

Justice on the Job
Perspectives on the Erosion
of Collective Bargaining
in the United States

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An Introduction to the Current State of Workers' Rights

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“Democracy cannot work unless it is honored in the factory as well as the polling booth; [workers] cannot be truly free in body and in spirit unless their freedom extends into the places where they earn their daily bread.” This quote from Senator Robert Wagner in 1935 as he introduced the bill that came to be known as the Wagner Act captures the importance of workers’ rights in our society. Yet in 2000, no less an authority than Human Rights Watch found that legal protections for the fundamental human rights of U.S. workers to form unions, bargain collectively, and strike fall woefully short of meeting the requirements of international law (Human Rights Watch 2000). The freedom to form a union has been formally recognized as a basic human right by the United Nations and its member states since the Universal Declaration of Human Rights was ratified in 1948 (United Nations 1948). The international importance of freedom of association and the right to bargain collectively was reaffirmed in 1998, when the International Labour Organization (ILO), the tripartite United Nations body that is responsible for labor issues, designated the right to freedom of association and to bargain collectively as one of four workplace rights so universal and

fundamental that they must be honored by all member states, whether or not they have ratified all the relevant ILO conventions (ILO n.d.).¹

Yet in the United States today, the freedom to form unions and bargain collectively is heavily suppressed, and the law provides workers with little protection. According to Bronfenbrenner's survey of 400 National Labor Relations Board (NLRB) elections in 1998 and 1999, private sector employers oppose the efforts of their employees to form unions during 97 percent of all organizing campaigns (Bronfenbrenner 2000). Firing or otherwise discriminating against a worker for trying to form a union is illegal but has become commonplace. The number of instances of discrimination, discharge, or other unfair labor practices against workers for union activity leading to a back-pay order by the NLRB skyrocketed from 1,000 per year in the early 1950s to 15,000–25,000 annually in recent years, despite the fact that private employment in the United States during this period increased less than threefold (Human Rights Watch 2000; U.S. Bureau of Labor Statistics n.d.). Almost without limit, employers can and do legally force workers to attend closed-door meetings during work time to dissuade them from forming unions. According to Bronfenbrenner (2000), private sector employers force workers to attend 11 such “captive audience” meetings during a typical organizing campaign. By contrast, unions have virtually no access to the workplace to present their case. Indeed, as political scientist Gordon Lafer recently concluded:

At every step of the way, from the beginning to the end of a union election, NLRB procedures fail to live up to the standards of U.S. democracy. Apart from the use of secret ballots, there is not a single aspect of the NLRB process that does not violate the norms we hold sacred for political elections. The unequal access to voter lists; the absence of financial controls; monopoly control of both media and campaigning within the workplace; the use of economic power to force participation in political meetings; the tolerance of thinly disguised threats; the location of voting booths on partisan grounds; open-ended delays in implementing the results of an election; and the absence of meaningful enforcement measures—every one of these constitutes a profound departure from the norms that have governed U.S. democracy since its inception. (Lafer 2005)

Under U.S. law, employers may lawfully “predict”—but not “threaten”—that the workplace will close or be moved if workers join a union.

The incidence of such “predictions” and (technically illegal but virtually unpenalized) threats that the workplace will close or move occurred in less than 30 percent of organizing campaigns in the mid-1980s, but more than half by the late 1990s—including more than 70 percent in the highly mobile manufacturing sector (Bronfenbrenner 2000, p. 18).

Employers who are so inclined may use NLRB procedures and legal doctrines to create delays and make collective bargaining appear futile so that employees will eventually abandon their struggle to form a union.² The bottom line: as Richard Freeman puts it, “the National Labor Relations Act . . . has institutionalized a process that effectively gives management near veto power over whether or not workers become organized” (Freeman 2004, p. 75).³ The consequences have been devastating for workers’ rights. According to a February 2005 Peter Hart survey, among nonunion workers 53 percent—or some 57 million workers—want union representation in their workplaces but are unable to have it under current law (Hart 2005).

