

## SECURING WORKERS' ECONOMIC RIGHTS THROUGH PUBLIC PROTEST

STEPHEN PLASS\*

### *Introduction*

Publicizing grievances has been a longstanding strategy for coercing legal and practical changes in society. Some of the more notable examples of this phenomenon include the initiatives of Mohandas Gandhi in India that helped to liberate that country from colonial rule,<sup>1</sup> and civil rights or solidarity movements in the United States and abroad that produced laws protecting labor and political rights.<sup>2</sup> Boycotts and other publicity campaigns have also been used to force governments and businesses to adopt models of governance that are consumer-friendly, worker-conscious, and environmentally sound.<sup>3</sup> Public protest has the capacity to advance democratic ideals

---

\* Professor of Law, St. Thomas University School of Law.

<sup>1</sup> See Shiv Narayan Persaud, *Eternal Law: The Underpinnings of Dharma and Karma in the Justice System*, 13 RICH. J.L. & PUB. INT. 49, 81 (2009) (discussing Gandhi's contribution to India's independence movement); John Leubsdorf, *Ghandi's Legal Ethics*, 51 RUTGERS L. REV. 923, 928 (1994) (reporting that the boycott of courts and schools, in addition to a boycott of foreign cloth, was central to Gandhi's program of protest).

<sup>2</sup> See Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1701 (2007) (noting that Cesar Chavez borrowed some of Gandhi's strategies to orchestrate a successful national boycott and unionization campaign on behalf of Mexican farm workers). The independent trade union movement in Poland, led by Lech Walesa, was a civil resistance movement that successfully advocated for worker's rights and other societal changes. See Mark Kramer, *The Rise and Fall of Solidarity*, N.Y. TIMES, Dec. 12, 2011, <http://www.nytimes.com/2011/12/13/opinion/the-rise-and-fall-of-solidarity.html>.

<sup>3</sup> See Simon Birch, *How Activism Forced Nike to Change its Ethical Game*, THE GUARDIAN, July 6, 2012, <http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike> (noting that a global boycott campaign against Nike resulted in unprecedented "openness and transparency" in the company's supply chain operations); Andor Skotnes, "Buy Where You Can Work": *Boycotting for Jobs in African American Baltimore, 1933-34*, 27 J. SOC. HIST. 735, 751-52 (1994) (reporting on the impact of economic boycotts of businesses that embraced segregation and did not employ blacks); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98

34 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11

such as nondiscriminatory employment decision making, and the right to just compensation for one's labor.<sup>4</sup>

For many people, their labor is often their most valuable economic asset. Labor not only creates property but it is property itself.<sup>5</sup> Except for minimum wage requirements, labor is generally sold at market rates.<sup>6</sup> But for large segments of the workforce,

---

YALE L.J. 999, 1044 (1989) (discussion how the economic boycott of the bus company Montgomery City Lines, coerced the company into ending its practices of segregated transportation); Erik Assadourian, *The State of Corporate Responsibility and the Environment*, 18 GEO. INT'L ENV'T'L. L. Rev. 571, 586 (2006) (reporting investor and nongovernmental organizations' protest activities targeted at the oil giant ExxonMobil, to prod the company into investing in renewable energy technologies); and Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1, 33-34 (2013) (discussing the international publicity campaign against the Fruit of the Loom apparel company by workers, students, and labor leaders, that resulted in significant job and wage gains for Honduran workers).

<sup>4</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that a civil rights boycott was protected activity under the First Amendment). The right to protest for better wages and work conditions was codified in the National Labor Relations Act, 29 U.S.C. §§ 157, 163 (2006) (providing that employees have the right to engage concerted activities for mutual aid or protection, and the right to strike, respectively). Strikes and boycott activities give workers a voice in their economic future, and serve as a counterweight to potential abuses by business interests that wield outsized economic strength in the marketplace for labor.

<sup>5</sup> With the fall of slavery, labor laws have codified the principle that human labor is not a commodity. See, e.g., Clayton Act, 15 U.S.C. § 17 (2006). But employers operating in competitive markets have a difficult time embracing this principle. See Ari Paul, *Rotten Apples, Core Values*, THE NATION, Aug. 12, 2010, at 28-30 (reporting a worker's complaint that a company official stated during collective bargaining negotiations that labor was no different than commodities like oil and soybeans that is traded based on market prices). See also IAN SHAPIRO, *DEMOCRATIC JUSTICE* 146 (1999) (observing that the term "human capital" is grounded in the principle that humans control their productive capacities, and the freedom to sell one's labor is what distinguishes market-based wage labor from slavery).

<sup>6</sup> See Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012) (providing minimum wage and overtime compensation requirements for broad segments of the labor force). States also legislate minimum wage requirements that may be somewhat higher than the federal requirement. See *Raise The Wage*, WHITE HOUSE, [whitehouse.gov/raise-the-wage](http://whitehouse.gov/raise-the-wage) (last visited Apr. 3, 2016) (reporting that since 2013, 18 states and the District of Columbia have legislated minimum wage

## 2016] SECURING WORKERS' ECONOMIC RIGHTS 35

market rates or the legally required minimum wage are too low to provide for their most basic needs.<sup>7</sup> Policymakers have largely been unresponsive to the plight of low-wage workers, and worker advocacy groups such as labor unions have been unable to mobilize the working poor to wield their collective strength.<sup>8</sup> Although both domestic and international laws acknowledge that workers are entitled to fair wages, non-discriminatory work environments, the right to join unions, and the right to strike,<sup>9</sup> such legal prescriptions

---

increases). And employers with public contracts may also be subjected to federal or state “prevailing wage” laws that provide wage premiums based on the predominant rate that is paid in that locality. *See* Cole Stangler, *Prevailing Wage Laws: Why Are They Increasingly Popular Target For Republican State Legislators?* INT’L BUS. TIMES, Mar. 11, 2015, <http://www.ibtimes.com/prevailing-wage-laws-why-are-they-increasingly-popular-target-republican-state-1843898> (discussing the goal of prevailing wage laws to protect wage levels, and growing Republican opposition to such laws as wasteful government spending and contrary to free market principles).

