights Watch of threats from "the consultant that was telling [the company] how to beat the union."¹² Part of a growing industry that specializes in telling employers how to defeat workers' self-organization, the consultant told striking apple workers, "You have thirty minutes to get back to work or you're all fired."¹³ A convoy of police cars escorted trucks and vans full of workers sent by other apple growers to break the strike. Farmworkers in the United States are excluded from coverage by laws to protect the right to organize, to bargain, and to strike, and can be fired for exercising these rights.

Nico Valenzuela is another kind of victim. He and his coworkers at a Chicago-area telecommunications castings company voted by a large majority in 1987 to form and join a union. Valenzuela is still working, but collective bargaining proved futile in the face of a management campaign to punish workers for their vote. Despite repeated findings by the NLRB that the company acted unlawfully, legal remedies took years to obtain. The workers abandoned bargaining in 1999, twelve years after they formed a union, never having achieved a contract. The delays "took away our spirit," said Nico Valenzuela of the bargaining process. "I don't know how the law in this country can allow these maneuvers."¹⁴

Lloyd Montiel, a twenty-seven-year veteran employee at a steel mill in Pueblo, Colorado, exercised the right to strike along with 1,000 coworkers in response to management's threats during bargaining. The company permanently replaced them with newly hired strikebreakers, many coming from other states. "How can the government and Congress allow companies to do this?" he asks. "They [the employer] can plan a strike, cause a strike, and then get rid of people who gave them a lifetime of work and bring in young guys who never saw the inside of a steel mill."¹⁵

At a world of work far removed from steel mills and nursing homes, Barbara Judd, a high-tech contract worker in Redmond, Washington, found herself and coworkers who formed a union caught between the firm where they worked and their temporary employment agencies when they sought to bargain collectively. As "permatemps"-long-term workers at a single firm, but nominally employed by outside agencies-Judd's group had no one to bargain with. Denying their employment status, the firm refused to bargain with the group. Meanwhile, the temporary agencies refused to bargain with workers placed at the firm.¹⁶

The stories of these and other workers who have tried to exercise the right to freedom of association promised by international human rights instruments and by the U.S. labor law principles are the focus of this report. The cases reported here are not exceptional, and the findings are not novel for those familiar with domestic U.S. discourse on workers' rights to organize and bargain collectively. Congressional

committees and presidential commissions have reached the same conclusions, and Human Rights Watch has consulted these sources among others in preparing this report.¹⁷

International Human Rights and Workers

Human Rights Watch brings to the discussion an analysis of workers' freedom of association in the United States in light of international human rights standards. An international human rights perspective provides new ways of understanding U.S. labor law and practice and of advocating changes to bring them in line with international standards.

Freedom of association is the bedrock workers' right under international law on which all other labor rights rest. In the workplace, freedom of association takes shape in the right of workers to organize to defend their interests in employment. Most often, workers organize by forming and joining trade unions. Protection of their right to organize is an affirmative responsibility of governments to ensure workers' freedom of association. As one scholar notes, "States are . . . obligated [under the International Covenant on Civil and Political Rights, ratified by the United States] to protect the formation or activities of association against interference by private parties."¹⁸

But the right to organize does not exist in a vacuum. Workers organize for a purpose: to give unified voice to their need for just and favorable terms and conditions of employment when they have freely decided that collective representation is preferable to individual bargaining or management's unilateral power.

The right to bargain collectively stems unbroken from the principle of freedom of association and the right to organize. Protecting the right to bargain collectively guarantees that workers can engage their employer in exchange of information, proposals and dialogue to establish terms and conditions of employment. It is the means by which fundamental rights of association move into the real and enduring life of workers and employers. The right to bargain collectively is "real" implementation in the economic and social setting of the "ideal" civil and political rights of association and organizing.

At the same time, the right to bargain collectively is susceptible to a higher level of regulation than the right to organize. Bargaining is more than an exercise of the pure right of association by workers, since it implicates another party—the employer—and can carry social effects outside the workplace. Collective bargaining takes a wide variety of forms in different countries reflecting their national histories and traditions. For example, some countries protect bargaining by workers whose unions represents only a minority of employees in workplaces. Others, like the United States, require majority support. Some countries allow multiple union representation among workers in the same jobs. The United States and others require exclusive representation by a single union for workers in a defined "bargaining unit." But regardless of differences in models of collective bargaining, the underlying basic right must be given effect.