The economic consequences of suppressing workers’ freedom to form unions are severe. Union jobs paid 27.6 percent more than nonunion jobs in 2004—\$781 per week versus \$612 per week (U.S. Bureau of Labor Statistics 2005). Real wages of U.S. workers are 4.7 percent lower in 2004 than they were in 1971, although productivity increased at an annual average of 2.11 percent during that time period (U.S. Bureau of Labor Statistics n.d. b,c). The absence of workplace democracy and the right to negotiate for a share of this increased productivity has contributed to this gap. Indeed, the inability of workers to unionize may threaten middle-class jobs and the associated lifestyles. Collective bargaining raises wages for all workers, union and nonunion alike. One recent study found that, for workers with high school educations in the 1980s, the spillover effect of collective bargaining led to aggregate earnings increases for nonunion workers that were three-fifths as large as the aggregate of earnings increases received by union members as a direct result of collective bargaining (Mishel and Walters 2003).

As workers lose the freedom to form unions, race and gender pay gaps grow. For example, according to the U.S. Bureau of Labor Statistics (2005), in 2004, African-American workers who are members of a union made 29 percent more per week than their nonunion counterparts, and Latino workers who are members of unions earned 59 percent more per week in 2004 than nonunion Latino workers. Furthermore, the union

wage advantage was 34 percent for women workers. Numerous studies have found a link between the erosion of collective bargaining coverage and widening economic inequality (Card 1996, 2001; Card, Lemieux, and Riddell 2003; Mishel and Walters 2003).

Collective bargaining also makes a huge difference in workers' access to pensions, health insurance coverage, and paid time off the job. Union workers are nearly five times more likely to have guaranteed, defined benefit pension plan coverage (U.S. Bureau of Labor Statistics n.d. a) and are 53 percent more likely than nonunion workers to get health insurance benefits through their jobs (Buchmueller, DiNardo, and Valleta 2001). Nonunion workers are six times more likely to lack health insurance coverage than union members; the long-term decline in unionization and collective bargaining coverage is therefore a significant cause of the growth in the number of uninsured Americans (Fronstin 2005). Thus, unions and collective bargaining are vital to preventing low-road employers from shifting the costs for health care of their employees to more responsible employers and the public (Maxwell, Temin, and Zaman 2002; Waddoups 2003).

In a period when the work/family time squeeze is high on the agenda of many social analysts, unions help to maintain a healthy work/life balance. Collective bargaining confers a 28 percent advantage in paid vacation time to union members as compared with nonunion workers (Mishel and Walters 2003).

Furthermore, unions make a huge difference in justice on the job. In 99 percent of unionized workplaces, workers can be disciplined or fired only for a good reason related to work performance (Bureau of National Affairs 1995). By contrast, in virtually all nonunion workplaces in the private sector, workers are "employees at will" who can be disciplined or discharged for no reason at all.

Suppressing the freedom to form unions also harms political participation and weakens a vital component of countervailing power in society (Voos 2004). Radcliff (2001) estimates that each percentage point decline in union density triggers a 0.4 percentage point decline in voter participation. Perhaps most serious of all, workers are denied both a democratic voice in their workplace to shape their terms and conditions of employment and a vehicle to use their expertise to improve organizational performance. This lack of voice harms not only workers and organizations, but, depending on the organization, also the general

public. For example, recent research indicates that heart attack survival rates are higher in hospitals where nurses are unionized than in hospitals where nurses are not unionized (Ash and Seago 2004).

In October 2002, the School of Labor and Industrial Relations at Michigan State University and the AFL-CIO co-sponsored a conference on workers' rights that aimed to encourage much-needed academic research on workers' rights in the United States. The conference organizers believed that if we provided researchers in industrial relations and related disciplines a forum for new inquiries into workers' rights, excellent research would emerge.

This volume is an edited selection of 13 papers presented at the conference. The result is a wide-ranging examination of the state of workers' freedom to form unions and bargain collectively in the United States. The book has a point of view: legal protection for workers' rights in the United States is low, and this situation is adversely affecting the well-being of society as a whole. Justice, fairness, and widely shared prosperity are the watchwords of the papers in this volume.

