

Labor Rights as Human Rights?

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INTRODUCTION

Labor rights and human rights movements, it would seem, should have a great deal in common: both are motivated by a commitment to justice, both advocate for the interests of the oppressed, and both have long used rights principles and language to advocate for their goals. Yet, as Virginia Leary observed in a seminal essay published in 1996, these movements have long “run on tracks that are sometimes parallel and rarely meet.”¹ Leary wrote that while unions and other labor rights organizations tended to monopolize questions of workplace justice, human rights organizations generally chose to concentrate instead on political and civil rights issues that enjoyed more popular support, such as torture, imprisonment of political prisoners, or free speech issues, usually focusing on failed states.²

Recently, however, the tracks have begun to meet much more often. First, as I describe in Part I of this Article, labor scholars and labor movements, particularly in the United States, have developed a keen interest in using human rights discourse and international legal instruments to break down the walls of what they believe to be an ossified legal system in which the U.S. Constitution plays no important role in workplace governance.³ These scholars and advocates have argued that labor rights are fundamental human rights, and ought to be constitutionalized or statutorily recognized as such.⁴ Second, non-union labor

1. Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22, 22 (Lance A. Compa & Stephen F. Diamond eds., 1996).

2. *Id.* at 26–27.

3. Cynthia L. Estlund, *An American Perspective on Fundamental Labour Rights*, in SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 192, 193–94 (Bob Hepple ed., 2002) (arguing the Constitution plays “essentially no role” in: (1) collective labour rights, (2) equal status rights, (3) individual employee rights, or (4) minimum terms of employment).

4. See, e.g., Lance Compa, *Trade Unions and Human Rights*, in 2 BRINGING HUMAN RIGHTS HOME 209 (Cynthia Soohoo et al. eds., 2008) [hereinafter Compa, *Trade Unions*]; Lance Compa, *Labor's New Opening to International Human Rights Standards*, 11 WORKINGUSA: J. LAB. & SOC'Y 99 (2008) [hereinafter Compa, *Labor's New Opening*]; Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL'Y J. 29, 30 (2007) (describing a “new discourse” of labor rights, in that there has been a move away from social and

rights organizations have increasingly utilized human rights discourse and methods to fight for labor rights both domestically and abroad. Third, although to a lesser degree, some human rights organizations and scholars have been directing some of their attention to questions of labor rights, an issue long left to unions and labor law scholars.⁵ Indeed, this Article stems in part from such an intersection, drawing upon my own prior experience as an organizer in the U.S. labor movement, and then as a lawyer for a prominent U.S. human rights organization.⁶

As I suggest in Part II, the reasons for the turn to human rights discourse by labor scholars and labor organizations are largely strategic. Fundamentally, they wish to take advantage of the hegemonic status of human rights discourse and the relative effectiveness of some human rights advocacy strategies to help realize several objectives. In the United States, a primary objective has been to reform domestic labor law to reflect international norms regarding collective labor rights, including the rights of freedom of association and collective bargaining. A second objective has been to wage corporate campaigns against companies that are vulnerable to charges of human rights violations. Activists have also used human rights discourse to gain public support in labor rights campaigns and to mobilize workers to take action. Finally, international labor campaigns have increasingly used human rights discourse and methodologies to address labor rights violations in global supply chains.

Despite the seeming benefits of strategically deploying human rights to achieve these goals, scholars and activists should, as David Kennedy urges, “adopt a more pragmatic attitude toward human rights” and carefully weigh the costs and benefits of adopting a human rights framework.⁷ I argue in Part III that there are salient differences between labor

economic rights discourse to one of fundamental rights); James A. Gross, *Workers Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. PA. J. LAB. & EMP. L. 479, 490 (2002) (arguing for a human rights analysis of U.S. labor law).

5. For examples of prominent human rights scholars who have turned some of their attention to questions of labor rights, see LABOUR RIGHTS AS HUMAN RIGHTS (Philip Alston ed., 2005); Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457 (2004); Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT’L L. & POL. 221 (2004); Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT’L ECON. L. 43 (2000); see discussion *infra* Part III.A.4.

6. Prior to attending law school, I worked as a labor organizer for several American unions in Washington D.C., California, and Texas. After law school, I took a position with a prominent human rights organization in its newly created workers’ rights department. This Article draws on some of my observations and thoughts about the differences between the two movements.

7. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15

rights and human rights, not only in how these rights operate conceptually, but also—perhaps equally importantly—in how their respective movements actualize these rights. While human rights are primarily oriented toward limiting the power of the state, labor rights are primarily oriented toward limiting the power of private actors in the market. While human rights concern individuals and, arguably, achieve outcomes such as better working conditions, labor rights are more collectively orientated, and worker mobilization and negotiations processes take precedence.

Related to these conceptual differences, there are also important distinctions between human and labor rights movements, and I draw on specific examples to illustrate these points. Here, we see differences in conceptions of the role of law as a central force behind the movements; ideological differences regarding the drivers of social change and agency; class and cultural differences that impact the movements' relationships with labor unions and workplace democracy; and radically different approaches to freedom of association.

My goal in this Article is two-fold: to challenge American labor law scholars' and labor rights activists' recent turn to human rights and to suggest that such a turn requires more intellectual reflection, dissection, and discussion in order to make hard-nosed decisions about where synergies exist and where there are deep divides. While strategic deployment of human rights discourse might appear to be advantageous in the short run, the fundamental differences between this discourse and that of labor rights may inhibit the long-term effectiveness of this approach. As this Article explores, the strategies, politics, culture, and ideologies that inform much of the U.S. human rights establishment are quite at odds with those of the labor rights movement, and a serious human rights turn risks weakening commitment to the economic justice and workplace democracy principles that have long underpinned labor rights thought and practice.⁸

HARV. HUM. RTS. J. 101, 102 (2002).

8. To clarify, this Article attempts to make a different, albeit related, argument than the one about the relative merits of a rights-based versus workplace democracy model of trade unionism. For arguments supporting a rights orientation to labor movements, see James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–57*, 102 COLUM. L. REV. 1 (2002) (arguing that the Wagner Act should have been grounded in a human rights framework rather than one based in economics and the Commerce Clause); Lance Compa, *Response to Democratizing the Demand for Workers' Rights*, DISSENT, Winter 2005, at 66. For skeptical approaches to the use rights frameworks for the labor movement, see David Brody, *Labour Rights as Human Rights: A Reality Check*, 39 BRIT. J. INDUS. REL. 601 (2001); Joseph A. McCartin, *Democratizing the Demand for Workers' Rights*,

DEFINITIONS

As a preliminary matter, it would be useful to specify what I mean when I discuss labor rights and human rights. These preliminary definitions will allow me to more clearly explain the convergence of labor rights and human rights, and the differences between the two later in the Article. While the intellectual origins of human rights lie in early religious and philosophical writings,⁹ contemporary conceptions of human rights are perhaps most rooted in the enlightenment era,¹⁰ natural law notion that certain inviolable spheres of action and non-action universally inhere in every human being by virtue of his or her humanity.¹¹ Human rights both limit what society can do to the individual and, according to the noted legal scholar Louis Henkin, are “claims to what society is deemed required to do *for* the individual.”¹² While a legal scholar might understand human rights to be legal rights and duties and identify a human right by pointing to international human rights treaties and enacted laws, others might ground human rights in moral and ethical philosophy, and use philosophical criteria to identify them.¹³

In contrast to human rights, which are universal and possessed by all human beings by virtue of their humanity, labor rights can be defined as the set of rights that humans possess by virtue of their status as workers.¹⁴ The particularity of this definition can also be restrictive, of course, for it limits the rights holder to his or her identify or function as a worker,¹⁵ and what constitutes work is also a contested question as in-

DISSENT, Winter 2005, at 61. Moreover, it should be emphasized that this Article primarily addresses dynamics in and between the American human and labor rights movements. The reasons for the human rights turn by U.S. labor movements, I would suggest, is particular to the pluralist industrialist relations system of the United States and, to a lesser extent, Canada, in which collective labor relations are not embedded in the industrial relations system, but rather considered to be an alternative to the default rule of individual contract. In the United States, the scope of labor law is narrow and almost uniquely focused on matters of collective representation, while in Europe and most of the rest of the world, labor law is far more encompassing, addressing a large number of labor rights that are often described as social rights.

9. See MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 15–61 (2004).

10. *Id.* at 64–65.

11. LOUIS HENKIN, *THE AGE OF RIGHTS* 2 (1990).

12. *Id.*

13. See, e.g., AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 229 (1999) (“[I]t is best to see human rights as a set of ethical claims.”); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 19 (1980) (arguing from a moral basis that “basic rights” are those rights necessary for the enjoyment of other rights).

14. Guy Mundlak, *Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages*, 8 *THEORETICAL INQUIRIES L.* 719, 730 (2007).

15. This restrictiveness is evident in the example of the Coalition of Immokalee Workers

formal work and nontraditional forms of work have sometimes been excluded from the definition of work.¹⁶

The question of what constitutes a labor right, and which labor rights rise to the level of universal human rights is contested. In 1998 the International Labor Organization (ILO) famously generated the Fundamental Declaration on Principles and Rights at Work (Fundamental Declaration).¹⁷ The Fundamental Declaration was an attempt, in part, to achieve a degree of moral, political, and legal consensus on what constitutes universally recognized labor rights.¹⁸

In the Fundamental Declaration, the ILO designated four categories of rights as core labor rights: freedom of association and collective bargaining, abolition of forced labor, elimination of child labor, and freedom from discrimination.¹⁹ The ILO specified these categories in part to reinforce the notion that these rights are integral and unquestioned elements of the human rights corpus.²⁰ Any ILO member state is bound to “promote and to realize” such fundamental rights by reporting on its progress in implementing the relevant standards, regardless of whether it has ratified the related conventions.²¹ These rights differ from the broader conception of labor rights in part because they do not necessarily require a given level of economic advancement and arguably do not impact comparative advantage.

(CIW), the group that has been organizing Florida tomato pickers around issues such as wages and forced labor. See *infra* Part I.B. The CIW has explicitly described itself as working within a human rights framework because it believes that such a framework encompasses a broad set of social and political rights that are not specific to a given sector of society, such as “worker” or “immigrant.” See Greg Asbed, *Coalition of Immokalee Workers: “¡Golpear a Uno Es Golpear a Todos!” To Beat One of Us is to Beat Us All!*, in 3 BRINGING HUMAN RIGHTS HOME: PORTRAIT OF A MOVEMENT 1, 2 (Cynthia Soohoo et al. eds., 2007).