<sup>7</sup> For example, one study showed that about 50 percent of fast-food workers rely on public assistance to get by. *See* Morgan Housel, *How You Subsidize the Minimum Wage*, THE MOTLEY FOOL, Oct. 29, 2013, <http://www.uexpress.com/motley-fool-investor/2013/10/30/how-you-subsidize-the-minimum-wage>. The median wage for fast-food workers in May 2015 was \$9.11 per hour, and for retail sales workers it was \$9.84 per hour. *See* Press Release 16-0661, U.S. Dep’t of Lab., Bureau of Lab. Statistics, Occupational Employment And Wages—May 2015, Table 1, Mar. 30, 2016.

<sup>8</sup> *See* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 150-52 (2013) (reporting studies that show that the government has been indifferent to the economic preferences and views of the poor, most of whom unions now have difficulty organizing).

<sup>9</sup> *See* Universal Declaration of Human Rights (UDHR), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (providing in Articles 23 and 24 for the human right to “just and favourable remuneration,” the right to a nondiscriminatory workplace, the right to join unions, and the right to holidays with pay); International Covenant on Economic Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S. 3 (providing in Articles 7 and 8 for “fair pay and equal remuneration for work of equal value,” paid holidays, wages that support a decent living, the right to form unions, and the right to strike); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin). The fair-pay principles emanating from the UDHR and the ICESCR remain aspirational because there is no process through which ratifying nations can be forced to implement policies that advance these principles. *See* Patrick J.

36 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]

do not trump the free market principles that can operate to deny workers a living wage.

This essay will explore the use of public protest as a non-regulatory device for promoting the fair pay and equal workplace treatment principles of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and American domestic laws. Specifically, it will consider the role of public protest in improving the economic condition of workers who face discrimination, low wages, and “gig” or contractual work arrangements that do not provide the kinds of job security contemplated by the law. The essay will first look at the effect of civil rights protests on the economic rights of minorities in the United States. Second, it will describe and evaluate the plight of low-wage workers. And, finally, it will consider the impact of purchasing labor through independent contracts that circumvent legal prescriptions for fair pay and non-discriminatory workplaces.

Part I of the essay shows that public protest helped to produce legal prescriptions that were instrumental in improving the pay and benefits minorities and women receive. Part II shows that public protest has resurfaced as a viable strategy for low-wage workers who have found it difficult or impossible to improve their compensation status under existing regulations. This part highlights the free-market foundation of American labor laws, and how this model limits the power of unions to champion the economic claims of the most vulnerable workers. Part III considers the challenges that “gig” and contract employment present to the rules of fair pay, reasonable work hours, and complementary workplace benefits that come with full-time employment.<sup>10</sup> The essay concludes by referencing the success

---

Austin, *Expansive Rights: FDR's Proposed "Economic" Bill of Rights Memorialized in the International Covenant on Economic, Social and Cultural Rights, But With Little Impact in the United States*, 15 *CHI.-KENT J. INT'L & COMP. L.* 12, 32-35 (2015). Fair pay is also not guaranteed under United States domestic laws which largely leave the economic rights of workers to market forces. See *infra* text accompanying notes 54-59.

<sup>10</sup> Traditional hiring of full-time workers classified as employees came with many benefits. Those benefits include paid holidays, paid vacations, health and disability insurance, and retirement plans, among other things. These additional

recent worker initiatives have had in advancing their economic claims, and proposes that such activism should be expanded.

### I. *Public Protest And The Principle of Nondiscrimination*

The right to work free of discrimination and the right to fair pay are enduring societal challenges. Throughout American history, structural barriers that impede the realization of these rights have existed. Slave codes were the antithesis of the principle that a human's labor is his property,<sup>11</sup> and post-slavery rules of work and pay operated to perpetuate discriminatory employment results.<sup>12</sup> The advent of constitutional prescriptions for equality in the 13<sup>th</sup> and 14<sup>th</sup> Amendments did not translate into equal workplace treatment.<sup>13</sup> Both

---

perks that are used to attract and retain employees represent about 31 percent of an employer's labor cost, on average. *See* News Release 15-2329, U.S. Dep't of Lab., Bureau of Lab. Stat., Employer Cost For Employee Compensation—September 2015.

<sup>11</sup> For example, slave codes provided that black slaves were the property of their master and could not sell their labor, do anything, or possess anything on their own. *See Extracts from the American Slave Code, in* THE MAKING OF MODERN LAW: LEGAL TREATISES, 1800-1926, at 1 (2004).

<sup>12</sup> In the South, state leaders opposed legislation that would provide protection for labor contracts on the ground that the common law was sufficient. *See* S. EXEC. DOC. NO. 39-27, at 60 (1866). But the common law treated fixed-term labor contracts which blacks typically made as "entire." *See Snyder v. Walker*, 7 Ohio C.D. 99 (1896). Entire or fixed-term contracts had to be fully performed as a condition precedent to being paid. *Id.* Failure to perform until the end of the contract term resulted in forfeiture of wages, and potential damages for breach. *Id. See also Stark v. Parker*, 19 Mass. 267 (1824).

<sup>13</sup> *See* U.S. CONST. amend. XIII (prohibiting slavery and involuntary servitude); U.S. CONST. amend. XIV (conferring citizenship on blacks and providing them with due process rights, and equal protection of the laws as whites). However, the Supreme Court ruled that race discrimination is not a badge or incident of slavery, thereby narrowly constricting the reach of the 13<sup>th</sup> Amendment. *See Civil Rights Cases*, 109 U.S. 3, 25 (1883). The Court also ruled that discriminatory conduct by private individuals was not prohibited by the 14<sup>th</sup> Amendment, leaving blacks unprotected from discriminatory labor practices. *See The Slaughter-House Cases*, 83 U.S. 36, 80-81 (1872). Legislation passed to enforce constitutionalized equality for blacks such as the Civil Rights Act of 1866, were nullified by the Court's imposition of a state action requirement to justify

38 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]

in the North and the South, race served as the driving force for the type of work blacks could get, and the level of pay they could receive.<sup>14</sup>

In the post-emancipation South, blacks were expected and required to contract their labor for a small fraction of the wages they needed to survive.<sup>15</sup> Labor contracts provided for sixteen hour days, corporal punishment, and forfeiture of pay for breach by the worker.<sup>16</sup> In the North, blacks were relegated to the most undesirable jobs, and paid the lowest wages.<sup>17</sup> Such discriminatory labor contracting was practiced by private and public employers,

---

protection. *See Hurd v. Hodge*, 334 U.S. 24, 31 (1948) (holding that governmental action was required in a suit grounded in the 1866 Civil Rights Act which gave blacks the same rights as whites to make and enforce contracts). Years after private sector employment discrimination was prohibited by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2006), the Court finally interpreted the 13<sup>th</sup> Amendment as prohibiting racial discrimination as a vestige or incident of slavery or involuntary servitude. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Barely a generation later the Court attempted to constrict the reach of 42 U.S.C. §1981, the successor law to the 1866 Act, by ruling that the right to make and enforce contracts equally with whites did not prohibit on-the-job discrimination. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). This interpretation was rejected by Congress in the Civil Rights Act of 1991. *See* §101, 105 Stat. 1071-72 (1991).