The book is divided into five parts. Part 1 asks the following question: How free are U.S. workers to form unions and bargain collectively? In the first of three chapters in Part 1, James Gross takes an international, values-based look at workers' rights to bargain collectively in the United States. Gross argues that concepts of fundamental human rights must be applied not only to the individual vis-à-vis the state, but also the individual vis-à-vis the employer. Gross makes the argument that an employer can have an even greater effect on a person than does the state. Yet, in their status as employees—which is one of the most important aspects of life for the day-to-day existence of the average person—people are treated as little more than a physical asset allocated like any other asset. Such a view is values-based—there is nothing inherent in the nature of an economic system, including the capitalist system of private ownership of the means of production, that requires that citizens, in their status as employees, be denied such fundamental rights. The European Union (EU), for example, provides workers with a much broader set of legally protected rights than does the United States (Block, Berg, and Roberts 2003), yet the EU does not question private ownership of the means of production. Gross argues that it is the balance between employer rights and workers' rights that is at issue. Gross points out that a conceptualization of workers' rights as fundamental

rights would change the balance of our labor laws. More importantly, however, it would also change the nature of the employment system in the United States from one that is centered on property rights to one that balances property rights with human rights. Gross calls on us to rethink our views of the nature of the employment relationship, asking why we should consider property rights as fundamental for employers, but not consider organizing and bargaining rights—the right to a voice—as fundamental human rights for workers.

Taking this broad view of the right to organize and bargain collectively as a fundamental human right, David Cingranelli examines the most widely known procedure by which workers form labor unions in the United States—the NLRB representation election—and compares it to democratic political elections. Using accepted international standards for democratic elections as a yardstick, standards that the United States has been active in promulgating, Cingranelli concludes that, by these measures, the NLRB representation election process is neither free nor fair. It is not free because workers are not free from interference or coercion, are not allowed by employers or the law to fully exercise free speech rights, are not free to assemble on company property, do not have free access to information about the union at the workplace, and do not have proper redress for election violations because of inadequate laws, poor enforcement, weak and ineffective remedies, and long delays. Representation elections are not fair because eligibility is not clearly defined, access to resources and information is inequitable, and the two parties are not treated equally. Cingranelli's analysis thus calls into serious question whether the NLRB representation election process truly constitutes a free, fair, and democratic procedure for workers to determine whether or not they want to form a union. If it is not a democratic process, then the entire basis for our current system of employee choice, the NLRB election under “laboratory conditions” (Dana Corporation 314 NLRB No. 150 [2004]), is called into question.

The next chapter examines the status of workers' freedom to form unions and bargain collectively in the public sector. While public sector unionism has fared far better than private sector unionism (in 2004, 36 percent of public sector workers were union members, compared to just 7.9 percent of private sector workers) (U.S. Bureau of Labor Statistics 2005), Donald Wasserman claims that these numbers mask some disturbing facts regarding the rights of public employees to bar-

gain collectively. As Wasserman points out, states that permit collective bargaining among state and local government employees often do so with severe constraints. Moreover, Wasserman notes that “(a) majority of public employees in fully one-half of the states do not now have, and are unlikely to achieve, reasonable bargaining rights in the foreseeable future.” Wasserman also cites a U.S. General Accountability Office study that estimates that roughly one-third of all public employees lack collective bargaining rights. Wasserman also notes the minimal scope of bargaining in the federal sector.

Importantly, Wasserman discusses the extent to which the Bush administration and some governors have stripped their employees of even these narrow rights. In January 2005, the Bush administration adopted rule changes to increase management discretion and narrow the scope of collective bargaining in the Department of Homeland Security on the ground of national security, although we know of no serious scholarship that ties unionization to security risks. Additionally, new governors in Indiana and Missouri removed, by executive order, collective bargaining rights from state employees (Lee 2005; Missouri, Office of the Governor of 2005; *National Treasury Employees Union et al. v. Tom Ridge and Kay Coles James*;⁴ Office of the Governor [of Indiana] 2005; U.S. Department of Homeland Security and Office of Personnel Management 2005). In Kentucky, even the state’s obligation to meet and confer with public sector unions was abolished by the governor in January 2004 (Wasserman 2005). These actions indicate the precariousness of the status of collective bargaining for public employees, especially when that status is at the discretion of the executive branch. The net result, Wasserman finds, is that—even in the relatively highly unionized public sector—the United States falls short of meeting international human rights standards with respect to protecting the freedom of employees to form unions and bargain collectively.

