Who Are the Marginal Workers?

José Castro, an undocumented immigrant from Mexico, worked in a plastics factory in south Los Angeles from May 1988 to early 1989. In fact, “José Castro” is probably not his real name, but that was the name on the birth certificate he used in order to obtain employment at Hoffman Plastic Compounds, Inc.¹ Three years earlier, in 1986, the U.S. Congress passed an amnesty program for undocumented immigrants, and for the first time outlawed the hiring of unauthorized workers. Nevertheless, Castro found employment relatively easily, although he did have assistance from a friend who helped him fill out the paperwork to get a job with Hoffman.² Castro was also helped by the de-unionization of the manufacturing industry in Southern California that put immigrant labor in much greater demand.³

Castro’s story would be unexceptional in many urban areas over the last 40 years had it not been for the fact that he became involved in organizing a union, resulting in an unfair labor practice case that went to the U.S. Supreme Court. After being laid off by Hoffman for supporting the United Steelworkers Union, Castro and the union sought redress from the National Labor Relations Board (NLRB), the federal agency dedicated to protecting the right of all employees to form unions and bargain collectively. The NLRB decided to prosecute Castro’s case as a retaliatory firing in violation of the federal law protecting the right to join unions, the National Labor Relations Act of 1935 (NLRA).

The Hoffman case sits at the intersection of immigration and labor law. After the case worked its way through the administrative and court systems, the U.S. Supreme Court was to decide whether Castro, indisputably an “employee” within the broad definition of that term under the NLRA, nonetheless should be denied the statutory remedies because of his unauthorized immigration status. Although he was an employee owed protec-
tion under the statute (because the definition of “employee” in the NLRA does not distinguish between documented and undocumented workers), the Supreme Court held in a 5-4 decision that Castro nevertheless was not entitled to the standard NLRB remedy of back pay because granting the remedy would “unduly trench upon the federal immigration policy of preventing unauthorized employment.”

The Court rejected the NLRB’s argument that denying back pay would actually encourage employers to hire undocumented workers because the cost of violating workers’ rights would be so low it would offset the small risk of fines being brought by the government to enforce immigration law. In 2002, for example, the federal government prosecuted only 25 criminal cases against employers for hiring undocumented workers. As Justice Stephen Breyer wrote in a dissenting opinion for three other justices, employers will hire illegal labor with “a wink and a nod” and then get off “scot-free” when they violate “every labor law under the sun.” The Court, in an opinion by the late Chief Justice William Rehnquist, replied that the employer does not get off scot-free—the employer is still subject to contempt proceedings if it engages in similar conduct again, and must post a notice to employees promising compliance with the law.

Castro was caught in the margins of two different statutes, and his story is emblematic of marginal workers. In the chapters that follow, there are more examples of the ways in which courts have construed bodies of statutory law against the interests of workers. These cases raise a basic question about the efficacy of protective labor legislation, and whether or not a different approach to workers’ rights needs to be emphasized. I will pursue that question, and find common threads in recent efforts to put fundamental workers’ rights above the political processes of statutory change.

Here, I describe how statutory protections have failed to protect many workers besides undocumented workers, typically through judicial misconstruction. The weakness of labor law remedies for all employees has been documented in labor law scholarship. I recount the stories of workers whose protection is compromised by clashing statutory objectives. Castro, for example, was caught between a protective labor law statute that protects employees regardless of their immigration status, and immigration law which requires authorization to work in the United States. The fact that Castro was undocumented further marginalizes him, since undocumented workers are less likely to assert the workplace rights that they have than other workers whose immigration status is not precarious.
Even though Castro asserted his rights, the operation of immigration law affected his ability to receive the same remedies as other workers.

