Author's reply to Wheeler-Getman-Brody papers

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The contributions of Hoyt Wheeler, Julius Getman and David Brody in the December issue of this journal give important insights into strengths and weaknesses of the Human Rights Watch Report on workers' rights in the United States. Stephen Wood, Sheldon Friedman and the editors are to be commended for advancing a debate on the Report's approach, findings and recommendations.

Each of these three major figures in American labour scholarship brings the power of decades of research and analysis on these issues. Together, their critiques stretch the Report backward and forward: back to unstated assumptions that underlie the Report (or that it neglected, which could have better informed the Report), and forward to some unstated (or, again, missed) implications of its findings and recommendations.

The 'ought' in human rights analysis

Wheeler looks at the foundation of the human rights approach to freedom of association for workers. He probes for deeper roots than the recitation of international human rights instruments that are the starting point for Unfair Advantage. His attention to religious, moral and philosophical first principles is an important complement to the HRW study.

HRW did not take up such questions in depth. Speaking to a diverse audience, it could not opt for a particular school of thought about the source of human rights. Moreover, it was producing a report and recommendations to influence public policy, and the intended audience is notoriously short on patience with philosophical discourse.

Resolving where human rights come from, what it means to be human, what human dignity is, and other questions posed — rightly and eloquently — by Wheeler was beyond the project's scope. Still, the Report could have signaled the importance of these deeper questions. Anyone who cares about workers' rights should constantly be applying Wheeler's test for the 'ought' in human rights analysis.

Balancing speech right

Wheeler notes that US labour law takes a 'balancing' approach to rights and interests of workers and employers. He argues, as did HRW, that severe imbalance has set in. He then faults the HRW Report for recommending 'more speech for both the employer and the workers', an approach he gently terms 'problematic'.

But what the Report said was slightly different. HRW called for 'more free speech for workers, not less free speech for employers'. This formulation arose in a discussion of whether Section 8 (c) of the NLRA, the so-called 'employer free speech' clause, should be repealed.

HRW did not downplay the problem of employer speech. At pages 20-2, the Report acknowledged employers' 'inherent advantage in the employment relationship', their power to 'force workers to attend captive audience meetings,' and their 'superior economic power' when they make anti-union statements. The recommendation for 'closer scrutiny and tougher remedies,' including

greater use of Gissel bargaining orders when a union loses an election after a majority had signed cards, was all based on the inherent tendency of management speech to be coercive. In sum, the HRW Report recommends more constraints on less speech for employers, although it did not go as far as to recommend repeal of Section 8 (c). Certainly employers would view HRW's recommendations as a sharp abridgement of their rights.

Trade unionists will counter that the employer has no interest in the matter, and does not have rights at stake. But the NLRB election campaign is not about union formation. When they seek recognition, workers have already formed a union. The NLRB election decides whether the federal government will coerce an unwilling employer to the bargaining table. That is what union certification gets, and that is why most employers resist it.

HRW was unwilling to say that employers must, by force of law, stay mute in a matter that will so profoundly affect their affairs. HRW saw an absolute prohibition on employer speech as too injurious to free speech principles that are essential for human rights. Instead, the Report opted for reasonable limits, strict scrutiny, strong remedies against coercive speech, and the dramatic (in the United States, the Citadel of private property) step of allowing union organizers on to company premises. All these measures are meant to right the 'unfair advantage' the law now affords employers.

Capitalist exception or capitalist rule?

Getman criticizes the report's failure to address 'deeper causes' of the 'toxic system' that US labour law has become. A root cause, he suggests, is a 'Capitalist Exception' applied by judges and government officials favouring property rights over workers' associational rights.

Getman attributes judges' biased treatment of workers' rights to their ignorance of workplace realities. Others argue that judges are all too conscious of those realities, and they know which side they're on. As George Schatzki, another pantheonic figure in US labour scholarship, put it: 'Judges are elitists, individualists, overachievers, meritocrats, and fierce competitors .. . One would be dumbfounded to find judges reflecting sympathy, understanding, or more importantly empathy for the labor movement' (Schatzki 1998). The HRW Report took a step in the direction pointed by Getman. It noted that, 'in contrast to some areas of US law, courts have often acted in the labor law arena to curtail workers' rights . . . many of the features of US labor law and practice that counter international norms result from court-fashioned doctrine, not just from statutory deficiencies' (p. 17). In the Avondale case study, it characterized the anti-union ruling of a federal appeals court, which overturned a pro-union NLRB decision, as 'astonishing in its one-sided view of the case' (p. 129).

But the notion that executive branch agents exercising administrative authority are the good guys while independent judges are the bad guys was too much of a paradigm shift for a human rights organization. Most human rights discourse flows in the other direction. Arbitrary and abusive treatment by governments, with no effective judicial review by independent courts, is usually the biggest problem. In Unfair Advantage, HRW was not comfortable launching a full-scale assault on the role of the judiciary in labour matters without compromising broader human rights concerns favouring judicial review of administrative action.