<sup>14</sup> *See* GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY*, 195, 206-07 (Harper Brothers 1944). *See infra* notes 24-27 and accompanying text.

<sup>15</sup> *See* S. EXEC. DOC. NO. 39-27, at 87 (reporting that planter paid blacks two to seven dollars per month). Government officials noted, however, that blacks should be paid at least twenty dollars per month, plus rations. *See* S. EXEC. DOC. NO. 39-6, at 44 (1866).

<sup>16</sup> *See, e.g.*, REPORT OF THE ASS'T COMMR'S OF THE BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, S. EXEC. DOC. NO. 27, at 28 (1866) (reporting the efforts of planters to include a right to discipline with physical force in their labor contracts); S. EXEC. DOC. NO. 39-6, at 212 (noting that leaving the master's employ without just cause resulted in forfeiture of wages); S. EXEC. DOC. NO. 39-27, at 135 (reporting that sixteen-hour days were legal if proposed and accepted). Other contracts provided for hours that were customary on a plantation, and this meant from sunrise to sunset. *See* S. EXEC. DOC. NO. 39-6, at 51 (1866).

<sup>17</sup> *See* MYRDAL, *supra* note 14, at 182-93 (reporting that blacks were denied opportunities both in the South and the North). *See also* 110 CONG. REC. 6554 (1964) (reporting that "[d]iscrimination is not limited to one section of our land. It can and does occur in all parts of our country to a greater or lesser degree").

## 2016] SECURING WORKERS' ECONOMIC RIGHTS 39

employment agencies, government contractors, and unions, and continued mostly unchecked for almost a century after emancipation.<sup>18</sup>

Public protest was instrumental in coercing changes, however. Civil rights demonstrations helped to force the nation and employers to confront the discriminatory practices that plagued the purchase and sale of black labor.<sup>19</sup> Economic boycotts<sup>20</sup> and protest marches for jobs and equal employment opportunity were some of the strategies employed to address racial oppression and economic inequality.<sup>21</sup> In addition to prodding Congress into action, public demonstrations coerced the executive branch into passing initiatives that promote fair treatment in employment.<sup>22</sup>

---

<sup>18</sup> It was not until 1964 that a comprehensive scheme prohibiting private sector discrimination was enacted. *See* 42 U.S.C. § 2000e (2006). Subsequent amendments expanded Title VII's coverage to public employers, and government contractors were regulated by executive order. *See*, for example, E.O. 11,246, 30 Fed. Reg. 12,319 (1965).

<sup>19</sup> *See* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527, 527-29 (2014) (listing some pivotal civil rights events that helped to pave the way for an equal employment opportunity law in 1964).

<sup>20</sup> The Montgomery bus boycott and the "buy where you can work" campaigns are examples of protest activities that seek to rob businesses of economic relationships or profit they generate from boycott supporters. *See* Kennedy, *supra* note 3.

<sup>21</sup> *See* Martin Luther King III, *Still Striving for MLK's Dream in the 21<sup>st</sup> Century*, WASH. POST, Aug. 25, 2010 (reflecting on his father's participation in the 1963 march on Washington for jobs and freedom, and noting that black economic prosperity remains a compelling challenge). Public protests for jobs pre-date and post-date the civil rights movement. *See* Susan Svrluga & Bill Turque, *D.C. Marchers Rally for Jobs and Justice*, WASH. POST, Oct. 15, 2011, (reporting on public dissatisfaction with poverty and economic inequality manifested in a protest march for jobs); Jon Grinspan, *How a Ragtag Band of Reformers Organized the First Protest March on Washington D.C.*, SMITHSONIAN.COM, May 1, 2014 (discussing the first March on Washington to protest high unemployment, and its leader Jacob Coxey's emergence as a visionary rather than a radical when the Roosevelt New Deal administration was in office).

<sup>22</sup> For example President Lyndon Johnson issued Executive Order 11,246 to regulate the discriminatory employment practices of private firms that contracted with the federal government. *See* 30 Fed. Reg. 12,319, 12,935 (1965). President Kennedy issued Executive Order 10,925, to prohibit the discriminatory hiring practices of government contractors. *See* 26 Fed. Reg. 1,977 (1961).

40 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]

Stimulated by civil rights demonstrations, Congress investigated the issue of workplace bias in 1964 and found that most employers did not hire blacks, or at best hired a token few.<sup>23</sup> Congress found that there were cases where “fine Negro men and women with distinguished records in our best universities have been unable to find any kind of job that will make use of their training and skills.”<sup>24</sup> Further, it was reported that whites with an eighth grade education had greater lifetime earnings than blacks with a four-year college degree.<sup>25</sup> Congress also found that discrimination was practiced by employers, employment agencies, and unions; that it affected the kinds of jobs and pay blacks could get; and produced high unemployment for blacks.<sup>26</sup> This discrimination significantly impacted the economic life of blacks and the nation. Specifically, it condemned blacks to poverty,<sup>27</sup> and it robbed the nation of billions of dollars of the productive capacity of blacks.<sup>28</sup>

These Congressional findings served as the foundation for Title VII of the 1964 Civil Rights Act that prohibits discrimination on the basis of race, sex, religion, color, and national origin.<sup>29</sup> Title VII has been instrumental in advancing the international principle of nondiscriminatory employment articulated in the UDHR and ICESCR, by removing both the overt and subtle barriers to equal employment opportunity,<sup>30</sup> but it has not been a panacea.<sup>31</sup>

---

<sup>23</sup> See 110 CONG. REC. 7206 (1964) (reporting that “[t]he preponderance of cases involve a 100 percent-white situation, where employers have refused to hire or promote a single Negro worker, or unions have barred Negroes from entering a craft or receiving apprenticeship training. In other cases there has been token integration only, to provide the pretense rather than the reality of nondiscrimination.”) *Id.*

<sup>24</sup> See 110 CONG. REC. 6547 (1964).

<sup>25</sup> See 110 CONG. REC. 7204 (1964).