By providing different remedies to employees who work side by side, the *Hoffman* decision, and many statutes, divide workers who should share common interests. The problem in *Hoffman* is not the statute itself, but judicial mis-construction. Some statutes, however, explicitly divide workers into different categories. Sometimes there is a good reason for divisions, such as the division between supervisors and employees in collective bargaining law, but the courts and administrative agencies have not always been correct in determining where the line between employee and supervisor is drawn. This divides workers who should share common interests, and makes collective change less likely.

The gaps left by statutes like the National Labor Relations Act raise questions about the effectiveness of all legislation to protect workers. Even the immigration control statute has failed to live up to its promise. Much research has shown that immigration law has not functioned in keeping with its purpose of preventing illegal employment while simultaneously meeting labor market needs for immigrant labor. Here, however, focuses on the dysfunction of protective labor laws for the most vulnerable workers, and how to improve the protections of those workers. I define “marginal workers” as those who are technically protected by labor and employment laws, but because of competing policy concerns or bodies of law, they lose full protection. This is especially true of more legally vulnerable workers, such as noncitizens, people of color, and women. Despite the additional protections that these workers enjoy on paper, they are often unable to fully enforce their rights. But all workers are affected by the inadequate protection given to marginal workers. In the *Hoffman* case discussed earlier, José Castro’s inability to organize a union affected all workers, not just those who were undocumented. These fault lines divide workers and leave them without protection.

There are a number of ways to ameliorate the situation of marginal workers. First, statutes could be modified and clarified to better protect workers. As will become evident, however, labor legislation fails to fully protect workers, and workers are generally too politically diffuse to change the law to their advantage. With regard to marginal workers, this political powerlessness is even more acute, since many of the workers discussed herein are minorities, noncitizens, or low-wage workers.

Second, courts could simply make better decisions. Many times, court decisions can be criticized as a misapplication of the law. And there
have been some situations where legislatures have corrected decisions. In chapter 6, I discuss the case of Lily Ledbetter, whose case led to a Supreme Court decision and a legislative change to the Equal Pay Act. In Ledbetter’s case, the political process worked to reverse the decision, but a closer examination will reveal that the gains made by Ledbetter do not stem the tide of pay inequity in the United States.

I address a puzzling paradox about labor and employment law protections: Why are workers still poorly protected by the plethora of twentieth-century statutory innovations passed on their behalf in the last century? The reasons are many, but I focus mainly on the way in which most workplace regulation has been accomplished as the primary problem. Workplace law is seen as a political battlefield between labor and capital, with each successive political change leading the pendulum either more toward the laissez-faire or toward New Deal-style regulation. This political see-saw has created a class of “marginal workers”—workers who fall through the margins of different bodies of law that are supposed to protect them, but lack the political power to fix the holes in the legislation. These pendulum swings have produced a statutory framework that has left numerous gaps and incomplete protections for all workers.

In order to better protect marginal workers, I advocate changing the primary framework in which we conceive workers’ rights. We have tended to see workplace regulation as a contest between labor and capital—a pendulum that swings back and forth between labor-friendly and business-friendly administrations. Rather than the spoils of political victory, workers’ rights should be seen as fundamental human rights, as they are in international law. Indeed, the human rights frame is increasingly being used by scholars, unions, and practitioners to advance the cause of worker freedom. In so doing, I argue that a global constitution of worker freedom is effectively being crafted and should be encouraged through litigation and dialogue to change attitudes and behavior.

Even in the face of the Hoffman decision and the threat of deportation, undocumented workers continue to organize in unions and in litigation against their employers. Several scholars have shown the willingness of immigrants to organize in unions.11 Like other employees who have found resort to the law unavailing, undocumented workers and unions have also continued to use a dialogue of human rights for greater protection. For example, in the wake of the Hoffman decision, the AFL-CIO filed a complaint with the International Labor Organization alleging that the decision violated international human rights law. The ILO agreed, but as a
matter of statutory construction of the NLRA, the *Hoffman* decision is still the law of the land.