16. See Fudge, *supra* note 4, at 49 (highlighting that labor and social rights often do not apply to gendered households).

17. See INT’L LABOUR ORG., ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998), available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

18. See *id.* pmb1. (“[I]t is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application.”).

19. *Id.* art. 2.

20. See HÉCTOR BARTOLOMEI DE LA CRUZ, GERALDO VON POTOBOSKY & LEE SWEPSTON, THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS 127–29 (1996).

21. ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP (1998), reprinted in THE INTERNATIONAL LABOUR ORGANIZATION’S FUNDAMENTAL CONVENTIONS 73, 74 (2002), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf.

Within this subset of rights, North American labor scholars and advocates tend to focus particularly on the freedom of association and collective bargaining rights, which they understand to be the bedrock of the core labor rights.²² This might be in part because these scholars and advocates operate in the context of pluralist labor law regimes where unionization is optional, and rates of unionization are decreasing. This focus on freedom of association and collective bargaining rights forms an important basis for the differences between labor and human rights approaches.

Some scholars, however, believe that such a narrow conception of labor rights is limiting, and favor a more expansive account of labor rights. They argue that the entire corpus of rights, as embodied in the essential international human rights conventions and the ILO's conventions and jurisprudence, ought to be treated as fundamental and co-equal labor rights.²³ These rights include not only the civil and political rights highlighted in the Fundamental Declaration, but also so-called "social rights," such as the right to "full and productive employment" as provided for in the International Covenant on Economic, Social, and Cultural Rights,²⁴ and the labor-related social rights included in the Universal Declaration of Human Rights (UDHR).²⁵ As I discuss at greater length later in this Article,²⁶ some labor law scholars are skeptical of the viability of such a "thick" account of labor rights, arguing that social rights are contingent upon the economic context of a given country.²⁷

I. CONVERGENCE

To understand the broader context of the labor rights turn to human rights, it is important to briefly map at least three contexts in which la-

22. See, e.g., Gross, *supra* note 4, at 1 ("Few human rights are more important than the right of freedom of association."); see *infra* Part III.A.4.

23. See *infra* Part III.A.4.

24. International Covenant on Economic, Social, and Cultural Rights art. 6, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR]. For an example of an attempt to argue that one such social right is indeed a fundamental human right, see Mathias Risse, *A Right to Work? A Right to Leisure? Labor Rights as Human Rights*, 3 J.L. & ETHICS HUM. RTS. 1 (2009) (developing a broader theory of human rights that encompasses labor rights, particularly with respect to the right to work and the right to leisure).

25. These rights include the right to work, free choice of employment, just and favorable conditions of work, and protection against unemployment. Universal Declaration of Human Rights art. 23, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

26. See *infra* Part III.A.4.

27. See, e.g., BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 265 (2005).

bor rights and human rights movements have increasingly converged, or at least intermingled, in the last several years.

A. *Trade Unions*

The first and most significant point of convergence for the purposes of this Article is the embrace of human rights discourse and the use of international legal institutions by the U.S. labor movement. The use of human rights discourse is not necessarily a radical shift for the U.S. labor movement. Rights discourse has long been familiar to and utilized by American unions and labor activists.²⁸ Labor movements were also engaged at the international level and were actively involved, for example, in drafting the labor rights provisions of the UDHR, ensuring that there was an explicit articulation of the right to organize unions in the text of the document.²⁹ But the contemporary turn to human rights by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and its affiliates differs in substance and degree.³⁰ For example, an AFL-CIO issue brief explicitly states that freedom of association is a human right that U.S. law grants in principal, but denies in practice.³¹ The AFL-CIO also began a “Voice at Work” campaign, the stated purpose of which is “to help U.S. workers regain the basic human right to form unions to improve their lives.”³² American unions have al-

28. The best documentation of the historical use of rights discourse in the United States is by James Pope, who has argued that in the early nineteenth century, American workers and the American labor movement were grounded in a “constitution of freedom” based on notions of emancipation and legal rights. James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor’s Constitution*]. In fact, the labor movement in the early twentieth century was infused with rights discourse, and Pope cites, for example, a 1920s union activist in Kansas, well before the advent of the modern human rights movement, explicitly adopting the language of human rights when he described union members boycotting a Kansas industrial court in 1921 as “fighting for ‘human rights.’” *Id.* at 990. Pope also notes that a popular notion among American unionists in the 1930s was that human rights took priority over property rights. See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45, 71–72 (2006). For a contrasting view, see McCartin, *supra* note 8, at 62 (“[N]o equivalent to the ‘workers’ rights are human rights’ slogan was evident during the 1930s industrial union upsurge.”).

29. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 157, 168–74 (1999).

30. See *infra* Part II for further discussion.

31. AFL-CIO, *THE SILENT WAR: THE ASSAULT ON WORKERS’ FREEDOM TO CHOOSE A UNION AND BARGAIN COLLECTIVELY IN THE UNITED STATES* (2005), available at http://www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf.

32. Voice@Work, <http://www.aflcio.org/joinaunion/voiceatwork> (last visited Dec. 16, 2009).

so begun to organize major events on Human Rights Day, the anniversary of the day the UDHR was ratified.³³

In the international sphere, the International Trade Union Confederation (ITUC), an international coalition of unions located in Brussels, explicitly cites the defense of trade union rights among its primary objectives.³⁴ Its constitution explicitly refers to the pursuit of democracy so that the “conditions for the full exercise of all human rights, universal, indivisible and inalienable, may be enjoyed by all;” and a primary aim of the organization is to “strive for the universal respect of fundamental rights at work, until child labour and forced labour in all their forms are abolished, discrimination at work eliminated and the trade union rights of all workers observed fully and everywhere.”³⁵ The ITUC’s embrace of human rights and its claim to be part of the human rights movement represents a general, global shift in labor movements, which are beginning to conceive of themselves as part of the international human rights movement.

B. *Non-Union Labor Rights Organizations*

A second point of convergence has been the proliferation of non-union labor rights groups that espouse the discourse and traditional methodologies of human rights movements.³⁶ Two examples of this phenomenon are the International Labor Rights Forum,³⁷ and International Rights Advocates,³⁸ which together comprised the former International Labor Rights Fund (ILRF). One of the ILRF’s primary activities was filing lawsuits against companies such as Unocal,³⁹ Exxon-Mobil,⁴⁰ and

33. See, e.g., International Human Rights Day, <http://www.aflcio.org/joinaunion/voiceatwork/d10.cfm> (last visited Dec. 16, 2009). In 2003, I was invited to speak at a human rights rally organized by the New York Labor Council in my then-capacity as a representative of the Lawyers Committee for Human Rights.

34. International Trade Union Confederation, Human & Trade Union Rights, <http://www.ituc-csi.org/-human-trade-union-rights-.html> (last visited Dec. 16, 2009).

35. INTERNATIONAL TRADE UNION CONFEDERATION, CONSTITUTION 5, 6–7 (2006), available at <http://www.ituc-csi.org/IMG/pdf/Const-ENG-W.pdf>.

36. See Compa, *Trade Unions*, *supra* note 4, at 233–36 (describing some of these new initiatives).

37. The International Labor Rights Forum describes itself as “an advocacy organization dedicated to achieving just and humane treatment for workers worldwide.” It engages in a range of programmatic work around labor rights advocacy issues. See International Labor Rights Forum, <http://www.laborrights.org/> (last visited Dec. 16, 2009).

38. International Rights Advocates is now defunct.

39. See, e.g., *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001).

40. See Complaint, *Doe v. Exxon Mobil Corp.*, No. 01-cv-1357 (D.D.C. June 11, 2001), available at <http://www.iradvocates.org/exxoncomplaint.pdf>.

Wal-Mart,⁴¹ among others,⁴² under the Alien Tort Claims Act for violations of the law of nations as applied to such workers rights issues as forced labor and trade unionist murders. International Rights Advocates assumed the ILRF's former legal causes, and continued to pursue lawsuits. Notably, the ILRF, followed by its successor organizations, explicitly identified itself as a human rights organization that, according to its website, "advocates for and with working poor around the world."⁴³

A number of other activist organizations, particularly those that work on labor rights in international supply chains, also explicitly use human rights language in their advocacy and mission statements. Examples in this category include the Fair Labor Association (FLA),⁴⁴ the Workers Rights Consortium,⁴⁵ and the Clean Clothes Campaign.⁴⁶

Finally, and perhaps most significantly within this category, there is the rise of worker centers across the United States. Worker centers are, according to Janice Fine, "community-based mediating institutions that provide support to low-wage workers."⁴⁷ Many worker centers are particularly focused on immigrant work forces and use ethnicity as a primary identity around which to organize. Unlike trade unions, worker centers do not focus primarily on collective bargaining, but rather on a combination of organizing, which sometimes results in collective agreements, together with policy advocacy and service delivery.⁴⁸

41. Complaint, *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 (C.D. Cal. Oct. 11, 2005).

42. *See, e.g.*, Complaint, *Roe v. Bridgestone Corp.*, No. CV 05-8168 (C.D. Cal. Nov. 17, 2005), available at <http://www.iradvocates.org/Firestone%20Complaint%20Final1105.pdf>.

43. International Labor Rights Forum, About ILRF, <http://www.laborrights.org/about-ilrf/> (last visited Dec. 16, 2009).

44. *See* Fair Labor Association, FLA Mission, http://www.fairlabor.org/about_us_fla_mission_b1.html (last visited Dec. 16, 2009) ("The mission of the Fair Labor Association (FLA) is to combine the efforts of industry, civil society organizations, and colleges and universities to protect workers' rights and improve working conditions worldwide by promoting adherence to international labor standards.").

45. *See* Workers Rights Consortium, WRC Mission, <http://www.workersrights.org/about/> (last visited Dec. 16, 2009) ("Our purpose is to combat sweatshops and protect the rights of workers who sew apparel and make other products sold in the United States.").

46. "All workers—regardless of sex, age, country of origin, legal status, employment status or location, or any other basis—have a right to good and safe working conditions, where they can exercise their fundamental rights to associate freely and bargain collectively, and earn a living wage, which allows them to live in dignity." Clean Clothes Campaign, The Principles of the Clean Clothes Campaign, <http://www.cleanclothes.org/about-us/870> (last visited Dec. 16, 2009).

47. JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 2 (2006).

48. *See id.* at 40–41.

Human rights discourse is often the framework and foundation upon which worker centers operate,⁴⁹ and, in some cases, more mainstream human rights organizations have allied with the centers. In one example, the Coalition of Immokalee Workers (CIW), a group that has been organizing Florida tomato pickers around issues such as wages and forced labor, has explicitly described itself as working within a human rights framework.⁵⁰ Illustrating its relationship with the human rights community, the CIW also received an award from the Robert F. Kennedy Memorial Center for Human Rights, which has worked closely with the CIW in advancing the CIW campaign.⁵¹

C. *Human Rights Organizations*

A third point of convergence is the work begun on labor rights issues by some traditional human rights organizations, which often utilize such traditional human rights methodologies as investigating, reporting, and human rights advocacy.⁵² Of these human rights organizations, Human Rights Watch (HRW) is the most prominent and active on labor issues. While HRW had previously issued reports on some aspects of labor rights, including workplace discrimination,⁵³ its real breakthrough occurred in 2000, when it published a major study on the state of freedom of association in America.⁵⁴ Lance Compa, a noted labor lawyer and scholar with close ties to American unions, was the report's primary author. The report argued that American law and practice violates international human rights law in a number of ways.⁵⁵ Since this initial report was published, HRW has employed a researcher who works primarily on labor issues and HRW has generated a number of reports analyzing labor rights abuses, particularly the right to freedom of association by states,⁵⁶ industries,⁵⁷ and corporations, most notably including a report

49. *See id.* at 100.

50. *See* Asbed, *supra* note 15, at 2.

51. *See* Robert F. Kennedy Memorial, Legacy in Action, http://www.rfkmemorial.org/legacyinaction/2003_CIW/ (last visited Dec. 16, 2009).

52. *See* Compa, *Labor's New Opening*, *supra* note 4, at 103–06.

53. HUMAN RIGHTS WATCH, NO GUARANTEES: SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR (1996).

54. *See* HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000) (hereinafter HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE). For a description of the success and notoriety that this report received, *see* Compa, *Labor's New Opening*, *supra* note 4, at 103–06.

55. *Id.*

56. *See* HUMAN RIGHTS WATCH, DELIBERATE INDIFFERENCE: EL SALVADOR'S FAILURE TO

on the conduct of Wal-Mart.⁵⁸ It also has issued reports on less controversial labor rights issues, such as child labor.⁵⁹

Another prominent human rights organization, Human Rights First (HRF), formerly known as the Lawyers Committee for Human Rights, has also been involved in workers' issues, although much less so currently. At one time during 2002–2003, HRF ran a short-lived Workers' Rights Program. Whereas HRW focused primarily, although not exclusively, on domestic labor rights issues, HRF has mostly focused its attention on the international sphere. Its primary goal has been to implement codes of conduct and allow for transparent monitoring of the corporations' activities in global supply chains. HRF has mostly worked in conjunction with another nongovernmental organization (NGO), the FLA.⁶⁰

A third major human rights organization, Amnesty International, addresses workers' rights through the forum of its Business and Human Rights Program, although the organization does not expressly list workers' rights as one of its major initiatives.⁶¹ Amnesty International has, under the heading of business and human rights, made a number of interventions, including responses to the killing of trade unionists in Colombia⁶² and to restrictions on freedom of association in China.⁶³ The

PROTECT WORKERS' RIGHTS (2003), available at <http://www.hrw.org/en/reports/2003/12/03/deliberate-indifference>; HUMAN RIGHTS WATCH, NOT YET A WORKERS' PARADISE: VIETNAM'S SUPPRESSION OF THE INDEPENDENT WORKERS' MOVEMENT (2009), available at <http://www.hrw.org/en/reports/2009/05/03/not-yet-workers-paradise-0>.

57. See HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (2004), available at <http://www.hrw.org/reports/2005/usa0105/index.htm>.

58. See HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART'S VIOLATION OF U.S. WORKERS' RIGHTS TO FREEDOM OF ASSOCIATION (2007), available at <http://www.hrw.org/en/reports/2007/04/30/discounting-rights-0>.

59. See HUMAN RIGHTS WATCH, TURNING A BLIND EYE: HAZARDOUS CHILD LABOR IN EL SALVADOR'S SUGARCANE CULTIVATION (2004), available at http://www.hrw.org/sites/default/files/reports/elsalvador0604full_1.pdf.

60. This is primarily accomplished through two mechanisms: (1) working with the Fair Labor Association, of which HRF was a founding member, see *infra* note 176; and (2) developing a set of "yardsticks for workers rights," which included a large database of questions asked and issues investigated by factory monitors, primarily from companies and independent organizations. See Human Rights First, Workers Rights Information Project, http://www.humanrightsfirst.org/workers_rights/wr_wrip/wrip.htm (last visited Dec. 16, 2009). I was a Senior Associate in Human Rights First's Workers Rights Program during 2003.

61. See Amnesty International, Human Rights by Topic, <http://www.amnesty.org/en/human-rights/human-rights-by-topic> (last visited Dec. 16, 2009).

62. See Amnesty Int'l, *Colombia: Killings, Arbitrary Detentions, and Death Threats—The Reality of Trade Unionism in Colombia*, AI Index AMR 23/001/2007, July 3, 2007; Amnesty Int'l, *Colombia: Trade Unionists Under Attack in Colombia: Defending the Rights of Education*,

organization has also attended the ILO's annual International Labor Conference to lobby for ILO action on some of these issues,⁶⁴ as well as on issues of forced labor in Mauritania⁶⁵ and Burma.⁶⁶

II. DEPLOYMENT

For the U.S. labor movement, the use of human rights discourse has been a highly pragmatic course of action. At least in good part, it is a strategic and instrumental response to the decline of union membership and to the loss of moral, political, and intellectual support for labor movements, both in the United States and abroad.⁶⁷ Academic discourse in the United States, and increasingly in other nations, often frames labor unions as special, rent-seeking economic interests that work to benefit their membership to the detriment of the economy as a whole.⁶⁸ Unions also suffer from popular political and cultural perceptions of being corrupt or self-serving organizations that work in the interest of their own members rather than for the greater good.⁶⁹

This negative perception of unions has compelled the labor movement to attempt to redefine itself within a framework that has obtained widespread intellectual, cultural, moral, and political support: human rights. Calling a particular right a "human right," in both law and popu-

Health and Public Service Workers, AI Index AMR 23/033/2007, Oct. 1, 2007.

63. Amnesty Int'l, *People's Republic of China: Labour Unrest and the Suppression of the Rights to Freedom of Association and Expression*, AI Index ASA 17/015/2002, Apr. 29, 2002.

64. See Amnesty Int'l, *Fundamental Rights at Work: Amnesty International's Concerns to the International Labour Conference (4–20 June 2002, Geneva)*, at 10–14, AI Index IOR 42/001/2002, May 2002.

65. See *id.* at 14–18.

66. See *id.* at 19–21.

67. See Fudge, *supra* note 4, at 39–40 (arguing that there has been a normative and conceptual move to international human rights in response to declining trade unions and welfare states).

68. Labor law historian James Pope has pointed out and critiqued the framing of labor unions and labor issues as purely economic matters rather than human rights matters. See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002). Pope argues that it is problematic to justify the National Labor Relations Act under the Commerce Clause rather than the Thirteenth Amendment because by using the Commerce Clause, U.S. labor law was conceptualized as an economic matter seeking to achieve industrial peace, rather than as human rights law that ensures workers' basic freedoms. See *id.* at 81–85. This, in turn, has had deleterious effects on constitutional law and labor and has also potentially impacted the way labor is construed in U.S. political discourse, as well as labor's capacity to mobilize. See *id.* at 115, 120.

69. See Lydia Saad, *Labor Unions See Sharp Slide in U.S. Public Support*, GALLUP, Sept. 3, 2009, <http://www.gallup.com/poll/122744/labor-unions-sharp-slide-public-support.aspx> (reporting on a Gallup poll finding that a slight majority of Americans believe that unions mostly hurt the U.S. economy while benefiting their own members).

lar discourse, makes that right almost numinous. While opposing unions or requiring balancing of interests with regard to freedom of association and collective bargaining is wholly acceptable, opposing a right that has achieved “human rights” status appears illegitimate. Framing labor rights as human rights thus shifts the labor discourse from economics and special interest politics to ethics and morality. In other words, activists and labor law scholars seek to harness the hegemonic status of human rights discourse in order to gain public support for a number of legal, political, and strategic objectives.⁷⁰

A. *Domestic Legal Reform*

One of these objectives is to achieve domestic legal reform. Labor law reform has been a major goal not only of labor movements, but also of labor lawyers and scholars who have criticized the way courts have whittled away the National Labor Relations Act (NLRA)⁷¹ over the years.⁷² These critics contend that the NLRA is now a mere shell of its intended form, gutted of its core human rights values.⁷³ These lawyers and scholars argue that: (a) labor rights are human rights; (b) U.S. labor law does not conform to international labor and human rights standards; and (c) U.S. law ought to do so. These scholars lament what Cynthia Estlund entitled the “ossification of American labor law”⁷⁴ and advocate greater penetration of international labor and human rights norms.⁷⁵ Such penetration, they argue, would require that U.S. law provide for stronger rights to strike and organize, protections for agricultural and

70. For a description and critique of how human rights hegemony functions, see Kennedy, *supra* note 7, at 108–09.

71. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).

72. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532–44 (2002).

73. See Gross, *supra* note 4, at 491 (arguing that the values underlying the Wagner Act were in fact human rights values).

74. See Estlund, *supra* note 72. Estlund argues that since the 1950s, U.S. labor law has become hardened and resistant to change and, as a result, “labor laws have failed to deliver an effective mechanism of workplace representation, and have become nearly irrelevant, to the vast majority of private sector American workers.” *Id.* at 1528.