In Part 2, the focus of the volume shifts from broad human rights doctrine to an examination of the social and economic importance of collective bargaining. Why does free worker access to collective bargaining matter? What does society gain from protecting workers’ rights? How do workers themselves, communities, and indeed, employers, benefit from collective bargaining? Thomas Juravich, Kate Bronfenbrenner, and Robert Hickey; Laura Dresser and Annette Bernhardt; and Adrienne Eaton and Jill Kriesky provide insights into these ques-

tions. The chapter by Juravich, Bronfenbrenner, and Hickey represents the first systematic scholarly analysis ever undertaken of the provisions included in the first contracts workers negotiate with employers after they organize a union. The authors find that three-quarters of the first contracts studied contained antidiscrimination and just-cause language, and 96 percent had a grievance procedure with third-party arbitration. Seniority is created in more than two-thirds of all agreements, but seniority is used primarily in layoffs, recall, and transfer. It is much less likely to be used as the primary criterion in promotions. Most of these provisions prevent management from taking arbitrary action. Thus, the chapter suggests that these first contracts represent significant gains for workers—both in terms of economic benefits and workplace rights. Given the difficulty workers face in securing first contracts over employer opposition—45 percent of initial contract negotiations fail to result in a first contract within two years, according to the latest Federal Mediation and Conciliation Service data—these are significant victories indeed (Federal Mediation and Conciliation Services 2004).

The Dresser and Bernhardt chapter on unionization and the hotel industry addresses a broad range of workplace and unionization issues. From a societal point of view, however, the authors' major contribution may be their focus on a sector that has a large number of low-wage, nonunion service jobs, often held by recent immigrants, which generally require limited formal education. From the late 1930s through the late 1950s, workers with little formal education were an important component of the unionized workforce, for instance, in manufacturing and construction. In essence, unionization and collective bargaining helped move these workers into the middle class with all the implications for consumption and intergenerational mobility that went with middle-class status. The decline of middle-wage, unionized manufacturing jobs available to workers with limited formal education, and the coincident increase in nonunion low-wage service jobs, means that there are fewer pathways into the middle class for such workers. This has serious implications for upward social and intergenerational mobility and income growth and inequality in the United States. The substantial wage effects of unionization found by Dresser and Bernhardt, from 19 percent to 39 percent, depending on the level of analysis, suggests the importance of enhancing workers' freedom to form unions and bargain collectively if we wish to reverse the decline of living standards for workers with

relatively low levels of formal education, recent immigrants, and other workers who occupy a disadvantaged position in the labor market.

Adrienne Eaton and Jill Kriesky examine the minority of employers who choose to respect their employees' freedom to form unions by remaining neutral during organizing campaigns and/or voluntarily recognizing unions when a majority of their employees choose them. The authors find no inconsistency between employer success and employer choice to respect workers' freedom to organize and bargain collectively. Indeed, in many cases, unions are perceived as aiding management in improving the workplace or product. In the auto parts industry, for example, with the interest of the domestic automakers and the UAW in purchasing from unionized suppliers, unionization may actually generate business. More generally, avoiding the conflict and disruption typical of contested NLRB representation election campaigns can foster more positive labor-management relations and permit the relationship between the parties to develop on the basis of mutual respect and trust. Thus, for these firms, and for the workers fortunate enough to be employed with them, respect for workers' freedom to form unions and business success go hand-in-hand. The Eaton and Kriesky chapter, when read against the backdrop of the antidemocratic deficiencies of the NLRB representation elections that Cingranelli's chapter documents, strongly suggests that public policy should promote voluntary recognition agreements and employer neutrality as a valuable and constructive alternative to the contested, adversarial, and coercive NLRB representation election process (*Dana Corporation*, 341 NLRB No. 150 [2004]; Brudney forthcoming).