*The Historical Trajectory of Labor Regulation in the United States*

The lack of protection in *Hoffman Plastics* described above raises questions about whether the worker protection goals of the progressive movement of the early twentieth century have been fully realized. In the legal realist tradition, law was an instrument for positive social change and a tool to be used with caution. Working hand in hand with progressive movements, legal reformers enacted workers’ compensation and state health and safety protections in the early 1900s. Then, in the 1930s, after the beginning of New Deal reforms and mass protests in the streets, the National Labor Relations Act of 1935 became the first modern piece of labor legislation.

In Critical Legal Studies and other jurisprudential movements of the latter twentieth century, law was viewed with suspicion as a necessary evil for social reform. In legal realist movements, legal scholars sought to reform the law through legislative change and administrative agencies. For the early labor movement, however, law and the courts were obstacles to progress because of the labor injunction, which was used to put a stop to even peaceful picketing. Labor was thus more interested in solidarity actions than a resort to law.

Still, the question of what kind of law—statutory or constitutional—confronted the labor movement in its nascent stages. Constitutional doctrine was frequently used against the labor movement in the form of “substantive due process.” Thus, the liberty interest in the Fourteenth Amendment due process clause was being used to invalidate state prohibitions of “yellow dog” contracts. These were contracts that employers required before a worker could start employment, promising that the employee would not join a union. It took the passage of the Norris LaGuardia Act of 1932 to reverse the Supreme Court’s decision in *Coppage v. Kansas* to outlaw yellow dog contracts. In spite of this, labor activists in the early twentieth century sought to base congressional legislation to protect freedom of association and collective bargaining on the Thirteenth Amendment to the U.S. Constitution, which prohibits “slavery or involuntary servitude in the United States or any place subject to its jurisdiction.” Like much of the New Deal, however, labor legislation was
enacted pursuant to Congress’s constitutional authority to regulate inter-state commerce, and survived the legal challenges of business groups that it was beyond congressional authority.17

The 1934 passage of section 7(a) of the National Industrial Act and the subsequent National Labor Relations Act in 1935 began a move toward the legal protection of concerted activity through a federal administrative agency. The National Labor Relations Board (NLRB) was one of the first federal agencies created for the protection of labor rights. More than 70 years after its creation, many see the NLRB as an emblem of the ossification of American labor law.18 The five-member Board that reviews the decisions of NLRB trial judges are appointed by the president. Thus, with each administration, the pendulum swings back and forth between more labor-friendly to more business-friendly decisions.

In the meantime, the protection for union organizing has diminished over the years. Studies have shown that one in 20 workers who support a union is fired for organizing campaigns at their workplaces.19 Interpretations of the NLRA by the Board and the courts have decimated worker rights.20 At the same time, there has been a proliferation of statutes to protect workers in the 75 years since the NLRA was enacted. Ironically, the proliferation of statutes has not led to a corresponding level of protection for marginal workers.

The politics of law, the title of a seminal anthology of the work of critical theorists, has not been good to workers. Critical scholars such as Alan Hyde, Karl Klare, and James Atleson have long questioned whether the law really protected workers’ interests.21 These scholars questioned the courts’ handling of labor law, but perhaps the heart of the problem lay with the statute itself—born of compromise and unable to be amended quickly.

In contemporary politics, we see this all the time. Health care legislation took years and was constantly critiqued as a choice between incrementalism or omnibus reform, until finally resulting in the Patient Protection and Affordable Care Act in March 2010. Immigration reform similarly has proceeded at a glacial pace. The Family Medical Leave Act, while it was welcomed in 1994 for allowing workers to take off 12 weeks from work to care for sick family members, is now being criticized for not providing paid leave. It also does little to address the instances of family responsibilities discrimination that are now being brought under Title VII, often unsuccessfully, in the absence of a separate statute dealing with such discrimination. Although Congress passed the Lilly Led-
Who Are the Marginal Workers?