75. See, e.g., Compa, *Trade Unions*, *supra* note 4, at 218–20 (describing ways “American exceptionalism” in U.S. courts might be breaking down and how the courts are beginning to consider international human and labor rights norms); Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT’L L. REV. 1 (2005) (outlining a theory for using international law to hold U.S. corporations liable for violations of freedom of association and collective bargaining); Estlund, *supra* note 72, at 1588 (“The United States government has not embraced the affirmative dimension of international labor rights (though it is bound by the instruments that establish it) and it is primarily on that score that American law falls short.”).

public sector workers, and effective enforcement of labor laws so that international labor law norms are respected in practice, and not just in form.⁷⁶

Proponents also argue that international human rights law, particularly that of the ILO and its norm-generating supervisory mechanisms such as the Committee on Freedom of Association, provides “an authoritative voice and moral standing in the international community”⁷⁷ and gives “precise meaning” to international labor standards.⁷⁸ Such language could help persuade the U.S. legislature, courts, and administrative bodies to bring American labor law into conformity with international norms and help restore the human rights basis of the NLRA.⁷⁹

The American labor movement has also shown increasing interest in such international human rights instruments as the ILO’s freedom of association complaint mechanisms.⁸⁰ For example, the AFL-CIO recently filed complaints before the Committee on Freedom for Association (CFA), challenging two U.S. Supreme Court decisions: one that denied back pay for immigrant workers who were fired for exercising their rights to organize under the NLRA,⁸¹ and another that expanded the definition of “supervisor” under the NLRA, thus excluding a number of workers from the right to organize afforded non-supervisor employees.⁸² Furthermore, the United Electrical, Radio and Machine Workers of America (UE), in conjunction with a non-union labor rights nongovernmental organization, the International Commission for Labor Rights (ICLR), also filed a successful complaint challenging North Carolina’s ban on public employee collective bargaining.⁸³ Recently, the AFL-CIO, in response to a slew of National Labor Relations Board (NLRB) decisions that went against labor unions, filed what Compa calls a “mega-complaint” with the CFA, claiming that these decisions violate ILO jurisprudence.⁸⁴

76. Estlund, *supra* note 72, at 1587–91.

77. Compa, *Labor’s New Opening*, *supra* note 4, at 111.

78. *Id.* at 118.

79. Compa, *Response to Democratizing the Demand for Workers’ Rights*, *supra* note 8, at 66; see also Compa, *Labor’s New Opening*, *supra* note 4, at 118–19.

80. See Compa, *Labor’s New Opening*, *supra* note 4, at 111–15.

81. *Id.* at 111–12.

82. *Id.* at 112–13.

83. *Id.* at 113–14. I served on a delegation which ICLR sent in November 2005 to collect on the complaint and to hear North Carolina public sector employees testify about the consequences of their inability to organize a union.

84. *Id.* at 115.

Other examples of this phenomenon abound.⁸⁵ In 2003, for example, the AFL-CIO helped launch a separate nonprofit organization called American Rights at Work (ARAW). The purpose of the organization—which has directors from a range of backgrounds, and only one from the labor movement (AFL-CIO president John Sweeney)—is to bring attention to deficits in U.S. labor law, particularly with respect to organizing rights and the anti union practices of certain corporations.⁸⁶ ARAW makes explicit its links with the international human rights movement, and Mary Robinson, the former head of the United Nations Human Rights Commission, serves as its international advisor.⁸⁷ The organization also holds an annual Eleanor Roosevelt Awards Dinner, where it recognizes institutions and people it believes “reflect the institutions and communities outside of the labor movement that view protecting workers’ rights as good for business and crucial for a vibrant democratic society.”⁸⁸

ARAW and its partners have also used human rights discourse to help advocate for legislative reform, including the Employee Free Choice Act, which would provide for union certification based on signatures, first contract mediation and arbitration, and stiffer penalties for NLRA violations.⁸⁹ ARAW has also tried to affect administrative and legal practice by utilizing human rights language to push the NLRB to hand down more worker-friendly decisions.⁹⁰

B. *Corporate Advocacy*

Another objective is to more effectively target multinational corporations (MNCs) and engage in corporate campaigning. MNCs have become particularly susceptible, and amenable, to human rights discourse.

85. For an extensive description of this phenomenon, see Compa, *Trade Unions*, *supra* note 4, at 382–417; Compa, *Labor’s New Opening*, *supra* note 4, at 106–15.

86. See American Rights at Work, About Us, <http://www.americanrightsatwork.org/about-us.html> (last visited Dec. 16, 2009).

87. See American Rights at Work, Board of Directors, <http://www.americanrightsatwork.org/board-of-directors.html> (last visited Dec. 16, 2009).

88. American Rights at Work, 2007 Awards Celebration, <http://www.americanrightsatwork.org/awards-celebration/main/2007-awards-celebration-20070417-505-380-380.html> (last visited Dec. 16, 2009).

89. See American Rights at Work, The Employee Free Choice Act: Solutions to a Failed Labor Law, http://www.americanrightsatwork.org/dmdocuments/OtherResources/araw_efcasolutions2009.pdf (last visited Dec. 16, 2009).

90. To that end, it has launched a project called “Eye on the NLRB,” which was formerly called “Workers Rights Watch: Eye on the NLRB,” an obvious play on Human Rights Watch’s credibility and name. American Rights at Work, Eye on the NLRB, <http://www.americanrightsatwork.org/eye-on-the-nlrb/> (last visited Dec. 16, 2009).

Corporations are often eager to drape themselves in the human rights cloth, signifying their status as good corporate citizens. Because of the popularity and positive view of human rights among the general population, MNCs realize that promoting human rights can be an effective marketing tool, and they are eager to both embrace human rights and avoid the stigma of being labeled a human rights violator. Reebok, for example, has established a foundation that grants human rights awards in an effort to brand itself as a company that promotes human rights.⁹¹

Additionally, high rates of participation in the UN's Global Compact initiative may be indicative of the desire of MNCs to associate with organizations that promote compliance with international human rights norms.⁹² The Global Compact has over four thousand business participants,⁹³ most of which are based outside the United States, as well as stakeholders from labor⁹⁴ and civil society.⁹⁵ As these companies increasingly link themselves to broader human rights initiatives and labor rights initiatives portrayed as human rights movements, labor movements believe that companies will be more vulnerable and responsive to charges that they have violated human rights and labor rights. Arguably, the success of workers' rights in compelling corporations to address workers' rights violations in their supply chains is attributable to this new framing of workers' rights as human rights.

91. See Reebok Human Rights Foundation, <http://www.reebok.com/Static/global/initiatives/rights/foundation/index.html> (last visited Dec. 16, 2009).

92. Each participant is required to produce a "communication on progress," meant to convey to stakeholders the ways in which it is implementing the ten guiding principles it has pledged to advance. The first two guiding principles are derived from the UDHR and state that companies should support and respect internationally proclaimed human rights and should not be complicit in human rights abuses. Other principles address labor, environmental, and corruption issues. See UNITED NATIONS GLOBAL COMPACT, AFTER THE SIGNATURE: A GUIDE TO ENGAGEMENT IN THE UNITED NATIONS GLOBAL COMPACT 18–20, 38, available at http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf.

93. United Nations Global Compact, Business Participation, http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html (last visited Dec. 16, 2009).

94. See United Nations Global Compact, Labour Organizations in the Global Compact, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/labour.html> (last visited Dec. 16, 2009).

95. See United Nations Global Compact, Civil Society Organizations in the Global Compact, http://www.unglobalcompact.org/ParticipantsAndStakeholders/civil_society.html (last visited Dec. 16, 2009).

C. *Grassroots Organizing*

Another objective of labor movements is to make use of the hegemonic status of human rights dialogue to help in grassroots organizing and union campaigns.⁹⁶ The Teamsters Union, for example, in order to gain public support during a recent organizing campaign, issued a public report on the shipping giant Maersk's conduct towards truck drivers who transport cargo containers between ports and distribution centers.⁹⁷ The report claimed that Maersk's actions violated the "basic rights of association" of the drivers by preventing them from organizing a union.⁹⁸ It cited to the UDHR and called on Maersk to "declare publicly its commitment to respect international human rights and labor rights standards,"⁹⁹ threatening to file complaints before the ILO, a North American Free Trade Agreement tribunal, or the Organization for Economic Cooperation and Development.¹⁰⁰ The Teamsters also introduced a shareholders' resolution that called upon the company to adopt international labor rights standards.¹⁰¹

In another example, the American Federation of State, County and Municipal Employees (AFSCME) a large public sector workers' union, claimed in a report that an employer, Resurrection Health, demonstrated "a systematic pattern of interference with workers' organizing rights and reflect[ed] a failure to meet human rights principles and obligations" when it opposed an AFSCME union drive.¹⁰² In a final example, the Service Employees International Union (SEIU), the largest union in the United States, used human rights language in its global campaign against Group 4 Securicor. Specifically, the website dedicated to the campaign was entitled "Focus on G4S: A Global Campaign for Human Rights."¹⁰³

96. Compa makes a similar point, but locates the value of human rights discourse in the realm of public opinion by diverting focus away from economic issues because "[workers] are vindicating their fundamental human rights, not just seeking a wage increase or more job benefits." Compa, *Labor's New Opening*, *supra* note 4, at 117.

97. See Compa, *Labor's New Opening*, *supra* note 4, at 109.

98. *Id.* (quoting LANCE COMPA, WORKERS' RIGHTS VIOLATIONS AT MAERSK: REPORT AND ANALYSIS: ACTIONS BY U.S. DIVISIONS OF MAERSK CORPORATION IN LIGHT OF INTERNATIONAL HUMAN RIGHTS AND LABOR RIGHTS STANDARDS (2004)).

99. *Id.*

100. *Id.*

101. *Id.* at 110.

102. *Id.*

103. The website was removed when SEIU reached a settlement with the Wackenhut Corporation, the owner of G4S. For an announcement of the settlement, see Press Release, SEIU, SEIU Reaches Agreement with Wackenhut (Dec. 16, 2008), available at <http://www.seiu.org/2008/12/seiu-reaches-agreement-with-wackenhut.php>.

