

NOTES & COMMENTS

GLOBAL JUSTICE THROUGH GLOBAL ORGANIZING: HOW LESSONS FROM OUR LABOR PAST CAN TURN RHETORIC INTO REALITY

by
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I. INTRODUCTION

In a world sensitive to cultural pluralism and the need for tolerance, are principles of universal justice possible? The simple answer is yes. The more complex answer is that global justice is only possible if traditional cosmopolitan ideals are moderated to account for the dilemmas of cultural pluralism. This Comment discusses how this might be accomplished by building on John Rawls's arguably strict communitarian conception of global justice in *The Law of Peoples* with his second principle of domestic justice in *A Theory of Justice*. This Comment argues that a reconstructed theory of global justice requires us to assist in establishing just, private economic institutions which necessarily entails workers' right to a living wage and to be free from discrimination. In the end, I will show that global organizing strategies consistent with "pure and simple" unionism are the most likely and feasible means capable of reaching our global justice goals.

Part II explores Rawls's two theories of justice with as much brevity as possible to provide needed context for later discussion. Part III proposes a reconstructed version of Rawls's theories, seeking to meld Rawls's duty of humanitarian assistance with his second principle of domestic justice in order to establish concrete, workable principles of global justice. Under this reconstructed theory, global justice does not require an absolute guarantee of universally equal basic rights. But, it does require our assistance in establishing a just workplace. Part IV will scrutinize possible mechanisms to ensure these principles of justice such as the International Labour Organization, corporate self-governance, and International Framework Agreements. In finding those mechanisms insufficient, Part V considers whether global organizing is a sufficient mechanism and con-

cludes that pure and simple unionism¹ promises global justice. This part explores labor strategies during the “lawless” turn of the century to analogize to the global playground of today.

II. RAWLS’S THEORIES OF JUSTICE ESTABLISH A FOUNDATION FOR THE ANALYSIS IN THIS COMMENT

In *A Theory of Justice*, Rawls derives two principles of justice from a thought experiment meant to illustrate what those in a democratic, liberal society² would choose if they were behind a “veil of ignorance.”³ This is what Rawls describes as the “original position.”⁴ He explains that:

The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.⁵

Rawls contends that those in the original position will rationally adopt two principles of justice: (1) “[E]ach person is to have an equal right to the most extensive scheme of equal basic liberties compatible

¹ The phrase “pure and simple” refers to a labor philosophy that adheres to the notion that gains for workers are best obtained by action that directly affects working conditions, rather than focusing on broader social reforms sought through politics. The phrase was coined by union leader Samuel Gompers in an address to the American Federation of Labor convention attendees in Detroit. SAMUEL GOMPERS, *SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY* 385 (1925). Leading up to the convention, Gompers had denied an application for charter because included in the list of unions belonging to the proposed charter was the “New York section of the Socialist Labor Party.” *Id.* (internal quotation marks omitted). Gompers felt strongly that “no political organization had a right to representation in the trade union movement.” *Id.* (internal quotation marks omitted). When making his case against the charter at the convention he argued, “I am willing to subordinate my opinions to the well being, harmony, and success of the labor movement; I am willing to sacrifice myself upon the altar of any phase or action it may take for its advancement; I am willing to step aside if that will promote our cause; but I cannot and will not prove false to my convictions that the trade unions pure and simple are the natural organizations of the wage workers *to secure their present and practical improvement and to achieve their final emancipation.*” *Id.* (emphasis added) (internal quotation marks omitted).

² See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 14 (Erin Kelly ed., 2001) [hereinafter *JUSTICE AS FAIRNESS*] (“[W]e start with the organizing idea of a society as a fair system of cooperation between free and equal persons.”).

³ *Id.* at 15.

⁴ *Id.*

⁵ JOHN RAWLS, *A THEORY OF JUSTICE* 118 (rev. ed. 1999) [hereinafter *THEORY OF JUSTICE*].

with a similar scheme of liberties for others,”⁶ and (2) “Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).”⁷ The first principle is a “protection of equal basic rights,” whereas the second principle addresses “the distribution of social and economic resources.”⁸ The rational actor would adopt these principles because, according to Rawls, “[n]ot only do the parties protect their basic rights but they insure themselves against the worst eventualities.”⁹

The first principle focuses on establishing a “basic structure” that “specifies and secures citizens’ equal basic liberties” with a “just constitutional regime.”¹⁰ Essentially, the role of the first principle is to establish a guarantee of equal basic liberties through a society’s political institutions.¹¹ In Rawls’s view, the first principle takes priority over the second because “the fair value of . . . political liberties ensures that citizens . . . have roughly an equal chance of influencing the government[] . . . irrespective of their economic and social class.”¹² Additionally, his view presupposes that conditions that affirmatively protect political liberties will foster the political will necessary to support “effective political institutions.”¹³

The “fair equality of opportunity” condition in the second principle goes beyond that. While the first principle may guarantee all persons the opportunity of public office, fair equality of opportunity guarantees that “all should have a fair chance to attain” that public office.¹⁴ As Rawls states, “Fair equality of opportunity here means liberal equality.”¹⁵ The second condition of the second principle—the difference principle—relates to economic inequalities.¹⁶ In Rawls’s words, “the distribution of wealth and income need not be equal, [but] it must be to everyone’s advantage.”¹⁷ This condition demands that if there is an inequality in wealth distribution, it must be to the benefit of the least advantaged. Rawls tries

⁶ *Id.* at 53.

⁷ JUSTICE AS FAIRNESS, *supra* note 2, at 42–43.

⁸ CATHERINE AUDARD, JOHN RAWLS 98 (2007).

⁹ THEORY OF JUSTICE, *supra* note 5, at 154.

¹⁰ JUSTICE AS FAIRNESS, *supra* note 2, at 48.

¹¹ *See id.* at 46. Rawls suggests that a society would create a list of constitutionally protected, equal basic liberties. His list contains the freedom of thought, liberty of conscience, right to vote and participate in politics, freedom to associate, rights related to physical and psychological integrity, and other rights “covered by the rule of law.” *Id.* at 44; *see also* AUDARD, *supra* note 8, at 95.

¹² JUSTICE AS FAIRNESS, *supra* note 2, at 46.

¹³ *Id.* at 47.

¹⁴ *Id.* at 43.

¹⁵ *Id.* at 44.

¹⁶ *See* THEORY OF JUSTICE, *supra* note 5, at 53.

¹⁷ *Id.*

to explain this concept with an illustration of an entrepreneur making more than an unskilled worker. He suggests that it is conceivable that the inequality is justified because the worker may benefit from the risk taken by the entrepreneur.¹⁸

Whereas *A Theory of Justice* provides principles to support just institutions and informs just distribution of goods within a society, Rawls argues that these principles should not be applied on the global scale.¹⁹ In fact, that sort of application would be consistent with a cosmopolitan view. Rawls points out that “[the cosmopolitan view] is concerned with the well-being of individuals, and hence with whether the well-being of the globally worst-off person can be improved.”²⁰ If the two principles of justice in *Theory* were applied globally, not only would there be redistribution amongst societies and within those societies, but application would assume that the global position would undoubtedly adopt equal basic rights and liberties for all.²¹ A strong cosmopolitan would advocate for this kind of application and result.²² Under that view, the concern for individuals “entail[s] a commitment to some form of global distributive equality . . . above the threshold of minimal adequacy.”²³ But Rawls does not agree because this view fails to account for the need for tolerance.²⁴ Further, he points out that we should not assume that all societies must be liberal in order to attain justice.²⁵

Instead, Rawls provides a theory for global justice that aims to show that both non-liberal and liberal societies would agree to recognize a general set of international principles.²⁶ These international principles address equality amongst peoples,²⁷ rather than individuals.²⁸ Rawls claims

¹⁸ *Id.* at 67–68.

¹⁹ See JOHN RAWLS, *THE LAW OF PEOPLES* 119–20 (1999) [hereinafter *LAW OF PEOPLES*].

²⁰ *Id.* at 120.

²¹ *Id.* at 82.

²² See KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* 10–11 (2004).

²³ *Id.* at 11.

²⁴ See *LAW OF PEOPLES*, *supra* note 19, at 82.

²⁵ *Id.* at 60, 82.

²⁶ See TAN, *supra* note 22, at 63. Rawls’s procedure is similar to that in *A Theory of Justice*. He sets up a thought experiment where representatives of the liberal societies are under a veil of ignorance. The representatives adopt eight principles that each society will adhere to. *Id.* The eight principles include: “Peoples are free and independent,” “Peoples are to observe treaties,” “Peoples are equal and are parties to the agreements that bind them,” “Peoples are to observe a duty of non-intervention,” “Peoples have the right of self-defense, but no right to instigate war for reasons other than self-defense,” “Peoples are to honor human rights,” “Peoples are to observe certain specified restrictions in the conduct of war,” and “Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having . . . just regimes.” *LAW OF PEOPLES*, *supra* note 19, at 37 (emphasis added); see also TAN, *supra* note 22, at 63 n.4.

²⁷ See *LAW OF PEOPLES*, *supra* note 19, at 41. “[T]he Law of Peoples conceives of . . . peoples . . . as the actors in the Society of Peoples, just as citizens are the actors in domestic society.” *Id.* at 23. Rawls’s conception of “peoples” includes both liberal

that “well-ordered peoples [would] simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives.”²⁹ Amongst these principles is that “[p]eoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.”³⁰ It seems the ultimate goal is to make it possible for all societies to establish their own just and stable institutions,³¹ which will support justice on the global scale. For Rawls, this requires minimal intervention amongst societies.³² He claims that once just and stable institutions are realized, “the Law of Peoples prescribes no further target such as, for example, to raise the standard of living beyond what is necessary to sustain those institutions.”³³

III. RECONSTRUCTING RAWLS TO INFORM CONCRETE PRINCIPLES OF GLOBAL JUSTICE

Rawls has been criticized for not going far enough in *The Law of Peoples*³⁴—that a global conception of justice requires more consideration for the individual and less tolerance for non-liberal societies.³⁵ On the other hand, broad concepts of global justice, as proscribed by cosmopolitanism, have been criticized as failing to account for the reality of cultural pluralism.³⁶ A closer look at Rawls’s domestic and international principles of justice provides a sufficient framework to derive meaningful and concrete principles of global justice that are sensitive to both criticisms.

Consistent with *The Law of Peoples*, global justice does not require application of Rawls’s first domestic principle—maximum liberty consistent with liberty for others. Further, the humanitarian assistance proscribed in

democratic societies and what he calls “decent” peoples. *Id.* at 59–60. Decent peoples are non-liberal societies that have basic institutions that “meet . . . conditions of political right and justice and lead its people to honor a reasonable and just law for the Society of Peoples.” *Id.*

²⁸ *See id.* at 119.

²⁹ *Id.* at 41.

³⁰ *Id.* at 37. For a list of other principles that Rawls recognizes, see note 26.