<sup>26</sup> See 110 CONG. REC. 6547 (1964).

<sup>27</sup> See 110 CONG. REC. 7204 (1964) (reporting that “economics is at the heart of racial bias. The Negro has been condemned to poverty because of lack of equal job opportunities. This poverty has kept the Negro out of the mainstream of American life.”) *Id.*

<sup>28</sup> See 110 CONG. REC. 6562 (1964) (reporting that \$13 billion could be added to the gross national product if the skills of blacks were fairly utilized).

<sup>29</sup> See 42 U.S.C. § 2000e-2(a) (2006).

<sup>30</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that



## 2016] SECURING WORKERS' ECONOMIC RIGHTS 41

Disparities in work opportunities and pay persist,<sup>32</sup> and there is evidence that discrimination is responsible for some of these lingering disparities.<sup>33</sup> Title VII and other antidiscrimination laws remain challenged by economic developments and practices that Congress did not contemplate. For example, employers' reliance on criminal or credit records to deny job opportunities, has presented a new challenge for minorities.<sup>34</sup> Public protest about these practices,

---

Title VII's prohibitions were not limited to intentional workplace discrimination but also cover neutral practices that produced discriminatory consequences). *See also* John J. Donohue III, *The Impact Of Federal Civil Rights Policy On The Economic Status Of Blacks*, 14 HARV. J.L. & PUB. POL'Y 41, 47 (1991) (stating that Title VII increased employment opportunities for blacks by changing the discriminatory conduct of employers).

<sup>31</sup> *See* Brown, *supra* note 19, at 549 (attributing little diversity in certain professions to the weaknesses of Title VII); Donald Tomaskovic-Devey & Kevin Stainback, *Discrimination And Desegregation: Equal Opportunity Progress In U.S. Private Sector Workplaces Since The Civil Rights Act*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 51 (2007) (noting that although many commentators have concluded that Title VII increased job opportunities for minorities, others have expressed concerns that the progress under the law has been too slow or has stagnated); Angela Onwuachi-Willig, *When Different Means The Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Test*, 50 CASE W. RES. L. REV. 53, 72-73 (1999) (using income disparities between blacks and whites and unemployment data to show that Title VII did not help most blacks, even if it contributed to the emergence of a black middle class). Large disparities in wages persist between the races, and questions persist about the extent to which discrimination contributes to those disparities. *See* News Release 16-0111, U.S. Dep't of Lab., Bureau of Lab. Stat., Usual Weekly Earnings Of Wage And Salary Workers Fourth Quarter 2015 (Jan. 22, 2016) (reporting that "median weekly earnings for black men working at full-time jobs was \$674 per week or 72.4 percent of the median for white men (\$931). The difference was less among women, as black women's median earnings (\$621) were 83.4 percent of those for white women (\$745)"). *See also* Andrea Orr, *Why Do Black Men Earn Less?*, ECON. POL'Y INST. (Mar. 3, 2011), [http://www.epi.org/publication/why\\_do\\_black\\_men\\_earn\\_less/](http://www.epi.org/publication/why_do_black_men_earn_less/) (reporting research that shows that although education and other factors explain wage discrepancies between blacks and whites, race still contributes to blacks receiving lower pay).

<sup>32</sup> *See* Usual Weekly Earnings Of Wage And Salary Workers Fourth Quarter 2015, *supra* note 31. *See also* Willig, *supra* note 31.

<sup>33</sup> *See* Orr, *supra* note 31.

<sup>34</sup> For example, neutral practices that can have discriminatory effects continue to exclude minorities from employment opportunities without violating the law. Employers are increasingly using arrest or conviction records, or poor

and others that are impoverishing workers, can influence employers and legislators to end such practices.<sup>35</sup>

## II. *Public Protest Via Unions*

Blacks have not been alone in the quest for favorable pay and work conditions. Industrialization, competitive pressures, and the drive to increase profits have contributed to low pay and oppressive work conditions for workers of all races. Unions were formed as a response to corporate control of the rules of work and pay, and public protest has been an indispensable union strategy for improving the economic condition of workers.

The UDHR and the ICESCR embrace the rights to form and join unions as universal rights. In some countries, however, union activities remain dangerous to life and limb,<sup>36</sup> while in others,

---

credit history, as a basis for denying job opportunities, and this contributes to the high unemployment rates of minorities who are disproportionately plagued by these problems. One study showed that employer reliance on prison records resulted in significantly fewer invitations for interviews of blacks than whites, and this translated into fewer chances for blacks to build the rapport with employers that is essential to job acquisition. See Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009). See also EEOC v. Freeman, 961 F. Supp. 2d 783, 786-88 (D. Md. 2013) (detailing some of the Equal Employment Opportunity Commission's (EEOC) litigation efforts to curb employer reliance on worker's criminal and credit histories that allegedly have a disparate impact on blacks); Douglas L v. Se. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007) (holding that an employer's termination of a bus driver because of a past criminal conviction was consistent with business necessity and therefore did not violate the laws prohibiting racial discrimination in employment).

<sup>35</sup> Employer reliance on unemployment status to deny job opportunities has also been a concern for minorities who have a much higher rate of unemployment than whites. See E. Ericka Kelsaw, *Help Wanted: 23.5 Million Unemployed Americans Need Not Apply*, 34 BERKELEY J. EMP. & LAB. L. 1 (2013) (discussing increasing employer reliance on unemployment status to denying job opportunities, the state and federal legislative responses to this practice, and proposing the expansion of antidiscrimination laws to address this issue).

<sup>36</sup> Colombia is regarded as the most dangerous country in the world for anyone advocating unionism. See Daniel Richard Kuehnert, *The International*

## 2016] SECURING WORKERS' ECONOMIC RIGHTS 43

unionism receives widespread support.<sup>37</sup> The right to join unions to obtain favorable work conditions and pay was itself a product of public protest. Low pay and poor working conditions incentivized workers to organize and join unions, sometimes resulting in violent clashes between workers and their employers.<sup>38</sup> Employers vigorously oppose unions in order to reduce their labor costs, and unions generally advocate for better pay and work conditions that drive up the price of labor.<sup>39</sup>

In 1935, long before the UDHR or ICESCR were adopted, Congress concluded that it was in the national interest to legitimize the anticompetitive activities of unions. Congress found that workers did not have the ability to secure just compensation and safe working conditions as individual bargainers.<sup>40</sup> The imbalance in bargaining

---

*Labor Organization and a Possible End to Violence Against Union Members in Colombia*, 7 WASH. U. GLOBAL STUD. L. REV. 593 (2008) (providing data that shows a history of significant violence against union members in Colombia, and evaluating whether a cooperative agreement signed by Colombian unions, employers, and the International Labor Organization is the antidote for this problem).