Reality check

Getman splashes cold water of reality on the Report's call for 'a new spirit of commitment' and for Congress to 'work cooperatively with the administration to craft and adopt new legislation etc. etc', (p. 17). 'Not a single one of the recommendations in this report would have a chance of being enacted by our current Congress or Labour Board', he says.

Getman writes in the shadow of a Bush administration. The report appeared before the 2000 election. Advocates hoped that a Gore White House and a Democratic Congress might be responsive to at least some of HRW's recommendations. The labour movement worked hard both to elect Gore and to sensitize him to the problems of workers seeking to form unions. Perhaps, in a Gore administration and a Democratic-controlled Congress, the labour movement and its allies could have gained approval of a labour law reform bill.

But Getman is probably right, even had Gore and the Democrats won the election. As he says, 'the changes called for in this report will only happen if public opinion changes dramatically'. He cautions how hard this will be, given the resources of the other side. For example, it would take an enormous effort to convince the US Congress, even one with a solid Democratic majority, to vote for HRW's recommendation that entrepreneurs who start up successful businesses should be forced to allow union organizers on to their property to persuade their own employees to turn against them (which is how the issue would be portrayed by anti-union forces in the battle for public opinion).

What is needed, Getman argues, is 'a new burst of rank and file-led activism' and organized labour leadership that expresses 'the voice of its rank and file members'. He's right. That's how the original Wagner Act was won in 1935 — not by the benevolence of Senator Wagner or President Roosevelt, but by sit-down strikes and other mass organizing action by millions of workers led by communists and socialists who wanted to build worker power.

Horse of a different colour

David Brody levels the harshest criticism, calling the Report a gift horse without teeth. He faults the Report for lacking historical perspective, supporting a 'formal democratic process [the secret ballot representation election] .. . at odds with workers' freedom of association', and advocating 'more free speech for workers, not less free speech for employers' instead of a ban on employer speech.

Rather than exposing and bursting the historically determined and constricting framework of US labour law, says Brody, the HRW Report embraces it. The Report supports a system where collective bargaining is gained through a bureaucratic process of government certification rather than by workers' direct action. In sum, the HRW Report accepts the premise of the anti-union 1947 Taft-Hartley Act: that the worker is 'just a voter making a choice between individual and collective bargaining'.

These are trenchant and fair criticisms informed by deep scholarship and powerful analysis. Except for brief references to the Railway Labour Act of 1926 and the Norris-LaGuardia Act of 1932, the HRW Report's treatment of history begins in 1935 with passage of the Wagner Act. A lot of rich history is forgone. While personally I am not 'incurious' about labour history (my Italian immigrant grandfather took part in the 1919 steel strike), HRW was no more producing a work of historical analysis (or any kind of scholarship) than a work of philosophical inquiry suggested by Wheeler. It was a report meant to induce action.

Elections, card checks and 'government-free' organizing

Brody has long argued that the NLRB election system violates workers' rights. I eagerly read his Dissent and New Labor Forum articles when they appeared, and should have included his arguments and articles in the discussion on page 22 and in footnote 34 of the HRW Report. Not doing this was a mistake.

But Brody's critique of the election system as a 'formally democratic process .. . at odds with workers' freedom of association' applies with equal force to the card-check system advocated by US trade unionists and practised in much of Canada. Brody opposes any system of government certification to start collective bargaining. He calls for pure, pre-Wagner worker self-organization and strikes to compel recognition and bargaining, without government intervention.

Card checks are another form of government intervention. Under a mandatory card-check system, an intransigent employer can still refuse to bargain, arguing that harassment and peer pressure motivated card signing. That would trigger some kind of bureaucratic procedure involving a government agency or an arbitrator holding hearings and taking evidence on the circumstances of card signing. Their decisions would ultimately be reviewable by courts, as with the San Francisco Marriott case study in the Report, at pp. 88-93. Here, too, 'the organizing tempo is dictated by the calendar of an administrative/judicial proceeding, one of course all too readily manipulated by employers, and the drain on union resources can be enormous', as Brody characterizes the NLRB election process.

The HRW Report went far in the direction of favouring a card-check system. Most of the case studies recounted in excruciating detail abuses in the NLRB election campaign system. The report noted 'powerful' critiques of the election process and arguments for the card-check system. It characterized the secret-ballot election as 'a' standard method (not 'the' standard method) to resolve representation rights, and called card-checks 'an alternative means' that public policy 'should encourage'.

But in a global setting of human rights advocacy, where free, fair secret-ballot elections are prized, HRW could not advocate abolishing secret-ballot elections altogether. The 'formally democratic process' of a secret-ballot vote that Brody scorns in the union organizing context is too precious in too many other places for a human rights group to jettison.

Voice of experience

HRW's position was also informed by its own experience. While the US labour rights report was being researched, and before it was published, the staff formed a union affiliated with the Communications Workers of America (CWA).

HRW scrupulously maintained neutrality, instructing supervisors not to ask or opine about the union with their employees. HRW did not engage in any form of campaign against the union — no letters, no individual or group meetings, no nothing. There was a slight but not undue delay resolving who belonged in the 'appropriate bargaining unit', as the law requires. Staff voted 35-1 in favour of representation, and achieved a good collective agreement after several months of often hard bargaining.