³¹ Rawls claims that “[i]n a reasonably just . . . Society of Peoples, the inequalities of power and wealth are to be decided by all peoples for themselves.” LAW OF PEOPLES, *supra* note 19, at 39.

³² *Id.* at 37–38. Although Rawls recognizes the duty of non-intervention, he claims that this duty does not hold when there is a “society of disordered peoples in which wars and serious violations of human rights are endemic.” *Id.*

³³ *Id.* at 119.

³⁴ *See, e.g.,* TAN, *supra* note 22, at 72–82; Gary Chartier, *Peoples or Persons? Revising Rawls on Global Justice*, 27 B.C. INT’L & COMP. L. REV. 1 (2004).

³⁵ *See* TAN, *supra* note 22, at 81–82.

³⁶ *See* Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in GLOBAL JUSTICE 12, 13–14, 34–40 (Ian Shapiro & Lea Brilmayer eds., 1999); Frank J. Garcia, *Three Takes on Global Justice*, 31 LA VERNE L. REV. 323, 325–26 (2010); *see also* Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 YALE HUM. RTS. & DEV. L.J. 185, 188 (2010).

The Law of Peoples should be tailored to support what Rawls's second principle of domestic justice provides—mechanisms that support fair distributions of social and economic capital. Disregarding the first domestic principle avoids the problem of cultural pluralism. At the same time, allowing the second domestic principle to inform the duty of humanitarian assistance will provide the foundation necessary for societies to establish just institutions that will foster greater civil liberties.

A. *Global Justice Need Not Include an Absolute Guarantee of Equal Basic Rights*

The first principle presents the greatest problem to cultural pluralism. Applied globally, it would insist that all societies adopt a scheme of civil and political liberties that is relatively consistent with liberal democracy.³⁷ That might be a legitimate philosophy to hold, but it seems, if nothing else, impractical to expect on the global scale. For example, freedom of expression is a basic and fundamental liberty protected in the United States. But for more than 1.3 billion people living in China,³⁸ this right is severely restricted.³⁹ Although many arguments can be made that China's failure to respect freedom of expression is direct evidence of injustice, arguments can also be made that China's lack of protections illustrate that the liberal ideal of justice is not flexible enough to account for legitimate cultural differences. Nevertheless, an effective theory of global justice must account for these types of differences, which will not likely drastically change. Therefore, Rawls was right. Global justice must not require universal adherence to his first principle of domestic justice.

B. *The Duty of Humanitarian Assistance Requires More*

On the other hand, *The Law of Peoples* failed to go far enough. Rawls's theory can be pushed a bit further by focusing on the principle of humanitarian assistance, or in Rawls's words, "a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime."⁴⁰ For ease, he describes those living under unfavorable conditions as "burdened societies."⁴¹ He adds, "Burdened societies . . . lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered."⁴² Rawls provides three guidelines to inform the duty to assist burdened societies. First, the wealth of a society

³⁷ See LAW OF PEOPLES, *supra* note 19, at 82.

³⁸ *The World Factbook: China*, CENTRAL INTELLIGENCE AGENCY (Mar. 11, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>.

³⁹ See Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326, 328 (2013).

⁴⁰ LAW OF PEOPLES, *supra* note 19, at 37.

⁴¹ *Id.* at 106.

⁴² *Id.*

is not dispositive of a well-ordered society.⁴³ What matters is that there are institutions capable of supporting a well-ordered society. A poor society may have the same or better capabilities of establishing just institutions than a wealthy society.⁴⁴ Second, there is “no easy recipe” for determining how to assist a burdened society because its social and political culture is “all-important.”⁴⁵ Basically, any assistance must work within the confines of the burdened society’s cultural norms. Third, the scope of assistance should not exceed what is necessary for the burdened society to manage its own method of becoming a well-ordered society.⁴⁶ Rawls warns that the assisting society “must not act paternalistically.”⁴⁷

Those guidelines are a great start. However, it seems like Rawls’s reluctance to interfere with cultural pluralism prevented the imposition of a much-needed affirmative and instructional duty. If the goal is to assist in a way that supports the establishment of just institutions necessary for a well-ordered society, the inquiry must begin with whether just institutions have requisite standards that hold across cultures. If there are such standards, they should become the basis for the duty to assist burdened societies.

1. *The Cultural Pluralism Dilemma Must and Can Be Avoided*

Institutions can be distinguished as being either private or public. Public institutions are more political in nature. For example, public institutions include government agencies, political offices, judicial systems, political parties, public interest groups, and other institutions that manage the commons. These institutions seem to be inherently influenced by the culture of the society in which the institutions reside. So, to avoid cultural conflict, those institutions should not be the subject of assistance.

On the other hand, private institutions are generally more neutral or apolitical in nature—especially private institutions that provide economic opportunities. While private economic institutions may have goals that are furthered by a particular political process, the political motivation is not inherent to the institution; the political motivation is a consequence of inherent economic goals. For example, when Monsanto lobbied Congress to adopt section 735 in House Bill 933,⁴⁸ its motivation was directly related to its ability to sell and grow genetically modified seeds.⁴⁹ The un-

⁴³ *Id.*

⁴⁴ *Id.* at 107.

⁴⁵ *Id.* at 108.

⁴⁶ *Id.* at 111.

⁴⁷ *Id.*

⁴⁸ Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 735, 127 Stat. 198, 231–32.

⁴⁹ See David Knowles, *Opponents of Genetically Modified Organisms in Food, or GMOs, Rail Against Provision That Would Limit the Courts’ Ability to Stop Food Producer Monsanto from Growing Crops Later Deemed Potentially Hazardous*, N.Y. DAILY NEWS (Mar. 25, 2013), <http://www.nydailynews.com/news/national/food-oversight-curbs-spending-bill-outrage-article-1.1298967> (“These provisions are giveaways, pure and simple, and

derlying motivation was economic, not political. Monsanto is an example of how private economic institutions are only political actors insofar as economic motivations entail. Therefore, it is possible that assistance which targets private institutions providing economic opportunities in a burdened society will not likely face major cultural conflict. For that reason, it seems appropriate to focus on what standards both avoid cultural conflict and satisfy the criteria for a just private institution.

Before returning to Rawls's second principle of domestic justice to determine what a just institution requires, it is important to recognize that Rawls's conception of an institution is far broader than being either public or private. For Rawls, an institution can be "an abstract object . . . [or] conduct expressed by a system of rules . . . [, or] the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules."⁵⁰ Under this conception "games and rituals, trials and parliaments, markets and systems of property" are all institutional subjects.⁵¹ This Comment, however, limits its focus to a narrower conception of private institutions.

2. *A Just Private Economic Institution Will Guarantee a Living Wage*

Let us first tease out the requisite standards for a just institution by applying the difference principle within the marketplace. Recall the basic idea of the difference principle is that inequalities should be distributed to the benefit of the worst off.⁵² Rawls even articulates this principle as requiring that inequalities be distributed to the "greatest expected benefit of the least advantaged."⁵³ Within the context of the workplace, the least advantaged—usually the unskilled workers—have a *minimum* expectation of making a living or subsistence wage.⁵⁴ It may be the case that the difference principle requires more than that.⁵⁵ However, it seems that the difference principle requires that in the least, private economic institutions ought to provide a living wage for its workers.⁵⁶

will be a boon worth millions of dollars to a handful of the biggest corporations in this country.") (quoting Senator John Tester) (internal quotation marks omitted).

⁵⁰ THEORY OF JUSTICE, *supra* note 5, at 48.

⁵¹ *Id.*

⁵² See JUSTICE AS FAIRNESS, *supra* note 2, at 64.

⁵³ THEORY OF JUSTICE, *supra* note 5, at 72 (emphasis added).

⁵⁴ There is no clear definition of a living wage. Most commonly, a living wage is linked to the expectations of the workers which may be a bare subsistence wage or a wage that covers all necessities that afford a certain standard of living. See LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY 61–77 (1997). Here, a clear definition is not necessary because the difference principle only links the outcome to the expectations of the worker.

⁵⁵ See THEORY OF JUSTICE, *supra* note 5, at 245 ("Whether the principles of justice are satisfied, then, turns on whether the total income of the least advantaged . . . is such as to maximize their long-run expectations . . .").

⁵⁶ Application of the difference principle shows that the only time this would not be the case is if an economic institution is not able to provide a living wage for *all* of its workers, including management. This is because any outcome must be to the benefit

3. *A Just Private Economic Institution Will Guarantee Freedom from Discrimination*

Application of the principle of fair equality of opportunity skates a thin line in avoiding standards that do not hold across cultures. Recall that the principle requires that institutional positions “be open in the formal sense [and] all should have a fair chance to attain them.”⁵⁷ The principle does not require that all persons, irrespective of their abilities, have a fair chance of getting the same position. It simply requires that those who have similar capabilities have an equal chance of success.⁵⁸ At first, it seems that this principle establishes a robust substantive right. However, as Rawls explains: “The role of the principle of fair opportunity is to insure that the system of cooperation is one of pure procedural justice.”⁵⁹ And, “pure procedural justice obtains when there is no independent criterion for the right result.”⁶⁰ The idea is that as long as decisions are based on objective, unwavering standards, the outcome will be just based on the process in which the decision was made. So, the principle is meant to establish procedural rights that may incidentally protect substantive ones.

What happens when this principle is applied to an institution that provides economic opportunities? Decisions that affect a person’s status within the workplace must be made based on criteria independent of characteristics unrelated to capability. This creates workplace opportunities free from discrimination because characteristics unrelated to capability cannot be applied as an objective standard as the second principle demands.

This standard is flexible enough to account for bona fide occupational qualifications (BFOQ). Under 42 U.S.C. § 2000e-2(e), it is not unlawful to make employment decisions based on status⁶¹ when such status is a “qualification reasonably necessary to the normal operation of that particular business.”⁶² Courts have adopted a narrow interpretation of this defense in the context of sex discrimination,⁶³ where discrimination is “valid only when the essence of the business operation would be un-

of the least advantaged. Given the nature of the global marketplace, it is unlikely that it would be impossible to meet the minimum expectations of the workers.

⁵⁷ JUSTICE AS FAIRNESS, *supra* note 2, at 43.

⁵⁸ *Id.* at 44.

⁵⁹ THEORY OF JUSTICE, *supra* note 5, at 76.

⁶⁰ *Id.* at 75.

⁶¹ Status is limited to religion, sex, and national origin. 42 U.S.C. § 2000e-2(e) (2012).

⁶² *Id.*

⁶³ See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 385–88 (5th Cir. 1971), *cert. denied*, 404 U.S. 275 (1971); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 229–30, 232 (5th Cir. 1969); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 303 (N.D. Tex. 1981) (“[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool . . .”); see also Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 11–20 (1991).

dermined by not hiring members of one sex exclusively.”⁶⁴ While very narrow, this exception is consistent with the demands of the second principle. Just as status may inform whether one is qualified for a position, status may be related to one’s capability. So, in those rare circumstances where capability is related to status, the second principle would permit such discrimination just as the BFOQ defense does.