The broad-based acceptance and embrace of human rights can also help at the grassroots level. The job of organizers is primarily to mobilize workers to take action and form solidarity, and a great challenge is to convince workers that they deserve better treatment and should take risky action to improve their situations. Joel Handler has referred to this process as a form of “rights as exhortation,” which is “an assertion of one’s self-worth and entitlement, one’s role in society.”¹⁰⁴ In this arena, the benefits of international human rights discourse are obvious. Using human rights language can help validate the workers’ experience of oppression. The injustice one feels at work becomes something greater than just a personal sense of unfairness: it is a violation of one’s human rights. Personal injustice is understood to be a violation of a set of universally accepted standards that enjoy a broad moral consensus. This means of validating the individual experience of disempowered workers, who accept confining narratives about the proper subordinate relationship between employer and employee, can be a powerful tool in motivating workers to take action.¹⁰⁵

D. New Forms of Global Production

Labor movements have also strategically utilized human rights discourse and methods in order to address labor rights violations in global supply chains. The traditional method of labor organizations has been to organize workers, usually in the formal sector, to form unions as a means of addressing workplace concerns, while also using work actions, strikes, and public outreach to compel employers to accede to demands. Such forms of mobilization, however, are not necessarily well suited to the new forms of global economic organization. International supply chains are often located in developing countries with poor rule of law, weak regulatory capacity, and large informal sectors. Direct organizing in these countries is often very difficult, and, consequently, unions are often underdeveloped.

In order to address violations of workers’ rights in these poor regulatory environments, activists—including unions, non-union labor rights groups, and human rights organizations—have resorted to advocacy me-

104. Joel F. Handler, *Constructing the Political Spectacle: Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 965 (1990).

105. See ANDREW CLAPHAM, HUMAN RIGHTS: A VERY SHORT INTRODUCTION 17–20 (2007) (discussing the resonance of human rights language); Pope, *Labor’s Constitution*, *supra* note 28, at 953 (“Rights claims now play a vital role in the ‘cognitive liberation’ of social movements from fatalism.”).

thods that are more traditionally associated with the human rights movement.¹⁰⁶ These human rights methods include monitoring, reporting, and disseminating information by transnational activists to compel action by various stakeholders.¹⁰⁷ Activists label worker abuses as human rights abuses in order to gain sympathy and mobilize pressure against local primary employers, as well as against the MNCs that contract out to those primary employers, and who usually bypass state actors along the way.¹⁰⁸ Many companies have responded to the new global labor terrain by establishing extensive private regulatory mechanisms to insulate themselves, in part, from the activism of labor rights NGOs and global union campaigns and from being labeled human rights violators.¹⁰⁹ These mechanisms include self-regulation and partnerships with third-party monitors or associations.

III. DIFFERENCE

The discussion in Parts I and II, above, has shown that there are compelling strategic reasons for labor organizations' turn to human rights. It is vitally important, however, to parse the ways in which labor rights and labor rights movements have properties and normative commitments that differ from those of the broader corpus of human rights law and human rights movements. Part III.A surveys and highlights some important *conceptual* differences between human and labor rights discussed in the literature, while Part III.B highlights some important, but less examined, differences between the human and labor rights *movements*. While the divergences I emphasize in this Part are by no means intended to be exhaustive, they do illustrate important differences that should be made apparent.

A. *Conceptual Differences*

There are at least three important ways that human rights and labor rights conceptually differ from each other. These include the ways that they engage with and conceptualize the state and the private sphere; the indi-

106. See GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM 32–37 (2007).

107. Seidman notes, however, that in the case of transnational labor campaigns, nonstate actors often play larger roles than do state actors. See *id.* at 28–32.

108. *Id.* at 17–19.

109. See Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 225–234 (2007) (describing private labor regulatory schemes).

vidual and the collective; and processes versus outcomes. In this Section, I will discuss each of these conceptual differences and then introduce a particular academic exchange that provides an example of how these conflicts are articulated.

1. *The State and the Private Sphere*

The first important distinction between labor and human rights is that while labor rights primarily affect private actors, human rights primarily affect states.¹¹⁰ Although a growing body of human rights literature has explored the application and scope of human rights in relation to non-state actors,¹¹¹ by and large, human rights regulate and apply to the relationship between states and individuals.¹¹² Labor rights, on the other hand, generally require state intervention into the private sphere. That is, they require states to implement and enforce laws and regulations that discipline the conduct of private actors (employers and employees). For example, labor rights may require states to prevent employers from discriminating against particular employees or from blocking worker organization, or, if we extend beyond the “core rights,” to provide adequate rest and leisure time to their employees.

Within the private sphere, labor rights serve at least two important market and economic functions. The first function is protective and limiting: labor rights provide guarantees to workers in the context of an economic relationship between the employer and employee in which there is unequal bargaining power. Without these guarantees, the terms and consequences of unequal employment relationships can potentially conflict with society’s normative commitments. Accordingly, labor law developed in part as a means of guarding against various detrimental social and economic outcomes of the functioning of liberal labor markets.¹¹³

110. Mundlak, *supra* note 14, at 730.

111. See, e.g., ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1 (2008) (exploring human rights relationships between private actors).

112. Fudge describes the issue as one of “material scope,” noting that most constitutional rights are vertical in nature and “apply to the relationship between the state and the citizen/subject.” Fudge, *supra* note 4, at 52.

113. For a fuller discussion of the justifications for labor law, see, for example, Alan Hyde, *What is Labor Law?*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 37, 53 (Guy Davidov & Brian Langille eds., 2006) (“[T]he collection of regulatory techniques and values that are properly applied to any market that, if left unregulated, will reach socially sub-optimum outcomes because economic actors are individuated and cannot overcome collective action problems.”).

A second market function of labor rights, particularly those highlighted in the ILO's core labor rights, is facilitative:¹¹⁴ labor rights guarantee workers' ability to engage fairly with employers in market economies.¹¹⁵ The abolition of forced labor requires employment relationships to be predicated on a free, non-coerced basis. Freedom from discrimination requires employers to accept all workers into the labor market, enabling them to participate fully as economic actors. The abolition of child labor requires employers to engage adult workers who are less subject to exploitation and better able to negotiate the terms of employment. Finally, and perhaps most importantly, freedom of association and collective bargaining rights give employees the ability to engage in more-equal employment relationships and to realize the goals of workplace democracy.¹¹⁶

Human rights, however, do not by and large focus on this private market sphere, nor is doing so their purpose. As a result, human rights law and discourse do not necessarily provide sufficient tools to enter the realm of private market relationships. In fact, human rights might actually do destructive work in the private sphere. David Kennedy has argued that the state focus of human rights may in fact legitimize the ills and delegitimize the remedies that occur between private actors.¹¹⁷ Human rights, he argues, tend to insulate the market economy and fail to address matters of redistribution.¹¹⁸ This is particularly relevant in the labor context, for here private ills and remedies and matters of redistribution are central issues.

2. *Individualism Versus Collectivism*

Another key issue concerns the units of analysis for human rights versus labor rights. An ethos of individualism substantially grounds human rights, which take the individual as the primary subject. As

114. I thank Judy Fudge for helping to articulate the dual purposes of labor rights: both facilitative and limiting.

115. See Fudge, *supra* note 4, at 39–40 (describing the “official story” of the ILO's core labor rights as one of rights that workers need to engage freely in the market, but that mandate only procedures, not outcomes). But core rights are not the only rights integrally related to labor markets. Simon Deakin, for example, has argued that social rights—encompassing a number of labor rights—developed with and are integrally linked to labor market regulation, and as such, individuals need these rights in order to fully engage with the market. Simon Deakin, *Social Rights in a Globalized Economy*, in *LABOUR RIGHTS AS HUMAN RIGHTS*, *supra* note 5, at 25.

116. Among the “non-core” rights, the right to work is the most obvious example of the market-creating function of labor rights.

117. Kennedy, *supra* note 7, at 109.

118. *Id.*

Louis Henkin wrote, “human rights are the rights of individuals in society.”¹¹⁹ While scholars such as Henkin recognize that human rights include the rights to associate and form groups, the “essential human rights idea addresses the rights of the individual, not of any group or collectivity.”¹²⁰ Michael Ignatieff also emphasizes the fundamental individual nature of human rights, suggesting that the “core of the Universal Declaration is . . . moral individualism”¹²¹ Ignatieff underlines that while some rights might be collective in nature or “group rights,” the fundamental “ultimate purpose and justification of group rights is not the protection of the group as such but the protection of the individuals who compose it.”¹²²

Labor rights, on the other hand, particularly freedom of association rights, emphasize the collective as the means of individual emancipation. As Sheldon Leader argued in his seminal work on freedom of association, this freedom serves to self-actualize the individual, but it does so through the collective.¹²³ This focus on collective rights matters because, as the ILO made clear in the Fundamental Declaration, the rights to freedom of association and collective bargaining are linchpins in the labor rights canon. This is so because a central objective of workplace law is workplace democracy. The mobilization of workers and the commencement of collective bargaining processes are key means of achieving this goal.¹²⁴

3. “Rights as Process” Versus “Rights as Outcomes”

Accordingly, an important logic underlying the core labor rights is that they facilitate a *process* of organizing and negotiating over work conditions with a collective voice. This idea in fact underlies the ILO’s designation of the core labor rights.¹²⁵ That is, the core labor rights impose no specified economic costs on private market actors, but rather, as noted above, guarantee employees’ ability to engage in the labor market

119. HENKIN, *supra* note 11, at 2.

120. *Id.* at 5.

121. MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 66 (2001).

122. *Id.* at 67.

123. SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY 34 (1992). *But see* Fudge, *supra* note 4, at 47–48 (emphasizing the inherently collective nature of freedom of association and collective bargaining rights).

124. This emphasis on collective action is particularly evident in American labor law and the American system of pluralist industrial relations. For a discussion of industrial pluralism in the United States, see, for example, Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1513 (1981).

125. Fudge, *supra* note 4, at 39–40.

as free actors and negotiate collectively to achieve specifically desired economic and noneconomic outcomes.¹²⁶

Central to this procedural conceptualization of labor rights is the role of collective voice: a fundamental and constitutive aspect of labor rights is their quality of what I call process-oriented *mobilization rights*. Mobilization rights are facilitative and procedural in the sense that they provide a legal right for workers to form a collective that, through the power of law, can force the firm to negotiate work conditions against a backdrop of state-prescribed minimal standards.

Human rights, on the other hand, generally do not possess the qualities of collective mobilization rights. Rather, they tend to be legalistic guarantees of individuals in relation to the state. While the mobilization perspective seeks to create a context in which workers can collectively act towards obtaining certain outcomes of their choosing, a human rights perspective often focuses on the outcomes themselves. These outcomes are achieved through the mechanism of law, as articulated by judges, legal institutions, states, civil society, and human rights scholars. Grounded in a legalistic approach to social change, the human rights perspective tends to view law from above in order to effectuate desirable social outcomes. In other words, the law is a top-down, not bottom-up, process.