<sup>37</sup> See Carol Daugherty Rasnic, *Shootout At The ECJ Corral: Management 4, Labor 0; European Labor Dispute Law After Viking Line*, 9 S.C. J. INT'L L. & BUS. 353, 355-56 (2013) (discussing the high levels of union membership in Europe, and the significant powers unions wield in the workplace, in juxtaposition to the status of unions in the United States).

<sup>38</sup> See, e.g., Ben Mauk, *The Ludlow Massacre Still Matters*, NEW YORKER, Apr. 18, 2014 (reflecting on a strike by coal miners for better pay, working hours and working conditions that eventually led to violence and the death of many miners and their family members).

<sup>39</sup> See Sachs, *supra* note 8, at 178-79, (discussing the role of collective bargaining in raising the labor costs of employers and its associated anticompetitive effects that lead to employer opposition to unions); RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 3 (reporting the business view that unions extract wage increases from employers resulting in reduced productivity and employment).

<sup>40</sup> See 29 U.S.C. §§ 151-169 (2006) (reporting the Congressional finding that “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates

44 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]

power between employers organized in the corporate form and workers contracting as individuals needed to be tempered by giving workers the right to pool their strength. It was determined that some leveling of the playing field was necessary in order to promote the national interest in industrial peace, and to avoid disruptions to commerce associated with labor strife.<sup>41</sup>

The National Labor Relations Act (NLRA) was passed in 1935 to protect employees who engage in union or other concerted activities, and to promote collective bargaining as the antidote for labor strife.<sup>42</sup> The NLRA gives workers the right to bargain collectively about wages, work hours, and other terms and conditions of employment.<sup>43</sup> The Act also protects the right of workers to strike.<sup>44</sup> Traditionally, the right to picket and strike was the workers' most potent weapon to secure union recognition, and better pay and work conditions.<sup>45</sup> An effective strike, which is essentially a public protest or publicity campaign, could freeze or disrupt an employer's operation and cause significant economic losses.<sup>46</sup> But the

---

and working conditions within and between industries.”) *Id.* at § 151.

<sup>41</sup> *See id.*

<sup>42</sup> Congress determined that “the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.” *Id.* § 151. In 1947, the NLRA was amended to expressly confirm the right of employees to also refrain from organizational activities. *Id.* § 157.

<sup>43</sup> *See id.* § 158 (d).

<sup>44</sup> *See* 29 U.S.C. § 163 (2006) (stating that nothing in the NLRA “shall be construed so as either to interfere with or impede or diminish in any way the right to strike”).

<sup>45</sup> *See* Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. C.R.-C.L. L. REV. 60 (2014) (recounting the tremendous success workers had in getting their voices heard through mass picketing and sit-down strikes).

<sup>46</sup> *See id.* at 75 (discussing the sit-down strike at General Motors in 1937 that forced a shutdown and persuaded the company to enter into labor talks). *See also* Karl Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 778 (1985)

effectiveness of this protest mechanism has been in a steady decline.

A huge drop in union membership has deprived unions of their dominance in many occupations, along with their power to launch successful strikes.<sup>47</sup> Second, competition to attract businesses both between states and internationally has produced legal regimes that are more hospitable to employer interests than those of workers or unions. For example, the growth of right-to-work laws in the United States has deprived workers of the incentive to financially support unions because they could benefit from union representation without paying for it.<sup>48</sup> Lower labor costs in other countries have combined with technological developments to give employers operating alternatives that put the jobs of striking workers at risk.<sup>49</sup> These pressures on worker protest are aggravated by competition for jobs during periods of recession or high unemployment that allow employers to bid down the price of labor.

The flexibility of employers under the NLRA to replace

---

(reporting that businesses complained that the NLRA promoted strikes that were harmful to society).

<sup>47</sup> See News Release 16-0158, U.S. Dep't of Lab., Bureau of Lab. Stat., Union Members—2015, Jan. 28, 2016 (reporting that union membership has declined from a rate of 20.1 percent in 1983 to 11.1 percent in 2015). See also, 39 DAILY LAB. REP., Feb. 29, 2016 (reporting that the dominant labor union, the AFL-CIO, experienced membership decline of 66,262 in 2015, continuing the downward trend from 2014 when it lost about 43,000 members). For a good comparison of union density rates around the world, and the forces that contribute to widespread or low worker participation, see Jelle Visser, *Union Membership Statistics in 24 Countries*, 38 MONTHLY LAB. REV. 38 (2006). For a discussion of the importance of the strike weapon to the success of the labor movement, see James Gray Pope, *How American Workers Lost the Right to Strike, And Other Tales*, 103 MICH. L. REV. 518 (2004).

<sup>48</sup> There has been a steady increase in state laws that prohibit unions from requiring workers they organize to provide financial support. These right-to-work laws are promoted and adopted on the premise that they make the state more attractive to businesses. See Bebe Raupe, *West Virginia Becomes Right-to-Work State After Veto Override*, 29 DAILY LAB. REP. A-11, Feb. 12, 2016.

<sup>49</sup> See Kenneth G. Dau-Schmidt, *Labor Law 2.0: The Impact of New Information Technology on the Employment Relationship and the Relevance of the NLRA*, 64 EMORY L.J. 1583, 1585-86 (2015) (discussing how information technology has promoted employers' departure from traditional long-term employment relationships).

striking workers or change the operating locales of their businesses has had a chilling effect on the protest activities of workers who are unhappy with their pay and work conditions.<sup>50</sup> Strike activity is down significantly and there are no signs that global labor competition that drives down wages will decrease in the future. Further, the NLRA does not protect strikers whose goal is to gain better compensation or economic rewards. Under the NLRA, “economic strikers” are unprotected from discharge or replacement,<sup>51</sup> and this rule gives employers the flexibility to continue their operations uninterrupted when workers take it to the streets.<sup>52</sup>

The NLRA also does not impose any economic responsibility on employers to pay a fair or favorable wage. The NLRA simply provides that employers must bargain about wages, hours and other terms and conditions of employment.<sup>53</sup> The law requires employers to meet with unions and bargain in good faith, but it does not regulate the substantive terms of their discussions.<sup>54</sup> Moreover, the NLRA does not permit the enforcement agency, the National Labor Relations Board (NLRB), to provide substantive contract terms as a remedy for breach of this obligation.<sup>55</sup> Employers are not required to make any concessions at the bargaining table, nor are they required

---

<sup>50</sup> See Kati Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?* 59 AM. U.L. REV. 1, 2 (2009) (recounting scholarly criticism that the NLRA has been ineffective in protecting workers’ collective activity, and has not been responsive to structural changes in the workforce or the economy).