Part 3 focuses on legal obstacles to workers' rights. While common sense suggests that statutory law matters a great deal, those who do not follow labor law developments closely may not realize the impact specific interpretations of statutory language can have. Steven Abraham, Adrienne Eaton, and Paula Voos; and Ganagram Singh and Ellen Dantin examine the impact of interpretations of the NLRA in two areas: the exclusion of supervisors from being part of the union, and employers unilaterally implementing their proposals when bargaining for a contract has reached an impasse. Abraham, Eaton, and Voos note that the U.S. Supreme Court's decisions in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) and *NLRB v. Health Care and Retirement Corp. of America*, 511 U.S. 571 (1994) have increased the burden on

union organizing by encouraging delays in the representation process. Employer arguments that some employees are supervisors result in legal disputes that increase the processing time in a case. Employers can, in fact, delay the process by weeks by making arguments about the supervisory status of workers even if the merit of the arguments is questionable. In addition, these cases have encouraged courts of appeals to remand cases to the board for further consideration. This increase in case processing time in representation cases generally decreases the probability that the employees will succeed in forming a union (Roomkin and Block 1981). The increased time associated with remands in court cases further discourages employees from exercising their rights. Thus, Abraham, Eaton, and Voos demonstrate that board and court decisions have an effect not only on the substance of the law, but on NLRB procedures as well. It appears that legal decisions, by creating ambiguity in the law, create openings for litigation that cause delay.

Singh and Dannin provide a unique perspective on a current interpretation of the law of the bargaining process under the National Labor Relations Act (NLRA)—implementation at impasse. They asked a sample of business and law students to share their views of the relative bargaining power of the union and the employer under three regimes, including the current regime, which gives employers the right to implement their final pre-impasse proposal and to replace strikers. As these students knew nothing about the law and had no vested interest in any particular statutory structure, their situation was roughly akin to a Rawlsian “veil of ignorance” (Rawls 1971). The authors report that these disinterested, unknowing parties believed the current regime strongly favored employers, enhancing their bargaining power, and that a regime that permits no implementation at impasse and prohibits striker replacement would enhance worker power. A compulsory arbitration regime favors neither party. Their work suggests that the current law strongly favors employer interests over worker interests.

Part 4 looks beyond U.S. labor law to international perspectives. Industrial relations in the United States often have been discussed in the context of “exceptionalism,” the notion that, in some way, the United States is different from other countries and should not be subject to international scrutiny. It is difficult to understand the justification for this notion, especially in a world of globalized markets. Roy Adams and Richard McIntyre and Matthew Bodah analyze the role of the United

States in the tripartite ILO, the internationally recognized center for monitoring worker rights. They revisit the strained relationship between the United States and the ILO. Adams argues that the real purpose of the United States Council on International Business (USCIB), the U.S. employer representative to the ILO, is to limit the influence of the ILO on U.S. labor and employment practices by denying the very premise of the ILO, namely, that union representation and industrial democracy are the socially desired methods of determining terms and conditions of employment. Adams points out that the USCIB instead takes the position that unions are outsiders and that employee interest in representation is indicative of poor management. This “bad management” principle is used to justify many of the positions taken by the USCIB, such as that ILO principles apply to countries and not corporations, that the United States provides protection that is superior to ILO principles, and that ILO principles should apply outside—but not within—the United States.

McIntyre and Bodah address the reasoning behind the United States' refusal to ratify two specific ILO conventions on collective bargaining and freedom of association. They state that these conventions are part of the “delicate balance-consensus principle,” the principle that U.S. law conforms to the principles of freedom of association and collective bargaining, and that the conventions are inconsistent with the U.S. federal system. McIntyre and Bodah argue that there is no consensus among labor and management that U.S. labor laws are working well, that various international organizations have found that U.S. labor law does not comply with these conventions, and that complying with these conventions would not compromise the U.S. federal system. In other words, to McIntyre and Bodah, the reasons that have been brought forward for the United States' refusal to ratify the two conventions are not convincing.

The last section of the book, Part 5, focuses on alternative strategies for advancing workers' rights. Charles Morris asks us to look within established labor law but through a new lens. He asks us to reconsider a fundamental principle of U.S. labor law: majority rule and exclusive representation. Morris argues that the NLRA requires both exclusive representation when a majority of employees in a bargaining unit select union representation and members-only representation when a union is unable to obtain the support of a majority of the employees in a unit.

Morris bases his conclusion on the legislative history of the NLRA, the text of the act, and the labor relations practices in existence in 1935 that Congress used as a reference for the act. Morris rejects the view that only single union exclusive representation is legal in the United States, concluding that this all or nothing system is incorrect as a matter of legislative intent and may have developed simply through assumption and acquiescence.