4. *The Alston Core Labor Standards Debate*

This Article's conceptualization of the differences between human and labor rights can be illustrated, in part, by a recent exchange over two papers by noted human rights scholar Philip Alston, one of which he co-authored with James Heenan, that argue vehemently against the formulation and ratification of the Fundamental Declaration and its articulation of a core set of labor rights that limits the essence of labor rights to just a few key rights.¹²⁷

These scholars raise a number of arguments against the move towards a core, but more relevant for our purposes are their more general conceptions of what human rights and human rights law are and should be. Reflecting a common conceptual division among human rights scholars and advocates, the authors are troubled by the core's exclusive focus on what they categorize as political and civil rights,¹²⁸ and are opposed to the Fundamental Declaration in part because, they argue, it is

126. Mundlak, *supra* note 14, at 728.

127. See Alston, *supra* note 5; Alston & Heenan, *supra* note 5.

128. Alston, *supra* note 5, at 487; Alston & Heenan, *supra* note 5, at 253.

part of a neoliberal agenda and excludes a number of what they consider economic and social rights, such as the minimum wage and health and safety standards.¹²⁹ Alston and Heenan believe that all human rights are indivisible and coequal, and should therefore all be “fundamental.”¹³⁰ By privileging political and civil rights, they argue, the ILO risks delegitimizing economic and social rights and relinquishing what Alston and Heenan believe is the “heartland of labor rights.”¹³¹

In response, Brian Langille and Francis Maupain, two noted international labor lawyers, argue that the heartland of labor rights is the core of “procedural” or “enabling” rights.¹³² The most pointed critiques come from Langille, who argues that labor law and labor lawyers differentiate between labor rights, which are procedural in nature, and labor standards, which are outcome-based.¹³³ In other words, he argues that labor regulation is composed of procedural and substantive components. Some components of labor regulation provide rights to workers that guarantee processes, such as freedom of association and collective bargaining, while other components might prescribe substantive standards that employers must meet, such as specified levels of health and safety and wages.¹³⁴ Langille accuses Alston of conflating these two concepts¹³⁵ and argues that the Fundamental Declaration is coherent and desirable because it takes an approach to labor law and labor rights that emphasizes worker agency.¹³⁶ These arguments, however, have not

129. Alston, *supra* note 5, at 486–87; Alston & Heenan, *supra* note 5, at 253–56. Not all scholars believe that the distinction between political and civil rights on one hand, and economic and social rights on the other is a particularly useful one. As Henry Shue and others point out, many such rights overlap. Shue argues that the right to freedom of association is a political liberty that concerns the basic structure of the economic system. See SHUE, *supra* note 13, at 8. Labor rights are generally difficult to classify within the broadly accepted human rights typology. While scholars often categorize human rights within a binary of positive or negative or define them as political, civil, or social, labor rights can complicate these categories. See Fudge, *supra* note 4, at 50. Some labor scholars, for example, conceptualize labor rights primarily as a subtype of social rights. See *id.* at 47. For example, Fudge, using positivist analysis, points out that freedom of association is noted in both the International Covenant on Civil and Political Rights and the ICESCR, thus the nature of the right overlaps between economic and social, and political and civil. *Id.*

130. Alston, *supra* note 5, at 459–60.

131. Alston & Heenan, *supra* note 5, at 255–56.

132. Brian Langille, *Core Labour Rights—The True Story (Response to Alston)*, 16 EUR. J. INT’L L. 409, 429 (2005); Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16 EUR. J. INT’L L. 439, 448 (2005).

133. Langille, *supra* note 132, at 428–29.

134. *Id.*

135. *Id.* at 427–35.

136. *Id.* at 431. It should be noted, however, that not all labor lawyers agree with Langille.

convinced Alston, whose views reflect a conception of rights, particularly economic and social rights, that focuses on guaranteeing outcomes rather than facilitating processes.¹³⁷ I would suggest that Alston's conception is typical of those who work in a human rights framework.¹³⁸

B. *Movement Differences*

In addition to the conceptual differences between human rights and labor rights described above, there are vitally important institutional, cultural, and political differences between human and labor rights movements, as well as differences among the people who comprise the movements. These differences no doubt reflect and are in part derivative of the conceptual differences between the frameworks within which these rights function. For example, just as human rights law is particularly oriented towards state conduct, human rights movements tend to be state-focused in their campaigns and missions.¹³⁹ But there are also other cultural and socio-economic dynamics at play, which inform the strategic and methodological differences between these two movements.

Fudge, for example, takes issue with the procedural approach to labor rights and argues for the broader perspective of social rights, which she believes are intrinsically part of labor rights. She is suspicious of purely procedural approaches to rights, particularly in instances of unequal power. Fudge questions the distinction between labor rights and labor standards and believes that the distinction rehearses an outdated separation between civil and political (or negative) rights on one hand, and social (or positive rights) on the other. Fudge, *supra* note 4, at 56–57.

137. Alston finds the conceptual differentiation between outcomes and processes to be a weak one, arguing that many ILO standards contain requirements “of conduct and of result.” Alston, *supra* note 5, at 487. But Alston confuses the analogy. Alston argues that states must both incorporate certain norms and effectively enforce them, but the process-versus-outcome conflict is not between standards and state enforcement, but rather a problem of enabling processes whereby workers can negotiate economic and other outcomes. It is, in Langille's terms, a question of process versus substantive standards.

138. Not all labor law scholars, however, are antipathetic to the Alston perspective. *See, e.g.*, Fudge, *supra* note 4, at 39–40 (arguing that the contemporary move to a labor rights core marks a retreat from a desirable standards-based approach that encompasses a broad range of social rights).

139. The state focus on human rights movements is also evident. In its mission statement, HRW confirms the state orientation of human rights, stating that “[w]e challenge governments and those who hold power to end abusive practices and respect international human rights law.” Human Rights Watch, About Us, <http://www.hrw.org/en/about/> (last visited Dec. 16, 2009). HRF, in its charter, describes its mission in part as, “to ensure the security of individuals and to protect against the arbitrary exercise of state power.” HUMAN RIGHTS FIRST, HUMAN RIGHTS FIRST CHARTER, available at http://www.humanrightsfirst.org/about_us/charter.aspx (last visited Dec. 16, 2009).

1. *The Role of Law*

The first important difference relates to diverging conceptions of the role and function of law and rights discourse. Progressive, grassroots-oriented labor rights organizations and labor movements often approach law as dynamic, instrumental, and facilitative. Rights discourse in these movements serves as a means of facilitating workers' collective action by transforming individuals' capacity to challenge their working conditions and, as Jennifer Gordon frames it, serves as a narrative through which solidarity can form and "launch[] a vision of justice . . . beyond the law's provisions."¹⁴⁰ From this perspective, law complements and facilitates workers' collective action to achieve bottom-up change.¹⁴¹

However, according to its critics, law often fails to accomplish this change, instead co-opting workers' and grassroots movements.¹⁴² Their very nature and professional culture sets law and lawyers, even progressive ones, apart from movement leaders and activists. They "generate[] language, symbology, and rituals that reflect elite values and support elite interests."¹⁴³ Accordingly, labor organizers often approach law and lawyers with skepticism, partly because of concern that once courts get involved with an issue, workers will choose to put their fate in the hands of the law and lawyers instead of taking action themselves.¹⁴⁴ In a highly legalized environment like the United States, where lawyers and the law enjoy a great deal of status (in addition to derision), a lawyer's presence may distract workers from the labor movement's traditionally

140. JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 150 (2005); see Scott Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1945–51 (2007) (describing the use of law as a technique of labor mobilization).

141. Cummings, *supra* note 140, at 1980–81.

142. See Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 948–56 (2007) (describing the ways law can co-opt social action).

143. Pope, *Labor's Constitution*, *supra* note 28, at 958.

144. Articulating the arguments against law and rights talk, Jennifer Gordon explains that law and rights talk (1) focuses on individual rights, which can atomize movement participants; (2) diverts movement energy to the courts instead of the street; and (3) focuses on winning rights, which garners a passive reliance on the state rather than an active reliance on political mobilization. GORDON, *supra* note 140, at 149–50.

preferred forms of mobilization,¹⁴⁵ although Jennifer Gordon has argued that this need not necessarily be the case.¹⁴⁶

Human rights groups and lawyers, on the other hand, take a different approach to law. Law and lawyers play a central role in the human rights movement¹⁴⁷—it is not coincidental that the heads of the three major human rights organizations are all lawyers by training.¹⁴⁸ Accordingly, their methods are also legalistic: creating and utilizing legal instruments to check state power and hold states accountable.¹⁴⁹

Law, therefore, is not simply instrumental in achieving particular political ends, but is often *the* end in itself, central to human rights missions and methods. The method is to generate desirable norms and to codify and enforce those norms at the international and domestic levels through effective international and domestic institutions.¹⁵⁰ Particularly in the international sphere, this is often lawyers' work. As Kennedy frames it, human rights movements tend to understand problems as political and solutions as legal.¹⁵¹

By contrast, labor rights movements have generally regarded problems as primarily economic and social, and solutions as primarily political. That is, the primary source of human oppression that is addressed by labor rights is the socioeconomic relationship between worker and employer. The collective action of workers can positively affect that re-

145. Harry Arthurs, *Who's Afraid of Globalization? Reflections on the Role of Labour Law*, in *GLOBALIZATION AND THE FUTURE OF LABOR LAW* 51, 62–65 (John D.R. Craig & Michael S. Lynk eds., 2007) (critiquing the move to international human rights discourse in Canadian labor law, in part because it distracts from grassroots mobilization).

146. Gordon argues that rights talk, if properly channeled, can be a powerful complement and aid to organization. GORDON, *supra* note 140, at 148–84.

147. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 81 (1998).

148. Elisa Massimino of Human Rights First, Kenneth Roth of Human Rights Watch, and Irene Khan of Amnesty International are all trained as lawyers. See Human Rights First, Elisa Massimino, http://www.humanrightsfirst.org/about_us/staff/massimino_e.aspx (last visited Dec. 16, 2009); Human Rights Watch, Kenneth Roth, <http://www.hrw.org/en/bios/kenneth-roth/> (last visited Dec. 16, 2009); Amnesty International, Irene Khan Biography, <http://www.amnesty.org/en/library/asset/ORG10/010/2002/en/47e54e76-d792-11dd-b024-21932cd2170d/org100102002-en.html> (last visited Dec. 16, 2009).