<sup>51</sup> See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

<sup>52</sup> See *id.* at 345-46 (holding that it is an employer’s legal prerogative to replace workers striking for better wages, and retain the striker replacements after the strike ends).

<sup>53</sup> See *NLRB v. Insurance Agents Int’l*, 361 U.S. 477, 483-85 (1980) (noting that as originally enacted, the NLRA did not expressly state that employers were obligated to bargain with unions, but such an obligation was inferred from the provisions that detail when a union must be recognized, and a provision that made it illegal to refuse to bargain).

<sup>54</sup> See *id.* at 485-86 (holding that Congress did not regulate the substantive terms parties must include in their contract).

<sup>55</sup> See *id.* See also *H.K. Porter v. NLRB*, 397 U.S. 99 (1970) (holding that the NLRB’s remedial authority did not include the power to impose contract terms on employers who engage in bad faith bargaining). *Id.* at 103-08.

## 2016] SECURING WORKERS' ECONOMIC RIGHTS 47

to make a contract.<sup>56</sup> Whether a contract results from bargaining depends on the relative bargaining powers or strength of the parties. Essentially, market forces determine whether unions are able to improve pay and work conditions for the employees they represent.

Experience has shown that the NLRA model of labor relations is not effective in advancing the international principles of favorable pay and work conditions. Millions of unrepresented workers who cannot bargain about wages and benefits earn close to the minimum wage which is not enough to support them.<sup>57</sup> And, unionized workers increasingly face contract proposals and contract results that decrease the rewards for their labor, or provide pay that is insufficient to support their basic needs. Concession bargaining by employers has become a trend, and market prices for labor are viewed as the desirable goal of employers now competing in a global economy.<sup>58</sup>

The inability of unions to successfully organize millions of low-wage workers under the NLRA has left workers with the historical option of public protest to advance their claims. Low-wage workers in the food preparation and retail sectors, in particular, have begun to appeal to public sentiment to coerce employers into paying more. Fast food workers and others, sometimes with union backing, have begun publicizing their demand for a \$15 per hour pay structure.<sup>59</sup> Using work stoppages, walk-out campaigns, and other

---

<sup>56</sup> See 29 U.S.C. §158 (d) (providing that the bargaining duties of the parties “does not compel either party to agree to a proposal or require the making of a concession”).

<sup>57</sup> See Rhonda Smith, *Low Wages, Debt Loads Preventing Families From Meeting Their Basic Needs, Report Says*, 28 LAB. REL. WEEK, Sept. 3, 2014 (reporting the significant gap between the federal minimum wage and living wage requirements around the country which typically exceed \$15 per hour).

<sup>58</sup> See Michelle Amber & Susan R. Hobbs, *Is Collective Bargaining Headed for Crisis in 2016?*, 18 DAILY LAB. REP., Jan. 28, 2014 (reporting on the practice of concession bargaining and employers' willingness to lock out their workers to obtain their demands); *Union OKs Cost-Saving Deal to Keep Jobs at United*, 41 DAILY LAB. REP. A-9, Mar. 3, 2015 (reporting that the union representing workers at United Airlines accepted pay and benefit cuts in order to protect its workers' jobs).

<sup>59</sup> See Rhonda Smith, *New Coalition to Push for More Changes at Wal-Mart*, 180 DAILY LAB. REP., Sept. 17, 2015 (reporting the expansion of a grassroots

media events, workers are trying to persuade their employers to grant them more favorable rewards for their labor.<sup>60</sup> Workers have also targeted shareholders and politicians with their protest activities,<sup>61</sup> in addition to highlighting the dramatic disparities between their pay and that of senior executives.<sup>62</sup> And these protest activities have begun to pay dividends. Pay increases at McDonald's and Wal-Mart have been attributed to these protests.<sup>63</sup>

### *III. The Impact of Independent Contracts and Gig Work on the Fair Pay Principle*

The new economy will continue to place pressure on wages and other rewards for labor, so workers can adopt public protest as a viable mechanism for limiting practices and policies that impair their ability to receive just compensation. As employers continue to devise pay practices that further limit the rewards for labor because of competition or shareholder pressure, workers need an alternative to regulatory gridlock, and union impotence. Legislative failure to raise the minimum wage and more concession bargaining by unions

---

campaign led by former union leaders to secure a \$15 per hour wage for Wal-Mart workers).

<sup>60</sup> See Michael Rose, *Wal-Mart Illegally Fired Workers Who Protested*, *ALJ Finds*, 14 DAILY LAB. REP. A-3, Jan. 22, 2016 (reporting a finding by the National Labor Relations Board that Wal-Mart improperly disciplined or discharged workers who took off from work to protest pay and work conditions at the company's annual shareholder meeting).

<sup>61</sup> See Rhonda Smith, *Fight for \$15 Actions Planned in Houston at Debate*, 37 DAILY LAB. REP. A-11, Feb. 25, 2016 (reporting the plan of fast-food workers to strike, march, and rally at the site of a Republican presidential debate to highlight their condition of poverty and their need for \$15 per hour wages).

<sup>62</sup> See Michael Rose, *CEO Made 373 Times What Average Worker Did in 2014*, *Annual AFL-CIO Analysis Finds*, 29 LAB. REL. WEEK 1055, May 20, 2015 (reporting the disparity between CEO pay at Wal-Mart, calculated at \$9,323 per hour compared to that of retail workers starting pay of \$9 per hour).