Harris Freeman and George Gonos examine the growing labor market role of staffing agencies and their general lack of regulation. They compare this deregulated environment with the detailed regulation of union hiring halls, noting that staffing agencies, in principle, serve a similar function, providing access to short-term employment for employees. Yet, they note that workers in the industry have little protection from such tactics as paying less than promised, exorbitant fees—which may increase the cost to user employers—and the absence of criteria for conversion to permanent status. The use of preferred arrangements restricts worker choice. They argue that the nature of these agencies is such that certain fair representation obligations should be placed on them. In essence, they ask us to reconceptualize the temporary staffing agency from an arm of the employer to a true labor market intermediary that represents the interests of both employers and employees.

Finally, Jayne Elizabeth Zanglein proposes using existing workers' capital in the form of pension funds as a vehicle for expanding workers' rights. She points out that pension funds own approximately \$10 trillion worth of U.S. stock, accounting for 26 percent of the equity in the United States. She argues that pension funds are "universal owners"; they own stock for the long run rather than for a fast return. Zanglein argues that as universal owners of many companies, workers, and the unions that represent those workers, have a financial interest in encouraging socially acceptable corporate behavior. Improper or illegal actions by one firm can cause the value of other stocks in the fund's portfolio to drop, resulting in a loss to the fund. Reasoning that good conduct positively affects the long-term share prices of the stocks in the portfolio, and therefore the value of the portfolio, Zanglein argues for worker and pension activism vis-à-vis managers to assure that the managers behave responsibly.

Taken together, the essays that make up this volume demonstrate that, on the 70th anniversary of the signing of the National Labor Re-

lations Act on July 5, 1935, our system of laws designed to facilitate worker self-organization and access to collective bargaining is badly broken. But they do much more than that. For the first time, they begin to add up the costs to society of the suppression of our right to a voice at work, and they point toward what it will take to revive worker choice and worker voice. In the end, it will doubtless require major statutory reform to allow workers to organize relatively freely again.

We note that after our conference took place, a bill called the Employee Free Choice Act was introduced in the 108th Congress, and it was reintroduced in the 109th Congress by a bipartisan group of legislators led by Edward Kennedy and Arlen Specter in the Senate and George Miller and Peter King in the House. The legislation, which would provide for simple majority sign-up rather than election contests pitting workers against their employers, as well as first contract arbitration and meaningful penalties for violations of workers' rights, has garnered a substantial amount of support, with 210 cosponsors in the House and 38 in the Senate within a year of being introduced.

But the history of the last 100 years suggests that it will take a broad social movement, supplemented by the sophisticated financial strategies Zanglein describes, for workers once again to find their collective voice in the United States. And meaningful change will require much more research exploring both the mechanisms of worker representation and its importance for creating a just and healthy society. While we hope this volume contributes usefully to the discussion of worker rights in the United States, we hope even more that it serves as a catalyst, helping to spawn a significant new wave of research on how workers win collective bargaining and the role it can play in creating a society of workplace democracy, social justice, and broadly shared prosperity. More than that, we hope this volume will contribute to the ongoing efforts to strengthen workers' rights to bargain collectively so that the United States can move toward a more balanced, and more just, society.

Notes

1. The other three fundamental rights at work are the elimination of forced labor, the elimination of child labor, and the elimination of discrimination (ILO n.d.).
2. For example, on October 25, 2001, employees at Northern Michigan Hospital in Petoskey, Michigan, elected Teamsters Local 406 as their collective bargaining representative. Due to a strike and legal procedures, as of April 5, 2005, no contract had been signed (Ray 2005).
3. Indeed, a recent NLRB decision made this “veto power” explicit for workers who are “jointly employed” by a temporary staffing agency and the employer-customer of that agency. Such employees are generally hired by the staffing agency but assigned to work at the premises of, and are supervised by, the employer-customer of the staffing agency. In order for employees so employed to organize a union, both the staffing agency and the employer-customer must agree to permit the employees to organize (Oakwood Care Center 343 NLRB No. 76 [2004]).
4. “Complaint for Declaratory Judgment and Injunctive Relief,” U.S. District Court for the District of Columbia, Case No. 1:05CV00201, January 27, 2005. <http://www.afge.org/Documents/DHS%20COMPLAINT.pdf> (accessed April 1, 2005).

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