IV. GLOBAL JUSTICE LACKS ENFORCEMENT MECHANISMS IN THE CURRENT GLOBAL LANDSCAPE

As shown above, principles of justice, when applied to the global scale, require that private economic institutions provide a living wage for workers and offer opportunities free from discrimination. While in theory those standards have some bite, they offer little value without an effective means of enforcement. The current scheme of international protections for workers is deficient; the International Labour Organisation (ILO) lacks authority, corporate self-governance is illusory and offers insufficient protection, and current International Framework Agreements have little effect on actual working conditions.

A. *The International Labour Organisation Lacks Bite*

When considering whether the ILO is capable of enforcing the necessary principles for just private economic institutions, one might get false hope. Included in one of the core conventions is the right to be free from discrimination.⁶⁵ In addition, the preamble to the ILO Constitution recognizes that unjust labor conditions pose obstacles to peace and harmony.⁶⁶ Among other conditions identified to ensure just labor practices are “the provision of an adequate living wage” and “the principle of equal remuneration for work of equal value.”⁶⁷ If the substance of these principles could be enforced against transnational corporations, global justice—as discussed thus far—might be realized.

But, enforcement is precisely what the ILO is lacking. There are 185 member countries.⁶⁸ At best, the ILO has indirect enforcement capabilities against private organizations through the member states that have signed on to particular conventions at issue.⁶⁹

⁶⁴ *Diaz*, 442 F.2d at 388 (emphasis omitted).

⁶⁵ See Int’l Labour Org., Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31.

⁶⁶ CONSTITUTION OF THE INT’L LABOUR ORG., 1944, pmbl., available at <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>.

⁶⁷ *Id.*

⁶⁸ Int’l Labor Org., Official Relations Branch, Alphabetical List of ILO Member Countries (Sept. 17, 2012), <http://www.ilo.org/public/english/standards/rehm/country.htm>.

⁶⁹ See Miriam Mafessanti, *Corporate Misbehavior & International Law: Are There Alternatives to “Complicity”?*, 6 S.C.J. INT’L L. & BUS. 167, 178 (2010).

The actions taken against the Myanmar government in the face of forced labor allegations show that the ILO model is insufficient. In 2000, the ILO received a complaint from workers against the Myanmar government, alleging forced labor practices.⁷⁰ The allegations were substantiated by the ILO's Commission of Inquiry.⁷¹ It turned out that the government was supplying Unocal, a corporation building a gas pipeline in the area, with locals forced to work on the project.⁷² Even worse, there were allegations that Myanmar soldiers supervising the labor camp raped, tortured, and murdered those at the camp.⁷³ For the first time, the ILO *recommended* sanctions against a member country based on findings related to Unocal and that forced labor in Myanmar was "widespread and systematic."⁷⁴ The United States and the European Union implemented sanctions.⁷⁵ However, working conditions in Myanmar have changed very little.⁷⁶ Further, ILO enforcement deficiencies are expounded by the fact that only member countries are bound, not the private organizations doing business within the country.⁷⁷

⁷⁰ *Id.* at 191.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Doe I v. Unocal Corp.*, 395 F.3d 932, 939–40 (9th Cir. 2002) ("For instance, Jane Doe I testified that after her husband, John Doe I, attempted to escape the forced labor program, he was shot at by soldiers, and in retaliation . . . she and her baby were thrown into a fire, resulting in injuries to her and the death of the child."); see also Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT'L L.* 1, 13 (2001).

⁷⁴ See Press Release, Int'l Labour Org., ILO Governing Body Opens the Way for Unprecedented Action Against Forced Labour in Myanmar (Nov. 17, 2000) (internal quotation marks omitted), available at http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_007918/lang-en/index.htm ("[r]ecommending to the Organization's constituents that they review their relations with Myanmar and take appropriate measures to ensure that such relations do not perpetuate or extend the system of forced or compulsory labour in that country . . ."); Mafessanti, *supra* note 69, at 191.

⁷⁵ Both the EU and the U.S. already had a history of imposing sanctions on Myanmar. See Cleveland, *supra* note 73, at 14 ("In 2000, the EU further strengthened its sanctions policies by banning exports of technology that might be used for internal repression . . ."); Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 *WASH. U. GLOB. STUD. L. REV.* 455, 478–81 (2008).

⁷⁶ Myanmar continues to permit forced labor and only recently agreed to "eliminate all forms of forced labour by 2015." Statement, Int'l Labour Org., US President in Myanmar: ILO Director-General Welcomes Joint Commitment to Implementation of ILO Plan to Eliminate Forced Labour (Nov. 19, 2012), available at http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_193629/lang-en/index.htm. The ILO recently published a special report highlighting Myanmar's progress since it held elections in 2010. Marcia Poole, *Myanmar Turns a Corner*, *WORLD WORK*, Special 2013 Issue, at 19, 21. But, the report also makes clear that "challenges remain." *Id.* at 28.

⁷⁷ See Mafessanti, *supra* note 69, at 191.

Some might point to the ILO's attempt to directly address private organizations as evidence of more far-reaching authority. In 2006, the ILO revisited its original 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.⁷⁸ The Declaration incorporates many ILO conventions⁷⁹ and serves to "offer guidelines to MNEs [(multinational enterprises)], governments, and employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations."⁸⁰ The ILO conducts periodic surveys of compliance, but adherence to the recommendations is strictly voluntary.⁸¹ Given that Unocal was complicit in using forced labor in Myanmar,⁸² this declaration would have been unlikely to alter Unocal's behavior. Regardless, Myanmar provides the prime example of why the ILO cannot establish and enforce principles of justice within the private economic global order.

⁷⁸ INT'L LABOUR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1977) (amended Mar. 2006), available at http://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-multi/documents/publication/wcms_094386.pdf.

⁷⁹ See, e.g., *id.* at 11–15.

⁸⁰ *Id.* at v.

⁸¹ See *id.*; INMACULADA BAVIERA PUIG, ENFORCEMENT OF LABOUR STANDARDS IN MULTINATIONALS COMPANIES IN SPAIN: THE ROLE OF PUBLIC POLICIES, SOCIAL DIALOGUE AND CSR 3 (2012), available at <http://ilera2012.wharton.upenn.edu/RefereedPapers/BavieraImmaculadaPuigILERA%20updated.pdf>. A similar non-binding mechanism was adopted by the U.N. Human Rights Council when it endorsed the Guiding Principles on Business and Human Rights or "Ruggie Principles." Jena Martin Amerson, "The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective, 17 FORDHAM J. CORP. & FIN. L. 871, 873 (2012). The Ruggie Principles include a duty of corporate due diligence. U.N. Human Rights Council Rep. of the Special Representative of the Sec'y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enter., ¶ 17, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (John Ruggie). This principle encourages business enterprises to "carry out human rights due diligence" by "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." *Id.* at 16. Not surprisingly, the voluntary guidance in the Ruggie Principles has had little effect. See Sabrina Basran, *The Impact of Ruggie's Guiding Principles for Human Rights?*, CSR INT'L (Mar. 26, 2012), <http://csrinternational.blogspot.com/2012/03/impact-of-ruggies-guiding-principles.html>; John Ruggie's *Just Business: Multinationals and Human Rights*, CORP. CRIME REP. (Feb. 28, 2013), available at <http://www.corporatecrimereporter.com/news/200/ruggiejustbusiness02282013/>. For a detailed analysis of the guiding principles on business and human rights, see generally Amerson, *supra*.

⁸² See *Doe I v. Unocal Corp.*, 395 F.3d 932, 940–42 (9th Cir. 2002); Tawny Aine Bridgeford, Note, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009, 1029 (2003) ("[C]ommunications between various Unocal employees and consultants suggested that Unocal knew that the Myanmar military implemented a forced labor policy in connection with the pipeline.").

B. *Corporate Self-Governance Is No Governance*

Reliance on corporate codes to ensure just labor standards falls prey to most of the same criticism given to the ILO—enforcement measures are hollow. Aside from the fact that enforcement of socially responsible corporate codes depends on the good will of the corporation itself, many will never adopt substantively valuable codes to begin with.⁸³ Only organizations that are susceptible to public pressure will have the incentive to adopt meaningful codes.⁸⁴

If public pressure is a measure of likely self-compliance, a look at the Nike soccer ball controversy illustrates a best case scenario for the effectiveness of corporate codes. In June 1996, *Life Magazine* published an exposé on child labor practices in Pakistan.⁸⁵ The reporter went undercover and posed as a potential soccer ball exporter.⁸⁶ The article detailed his arrival in a Pakistani village where dozens of children were seen stitching The Swoosh on ball after ball.⁸⁷ He was even offered 100 “stitchers” of his own for less than \$200 apiece.⁸⁸ A Nike spokesperson was quoted in the article saying, “It’s an ages-old practice And the process of change is going to take time.”⁸⁹ It was also reported that she “acknowledg[ed] that her company [had not] implemented its stated goal of eliminating child labor in the production of soccer balls.”⁹⁰ Once the article was published, Nike was increasingly under public pressure to do the right thing.⁹¹ A survey of world-wide media coverage from that time shows a huge spike

⁸³ See RHYS JENKINS, U.N. RESEARCH INST. FOR SOC. DEV., *CORPORATE CODES OF CONDUCT: SELF-REGULATION IN A GLOBAL ECONOMY* 5 (2001), available at [http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=E3B3E78BAB9A886F80256B5E00344278&parentdoctype=paper&netitpath=80256B3C005BCCF9/\(httpAuxPages\)/E3B3E78BAB9A886F80256B5E00344278/\\$file/jenkins.pdf](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=E3B3E78BAB9A886F80256B5E00344278&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/E3B3E78BAB9A886F80256B5E00344278/$file/jenkins.pdf) (“[C]omprehensive codes are relatively limited in number” and “codes range from vague declarations of business principles . . . to more substantive efforts at self-regulation.”).

⁸⁴ Natasha Rossell Jaffe & Jordan D. Weiss, Note, *The Self-Regulating Corporation: How Corporate Codes Can Save Our Children*, 11 *FORDHAM J. CORP. & FIN. L.* 893, 914 (2006).

⁸⁵ Sydney H. Schanberg, *Six Cents an Hour*, *LIFE*, June 1996, at 38; see also Richard M. Locke, *The Promise and Perils of Globalization: The Case of Nike* 12 (Indus. Performance Ctr., Mass. Inst. Tech., Working Paper IPC-02-007, 2002), available at <http://ipc.mit.edu/sites/default/files/documents/02-007.pdf>.

⁸⁶ Schanberg, *supra* note 85, at 38.

⁸⁷ *Id.*

⁸⁸ *Id.* at 41. The foreman of the factory made it clear that the workers were for sale at a price equivalent to the debt incurred by their “owner” when the workers were “bought from their parents.” *Id.*

⁸⁹ *Id.* at 42 (internal quotation marks omitted).