<sup>63</sup> See Shannon Pettypiece & Rhonda Smith, *Wal-Mart Plans to Give Raises to 1.1 Million U.S. Workers*, 12 DAILY LAB. REP. A-3, Jan. 20, 2016 (reporting one policy analyst's conclusion that the "growing protests we've seen by Wal-Mart workers, and increasingly public pressure, has really pushed the world's largest employer to raise wages and improve [work] schedules.").



translate into greater economic insecurity for workers. Better pay and benefits are critical components for ensuring that workers have “an existence worthy of human dignity.”<sup>64</sup>

The new economy is increasingly promoting the use of independent contractor relationships to help businesses reduce the costs and risks associated with hiring full-time employees.<sup>65</sup> Workers contracted as independent contractors do not get the social security, workers' compensation, medical, and unemployment insurance benefits typically provided to full-time employees.<sup>66</sup> In addition to legitimate practices that hinder the prospect of economic security from labor, workers are now facing practices such as wage conspiracies designed to limit their ability to change jobs or gain pay increases.<sup>67</sup> Low-wage workers are also regularly encountering practices that deny them the minimum compensation required by law.<sup>68</sup>

---

<sup>64</sup> See Smith, *supra* note 57 (reporting research that showed that even a doubling of the minimum wage of \$7.25 per hour would not be enough to provide a living wage for a single individual in eight of ten states that were evaluated).

<sup>65</sup> Although it was utilized less in the past, the practice of buying labor through independent contracts to avoid wage regulations is a longstanding one. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). For example, Federal Express successfully classified package delivery drivers as independent contractors in one case. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

<sup>66</sup> See DOL, *Iowa Collaborate to Prevent Misclassification*, 27 LAB. REL. WEEK 155, Jan. 23, 2013.

<sup>67</sup> See Tiffany Friesen Milone, *Apple, Google to Pay \$415 Million in No-Poach Case*, 171 DAILY LAB. REP. A-7, Sept. 3, 2015 (reporting the settlement of a lawsuit by workers alleging that these two technology giants and others conspired to limit worker's mobility by agreeing “not to poach each other's employees”). Ebay and Intuit also agreed to settle a lawsuit that made similar allegations. See *Intuit and Ebay Settle California's No-Poach Suit*, 172 DAILY LAB. REP. A-12, Sept. 4, 2015. Animators have also sued film industry employers alleging that they conspired to suppress wages. See *In re Animation Workers Antitrust Litigation*, N.D. Cal., No. 5:14-cv-04062, Aug. 20, 2015.

<sup>68</sup> Lawsuits by workers alleging that they were denied overtime pay, required to work off-the-clock, or classified as interns or independent contractors and not paid the minimum wage, are now common. See *e.g.*, David McAfee, *CVS Workers Granted Approval of \$900,000 Settlement in Wage and Hour Class Action*, 29 LAB. REL. WEEK 496, Mar. 11, 2015 (reporting the settlement of workers' claims

50 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]

Despite the proliferation of practices that impede the realization of the fair pay goal, Congress has not acted to aid workers whose productivity has increased, but whose wages have stagnated or declined.<sup>69</sup> The national minimum wage stands at \$7.25 per hour, and a substantial part of the labor force earns close to the minimum wage.<sup>70</sup> Pay scales at or close to the current minimum wage level undoubtedly cannot provide an individual with an existence worthy of human dignity. The costs to support oneself or a family greatly exceed the minimum wage employers are required to pay for labor.<sup>71</sup> And although most businesses acknowledge that the current minimum wage is inadequate compensation for labor,<sup>72</sup> Congress has failed in recent years to legislate an increase in the minimum wage.<sup>73</sup>

---

that they were not paid for off-the-clock work); Lisa Nagele, *Court Approves \$30 Million Deal Settling Publix Managers' FLSA Overtime Claims*, 29 LAB. REL. WEEK 295, Feb. 11, 2015 (reporting settlement of workers claims that their employer did not comply with the wage requirements of the Fair Labor Standards Act); *New York Papa John's Franchise Owner To Pay \$2.1 Million to Resolve Pay Case*, 29 LAB. REL. WEEK 493, Mar. 11, 2015 (reporting a judgment against the employer for underpaying delivery workers); David McAfee, *Care Facility Owners Fined \$2.2 M for 'Wage Theft'*, 152 DAILY LAB. REP. A-7, Aug. 7, 2015 (reporting that oppressive wages of \$1.25-\$1.80 per hour, and work schedules of seven days a week and 24-hour shifts, resulted in fines for three residential care facilities).

<sup>69</sup> See Rhonda Smith, *NELP: Real Wage Declines Continued in 2014*, 171 DAILY LAB. REP. A-10, Sept. 3, 2015 (reporting that real wages fell for American workers by 4 percent from 2009-2014, and that low-wage workers were hardest hit by this decline); Steven Greenhouse, *Our Economic Pickle*, N.Y. TIMES, Jan. 13, 2013, at SR5 (reporting that although productivity and profits have increased, wages have remained flat).

<sup>70</sup> See Smith, *supra* note 69 (reporting the assessment that "about 64 million workers nationwide are paid less than \$15 an hour").

<sup>71</sup> Low-wage workers earn between \$8 and \$10 per hour, but studies show that much higher wages are needed to provide a most basic existence in most parts of the country. See Smith *supra* note 57.

<sup>72</sup> See Genevieve Douglas, *Most Employers Support Raising Minimum Wage*, 180 DAILY LAB. REP. A-5, Sept. 17, 2015 (reporting that 64 percent of surveyed employers responded that the minimum wage should be increased, with 61 percent saying that \$10 per hour is fair, while 11 percent said \$15 per hour is fair).

<sup>73</sup> Recent proposals by both Democrats and Republicans have been defeated. See *The Raise of The Wage Act*, H.R. 2150, 114th Cong. (1st Sess. 2015) (proposing an increase to \$12 per hour over a four-year period); Fair Minimum

## 2016] SECURING WORKERS' ECONOMIC RIGHTS 51

Both Republican and Democratic proposals for increases have been rejected, leaving workers unable to support themselves with their labor.<sup>74</sup> At the same time, public protest has made some private employers more progressive than Congress on the issue of pay.<sup>75</sup>

Currently very little is being done by any branch of government to advance the economic rights of workers. The Executive branch has made lukewarm efforts to raise the base pay of federal workers and employees of federal contractors.<sup>76</sup> But Congress has failed to legislate a minimum wage increase, and the Supreme Court has promoted bilateral arbitration of wage disputes, which impedes the ability of low-wage workers to vindicate their wage claims against their employers.<sup>77</sup> The Court's embrace of arbitral resolution of disputes and its endorsement of class action bans have made it very difficult for low-wage workers to pursue their

---

Wage Act of 2013, H.R. 1010, 113th Cong. (1st Sess. 2013) (proposing an increase to \$10.10 per hour over a two-year period). Chris Opfer, *Collins Working on \$9 Minimum Wage Hike, As Counter to Democrats' \$12 Per Hour Plan*, 78 DAILY LAB. REP. A-14, Apr. 23, 2015 (reporting a Republican senator's \$9 proposal); See Ben Penn, *Trumka Says Labor Still in Crisis, Call For Bolder Action by Obama and Congress*, 28 LAB. REL. WEEK 1883, Sept. 3, 2014 (reporting a union leader's concern about political inaction on the issue of suppressed wages).