better Act early in the administration of President Obama, most other business is stalled by the Senate’s filibuster rule, including some nominees to the National Labor Relations Board and Department of Labor. The U.S. Supreme Court’s 2010 Citizens United decision allowing corporations and unions to give unlimited funds as independent expenditures will further tilt the playing field away from ordinary workers and toward large corporations.22

The State of Workers Today

Some of the insecurity workers feel today is economic. Real wages for all workers, or the amount earned adjusted for inflation, have dropped.23 More and more workers are working part time. From April to May 2009, for example, the average wages of U.S. production workers shrank from $614.86 to $613.67 per week. This reflects the reduced bargaining power of workers over the years.24 But not all measures of worker insecurity are related to declining wages. Much of it is also related to the insecurity that workers feel in a down economy, without protections from discharge or layoff.

A great deal of worker insecurity is related to the decline of collective bargaining in the latter part of the twentieth century. Previously, protections in union contracts with their grievance arbitration processes provided a shield against unfair treatment. Now, statutory protections are the primary means of seeking this enforcement, but they have been ceded by the federal government to private plaintiffs. In many cases, private plaintiffs have been able to redress wage and hour violations, but there are many other violations against low-wage workers that are not economical for attorneys to take. Recently, a GAO report found that the Department of Labor under the Bush administration had completely failed to enforce wage and hour law.25 This uneven enforcement, even if corrected during the Obama administration, calls out for fundamental change in the way we look at workers’ rights.

Even if we had full enforcement of the minimum wage, for example, studies have shown it to be inadequate to support a family of four above the poverty line. This reality has led many to advocate for a living wage, rather than the minimum wage.26 Many cities and governmental entities have enacted living wage laws that apply only to contractors. This, however, is a small number of employers in the economy.27 Only a few municipalities, such as Santa Fe, San Francisco, and Washington, DC,
have adopted a local minimum wage ordinance that applies to all employers doing business within the city limits.

But real wages and income levels are only two measures of the status of workers in contemporary America. Workers today face other types of insecurity. Most workers are employed at will, which means that they are working without a contract or union protection specifying that they be terminated only for just cause. Based on current statistics, only about 15 percent of the workforce is unionized, meaning that nearly 85 percent of the workforce is most likely employed at will, without any contractual job protections. This means that statutory protections provide the backstop of fair treatment for most workers. As a safety net from unfair dismissal and discrimination, protective labor laws provide a patchwork quilt with some rather large holes which marginal workers fall through.

With unionization dropping below 10 percent in the private sector in the 2000s, there is a corresponding increase in the number of workers who are employed at will, without contractual recourse for unfair dismissals. The backstop of antidiscrimination law has contracted in significant ways from its initial promise. Indeed, one of the biggest cases in discrimination law in recent years has been a reverse discrimination case in which then-Judge Sonia Sotomayor participated on the Second Circuit Court of Appeals which was reviewed by the U.S. Supreme Court before she joined the Court.28 There is little concern about whether or not plaintiffs of color and women are able to get their cases heard by courts that are looking for ways to limit their dockets through doctrine that has a disproportionate impact on people of color and women who bring most of the claims.

All of these developments call for a new approach to the protection of the rights of the most vulnerable members of our society. Because the political processes have failed to adequately protect most workers, a fundamental rights discourse must be used to affirm the dignity of work and the moral imperative of certain basic minimum human rights for the protection of workers. This book focuses on a set of minimum workers’ rights as human rights.

And yet “rights talk” in the protection of the marginalized has a controversial pedigree. Legal realists, critical legal theorists, and race theorists have all debated the place of rights in the protection and empowerment of minorities.29 Critical race and feminist theorists have resolved that rights are necessary for the protection of women and minorities but should not be seen as ends unto themselves.30 Ultimately, rights continue to form the fabric of everyday life.
The debate over rights talk only begins a series of questions with regard to workers: What effect does rights talk have on the empowerment of workers? What is the effect of the counter-rights talk by employers? Has the language of rights had an effect on judges and administrative agencies offering better protection of workers? What kinds of rights should be employed? Should they be statutory, constitutional, or international? Does human rights talk lionize individuality and destroy solidarity?