149. Kennedy argues that, in fact, human rights strengthen national governance structures because human rights equate the structure of the state with the structure of freedom. Kennedy, *supra* note 7, at 113.

150. For example, Human Rights Watch's primary methodology is to produce reports that are generally framed in norms of international law, and that are so thoroughly researched that they could be submitted as evidence in courts of law.

151. See Kennedy, *supra* note 7, at 115. Kennedy further argues that law and legal processes play too central a role in human rights movements, a phenomenon that he describes as “foregrounding form.” *Id.* at 110.

lationship and lead to emancipation. For labor movements, the political process lies in collective action vis-à-vis the employer and, secondarily, the state. If law can help facilitate that political process, all the better, but labor movements do not revere the law per se.

2. *Drivers of Social Change*

This difference in the conceptualization and role of law in human rights and labor rights movements illuminates another fundamental difference between these two movements: the analysis of social change and political power and how both are achieved. In labor groups' sociopolitical analysis, social and political changes occur as grassroots, collective processes. In the United States, the core activity of labor unions and workers movements is organizing. While unions and labor organizations make varying commitments to organizing, grassroots mobilization is their primary vehicle for social change and power acquisition.¹⁵² Unions gain strength by recruiting new members and thereby increasing the size and power of the union. Unions gain power at the workplace through collective bargaining contracts and at the political level through the ability to mobilize members for election campaigns and to use union political funds for campaign contributions.¹⁵³

Human rights organizations and activists, on the other hand, tend to conceptualize social change as a top-down process in which individual elites are the primary agents of change. The primary mode of action by these elites is to advocate for stronger laws, promote responsive legal institutions, and create international mechanisms of accountability. Human rights organizations tend to adhere to a historical theory consonant with the so-called "great man" approach, by which individual actors are the primary engines of historic and social change. Individuals, who often come from the elite and educated classes, are held up as heroes, generally outside of any broader social and historical context.

This difference is evident, for example, in human rights organizations' programming, which often focuses on defending human rights activists from state oppression. HRF, for example, has a "Human Rights

152. See Kate Bronfenbrenner, *Introduction* to ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 1, 6–8 (Kate Bronfenbrenner ed., 1998) (describing the impact of the lower rate of union membership on wage inequality and political influence).

153. For a comparative discussion of "mobilization" versus "institutional" approaches to achieving union revitalization, see Lowell Turner, *Why Revitalize? Labour's Urgent Mission in a Contested Global Economy*, in VARIETIES OF UNIONISM: STRATEGIES FOR UNION REVITALIZATION IN A GLOBALIZING ECONOMY 1, 6–8 (Carola M. Frege & John Kelly eds., 2004).

Defenders” program that focuses on, for the most part, individual human rights activists oppressed by states.¹⁵⁴ Likewise, Amnesty International has traditionally focused on political prisoners.¹⁵⁵

This conception of social change also manifests itself at human rights awards dinners that are hosted by human and labor rights groups. In the case of human rights organizations, their fundraising events often weave narratives of courageous individual human rights activists who have, in heroic fashion, stood up for what is right, and fought for their causes, most often against states.¹⁵⁶

Labor organizations, on the other hand, tend to speak less of individual heroes (despite the ubiquitous image of the “working class hero”) and more of heroic groups of workers, or even entities. The AFL-CIO, for example, tends to give awards to groups, or to individuals on behalf of groups, often framing it in the context of their participation with other workers in a collective struggle.¹⁵⁷ The union presented its George

154. See Human Rights First, Human Rights Defenders, http://www.humanrightsfirst.org/defenders/hr_defenders.aspx (last visited Dec. 16, 2009).

155. STEPHEN HART, CULTURAL DILEMMAS OF PROGRESSIVE POLITICS: STYLES OF ENGAGEMENT AND WHY IT MATTERS 137 (2001) (“[T]he core subject of Amnesty’s work . . . remains the *individual* prisoner.”). One of Amnesty International’s original methodologies and one that it continues to utilize is to mobilize members of the organization as well as various non-members to write letters on behalf of human rights activists and individual dissidents, which is an unusual collective strategy, but one that is still at the organization’s core. *Id.* at 154 (“Writing letters, or at least addressing and mailing them, is the most pervasive and characteristic practice of local Amnesty members.”).

156. For example, in 2008, HRW gave awards to five human rights activists, including a Burmese activist working against the military *junta*, an Uzbek journalist working against political repression by the Uzbekistan Government, and a Saudi lawyer working to defend people who have been “unjustly convicted under the Saudi religious establishment’s narrow interpretations of Islamic law.” Press Release, Human Rights Watch, Five Activists Win Human Rights Watch Awards (Sept. 14, 2008), available at <http://www.hrw.org/en/news/2008/09/14/five-activists-win-human-rights-watch-awards>. At its 2009 gala, Human Rights First granted awards to a Brazilian activist campaigning for prison reform and against death squads in Rio De Janeiro, and to a Colombian activist who advocated for political prisoners. Human Rights First, 2009 Human Rights Awards Dinner, http://www.humanrightsfirst.org/about_us/award_dinners/2009_dinner/2009_dinner.aspx (last visited Dec. 16, 2009). A press release from Amnesty International announced the organization’s 2006 awards to Irene Khan and Nelson Mandela with the headline: “Two major international human rights awards celebrate the power of individual activism in the struggle for human dignity.” Press Release, Amnesty Int’l, *Two Major International Human Rights Awards Celebrate the Power of Individual Activism in the Struggle for Human Dignity*, AI Index ACT 10/007/2006, Nov. 1, 2006.

157. This is not always the case, but often so. For example, the AFL-CIO gave its 2008 Human Rights Award to an individual, Yessica Hoyos, who is a lawyer and the activist daughter of a slain Colombian trade union leader. James Parks, *Colombian Activist Yessica Hoyos Receives AFL-CIO Human Rights Award*, AFL-CIO NOW BLOG, Sept. 17, 2009, <http://blog.aflcio.org/2009/09/17/colombian-activist-yessica-hoyos-receives-afl-cio-human-rights-award>. In 2002, it presented the award to Sister Nancy Riche. AFL-CIO, 2002 George

Meaney-Lane Kirkland Human Rights Award to the Self-Employed Women's Association in 2005,¹⁵⁸ to the International Federation of Journalists in 2006,¹⁵⁹ and to the Agricultural Workers Union of Liberia in 2007.¹⁶⁰ ARAW's 2007 human rights dinner, for example, honored two organizations, Kaiser Permanente and, notably, Human Rights Watch, for their work. It honored just one individual, Judge Greg Mathis.¹⁶¹ ARAW followed the same pattern in 2008, extending awards to two organizations and one individual.¹⁶²

3. *Philanthropy Versus Agency*

Another important difference, particularly in the realm of labor issues, is that human rights groups often frame labor issues and their solutions as matters of charity and benevolence, rather than as matters of facilitating worker agency and voice. In this view, human rights activists and organizations "save" workers—particularly "innocent" children, in the popular case of child labor. I call this a philanthropic approach to labor rights.

The philanthropic approach to labor rights is in direct contrast to an agency approach to labor rights, whereby workplace emancipation and improved working conditions are not achieved as a gift from others, but rather through individual or collective action.

Sociologists Gay Seidman and Ethel Brooks described this phenomenon, arguing in their studies of transnational labor activists campaigns that international human rights organizations tend to frame the subjects of their activism as "victims."¹⁶³ Even where this is not the case, they

Meaney-Lane Kirkland Human Rights Award (Aug. 6, 2002), *available at* <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec0806g2002.cfm>.

158. AFL-CIO, 2005 George Meaney-Lane Kirkland Human Rights Award Self-Employed Women's Association (SEWA) (Mar. 1, 2006), *available at* <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec03012006.cfm>.

159. AFL-CIO, 2006 George Meaney-Lane Kirkland Human Rights Award: International Federation of Journalists (IFJ) (Mar. 7, 2007), *available at* <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec03072007e.cfm>.

160. AFL-CIO, 2007 George Meaney-Lane Kirkland Human Rights Award: Firestone Agricultural Workers Union of Liberia (Fawul) (Mar. 5, 2008), *available at* <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec03052008b.cfm>.

161. American Rights at Work, 2007 Honorees, http://www.americanrightsatwork.org/awards-celebration/honorees-381/page_3-381.html (click "Next" to locate page with 2007 honorees) (last visited Dec. 16, 2009).

162. American Rights at Work, 2008 Honorees, http://www.americanrightsatwork.org/awards-celebration/honorees-381/page_2-381.html (click "Next" to locate page with 2008 honorees) (last visited Dec. 16, 2009).

163. SEIDMAN, *supra* note 106, at 34; *see also* ETHEL C. BROOKS, UNRAVELING THE

argue that these campaigns tend to focus on compelling “stories,” such as child labor or abusive working conditions, in which the campaigns use “testimonials bearing witness to egregious exploitation” to gain popular support.¹⁶⁴ As a result, the campaigns deemphasize freedom of association because it makes for less compelling tales, and worker agency is replaced by that of U.S. consumers and MNCs.¹⁶⁵

4. *Class and Culture*

These differing approaches to law and political and social change also reflect an important cultural and demographic division between human rights activists and professionals, on the one hand, and labor rights and union professionals, on the other. Just as human rights organizations’ advocacy strategies often focus on elites, human rights organizations also tend to be composed of and staffed by elites.¹⁶⁶ The staff and leadership are almost always highly educated, and, because these organizations pay relatively low salaries, particularly at the entry level, employees would likely be unable to afford to stay in these jobs without extreme commitment, independent wealth, parental support, or spouses with high paying professional occupations.

By and large, members of the economic, social, and cultural elite also comprise the boards of the major human rights organizations. The board members are often business executives, lawyers, or other members of the professional and educated classes.¹⁶⁷ In contrast, rank-and-file individuals often staff and lead labor movements, although notable exceptions certainly exist.¹⁶⁸ Unions, particularly at the more local level, tend to value leadership that “comes from the ranks” and, as such, union

GARMENT INDUSTRY: TRANSNATIONAL ORGANIZING AND WOMEN’S WORK 31, 33 (2007).