<sup>74</sup> See *id.*

<sup>75</sup> See *supra* note 72 and accompanying text.

<sup>76</sup> See Hassan Kanu, *Wage Woes Make Federal Workers Wary of GOP Victory*, 28 DAILY LAB. REP. A-8, Feb. 11, 2016 (reporting the union president's position that federal employees deserve a 5.3 percent increase in 2017 to keep up with inflation); Ian Smith, *Federal Employee Groups Disgusted With President's Proposed Pay Raise*, <http://blogs.fedsmith.com/2015/09/02/federal-employee-groups-disgusted-with-presidents-proposed-pay-raise/>, Sept. 2, 2015 (reporting the displeasure of federal employee advocacy groups and unions with President Obama's proposed 1 percent pay increase for federal employees whose wages have not kept pace with the cost of living). See also Executive Order 13,658, 79 Fed. Reg. 60,634, Feb. 20, 2014 (providing for a \$10.10 minimum wage for workers of federal contractors).

<sup>77</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2312 (2013) (holding that a contractual ban on class claims is legal although it made it practically impossible for weak contract partners to vindicate their antitrust claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that a class action ban in a consumer contract must be enforced although its practical effect was to insulate the business from consumer claims of wrongdoing).

52 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11

wage claims.<sup>78</sup>

Contemporaneous with regulatory malaise, labor contracting practices are emphasizing contractual models that increase long-term worker vulnerability. Responding to the “on demand” economy, businesses are using “internet-based platforms to assign individuals seeking work to businesses and individuals seeking services, controlling relevant aspects of the work and working conditions.”<sup>79</sup> There has been a steady growth of app-based businesses that emphasize independent contracting arrangements that leave workers in an economically vulnerable position.<sup>80</sup> These arrangements classify the worker as a “partner” rather than an employee, and the business is classified as a “platform” rather than an employer.<sup>81</sup>

It is contended that the millions of workers who work for app-based businesses are entrepreneurs themselves whose services would be underutilized without the help of web-based enterprises.<sup>82</sup> Further, it is argued such workers are paid well, and they have the flexibility to structure their income-generating activities to suit their own needs.<sup>83</sup> Critics respond that app-based workers are really employees wrongly classified as independent contractors, and are therefore denied the protections and benefits of being classified as

---

<sup>78</sup> See *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335 (11th Cir. 2014), cert. denied, 134 S. Ct. 2886 (2014) (holding that Supreme Court precedents dictate that judges enforce arbitration agreements with class action bans against workers seeking to vindicate their minimum wage and overtime compensation claims under the Fair Labor Standards Act). Because wage claims typically involve small sums, the costs to arbitrate will often greatly exceed any potential recovery, thereby making bilateral arbitration an act in futility. See *Am. Express*, 133 S. Ct. at 2313-2320 (Kagan, J., dissenting).

<sup>79</sup> See Rhonda Smith, *On-Demand Economy Seen As Problematic for Many Workers*, 29 LAB. REL. WEEK 1900, Sept. 16, 2015.

<sup>80</sup> See Tatiana Darie, *More Americans Work in Gig Economy Than Live in Georgia*, 33 DAILY LAB. REP. A-3, Feb. 19, 2016 (reporting that between 2012 and 2015, “[a]n estimated 10.3 million Americans earned income through web-based platforms like Uber and Airbnb”).

<sup>81</sup> See Joel Rosenblatt, *Uber Can’t Force Arbitration on California Driver*, 182 DAILY LAB. REP. A-6, Sept. 21, 2015.

<sup>82</sup> See Smith, *supra* note 79.

<sup>83</sup> See *id.*

employees.<sup>84</sup> And some workers have contested their classification as independent contractors, and have sued alleging that they were denied pay and other benefits that are legally mandated for employees.<sup>85</sup> As regulators and the courts ponder the controlling rules for such gig workers, protest activities aimed at businesses and Congress should be continued in order to break down arbitrary barriers to worker economic security.

Government indifference or ineffectiveness in promoting workers' economic security has made the public protest model an essential tool for promoting the economic interests of workers and the international principle of fair pay. The success of protest activity by fast-food and retail workers is one example of the potential of such activism. Other examples include the campaign by former prisoners to secure "ban the box" policies that prohibit employers from requiring criminal histories in initial job applications,<sup>86</sup> and the coordinated organizational campaign to secure legislation prohibiting discrimination against the unemployed.<sup>87</sup> The successes of these campaigns should inspire workers to expand their activism for better compensation for their labor.

---

<sup>84</sup> *See id.*

<sup>85</sup> *See* Ben Penn, *Uber Trial Marks Next Phase in Gig Worker Status*, 30 DAILY LAB. REP. A-3, Feb. 16, 2016 (discussing the employment and tax policy implications any court decision about Uber's classification of drivers as independent contractors).

<sup>86</sup> *See* Jonathan J. Smith, *Banning The Box But Keeping The Discrimination? Disparate Impact And Employers' Overreliance On Criminal Background Check*, 49 HARV. C.R.-C.L.L. REV. 197, 211-13 (2014) (describing the advocacy activities of former prisoners and other civil rights activists to limit the harmful effects of employer reliance on criminal histories).

<sup>87</sup> *See* Kelsaw, *supra* note 35, at 14 (reporting the online and signature-collection campaign of advocacy organizations seeking to prohibit employment discrimination against the jobless).

*Conclusion*

Public protest has been instrumental in getting employers, Congress and the Executive Branch to respond to the hardships workers face from low pay and poor work conditions. But the gains from past protests and the laws they produced are not enough to meet the current needs of workers. The economy has changed, work and pay practices have evolved, but the applicable regulations have not. With the advent of global wage competition, the prospects for advancing a universal fair pay principle have declined. Although it is broadly acknowledged that a large portion of the workforce cannot support itself under existing pay structures, there have been few governmental attempts to facilitate change. The small gains that workers have made are attributable to their protest activities, so workers should build on these efforts and expand them to Congress in order to get a national and long-term response to their plight.