This book addresses these questions in two ways. First, I demonstrate the ways in which statutory methods of worker protection have failed workers in several high-profile Supreme Court cases involving immigrant workers, workers of color in unions, and noncitizen workers. I also describe how guestworkers are caught between the laws of two countries. Then, I describe and endorse a movement toward seeing U.S. worker rights in the framework of constitutional and international rights that is already part of the fabric of social movements. The point is to provide a conceptual framework of baselines from which to accomplish regulation, but also to change attitudes about the imperative of minimum worker protections.

The debate over how to best protect workers’ rights has been going on for years, but the question of whether to use human rights dialogue is a relatively more recent phenomenon. I do not claim to put an end to the debate in this book, but I do wish to provide a new understanding of how to best protect workers.

*Defining “Marginal Workers”*

I discuss workers who are marginalized not solely because of their economic circumstances. In labor economics, the term has a specific meaning: marginal workers are those in irregular employment, because they are part-time, contractors, or disabled. In a broader sense, many workers are marginalized by the lines of demarcation in statutes themselves. The National Labor Relations Act, for example, excludes agricultural workers and those in domestic service. All statutes exclude independent contractors, and cover only those who are considered “employees” who work under the control of an employer.

The problem with the way that labor regulation has proceeded over the last century is that it leaves a number of politically powerless workers behind. Even when workers have made strides, these have been incremental steps. The problem is that many of the most vulnerable workers
in American society have little political power to effect change through legislation. With the decrease in the number of unions over the last 30 years, workers’ political power has become diluted. Workers with diffuse interests are unable to effectively band together politically for their interests. This leads to legislation that is incomplete, incremental, sometimes at cross-purposes with other statutes, and lacking coherence.32

The deficit in democratic participation identified above requires a new approach to workplace regulation that takes into account the fact that many workers, such as undocumented workers, guestworkers, and other noncitizens, are politically powerless in a majoritarian political system. Even in situations where there is some arguable political power, such as for women, people of color, or public-sector employees, the failure of workers to effectively counter limitations on their freedom of association and ability to earn equal pay has been shown in several recent examples.

I argue that a new human rights dialogue is needed to break out of the back and forth movement of the political processes. Progress has been made in the Obama administration to protect workers, but gaps still remain. Change will have to come in the form of changed attitudes among individuals and in administrative agencies and court decisions incorporating international human rights principles.

Plan of the Book

This book tells the stories of marginal workers, so each chapter begins with a different example of workers trapped in the gaps between different legal regimes. In chapter 2, I trace the ground that has been ably covered by other labor scholars who have framed workers’ rights as human rights. As stated earlier, I cast my lot on the side of human rights. I also discuss in this chapter the general problems with statutory change in the protection of workers’ rights.

Chapter 3 looks at the clash of statutory objectives of the National Labor Relations Act and Title VII of the Civil Rights Act. In the upheaval of the 1960s, the protest activities of two African American department store workers in San Francisco led to the Supreme Court cleaving between the protections of concerted activities and antidiscrimination law. The implications of this split are salient today.

Chapter 4 looks at noncitizen immigrants, who are supposed to have virtually the same rights as citizens for most employee protections. Title
VII even has a protection for discrimination on the basis of national origin. In 1973, however, the Supreme Court held that discrimination against noncitizens because they were noncitizens was not actionable under Title VII. This decision means that an employer can discriminate against employees for no other reason but their lack of U.S. citizenship. In today’s immigration climate, noncitizens are stigmatized and are often the victims of discrimination simply because they are not citizens. Even though recent changes to immigration law prohibit citizenship discrimination, these laws are only enforced through the Department of Justice, rather than private parties. This leaves a gap in remedies for noncitizens, who make up a growing segment of the American workforce.