⁹⁰ *Id.*

⁹¹ See Max White, *Tripping Up Nike*, *OR.’S FUTURE*, Winter 1998, at 6 (“Every Saturday for four months last year in front of Portland’s Nike Town, *Justice. Do It NIKE!* handed out flyers asking Nike to improve the lives of their overseas workers.”).

in Nike's exposure in newspapers.⁹² Expectedly, the coverage was not favorable⁹³ and Nike's brand image was devastated.⁹⁴

Two months after the article hit the public sphere, President Clinton invited Nike and others in the apparel industry to meet with "labor unions, consumer groups and nongovernmental human rights organizations."⁹⁵ The goal of the collaboration was to reassure the public that steps were being taken to eradicate product manufacturing in inhumane conditions.⁹⁶ The result was the adoption of a code of conduct and the establishment of an association designated to independently monitor compliance.⁹⁷ The code, adopted by Nike, included provisions prohibiting forced labor, child labor, and discrimination.⁹⁸ Also included was the promise to respect collective bargaining, to "provide a safe and healthy working environment," and to "pay employees . . . at least the minimum wage required by local law or the prevailing industry wage, whichever is higher."⁹⁹

One would think years later, a trip to Pakistan would reveal that Nike was complying with the corporate code it adopted in the wake of the public controversy. That was *almost* the case. A report published in 2008 found that Nike's conduct, via two of its Pakistani soccer ball suppliers, failed to meet "its own standards for responsible business operations."¹⁰⁰ While the report did not find violations of child labor, it did find that the workers were being discriminated against and were being paid below the national minimum wage.¹⁰¹ If this is the best case scenario for corporate codes,¹⁰² there must be a better way of instilling just principles into private economic institutions.

⁹² See Locke, *supra* note 85, at 30–31.

⁹³ See *id.* (demonstrating how the rise in newspaper exposure included media mentions of "Nike" in conjunction with "sweatshop," "child labor," and "exploitation").

⁹⁴ *Id.* at 12.

⁹⁵ DAVID BOBROWSKY, CREATING A GLOBAL PUBLIC POLICY NETWORK IN THE APPAREL INDUSTRY: THE APPAREL INDUSTRY PARTNERSHIP 2, 19 n.18 (1999), available at http://www.gppi.net/fileadmin/gppi/Bobrowsky_Apparel_Industry.pdf.

⁹⁶ *Id.* at 2.

⁹⁷ *Id.*

⁹⁸ APPAREL INDUSTRY PARTNERSHIP'S AGREEMENT, 1997, reprinted in 1 PAULA R. RHODES ET AL., TRANSNATIONAL BUSINESS TRANSACTIONS App. 1H (1997) (Workplace Code of Conduct).

⁹⁹ *Id.* It does not go unnoticed that this last wage provision is illusory because many countries do not have minimum wage guarantees and industries will pay obscenely low wages if allowed. See *Minimum Wage—All Countries*, QUANDL (May 28, 2014), <http://www.quandl.com/economics/minimum-wage-all-countries> (listing 34 countries with no minimum wage).

¹⁰⁰ Karin Astrid Siegmann, *Soccer Ball Production for Nike in Pakistan*, 43 *ECON. & POL. WKLY.*, May–June 2008, at 57, 63.

¹⁰¹ *Id.*

¹⁰² As suggested earlier, if corporate code outcomes depend on public pressure, a case in which there is heavy public pressure should bring about the best possible

C. *International Framework Agreements Offer Questionable Enforcement and Little Substance*

Another growing trend in corporate responsibility is the advent of International Framework Agreements (IFAs) between global union federations (GUFs) and transnational corporations (TNCs).¹⁰³ The first IFA appeared in 1994 and since then, more than 100 have been adopted.¹⁰⁴ IFAs are general agreements that usually seek to incorporate core ILO labor standards into a corporation's internal code.¹⁰⁵ An IFA may also provide complaint processes and monitoring mechanisms.¹⁰⁶ In addition, IFAs are meant to provide "a context for unions to develop local bargaining with employers."¹⁰⁷ Operating somewhere outside the realm of collective bargaining agreements because IFAs do not generally address specific working conditions,¹⁰⁸ they may bring some value in that they are products of negotiation rather than unilateral corporate decisions.¹⁰⁹

There are several deficiencies with relying on IFAs as a significant mechanism in establishing global justice. First, local unionists are often unaware of the IFAs' "purpose, ramifications and implications."¹¹⁰ So, any effort to provide a context for bargaining is often futile. Second, there

implementation of corporate self-governance. The Nike case presents the prime example of intense public pressure and a corporation with the financial means to do different. However, despite the pressure and Nike's efforts, injustices remain. For more case studies detailing the ineffectiveness of corporate codes and self-governance, see generally BRIAN FINNEGAN, *AFL-CIO, RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS* (2013).

¹⁰³ KD Ewing, *International Regulation of the Global Economy—The Role of Trade Unions*, in *REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS* 205, 205, 209 (Brian Bercusson & Cynthia Estlund eds., 2008); see also Sarah Coleman, Note, *Enforcing International Framework Agreements in U.S. Courts: A Contract Analysis*, 41 *COLUM. HUM. RTS. L. REV.* 601, 601, 604 (2010).

¹⁰⁴ Coleman, *supra* note 103, at 604; see also *Framework Agreements*, GLOBAL UNIONS, <http://www.global-unions.org/framework-agreements.html> (providing a list of IFAs by company).

¹⁰⁵ See Ewing, *supra* note 103, at 210; Alvin L. Goldman, *Enforcement of International Framework Agreements Under U.S. Law*, 33 *COMP. LAB. L. & POL'Y J.* 605, 605 (2012); Coleman, *supra* note 103, at 604.

¹⁰⁶ RICHARD CROUCHER & ELIZABETH COTTON, *GLOBAL UNIONS, GLOBAL BUSINESS: GLOBAL UNION FEDERATIONS AND INTERNATIONAL BUSINESS* 61 (2011).

¹⁰⁷ *Id.* at 57. It has also been suggested that IFAs are promoted as "step[s] toward[] global social dialogue." Dimitris Stevis & Michael Fichter, *International Framework Agreements in the United States: Escaping, Projecting, or Globalizing Social Dialogues?*, 33 *COMP. LAB. L. & POL'Y J.* 667, 668 (2012).

¹⁰⁸ Goldman, *supra* note 105, at 605; Coleman, *supra* note 103, at 604. Also, the agreements are not the product of an exclusive representative negotiating on behalf of the employees with management. See Coleman, *supra* note 103, at 604. The exception is the International Transport Workers Federation (ITF), which "negotiates substantively on key distributive issues" on behalf of seafarers. CROUCHER & COTTON, *supra* note 106, at 64.

¹⁰⁹ CROUCHER & COTTON, *supra* note 106, at 58; Ewing, *supra* note 103, at 210.

¹¹⁰ CROUCHER & COTTON, *supra* note 106, at 57.

has been discussion on whether IFAs are even enforceable in the United States¹¹¹ or elsewhere.¹¹² Regarding the United States, it seems the answer is—not surprisingly—it depends.¹¹³ The terms need to be definite enough to withstand contract analysis,¹¹⁴ yet remain neutral when it comes to terms governed by the National Labor Relations Act because the GUF is not an authorized bargaining representative of the employees.¹¹⁵ But, as far as global enforcement, there is no such governing body with authority to resolve disputes arising from IFAs.¹¹⁶ Finally, only *one percent* of workers in the world are employed by TNCs.¹¹⁷ Such limited reach on workers, combined with questionable enforcement venues and terms insufficient to affect every day working conditions, shows that IFAs are not the answer to global justice.

D. Current Mechanisms Do Add Value to the Complex Global Community

While the ILO, corporate self-governance, and IFAs are undeniably insufficient for the purposes sought, they do add some value to the complex global community where the working class has far less power than their corporate counterparts. The value may simply be that the collective consciousness is readied to accept and support the struggles of the oppressed around the world, to accept the freedom of association—the right to organize—as a fundamental element in the age of globalization. As argued in the next section, union organizing efforts are the means to establishing just principles in the workplace. A collective consciousness open to the plights of working people will only serve to clear the way for less resistance to global organizing efforts.

V. GLOBAL ORGANIZING IS A MEANS TO ESTABLISH PRINCIPLES OF GLOBAL JUSTICE

Global organizing efforts are a necessary component to establishing just private economic institutions. We need only look to history to support this premise. Workers' rights have been a major point of contention since the beginning of the 19th century in America.¹¹⁸ Many issues from

¹¹¹ See generally Goldman, *supra* note 105; Coleman, *supra* note 103.

¹¹² See Ewing, *supra* note 103, at 224.

¹¹³ See generally Goldman, *supra* note 105; Coleman, *supra* note 103.

¹¹⁴ See Goldman, *supra* note 105, at 612–13.

¹¹⁵ *Id.* at 621–22 (“[T]he IFA would violate NLRA § 8(a)(2) because it would be setting a term or condition of employment even though the global labor organization is not authorized to bargain on behalf of the employees.”).

¹¹⁶ Coleman, *supra* note 103, at 612.

¹¹⁷ CROUCHER & COTTON, *supra* note 106, at 16.

¹¹⁸ See JIM HASKINS, *THE LONG STRUGGLE: THE STORY OF AMERICAN LABOR* 15–18, 143–150 (1976).

that day are still present today, such as wage and hours.¹¹⁹ However, instead of fighting for a ten-hour day, today, workers take on issues such as whether travel time should count towards overtime hours.¹²⁰ It cannot be denied that union organizing efforts played a pivotal role in establishing substantive rights for the American worker.

A closer look at the political and economic landscape in the United States during the turn of the century reveals a striking resemblance to the international backdrop in which transnational corporations operate today. Just like in the early twentieth century in America,¹²¹ very little substantive protections are available for the worker in the global marketplace.¹²² Organized labor in the United States managed to overcome these difficulties by moving away from social unionism and adopting “pure and simple” strategies.¹²³ It wasn’t until the 1930s—when labor had political support¹²⁴—that social unionism reemerged as a strong force in the Congress of Industrial Organizations (CIO).¹²⁵

In exploring ways to establish just, economic institutions on the global scale, it is best to analogize to the time period in the United States

¹¹⁹ *Id.* at 17; Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 355–56 (2013).

¹²⁰ HASKINS, *supra* note 118, at 19.

¹²¹ From the 1890s through the *Lochner* Era, courts regularly ruled in favor of limited regulation on business and struck down legislation intended to protect workers. *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 553 (1923) (striking down a provision providing minimum wages for women and children); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a New York statute limiting the working hours of bakers); *In re Debs*, 158 U.S. 564, 599–600 (1895) (recognizing the government’s right to issue an injunction against a labor strike affecting interstate commerce); see also Barry Friedman, *The History of the Countermajoritarian Difficulty: The Lesson of Lochner* (pt. 3), 76 N.Y.U. L. REV. 1383, 1391–97, 1448 (2001) (“From the decision in *Lochner* in 1905 to the mid-1930s, the Court invalidated approximately 200 economic regulations . . .”) (quoting GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 829 (3d ed. 1996) (internal quotation marks omitted). *But see* *Muller v. Oregon*, 208 U.S. 412, 418–23 (1908) (upholding Oregon state law that limited the working hours of women by distinguishing *Lochner* in that women, unlike bakers in New York, “ha[ve] always been dependent upon man”). For a discussion on injunctive use against labor in the 1800s, see generally Charles Noble Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 489–92 (1898).