The right to bargain collectively is compromised without the right to strike. This right, too, must be protected because without it there cannot be genuine collective bargaining. There can only be collective entreaty. Here, too, a greater level of regulation is contemplated under international norms since strikes can affect not just the parties to a dispute, but others as well. The International Covenant on Economic, Social and Cultural Rights proclaims "[t]he right to strike, provided that it is exercised in conformity with the laws of the particular country."¹⁹ The International Labor Organization (ILO) has long

maintained that the right to strike is an essential element of the right to freedom of association, but recognizes that strikes may be restricted by law where public safety is concerned, as long as adequate alternatives such as mediation, conciliation, and arbitration provide a solution for workers who are affected.

The right to organize, the right to bargain collectively, and the right to strike unfold seamlessly from the basic right to freedom of association. But they should not be equated with outcomes for the exercise of these rights. Workers do not have a right to win an NLRB election. They do not have a right to win their collective bargaining demands. They do not have a right to win a strike on their terms. Nothing in this report should be seen to argue for any specific outcome in an organizing, bargaining, or strike dispute. However, employers must respect and the state must protect workers' fundamental rights.

In recent months, the U.S. government has amplified calls for integrating human rights and labor rights into the global trade and investment system in such venues as the World Trade Organization and the Free Trade Agreement of the Americas. Freedom of association is the first such right cited in calls for labor rights in trade agreements. But to give effective leadership to this cause that is not undercut by hypocrisy, the United States must confront and begin to solve its own failings when it comes to workers' rights. Moving swiftly to strengthen labor rights enforcement and deter labor rights violations in the United States will reinforce the sincerity of U.S. concern for ensuring worldwide respect for core labor standards.

International Labor Rights Norms

A widely accepted body of international norms has set forth standards for workers' freedom of association. They can be found in the Universal Declaration of Human Rights and other United Nations instruments, in conventions of the ILO, in workers' rights clauses in regional trade agreements, and in other international compacts. They are also grounded in the near-universality of national laws protecting workers' freedom of association in all countries' labor law systems.

Workers' freedom of association in human rights instruments has been complemented by legal guidelines on international labor norms developed in detail by the ILO. These norms set forth the right to organize, the right to bargain collectively, and the right to strike as fundamental rights. They are inextricably tied to the exercise of the right to freedom of association and must be protected by national governments. Nearly every country is a member of the ILO. Each is bound by ILO Conventions 87 and 98 dealing with freedom of association whether or not they have ratified those conventions, since freedom of association is taken to be a constitutional norm binding on countries by virtue of their membership in the organization.²⁰

The United States has not ratified Conventions 87 and 98 but has long acknowledged its obligations under them. In 1998, the United States championed adoption at the ILO of a landmark Declaration on Fundamental Principles and Rights at Work stating that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution [of the ILO], the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; . . .²¹

International human rights law prohibits the use of state power to repress workers' exercise of their right to freedom of association. Forming and joining unions, bargaining collectively, or exercising the right to strike may not be banned or rendered impotent by force of law. Officially or unofficially, authorities may not harass workers, arrest them, imprison them, or physically abuse or kill them for such activities.

Moreover, governments must take affirmative measures to protect workers' freedom of association. Governments have a responsibility under international law to provide effective recourse and remedies for workers whose rights have been violated by employers. Strong enforcement is required to deter employers from violating workers' rights.

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

Endnotes

- 1 See Center on Budget and Policy Priorities; Economic Policy Institute, "Pulling Apart: A State-by-State Analysis of Income Trends" (January 2000), showing that the average income of families in the top 20 percent of the income distribution was \$137,500, or more than ten times as large as the poorest 20 percent of families, which had an average income of \$13,000, and that throughout the 1990s the average real income of high-income families grew by 15 percent, while average income remained the same for the lowest-income families and grew by less than two percent for middle-income families - not enough to make up for the decline in income in the 1980s. See also Richard W. Stevenson, "In a Time of Plenty, The Poor Are Still Poor," *New York Times*, January 23, 2000, Week in Review, p.3; James Lardner, "The Rich Get Richer" What happens to American society when the gap in wealth and income grows larger?", *U.S. News & World Report*, February 21, 2000, p.38.
- 2 In 1999 more than sixteen million workers in the United States belonged to trade unions. For the workforce as a whole, 13.9 percent of all workers and 9.4 percent of private sector workers were union members. While more workers gained union representation by forming new unions than lost it through workplace layoffs and closures in 1999 for the first time in many years, the proportion of the total workforce represented by unions remained unchanged because of employment growth in firms and sectors with less union presence. In the 1950s such union "density" reached more than 30 percent of the total workforce and nearly 40 percent in the private sector. See Frank Swoboda, "Labor Unions See Membership Gains," *Washington Post*, January 20, 2000, p. E2.
- 3 Union-represented workers generally have higher wages and benefits than non-represented employees. In 1999, union members had median weekly earnings of \$672, compared with a median of \$516 for workers who did not belong to a union. They are also protected against arbitrary discharge or other forms of discrimination under a "just cause" standard contained in nearly every union contract. For most non-represented workers in the private sector, an employment-at-will doctrine prevails. An employer can dismiss a worker for "a good reason, a bad reason, or no reason at all," in the classic formulation, except where laws specifically prohibit discrimination. On comparative weekly earnings, see U.S. Department of Labor, Bureau of Labor Statistics, "Union