Chapter 5 examines another group of workers who are legally allowed to be in the United States but unable to make full use of the laws that apply to them. Temporary workers from other countries, anomalously named “guestworkers” in today’s parlance, have been part of the U.S. labor force for over 80 years. History shows that guestworkers have faced exploitation in many instances, but also have been ignored by both their home governments and their “host” governments. Violations of the domestic statutes that are supposed to protect workers have been the subject of class actions in recent years. In this chapter, I conclude that international standards, and also international litigation, should be the primary means of addressing these violations.

In chapter 6, I again articulate the thread that runs through the book—that there is a movement toward the protection of workers’ rights on constitutional and international levels. These principles can provide a “default canon” in favor of workers’ rights, when two statutes are in tension with one another. This orientation will require a number of paradigm shifts that are also in the works—one that has been the subject of some controversy is the place of international law in the U.S. courts. By studying the ways in which workers have been marginalized by statutes, I hope to draw out the following three minimum principles as they apply to private- and public-sector workplaces:

1. Freedom of speech and association are overarching principles found in the Constitution and international law, because only through these procedural rights can workers’ bargaining power be fully realized.
2. The categorical approach to discrimination in statutes and the Constitution should be broadened to include international principles to which the United States is a signatory.
3. The meaning of “involuntary servitude” in the Constitution’s Thirteenth Amendment is broad enough to encompass a number of practices today—from the denial of the right to collective bargaining to guestworker programs.

I argue that judicial decisions and legislation should proceed in accord with these principles.

What Is This Book Not About?

There are a number of workers who are completely outside the labor and employment laws. They include domestic workers and agricultural workers who are not covered by statutes such as the National Labor Relations Act and the Fair Labor Standards Act. These workers are not the subject of this book per se, because it is about workers who are all employees within the statute’s definition and theoretically protected by the law. There have been a number of studies of marginalized workers who are treated as independent contractors, when in fact they are employees. The adult entertainment industry, for example, is notorious for this kind of misclassification. Basically, by claiming the worker is not an employee, the “employer” is absolved of all responsibility for workers’ compensation, wage and hour laws, and even discrimination laws. Many of these cases have resulted in large judgments and settlements for back wages, penalties, and attorneys’ fees.

There has also been a movement among marginalized workers for greater rights. Home health care workers in Los Angeles County fought for the right to have an employer, by making the County the employer of record. This is one of the cases that Jennifer Jihye Chun discusses in her book Organizing at the Margins. She discusses battles over the classification of workers as a way to marginalize them, both in the United States and Korea.

While I think the principles discussed here will beneficially inform the many misclassified workers, my aim is not to go deeply into the state of such workers. At its root, though, much of the problem with marginal workers lies in “employee” status itself. We will see that a more universal approach to those who work is embodied in international human rights. It should also be noted that all of the workers discussed in this book are considered statutory employees, yet because of court interpretations, they are unable to get real protection from the law.
When it comes to fundamental labor rights like protection from discrimination and the right to engage in collective bargaining, employee status should matter little. There are going to be some clear examples of contractors, or workers with a lot of bargaining power, but for the most part, misclassification will continue to frustrate even the laws that are supposed to protect “employees.” Or, as in some countries, the law protects all who work for another, eschewing the multipart test that is used in the United States to determine whether someone is an independent contractor.

But what is the logical stopping point? I believe international human rights law provides a logical stopping point. The last chapter will address some of the challenges to this approach, including its impracticability, the alleged antidemocratic nature of international human rights, and the possibility that international human rights might themselves be co-opted. Although these concerns are important, I believe that a new human rights strategy should be attempted. As Bob Dylan sang in “Like a Rolling Stone”: “When you got nothing, you got nothing to lose.” For many workers today, a new approach might be the only thing that seems worth trying.