¹²² See *supra* Part IV.

¹²³ See *infra* Part V.A.

¹²⁴ See STANLEY ARONOWITZ, WORKING CLASS HERO 42 (1983) (“[P]olitical and economic conditions became favorable to industrial organization in the 1930’s . . .”); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 19 n.96 (1999) (“[D]uring periods of amicable state/labor relations, such as the New Deal . . . unions were able to use both politics and collective bargaining to gain substantial benefits to workers.”). In fact, during industrial union efforts in the 1930s, after the passage of the National Industrial Recovery Act, the slogan became: “The President wants you to join the union.” ARONOWITZ, *supra* (internal quotation marks omitted).

¹²⁵ See ARONOWITZ, *supra* note 124, at 42.

when there was the least political protection and the most opposition to the worker because it better replicates the global marketplace of today. Therefore, even though social unionism strategies throughout the New Deal Era and beyond marked incredible advances for the American worker,¹²⁶ it will be less helpful to assume similar political structures and support throughout the world today. Exploring pre-New Deal era union strategies presents a feasible strategy in establishing principles of global justice.

A. *What We Can Learn from Turn of the Century Labor Strategies*

Focusing on the methods and strategies of labor organizers in the late-nineteenth and early twentieth centuries shows the feasibility of establishing just private economic institutions without the support of public institutions that are not available on the international scale¹²⁷ and may not be available through local governments in many parts of the world. Before the 1930s, there was little to no substantive legal protections for workers.¹²⁸ In fact, provisions in the Sherman Anti-Trust Act were frequently used by employers to obtain injunctions *against* union action.¹²⁹ The original purpose of the act was to impede monopolistic power, but it was ironically used by big business to squelch opposition to it.¹³⁰

Even with the system working against it, the labor movement continued to organize and put pressure on management to implement higher wages and an eight-hour work day.¹³¹ This focus on pure and simple unionism was a marked change from the failing social reform agenda adopted by unions throughout most of the 1800s.¹³² The labor movement also found success in organizing across industrial lines.¹³³ Ultimately, strategies that focused on immediate improvements in working conditions through collective bargaining and industrial organizing led to economic, social, and political gains for the American worker.¹³⁴

¹²⁶ Most notably was the right to organize provided by the Wagner Act. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

¹²⁷ See *supra* Part IV.

¹²⁸ See *supra* note 121 and accompanying text.

¹²⁹ *E.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478–79 (1921); United States v. Workingmen’s Amalgamated Council of New Orleans, 54 F. 994 (1893).

¹³⁰ WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 95–96 (1991); HASKINS, *supra* note 118, at 35.

¹³¹ BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BRIEF HISTORY OF THE AMERICAN LABOR MOVEMENT 14, 16 (1976) [hereinafter BRIEF HISTORY OF THE ALM].

¹³² See GERALD N. GROB, WORKERS AND UTOPIA: A STUDY OF IDEOLOGICAL CONFLICT IN THE AMERICAN LABOR MOVEMENT 1865–1900, at 6–10 (1961).

¹³³ See *infra* Part V.A.2.a.

¹³⁴ See *infra* Part V.A.2.a–c.

1. *Labor Unions Failed with Social Reform Platform*

Some of the very early labor organizations focused on social reforms beyond the everyday concern of the worker. The greatest example of this was the Knights of Labor, founded in 1869.¹³⁵ The Knights were the first to organize industry wide, accepting skilled and unskilled workers.¹³⁶ By 1886, over 700,000 workers were members.¹³⁷ Their broad base was matched by a broad platform.¹³⁸ The leaders promoted economic democracy in the form of cooperatives, public control and ownership of utilities, equal pay for women, and other social reforms.¹³⁹ The Knights' strategies to achieve these goals were through education, political pressure, and strikes.¹⁴⁰ Collective bargaining was not employed,¹⁴¹ likely because their goals could not be obtained by agreement with one employer. They wanted society to change as a whole.

The Knights failed in their quest to win over the hearts and minds of the country. Observers credit the downfall to an unclear philosophy, negative public perception, the refusal to engage in collective bargaining, and a series of unsuccessful actions.¹⁴² One of The Knights' greatest setbacks was part of ongoing agitation to obtain an eight-hour workday, culminating in a general walk out strike in 1886.¹⁴³ On May 1, 1886, an

¹³⁵ 2 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR TO THE EMERGENCE OF AMERICAN IMPERIALISM* 47 (2d ed. 1975); HASKINS, *supra* note 118, at 24.

¹³⁶ See ALBERT A. BLUM, *A HISTORY OF THE AMERICAN LABOR MOVEMENT* 11 (1972); HASKINS, *supra* note 118, at 28. However, not everyone was permitted to join. The organization excluded professions such as lawyers and liquor salesmen. BLUM, *supra*.

¹³⁷ BLUM, *supra* note 136, at 11; FONER, *supra* note 135, at 54; GROB, *supra* note 132, at 36, 109; HASKINS, *supra* note 118, at 29.

¹³⁸ The Knights' declared aims were "[t]o make industrial and moral worth, not wealth, the true standard of individual and National greatness" and "[t]o secure to the workers the full enjoyment of the wealth they create, sufficient leisure in which to develop their intellectual, moral and social faculties: all of the benefits, recreation and pleasures of association; in a word, to enable them to share in the gains and honors of advancing civilization." PREAMBLE AND DECLARATION OF PRINCIPLES OF THE KNIGHTS OF LABOR OF AMERICA, *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=ichihay&fileName=v03/ichihayv03.db&recNum=0>.

¹³⁹ See ARONOWITZ, *supra* note 124, at 26; BRIEF HISTORY OF THE ALM, *supra* note 131, at 10–11; GROB, *supra* note 132, at 37.

¹⁴⁰ The Knights supported strikes as a viable tactic reluctantly. BRIEF HISTORY OF THE ALM, *supra* note 131, at 11 ("Reliance was placed on educational and political methods rather than on collective bargaining. Strikes were to be employed only as a last resort."); see also GROB, *supra* note 132, at 43–52 (discussing the ideological conflict within The Knights between its primary goal of establishing a cooperative society and supporting a general strike fund).

¹⁴¹ BRIEF HISTORY OF THE ALM, *supra* note 131, at 11; see also GROB, *supra* note 132, at 37.

¹⁴² BLUM, *supra* note 136, at 11; BRIEF HISTORY OF THE ALM, *supra* note 131, at 12; see also GROB, *supra* note 132, at 187–88.

¹⁴³ HASKINS, *supra* note 118, at 30–31; see also GROB, *supra* note 132, at 137 n.84 (ascribing to the view that the Haymarket Affair had an impact "upon the decline of the Knights").

unbelievable 340,000 workers nationwide, 80,000 workers in Chicago alone, participated in the strike.¹⁴⁴ The strike continued, and on May 3, “trouble occurred” at a factory where 1,400 striking Knights had been locked out and replaced by 300 “scabs.”¹⁴⁵ “When the strikers, aided by several hundred striking lumber-shovers, demonstrated against the scabs, the police fired without warning into the unarmed workers.”¹⁴⁶ Four strikers were killed, and others were wounded.¹⁴⁷

In response to the police brutality, a rally was scheduled for the following day in Chicago’s Haymarket Square.¹⁴⁸ Thousands of people gathered to listen to speakers advocating for solidarity and “warning against violence.”¹⁴⁹ The rally was “peaceful until the very end.”¹⁵⁰ After most of the demonstrators had dispersed and the speeches were wrapping up, 180 police appeared.¹⁵¹ Shortly thereafter, a bomb was hurled at the officers.¹⁵² The explosion ended up killing six officers and wounding “some half hundred more.”¹⁵³ The police responded by opening fire upon the remaining demonstrators¹⁵⁴ and attacking them with bayonets.¹⁵⁵ Thirty people, including children, were killed by the police¹⁵⁶ and “at least 200 were wounded.”¹⁵⁷

Among others,¹⁵⁸ several of the Knights’ executive board members

¹⁴⁴ Edward de Grazia, *The Haymarket Bomb*, 18 LAW & LITERATURE 283, 285–86 (2006).

¹⁴⁵ FONER, *supra* note 135, at 105.

¹⁴⁶ *Id.*; The factory’s entrance was guarded by at least 300 police officers to protect the replacement workers known as scabs. *Id.*; see also De Grazia, *supra* note 144, at 283. Fighting erupted between the scabs and the strikers after factory windows were stoned and scabs were heckled upon leaving the factory. *Id.* That is when the police “fired at the workmen and charged.” *Id.*

¹⁴⁷ FONER, *supra* note 135, at 105; De Grazia, *supra* note 144, at 283.

¹⁴⁸ FONER, *supra* note 135, at 105–06. One of the promotional flyers distributed was penned by August Spies, editor of the anarchist newspaper *Arbeiter Zeitung*. *Id.*; de Grazia, *supra* note 144, at 284. Spies was later convicted of conspiracy to commit murder in connection with the Haymarket bombing. *Spies v. People* (The Anarchists’ Case), 12 N.E. 865 (Ill. 1887). He was eventually executed at the gallows. See *Biography: August Spies*, PBS.ORG, <http://www.pbs.org/wnet/historyofus/web09/features/bio/B04.html>.

¹⁴⁹ See FONER, *supra* note 135, at 106.

¹⁵⁰ Jerry Elmer, *Haymarket Riots and a Legacy of Injustice: A Commentary*, 60 R.I.B.J., May/June 2012, at 5, 5.

¹⁵¹ FONER, *supra* note 135, at 106.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (“The police immediately opened fire on the crowd, chasing, clubbing and shooting down workers.”).

¹⁵⁵ Elmer, *supra* note 150, at 5.

¹⁵⁶ *Id.*

¹⁵⁷ FONER, *supra* note 135, at 106.