Membership in 1999" (January 19, 2000). For extensive discussion of the at-will doctrine, see Pauline T. Kim, "Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will world," 83 Cornell Law Review 105 (1997); Richard A. Epstein, "In Defense of the Contract at Will," 51 University of Chicago Law Review 947 (1984).

- 4 At the same time, Human Rights Watch did find instances in various case studies of interference with workers' rights by government authorities. They included biased intervention by police and local government authorities and government subsidization of workers' rights violators. While these cases do not rise to a level of systemic abuse, they are no less troubling and, if they are not addressed and stopped, such abuses could spread.
- 5 See NLRB Annual Reports 1950-1998; 1998 Table 4, p. 137.
- 6 The Norris-LaGuardia Act outlawed "yellow-dog" contracts (requiring a worker to renounce union membership as a condition of employment) and *ex parte* labor injunctions (by which judges enjoined strikes and jailed strike leaders after hearing only the employer's argument in a case). The Wagner Act created Section 7 rights, defined unfair labor practices, and set up the NLRB for enforcement. Senator Norris and Congressman LaGuardia were both Republicans; Senator Wagner was a Democrat, reflecting a tradition of support for workers' rights from both major political parties.
- 7 29 U.S.C. §§ 151-169, Section 7.
- 8 Under the NLRA, back pay awards are "mitigated" by earnings from other employment. Employers who illegally fire workers for organizing need only pay the difference, if any, between what workers would have earned had they not been fired, and what they earned on other jobs during the period of unlawful discharge. Since workers cannot remain without income during years of litigation, they must seek other jobs and income, leaving the employers who violated their rights with an often negligible back pay liability.
- 9 See *PVM I Associates, Inc. D/b/a King David Center and U.S. Management, Inc. and 1115 Nursing Home Hospital and Service Employees Union-Florida*, 328 NLRB No. 159, August 6, 1999. In Duval's case, the judge found that management discharged him on fabricated misconduct charges because it was "determined to rid itself of the most vocal union supporter."
- 10 Human Rights Watch telephone interview, North Miami, Florida, March 8, 2000.
- 11 Human Rights Watch interview, near Mount Olive, North Carolina, July 15, 1999.
- 12 Human Rights Watch interview, Sunnyside, Washington, November 6, 1999. See Chapter IV., *Washington State Apple Industry* below.
- 13 A videotape of the workers' picketing activity, reviewed by Human Rights Watch, shows the consultant making this statement. For more details, see Chapter IV., *Washington State Apple Industry* below.
- 14 Human Rights Watch interview, Chicago, Illinois, July 8, 1999. For more details, see Chapter IV., *Northbrook, Illinois Telecommunications Castings* below.
- 15 Human Rights Watch interview, Pueblo, Colorado, May 20, 1999. For details on the legal underpinnings of an assertion of unlawful conduct, see the discussion and footnotes in Chapter V., *Colorado Steelworkers, the Right to Strike and Permanent Replacements in U.S. Labor Law* below.
- 16 Human Rights Watch interview, Seattle, Washington, November 4, 1999. For details, see Chapter IV., *Contingent Workers* below.
- 17 See, for example, Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 96th Cong., 2d Sess., "Report on Pressures in Today's Workplace" (1980); Subcommittee on Labor Management Relations of the House Committee on Education and Labor, 98th Congress, "The Failure of Labor Law: A Betrayal of American Workers" (1984); U.S.

Department of Labor, Bureau of Labor-Management Relations, Report No. 134, "U.S. Labor Law and the Future of Labor-Management Cooperation"(1989); U.S. Department of Labor, U.S. Department of Commerce, Commission on the Future of Worker-Management Relations, *Fact Finding Report* (May 1994).

- 18 See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Strasbourg, N.P. Engel, 1993), p. 387 (noting that "the US was unsuccessful with its motion in the HRCComm to protect freedom of association only against 'governmental interference.'").
- 19 ICESCR, Article 8 (d).
- 20 ILO member countries are "bound to respect a certain number of general rules . . . among these principles, freedom of association has become a customary rule above the conventions." See Fact Finding and Conciliation Commission on Chile, (ILO, 1975), para. 466.
- 21 See ILO *Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, p. 7.