164. SEIDMAN, *supra* note 106, at 33.

165. BROOKS, *supra* note 163, at 60; *see also* SEIDMAN, *supra* note 106, at 34.

166. Lance Compa, *Trade Unions, NGOs, and Corporate Codes of Conduct*, 14 DEV. PRAC. 210, 212 (2004).

167. For example, Human Rights First has a board largely comprised of partners in major corporate law firms. Human Rights First, Board of Directors, http://www.humanrightsfirst.org/about_us/staff/board.aspx (last visited Dec. 16, 2009).

168. Notably, UNITE-HERE and SEIU tend to have leadership and staff, certainly at the national level, that become staff because they are ideologically committed, not because they ever worked as seamstresses or service workers. John Wilhem (President of UNITE-HERE), and Andy Stern (President of SEIU) are Ivy-League educated former college activists, although Stern briefly worked as a social worker for an SEIU-represented bargaining unit. *See* Unite Here, John W. Wilhelm, President, <http://www.unitehere.org/about/wilhelm.php> (last visited Dec. 16, 2009); Matthew Kaminski, *Andy Stern: Let’s “Share the Wealth,”* WALL ST. J., Dec. 6, 2008, at A9; Service Employees International Union, *Our Union: Andy Stern, President*, <http://www.seiu.org/a/ourunion/andy-stern.php> (last visited Dec. 16, 2009).

leaders often lack human rights professionals' educational backgrounds. When they do have these backgrounds and credentials, labor leaders often still attempt to maintain at least a viable story of how they worked their way up from the shop floor to the union office, or came from humble working class roots.¹⁶⁹

By contrast, having suffered from personal human rights violations is seldom a job requirement for human rights professionals. The different economic and cultural backgrounds of the leadership and membership mean that building bonds of trust between these two movements can be difficult. Human rights activists are not necessarily comfortable communicating with the blue-collar cultures of labor movements, and vice versa.

5. *Freedom of Association and Collective Bargaining*

The two issues that most starkly express the differences outlined above are: the complicated relationship between the human rights movement and freedom of association and collective bargaining rights, and the centrality of unions and worker organizations as the solution to workplace issues. Divergent understandings of the role of these rights in solving workplace issues contribute to the divide between labor and human rights organizations.

Perhaps it is best to start with the strongest counter-example to this claim. HRW's 2000 report, *Unfair Advantage: Workers' Freedom of Association in the United States*,¹⁷⁰ was undoubtedly groundbreaking in that it focused the attention of one of the preeminent human rights organizations on an issue usually left to unions, and accordingly, it received a great deal of praise.¹⁷¹

This contribution was important, but it should be considered in context. HRW and other human rights organizations are not necessarily committed to unions, collective action, or workplace democracy as political or economic institutions. HRW reports tend to meticulously avoid

169. The new president of the AFL-CIO, Richard Trumka, a trained layer, notes in his biography that in his youth he "followed his grandfather Attilio and his father, Frank, into the mines." AFL-CIO, Top National Officers: Richard L. Trumka, President, http://www.aflcio.org/aboutus/thisistheaflio/leaders/officers_trumka.cfm (last visited Dec. 16, 2009). The biography of Andrew Stern, the president of SEIU and a graduate of the University of Pennsylvania, notes, "Stern began working as a social service worker and member of SEIU Local 668 in 1973 and rose through the ranks before his election as SEIU president in 1996." Service Employees International Union, Our Union: Andy Stern, President, <http://www.seiu.org/a/ourunion/andy-stern.php> (last visited Dec. 16, 2009).

170. See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE, *supra* note 54.

171. Compa, *Labor's New Opening*, *supra* note 4, at 103–05.

promoting unionism in itself, apart from a statement that democratic “unions are vital for societies where human rights are respected.”¹⁷² Rather, HRW hews closely to legal analysis that treats workers as “autonomous actors, not objects of unions’ or employers’ institutional interests.”¹⁷³

To its credit, the value of HRW’s contribution is probably predicated on such a “neutrality.” Its stakeholders cannot discount it as a “pro-union” organization. It is also true, however, that human rights organizations and human rights analysis will only be able to go so far in allying with unions and, more importantly, articulating a vision of workplace democracy, freedom of association, and collective bargaining.

The case of HRF and its short-lived Workers Rights Program experiment suggests even greater ambivalence toward the role of freedom of association and trade unions in finding solutions to global labor problems.¹⁷⁴ As noted earlier, HRF’s primary workers’ rights agenda was to promote corporate social responsibility on the part of corporations. In other words, it focused on one aspect of what can be called “private regulation.”¹⁷⁵ Unlike the bulk of its work, HRF hardly focused on state law at all in the labor rights realm. It pursued its agenda primarily through participating in and promoting the FLA, a multi-stakeholder group that works to have companies implement systems of monitoring and reporting along their supply chains.¹⁷⁶ Unions decided early on not to participate in the initiative, and there remains no union participation in the organization.¹⁷⁷ While freedom of association is one of the key rights in the FLA code of conduct, and one it monitors and reports on,¹⁷⁸

172. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE, *supra* note 54, at 10.

173. *Id.*

174. The Workers Rights Program ended in 2003, shortly after its creation.

175. Kolben, *supra* note 109, at 225–26 (“Private regulation in the context of transnational labor encompasses a broad range of practices, generally outside of the strict purview of the State, that serve to regulate working conditions and the employer-employee relationship.”).

176. Michael Posner, the former president of Human Rights First, has been actively involved in the FLA since its inception. Human Rights First, Michael Posner, http://www.humanrightsfirst.org/about_us/staff/posner_m.aspx (last visited Dec. 16, 2009). On its website, HRF identifies itself as having close ties with the FLA. Human Rights First, Fair Labor Association Releases Public Reports on Rights Conditions in Overseas Factories, http://www.humanrightsfirst.org/workers_rights/issues/fla/index.htm (last visited Dec. 16, 2009).

177. The FLA only has seats for NGO representatives, university representatives, and industry representatives. Fair Labor Association, Board of Directors, http://www.fairlabor.org/about_us_board_directors_d1.html (last visited Dec. 16, 2009). However, its charter provides that the NGO seats are “Labor/NGO” seats, leaving the door open for unions to join. *See* FAIR LABOR ASSOCIATION CHARTER art. II(B) (2008).

178. Fair Labor Association, Workplace Code of Conduct, <http://www.fairlabor.org/>

neither the creation of unions nor the promotion of independent workers' organizations—workplace democracy—are necessarily underlying principles or central objectives of the organization.

The lack of emphasis on freedom of association and workplace democracy in the FLA is also reflective of the approach at HRF. I realized this when I participated in a meeting of the Workers Rights Department. When members of the Department suggested that freedom of association ought to be a primary objective of the program, a senior manager of the organization responded that what workers really desire are better working conditions, not the right to form unions. Although this may be true, this is hardly the approach a grassroots-oriented organization such as a union would take.

I believe this exchange was indicative of the leadership of organizations like HRF, and probably of the HRF board, which is largely made up of Wall Street lawyers and financial professionals.¹⁷⁹ They were in favor of improving worker conditions through market-based appeals to social responsibility and consumer pressure, but were less comfortable with collective action.

As these examples illustrate, a human rights approach that focuses on individual rights will struggle with some of the same key issues as the American labor movement. For example, the proposed Employee Free Choice Act (EFCA) would, *inter alia*, replace the NLRA's election process with a "card check" system.¹⁸⁰ In other words, rather than the current process whereby a majority of employees voting can choose a bargaining representative through a secret ballot, the EFCA would allow for a duty to bargain in good faith to attach should a majority of workers in a bargaining unit sign a petition requesting representation by a union.¹⁸¹ Human rights organizations could potentially find this difficult to support because democratic elections in which individual workers vote on unionization are highly consonant with human rights assumptions.¹⁸²

about_us_code_conduct_e1.html (last visited Dec. 16, 2009).

179. *See supra* note 167.

180. The Employee Free Choice Act provides that if a majority of employees sign a petition requesting union recognition, an employer would be obligated to recognize that union for the purposes of collective bargaining. Employee Free Choice Act of 2009, S. 560, 111th Cong. § 2(a)(6) (2009), H.R. 1409, 11th Cong. § 2(a)(6) (2009). Under current law, employers are under no obligation to recognize a union unless that union succeeds in garnering a majority vote in an election administered by the National Labor Relations Board. 29 U.S.C. §§ 158(a)(5), 159 (2006).

181. *Id.*

182. *Unfair Advantage* walks a careful line with card check questions, suggesting that they are not rights and that the American political culture is not yet ready for mandatory card checks. *See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE, supra* note 54, at 30. For a rights-based criti-

CONCLUSION

This Article has aimed to articulate some of the differences between human and labor rights, both as concepts and as movements. While associating with the international human rights movement and adopting its discourse clearly has some potential benefits for labor advocates, both within and without the trade union movement, there are also some serious pitfalls. Reflective advocates and scholars should take heed.

I have argued that the strategies and politics of the human rights movement, while perhaps highly effective in impacting state action on many issues, could be less effective, and in fact debilitating, for labor rights actors that work primarily in the private economic sphere. Labor movements do not necessarily benefit from the legalism, elitism, or the individualistic and philanthropic frames that often define human rights approaches to workers' rights. The international human rights movement is not fundamentally committed to examining and questioning fundamental economic relationships in society, nor is it committed to direct action as a method—or workplace democracy as a goal—to the same extent as the labor movement.

The human rights movement has been perhaps the most successful and sustained movement of the last sixty years, but that does not mean that labor advocates should simply take a “by any means necessary” approach and hitch a ride on the human rights train. This Article contributes to the conversation that must take place among and between international labor and human rights lawyers and activists about important issues such as the nature of human and labor rights discourse, the role of law, and how the conceptualization of the two movements affect their respective political and policy objectives.

que of the EFCA, see James Pope et al., *The Employee Free Choice Act and a Long-Term Strategy for Winning Workers' Rights*, 11 WORKINGUSA: J. LAB. & SOC'Y 125 (2008). Interestingly, however, Human Rights Watch has issued a statement supporting the EFCA, including its card check provisions, based on the procedural fairness argument that elections require too much time, thus permitting employers to take advantage of unfair labor laws that allow them to prevent union formation. See HUMAN RIGHTS WATCH, *THE EMPLOYEE FREE CHOICE ACT: A HUMAN RIGHTS IMPERATIVE* 7–10 (2009).