¹⁵⁸ See *supra* note 148.

were blamed for the bombing at Haymarket Square.¹⁵⁹ Public opinion towards the Knights became that of condemnation because the Knights were perceived as being aligned with the anarchist movement.¹⁶⁰ The Knights ended up losing membership and by 1890 only 100,000 remained.¹⁶¹ By 1894, the Knights were no longer.¹⁶² Many reasons have been cited for the demise of the Knights,¹⁶³ but no single factor can be singled out. Taken together, the Knights' failed strikes and conflicting leadership translated into an inability to create a "sustainable challenge" to the political and capital power of the time.¹⁶⁴

2. *Progress Through Pure and Simple Unionism*

There was a paradigm shift in the movement as the Knights declined in popularity and the American Federation of Labor (AFL) gained support and membership.¹⁶⁵ Undeniably, there was a stark difference in the two philosophies. While the Knights pushed for social reform and recognition through broad political measures,¹⁶⁶ the AFL took a hardline position that focused on specific goals to benefit the individual worker within the existing economic, political, and social landscape.¹⁶⁷ The collective bargaining agreement would replace the "ballot box."¹⁶⁸

The AFL's position "adhered to the philosophy of pure and simple trade unionism,"¹⁶⁹ focusing on wages, hours, and other working conditions.¹⁷⁰ The underlying idea was that social gains for the working class would only come from a stronger economic foothold.¹⁷¹ This campaign

¹⁵⁹ *Chicago Anarchists on Trial: Evidence from the Haymarket Affair, 1886–1887*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/connections/haymarket/history6.html>.

¹⁶⁰ *The Early Labor Movement*, PBS.ORG, <http://www.pbs.org/opb/historydetectives/feature/the-early-labor-movement/>.

¹⁶¹ See FONER, *supra* note 135, at 159, 166.

¹⁶² Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 659 (2006).

¹⁶³ See, e.g., FONER, *supra* note 135, at 157–58; GROB, *supra* note 132, at 132–37; Pawlenko, *supra* note 162, at 659.

¹⁶⁴ Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 676 (2006).

¹⁶⁵ See BRIEF HISTORY OF THE ALM, *supra* note 131, at 12.

¹⁶⁶ See *supra* notes 140–41 and accompanying text.

¹⁶⁷ See HASKINS, *supra* note 118, at 34.

¹⁶⁸ BLUM, *supra* note 136, at 11–12; see also FORBATH, *supra* note 130, at 130.

¹⁶⁹ HASKINS, *supra* note 118, at 34 (internal quotation marks omitted); see also *supra* note 1.

¹⁷⁰ BRIEF HISTORY OF ALM, *supra* note 131, at 16; see also GROB, *supra* note 132, at 142 ("Instead of abstractions, union leaders devoted themselves to the development of wage and hour policies, work rules, and membership standards."); HASKINS, *supra* note 118, at 34.

¹⁷¹ AFL's founding leader, Samuel Gompers, expressed his reasoning for limiting the movement to "immediate, tangible goals" when he said, "We must walk before we can fly, and we believe the gaining of higher wages and shorter hours to be the

strategy, embodying political neutrality and focusing on specific working conditions, was also adopted by some of the emerging industrial unions.¹⁷² Industrial unionism began to surface throughout the 1890s as machines were introduced into the workplace.¹⁷³ Highly skilled craftsmen were no longer highly sought after.¹⁷⁴ So, in order to unite workers in significant enough numbers to compete with growing corporate power, all the workers within an industry were organized into the same union.¹⁷⁵ Although AFL leadership more strongly supported craft unions,¹⁷⁶ “an estimated 70% to 80% of all union workers were in the American Federation of Labor” between 1890 and 1920.¹⁷⁷

a. Industrial Unions Find Strength in Numbers

Whether craft or industrial, the unions under the AFL umbrella sought better working conditions through collective bargaining agreements with employers.¹⁷⁸ However, strikes were still hailed as a powerful tool beyond the negotiating table,¹⁷⁹ and industrial unions wielded more power to organize greater solidarity. An early example is the Pullman railway car workers campaign led by Eugene V. Debs.¹⁸⁰ Around 1893, George Pullman, President and General Manager of Pullman’s Palace

preliminary steps toward great and accompanying improvements in the condition of the working classes.” HASKINS, *supra* note 118, at 34 (internal quotation marks omitted).

¹⁷² See *id.* at 37–44. However, there were unions organized along industry lines that followed a far more progressive agenda. For example, in 1905 the Industrial Workers of the World (IWW) was founded. ARONOWITZ, *supra* note 124, at 18. Included in its preamble was the following statement: “Between [the working class and the employing class] a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system. . . . to do away with capitalism.” VINCENT ST. JOHN, *THE I.W.W.: ITS HISTORY, STRUCTURE, AND METHODS* 9–10 (1919).

¹⁷³ HASKINS, *supra* note 118, at 36; see GROB, *supra* note 132, at 141 (“[T]rade union[ism] remained the dominant form of organization, even though jurisdictional lines became blurred by the advances of technology. Nevertheless, the A.F. of L. was not necessarily committed to any specific structural form.”); see also FONER, *supra* note 135, at 14–15 (discussing “[t]he increasingly important role of the machine”).

¹⁷⁴ See HASKINS, *supra* note 118, at 36.

¹⁷⁵ See *id.* at 36–37. To put this change in context, in 1901 the labor movement was competing in an environment that produced “America’s first billion-dollar industry, United States Steel, directed by J.P. Morgan.” *Id.* at 36.

¹⁷⁶ See *id.* at 36–37; GROB, *supra* note 132, at 141.

¹⁷⁷ BRIEF HISTORY OF THE ALM, *supra* note 131, at 13–14. One of the most far reaching A.F. of L. affiliates was the United Mine Workers, an industrial union. *Id.* at 14.

¹⁷⁸ See ARONOWITZ, *supra* note 124, at 11 (“the goals and program of the AFL remained constant, but the means to their achievement had to adjust to changing times. In the process [Gompers, AFL president] gave birth to industrial unionism within the AFL”).

¹⁷⁹ See FONER, *supra* note 135, at 176–77 (“[T]he A.F. of L. had found through experience that strikes were often the only means whereby the rightful demands of labor can be secured.”) (internal quotation marks omitted).

¹⁸⁰ HASKINS, *supra* note 118, at 37–38.

Car Company¹⁸¹ began a series of wage cuts and lay-offs. While the workers suffered wage cuts as high as fifty percent, “the company . . . continued to pay eight percent dividends to its stockholders.”¹⁸² To make matters worse, rent in company-provided housing was not reduced and workers often fell behind on their rental payments to *the company*.¹⁸³ To collect the debt, the company often pressured the workers to sign over paychecks, sometimes leaving “less than a dollar to meet a family’s needs for two weeks.”¹⁸⁴

At the time, not all the workers in the Pullman shop were unionized and those that were belonged to separate craft unions.¹⁸⁵ Several strikes demanding higher wages were short lived.¹⁸⁶ “No one department or trade was important enough to stand alone.”¹⁸⁷ Debs stepped in and formed the American Railway Union (ARU).¹⁸⁸ Pullman workers were eligible to join and soon Pullman membership reached 4,000.¹⁸⁹ In May 1894, the ARU began negotiating with management, formally seeking either a return to wage levels prior to the cuts or a significant reduction in rent.¹⁹⁰ The meetings were futile and some of the ARU representatives were laid-off in retaliation.¹⁹¹ Word spread through the shop and soon the workforce was in full strike.¹⁹² ARU members across the nation joined the protest, “refusing to work on cars, trains, or rails that carried Pullman equipment.”¹⁹³ In the end, the Pullman workers gained broad public support, but could not withstand the intervention of federal troops and an injunction issued by the federal court.¹⁹⁴ After more than a month of

¹⁸¹ STANLEY BUDER, *PULLMAN: AN EXPERIMENT IN INDUSTRIAL ORDER AND COMMUNITY PLANNING 1880–1930*, at 15 (1967).

¹⁸² FONER, *supra* note 135, at 261.

¹⁸³ BUDER, *supra* note 181, at 153; FONER, *supra* note 135, at 261.

¹⁸⁴ BUDER, *supra* note 181, at 153.

¹⁸⁵ *See id.* at 152.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ FONER, *supra* note 135, at 261; *see also* BUDER, *supra* note 181, at 152.

¹⁹⁰ BUDER, *supra* note 181, at 155. “The most striking example of a general loss in earnings occurred among one hundred journeyman mechanics of the freight-car construction department. Normally a well-paid group, their average salary fell from \$53.06 per month in April 1893 to \$13.93 by April 1894.” *Id.* at 159.

¹⁹¹ *Id.* at 155–57.

¹⁹² *Id.* at 158 (“When headquarters learned that only a few hundred men—primarily foremen, clerks, and unskilled laborers—remained at work, they decided to close the shops.”).

¹⁹³ HASKINS, *supra* note 118, at 38.

¹⁹⁴ *See* FONER, *supra* note 135, at 270; HASKINS, *supra* note 118, at 38. “The soldiers did use their guns and they did shoot to kill—25 workers were killed and 60 badly injured—yet the strike remained unbroken.” FONER, *supra* note 135, at 269. When the strike continued, a “sweeping injunction made the very command of the union leaders to their striking men . . . an open defiance of the courts.” *Id.* at 270 (internal quotation marks omitted).

striking and sacrifice, the workers had no choice but to pack up and leave the company town.¹⁹⁵ While not a success for the workers, the Pullman strike illustrates the power of industrial organizing as the entire American railway system was “paralyzed” by the campaign.¹⁹⁶

b. Solidarity in the Garment Industry Leads to an Agreement

Organizing efforts found greater success after the turn of the century. Prime examples are two of the unions that emerged in the New York City garment industry: the International Ladies Garment Workers Union and the United Garment Workers.¹⁹⁷ Horrible working conditions were prevalent in many industries at the time,¹⁹⁸ but garment workers were especially exploited.¹⁹⁹ Immigrant families would basically live in the shops, were forced to pay for their own equipment, would work about 84 hours a week, and would sometimes only make three dollars for the entire week.²⁰⁰ These awful conditions gave rise to the term “sweatshop.”²⁰¹

In 1909, the workers, mostly women, began to fight back.²⁰² Throughout the entire industry workers were striking.²⁰³ With limited success, union leaders called a meeting.²⁰⁴ Even though the union leaders were reluctant, they supported a call for “an immediate general strike.”²⁰⁵ “On November 24, 1909, eighteen thousand waistmakers in . . . New York

¹⁹⁵ BUDER, *supra* note 181, at 177.

¹⁹⁶ FONER, *supra* note 135, at 264–65 (“With remarkable speed the boycott and the ensuing strike spread west and south, covering almost the entire country. This was the first truly nationwide strike. It stretched from the West Coast to northern New York, and involved more than 150,000 workers in hundreds of local lodges.”); *see also* HASKINS, *supra* note 118, at 38.

¹⁹⁷ HASKINS, *supra* note 118, at 38–40.

¹⁹⁸ *See* Saru Jayaraman, *From Triangle Shirtwaist to Windows on the World: Restaurants as the New Sweatshops*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 625, 629 (2011); Mark C. Niles, *Punctuated Equilibrium: A Model for Administrative Evolution*, 44 J. MARSHALL L. REV. 353, 379 (2011) (“[I]ncidents of workplace injury and death were far from rare in the early twentieth century . . . in the United States.”).