Most American unions would take this deal — genuine employer neutrality with a secret-ballot election. Here the election is really what it should be: a ratification vote, not a choice between individual

and collective bargaining. Workers have already formed a union and opted for bargaining. The election is really a confirmation of a choice already made.

The vote and resulting NLRB certification add important legal protections in our system — exclusive representation, an extended period of insulation against poaching unions, a good-faith bargaining obligation by the employer, a ban on any unilateral changes by the employer, a right to extensive information and more. None of these protections is worth much to a weak union. But if organizers and worker leaders did a good job building their union, these features of labour law give it a fighting chance to reach a solid agreement.

Good organizers understand Brody's warnings about the election system. Having worked for 15 years as an organizer with the United Electrical, Radio and Machine Workers of America (UE), I learned firsthand, often the hard way, that you don't go to an election to see if you have a union. You go to an election to prove it. Building and strengthening workers' self-organization come first.

Brody's main point is right. 'Self-organization' is the sine qua non of effective unionism. This is true in any context — secret-ballot elections, card-checks or Brody's preferred 'pure' organizing without government involvement. The thing is, governments are always going to be involved. Self-organization can be accomplished with elections or card-checks if workers are strong and united.

Mano a mano?

The US concept of the unwilling employer's coerced 'duty to bargain' after workers win an NLRB election is an anomaly compared with most of the world. It exists in Canada and Japan by imitation. Most of the world is closer to Brody's preferred model: workers have every right to form a union and every right to strike without employer interference, without any elections and without the need for government intervention to get the employer to the bargaining table.

In practice, however, while there is not the legal compulsion to bargain as in the US system, most governments intervene massively to promote 'voluntary' bargaining. Many have laws extending collective agreements negotiated by peak labour and management representatives to the entire economic sector. So in France, for example, a smaller percentage of workers are union members than in the United States, but a majority of workers are covered by collective agreements.

'Practice' is the point here. Realistically, some form of government intrusion is inevitable in any labour relations system. Mediating class conflict is what governments do. I admire, and in principle agree with, Brody's advocacy of unmediated worker power. I appreciated former AFL-CIO president Lane Kirkland's remark a few years ago that the labour movement would be better off without the NLRA — 'Let's go mano a mano,' he declared.

But in a capitalist system it's not mano a mano. It's workers' manos against employers' manos, brazos, hombros and espaldas. The challenge for workers is to mount the political force to pull the power of the state just partly in their favour. The challenge is severe, but that is not a reason to forget the law and hope for a new surge of syndicalist power.

HRW sought to link its recommendations to international human rights principles. The goal was to place these proposals in an international context precisely to break through the 'this is America, not the world' assertion with which Brody ends his essay. That view underlies the US government's go-it-

alone position on global warming, the international criminal court, 'star wars' missile defence, the Durban racism conference and other international disputes.

A strategy for change

Brody is right that American workers have to find their own way, in their own national tradition, to advance rights of association. This is the global challenge for labour movements confronting mobile capital while the workers they represent are still rooted in national and local labour relations systems. The HRW Report hoped to aid this process in the United States because, as Brody affirms, 'in this globalizing age the international obligations the US undertakes can begin to matter'.

While noting shortcomings in the HRW Report, Wheeler, Getman and Brody generously shared HRW's view that a human rights approach to labour law brings a new dimension that can begin a process of change. Can, not will, and begin, not complete. Just declaring 'workers' rights are human rights' is not going to change what HRW acknowledged as 'deeply entrenched' US labour law and practice.

Trade unionists know that they cannot go it alone in today's social and economic context. The cultural drumbeat that unions are 'special interests' seeking undue privileges compared with the rest of society is powerful and incessant. Workers need allies in other classes and sectors and groups to defend their rights.

The US labour movement has worked hard to coalesce with civil rights, immigrant, feminist, religious, student and other movements to advance a broad programme of economic and social justice. Emphasizing policy issues such as minimum wage and health insurance to protect those who mostly are not union members has helped the labour movement reach out to other social forces. The challenge now is to add the human rights movement to this coalition.

Until recently, the labour movement saw the human rights community as a separate venture, mostly concerned with victims of abuse in other countries. For their part, many human rights advocates and activists thought little about human rights for workers in the United States. Like many Americans unfamiliar with problems of organizing and collective bargaining, they saw trade unionists not as victims of abusive treatment, but as cosseted labour elites.

By focusing on case studies of workers' rights violations in the United States under human rights standards, the HRW Report aimed to change that perception and to promote a broader sentiment for labour law reform. Specific policy measures like how to stop employer harassment or when to allow union organizers on to company property will have to be fought out in the legislative and lobbying process. But the labour movement and its allies can get to the point of waging those fights only by reframing their organizing and bargaining efforts as a human rights mission and attracting allies for the 'new burst of activism' signalled by Getman.

Reference

Schatzki, G. (1998). 'It's simple: judges don't like labor unions'. Connecticut Law Review, 30: 1365-70.