¹⁹⁹ *See* PHILIP S. FONER, 5 HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE AFL IN THE PROGRESSIVE ERA, 1910–1915, at 227 (1980) [hereinafter FONER, PROGRESSIVE ERA] (“The industry subcontractors—men who hired from three to eight girl helpers—exploited the very young girls through an oppressive system of apprenticeship.”).

²⁰⁰ *See id.*; HASKINS, *supra* note 118, at 38–40; Jayaraman, *supra* note 198, at 628.

²⁰¹ Jayaraman, *supra* note 198, at 628 (“The term ‘sweatshop’ was meant literally; it referred to a dark tenement room where immigrants were ‘sweated,’ or worked, for long hours at low pay.”); *see also* HASKINS, *supra* note 118, at 39.

²⁰² HASKINS, *supra* note 118, at 40; Ruth Sergel, *Remember the Triangle Fire Coalition*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 611, 616 (2011) (“In 1909, these young immigrant women instigated wildcat strikes against individual garment factories.”).

²⁰³ FONER, PROGRESSIVE ERA, *supra* note 199, at 228–29; Jayaraman, *supra* note 198, at 629; Sergel, *supra* note 202, at 616.

²⁰⁴ *See* FONER, PROGRESSIVE ERA, *supra* note 199, at 229–30; Sergel, *supra* note 202, at 616.

²⁰⁵ Sergel, *supra* note 202, at 616.

walked out of nearly five hundred shops.”²⁰⁶ It was not long before an impressive 20,000 garment workers in New York City were picketing in the streets.²⁰⁷ Management had no choice but to bargain.²⁰⁸

Two months after the general strike began, it ended on September 2, 1910, when the garment workers and industry management agreed to the terms represented in the Protocol of Peace.²⁰⁹ The agreement was revolutionary in that it not only solidified specific working conditions, but it established a sanitation oversight committee, an internal arbitration system, and a committee to resolve minor grievances.²¹⁰ Today, the actual terms may seem quite modest, but for the garment workers in 1910, terms that guaranteed that “[n]o work shall be given to or taken to employees to be performed at their homes,” that “electric power [shall] be installed for the operation of machines . . . [at] no charge . . . against any of the employees,” or that “[t]he weekly hours of labor shall constitute fifty (50) hours in six (6) working days”²¹¹ were a significant departure from the status quo. The agreement even included a schedule of minimum wages and a clause that bound the management association to “discipline any [of its] member[s] . . . proven guilty of unfair discrimination among his employees.”²¹² Both parties conceded that disputes would not be settled by strike or by lockout.²¹³

²⁰⁶ FONER, *PROGRESSIVE ERA*, *supra* note 199, at 226.

²⁰⁷ *Id.*; see HASKINS, *supra* note 118, at 40; Jayaraman, *supra* note 198, at 629; Niles, *supra* note 198, at 381 (suggesting that there could have been as many as 40,000 garment workers that participated in the strike); Sergel, *supra* note 202, at 616.

²⁰⁸ HASKINS, *supra* note 118, at 40.

²⁰⁹ See FONER, *PROGRESSIVE ERA*, *supra* note 199, at 245; HASKINS, *supra* note 118, at 40; David W. Levy, *Brandeis, the Reformer*, 45 *BRANDEIS L.J.* 711, 717 (2007); George Nicolau, *The Future of Labor Arbitration*, *DISP. RESOL. J.*, Apr.–Sept. 1996, at 74, 75; Jacob Rader Marcus Ctr. of the Am. Jewish Archives (2010), *Significant Documents Illuminating the American Jewish Experience*, <http://americanjewisharchives.org/exhibits/aje/details.php?id=694> [hereinafter American Jewish Archives].

²¹⁰ See FONER, *PROGRESSIVE ERA*, *supra* note 199, at 245; American Jewish Archives, *supra* note 209. Not all the workers or union leaders were satisfied with the agreement. See FONER, *PROGRESSIVE ERA*, *supra* note 199, at 245, for a discussion on how the “settlement was a disappointment.”

²¹¹ Protocol of an Arrangement Entered into Between the Cloak, Suit and Shirt Manufacturers’ Protective Association and the Locals of the International Ladies’ Garment Workers’ Union, Sept. 2, 1910, *available at* http://americanjewisharchives.org/exhibits/aje/_pdfs/E_59.pdf.

²¹² *Id.*

²¹³ *Id.* While this agreement was a marked victory for the workers, management did not hold up to the bargain. In an attempt to keep organizers out of the factory, the Triangle Shirtwaist Company locked the workers inside. See HASKINS, *supra* note 118, at 40. Worse yet, unsafe working conditions—a key issue addressed by the strike—led to grave consequences when a fire rapidly spread through the factory. See Jayaraman, *supra* note 198, at 627–28 (“One hundred and forty-six young people were either burned or jumped to their deaths as hundreds of onlookers watched in horror from the street.”).

c. *Economic Gains Fueled Social and Political Power*

The Protocol of Peace changed the landscape of labor relations. Unions affiliated with the AFL continued to focus on wages, the eight-hour work day, and improving working conditions in industries such as steel, coal, shipbuilding, textile, food, and leather.²¹⁴ The AFL remained politically neutral, but spoke in favor of proposed legislation that would provide gains for individual workers.²¹⁵ This strategy seemed to work. By 1915, federal legislation began to pass that regulated working conditions in specific industries.²¹⁶ During World War I, the National War Labor Board was established to foster collective bargaining and dispute resolution.²¹⁷ These political gains foreshadowed the substantial labor protections later enacted in the 1930s.²¹⁸ Changes in the political atmosphere were a reflection of the growing public consciousness in support of labor. The growing number of union members was also evidence of this shift. By 1920, more than five million people were union members.²¹⁹

One might wonder why the struggles before the turn of the century did not have such far reaching results in the public sphere. Was it just that the natural progression of social gains came after enduring ebbs of struggle? Or, was it that the economic gains of individual workers had a growing influence on public opinion, followed by political support?

One thing is certain: The economic gains were significant. In the manufacturing industries, hourly earnings on average tripled between 1890 and 1919.²²⁰ This suggests that the American labor leaders of this time were right; that social gains for the working class would only come from achieving a stronger economic foothold.²²¹ In the words of AFL leader, Samuel Gompers: “We must walk before we can fly, and we believe the gaining of higher wages and shorter hours to be the preliminary

²¹⁴ BRIEF HISTORY OF THE ALM, *supra* note 131, at 16, 19.

²¹⁵ *Id.* at 16–17.

²¹⁶ See DAVID BRODY, IN LABOR’S CAUSE: MAIN THEMES ON THE HISTORY OF THE AMERICAN WORKER 59 (1993); BRIEF HISTORY OF THE ALM, *supra* note 131, at 16–17 (“In 1915, Congress passed the Seamen’s Act, regulating many of the conditions of employment for American sailors . . . and, in 1916, enacted the Adamson Act, establishing a basic 8-hour workday for railroad workers engaged in interstate commerce.”).

²¹⁷ BRIEF HISTORY OF THE ALM, *supra* note 131, at 18–19; see also Nicolau, *supra* note 209, at 75.

²¹⁸ E.g., National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)); Norris LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

²¹⁹ BRIEF HISTORY OF THE ALM, *supra* note 131, at 19; U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES 1789–1945, at 72 (1949); LEO TROY, TRADE UNION MEMBERSHIP, 1897–1962, at 4 (1965), available at <http://www.nber.org/chapters/c1707.pdf>. Of those, nearly 4.1 million were affiliated with the AF of L. See CENSUS BUREAU, *supra*.

²²⁰ See BRIEF HISTORY OF THE ALM, *supra* note 131, at 19 (“Average hourly earnings in all manufacturing industries, which were about 15 cents in 1890, rose slowly to 22 cents in 1914, then jumped to 47 cents in 1919.”).

²²¹ See *supra*, Part V.A.2.

steps toward great and accompanying improvements in the condition of the working classes.”²²² George Orwell later pointed out: “How right the working classes are . . . to realise that the belly comes before the soul, not in the scale of values but in point of time!”²²³ The extraordinary economic gains followed by social and political support in the early twentieth century show that rhetoric became a reality and can do so again.

B. *The Feasibility of Global Action Today*

The next big question is whether this model of pure and simple collective action, struggling for just private institutions, is feasible on the global scale. Workers have a stake in working conditions beyond their own borders sufficient to excite global action, and transnational corporations (TNCs) are no more powerful today than the American corporations were around the turn of the twentieth century. If workers’ concerns can be harnessed in a way that actually puts pressure on and competes with capital in the global market, there is no reason why immediate improvements in working conditions—like wages and discrimination—cannot be obtained through collective bargaining.

1. *Wages Are a Sufficient Stake for Working People*

Globalization is often described as advantageous for everyone.²²⁴ But this characterization fails to acknowledge the real losses for the working class. These losses are apparent just when considering the American worker.²²⁵ By some calculations, the median household income (adjusted for inflation) recently fell for the first time in nearly a hundred years.²²⁶ From 2000 to 2010, incomes fell from \$53,164 to \$49,445.²²⁷ Income losses have an even greater impact when everyday expenses rise. As Senator Bernie Sanders describes: “Today, a two-income family has less disposable income than a one-income family did 30 years ago because wages have not kept up with inflation, and because health care costs . . . , the cost of education . . . , housing . . . , and basic necessities have soared.”²²⁸ Global-

²²² HASKINS, *supra* note 118, at 34 (internal quotation marks omitted); *see supra* note 171 and accompanying text.

²²³ 2 GEORGE ORWELL, *Looking Back on the Spanish War*, in THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: MY COUNTRY RIGHT OR LEFT 1940–1943, at 249, 266 (Sonia Orwell & Ian Angus eds., 1968).

²²⁴ *See, e.g.*, JOSH BIVENS, GLOBALIZATION AND AMERICAN WAGES: TODAY AND TOMORROW, ECON. POL’Y INST. 1–2, Oct. 10, 2007, available at <http://www.epi.org/page/-/old/briefingpapers/196/bp196.pdf>.

²²⁵ *See id.* at 2.

²²⁶ *See* Steven Rattner, Op-Ed., *Let’s Admit It: Globalization Has Losers*, N.Y. TIMES, Oct. 16, 2011, at SR5.

²²⁷ *Id.*

²²⁸ BERNIE SANDERS, THE SPEECH: A HISTORIC FILIBUSTER ON CORPORATE GREED AND THE DECLINE OF OUR MIDDLE CLASS 108 (2011).

ization and outsourcing are likely the main causes for this decline in the American worker's standard of living.²²⁹

This outcome was to be expected. As Nobel economics laureate, Joseph E. Stiglitz put it, "The economic theory is very clear What happens [in a global economy] is that the wages in the high-wage country get depressed down. This was predictable. Full globalization would in fact mean the wages in the United States would be the same as the wages in China."²³⁰ And, globalization has not reached its full potential. While it is difficult to predict further damage to the American workers' wages and employment prospects, some estimates have been made as to how many American jobs are outsource worthy.²³¹ One notable estimate comes from Professor Alan Blinder,²³² indicating that 22% to 29% of American jobs are potentially "up for grabs."²³³ As a result of estimates like this one, wages can be expected to drop even further.²³⁴

Undeniably, working conditions—wages in particular—around the world have real and potential consequences for the American worker. Some may posit that energies should be spent on preventing more job loss and bringing old jobs back. That would be one way to protect the standard of living in America, but would also require serious policy changes²³⁵ that are unlikely to happen. For example, a series of outsourcing related bills have died in Congress over the last few years.²³⁶ A recent bill proposing tax credits for "insourcing expenses" and prohibiting deductions for "outsourcing expenses" could not pass cloture vote in the

²²⁹ See *id.*; Rattner, *supra* note 226, at SR5; Vic Thorpe, *Global Unionism: The Challenge*, in *LABOUR WORLDWIDE IN THE ERA OF GLOBALIZATION: ALTERNATIVE UNION MODELS IN THE NEW WORLD ORDER* 218, 218 (Ronaldo Munck & Peter Waterman eds., 1999). For a detailed analysis of how outsourcing has a disproportionate effect on "workers," as compared to "professionals," see BIVENS, *supra* note 224, at 4–5.

²³⁰ Chrystia Freeland, *As Jobs Go Global, U.S. Workers Pay*, N.Y. TIMES, Feb. 2, 2012, available at http://www.nytimes.com/2012/02/03/us/03iht-letter03.html?_r=0 (internal quotation marks omitted).

²³¹ See BIVENS, *supra* note 224, at 6.

²³² Professor Blinder is a faculty member at Princeton University and served under President Clinton on the Council of Economic Advisors. *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ SANDERS, *supra* note 228, at 108 ("[The decline] has to do with our disastrous unfettered free trade policy, which has resulted in the shutdown of tens of thousands of factories in this country. . . . [W]e have trade laws that say you have to be a moron not to shut down in America because if you go to China, go to Vietnam, go to Mexico . . . you pay workers there a fraction of what you are paying the workers in America.")

²³⁶ *E.g.*, Bring Jobs Home Act, H.R. 851, 113th Cong. (2013); Outsourcing Accountability Act of 2013, H.R. 790, 113th Cong. (2013); Bring Jobs Home Act, S. 337, 113th Cong. (2013); Bring Jobs Home Act, S. 3364, 112th Cong. (2012); Outsourcing Accountability Act of 2012, H.R. 3875, 112th Cong. (2012); Stop Outsourcing Security Act, H.R. 4650, 111th Cong. (2010); Stop Outsourcing Security Act, H.R. 4102, 110th Cong. (2007).

Senate.²³⁷ The American worker is better off recognizing common interests with other workers and finding ways to harness strength in numbers just like the railway workers did at the turn of the century.

2. *Compared to Yesterday, Corporations Are No More Powerful*

“Capitalism is not the same today as it was one hundred years ago.”²³⁸ Although that is true in many ways,²³⁹ the differences do not preclude an international application of the pure and simple union strategies of the past. This is because there are overwhelming similarities. First, there is no viable alternative to capitalism in the global market just as there was no real chance of abolishing the wage system in the nineteenth century.²⁴⁰ Second, the current power of TNCs is comparable to the power corporations wielded at the turn of the century. As discussed earlier, injunctions were often issued to prevent workers’ interference with business.²⁴¹ Essentially, there were no regulations on business, allowing it to grow virtually unchecked by any entity except for the workers.²⁴² Furthermore, with so much financial power came political power that was hard to match.²⁴³ Given that workers were able to successfully challenge the remarkable strength of corporations during the turn of the century in America and TNCs are not significantly more powerful today, workers ought to be able to make relative strides if past labor strategies are adopted (and adapted) for the global marketplace.

²³⁷ 112th Cong., Status Report on S. 3364: Bring Jobs Home Act (July 19, 2012), <http://www.govtrack.us/congress/bills/112/s3364> (providing an overview of the bill); see also Richard Rubin, *Senate Republicans Block Democrats’ Anti-Outsourcing Plan*, BLOOMBERG (July 19, 2012), <http://www.bloomberg.com/news/2012-07-19/senate-republicans-block-democrats-anti-outsourcing-plan.html>.

²³⁸ KIM MOODY, *WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY* 295 (1997).

²³⁹ As Moody points out: “The modern state is bigger and more universal than in the 1890s; the transnational corporation is a norm of capitalist organization, not an exception; and the sheer scale of production of goods and services is far greater than anyone at the turn of the last century could have imagined.” *Id.* at 295–96.

²⁴⁰ See FONER, *supra* note 135, at 80–81 (discussing the Knights’ attitude toward political action as a means to abolish the wage system); HASKINS, *supra* note 118, at 45 (discussing how the Socialist Party’s platform position on overthrowing the wage system alienated the labor movement).

²⁴¹ See *supra* Part V.A.

²⁴² See FONER, *supra* note 135, at 12–14 (discussing the rise of monopoly power); HASKINS, *supra* note 118, at 29; see also MOODY, *supra* note 238, at 296. And when workers did challenge management, they were often forced to sign yellow-dog contracts, prohibiting them from joining a union. See FORBATH, *supra* note 130, at 115 n.65 (“From the 1880s until the passage of the Norris–LaGuardia Act in 1932, virtually every . . . anti-yellow-dog law that was passed was struck down. Until the early 1900s, the contracts were enforced by employers’ unaided power to intimidate.” (citations omitted)).

²⁴³ See HASKINS, *supra* note 118, at 29; see also FONER, *supra* note 135, at 15–16 (discussing the inequities between the classes in the age of “robber barons”).

3. *There Is a Workable Foundation for Global Organizing*

If workers have a stake in collective action and TNCs do not present impossible challenges to overcome, why isn't there success on the global battlefield? A survey of the global organizing landscape reveals that there is little consensus in strategy and, more importantly, a lack of clear focus.²⁴⁴ Another major obstacle is a lack of resources dedicated to international efforts.²⁴⁵ Recalling the lessons drawn from our labor past, these issues can be overcome by utilizing industry-wide solidarity and focusing on meaningful collective bargaining agreements.

There are existing models that could support those efforts. International trade secretariats (ITSs) are federations that support world-wide industrial unions.²⁴⁶ They also have a practice of focusing on collective bargaining with TNCs.²⁴⁷ In addition, ITSs have the ability to "coordinate[] world-wide pressure or boycott campaigns."²⁴⁸ The problem is that most ITSs lack considerable resources to effectively take on TNCs and efforts are currently disproportionately concentrated on the goals of the more developed countries.²⁴⁹

A larger group of international organizations that affiliate with local unions are Global Union Federations (GUFs).²⁵⁰ There are about 10 GUFs which account for about 80% of global union activity.²⁵¹ GUFs' main functions are to "[c]reate" and "[d]efend space for local unions" and to "[d]emonstrate to unions how to move into space."²⁵² In order to do this, GUFs forge IFAs, coordinate solidarity actions, and educate labor leaders in effective organizing strategies.²⁵³ Because this model has far-reaching capabilities and has a workable structure, it may be a practical means of supporting actual substantive bargaining and collective coordination efforts on a much larger scale.

Some have suggested that "networks" within GUFs are the key to effective global organizing.²⁵⁴ Networks are smaller, local groups that are connected by industry or by a TNC.²⁵⁵ For example, some networks focus

²⁴⁴ See MOODY, *supra* note 238, at 289–92.

²⁴⁵ See CROUCHER & COTTON, *supra* note 106, at 50–51.

²⁴⁶ See MOODY, *supra* note 238, at 233–34.

²⁴⁷ *Id.* at 234.

²⁴⁸ *Id.* at 235.

²⁴⁹ *See id.*

²⁵⁰ Gregor Murray, *Can Multiple Weak Ties Reverse the Social Regulation Deficit? Multinational Companies and Labor Regulation*, 33 COMP. LAB. L. & POL'Y J. 715, 728 (2012) ("Global Union Federations . . . bring together national union movements in particular industries into a single overarching coordination . . ."); *see also* CROUCHER & COTTON, *supra* note 106, at 6.

²⁵¹ CROUCHER & COTTON, *supra* note 106, at 6–7.

²⁵² *Id.* at 8.

²⁵³ *See id.* at 8, 89.

²⁵⁴ *See, e.g., id.* at 69–70; Thorpe, *supra* note 229, at 224–25.

²⁵⁵ CROUCHER & COTTON, *supra* note 106, at 77.

energies on gathering collective bargaining data from single TNCs.²⁵⁶ That way, re-negotiation dates can be coordinated and specific contract clauses can be used as bargaining tools.²⁵⁷ Unfortunately, there are few examples of highly successful or utilized networks.²⁵⁸ Regional organization of networks is limited, but may be more effective in that they can “achieve higher degrees of mutual understanding, cohesion and coordinated action.”²⁵⁹

It seems that, just as past generations in the labor movement have given us practical lessons in progress, they have built the foundation of global labor relations. It is time for the next generation to develop the global organizing strategies of tomorrow by incorporating modern forms of communication and networking into the current structure. There is no telling just how powerful these tools can be in the hands of young and determined labor leaders.

VI. CONCLUSION

If global justice requires us to establish just principles within our global economic institutions, our affirmative humanitarian duty to assist in that endeavor requires us to support the labor community in its global organizing efforts. Some of Rawls’s biggest critics have questioned his emphasis on “peoples” rather than “persons.” But it is the collective that has sown the seeds of change in the past, and it is the collective that has the duty to do so today.

This Comment proposed a reconstructed theory of global justice based on Rawls’s theories of domestic and international justice. Rawls’s duty of humanitarian assistance gives little direction and is better informed if interpreted through the lens of his second principle of domestic justice. It follows that if global justice requires “peoples” of just societies to assist others in establishing just institutions of their own while tolerating cultural pluralism, assistance must be directed at private economic institutions. Through the second principle lens, this requires a mechanism capable of obtaining guarantees of a living wage and freedom from discrimination.

Current institutional mechanisms such as the ILO, corporate self-governance, and IFAs are insufficient on their own to obtain the guarantees of global justice. But, just as pure and simple unionism of the past was powerful enough to obtain economic and social justice for the American worker, the same can be done in the global economy. The focus should be on utilizing organizing methods that bring large groups of workers with common interests together in solidarity so that collective bargaining can be brought to the table. Diminishing wages should excite

²⁵⁶ Thorpe, *supra* note 229, at 224–25.

²⁵⁷ *See id.*

²⁵⁸ *See* CROUCHER & COTTON, *supra* note 106, at 779–878.

²⁵⁹ *Id.* at 87.

the workers in the developed world to join workers elsewhere and to challenge their corporate counterparts. In the least, bargaining should seek to obtain living wages and freedom from discrimination.

There is a framework for organizers to build upon. Institutional models like GUFs can be made more effective by bringing in modern forms of networking and communication. Finally, it is up to the next generation of labor leaders to suss out these intricacies, but they should be driven by lessons from our labor past.