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A TAXONOMY OF STRIKER REPLACEMENTS

James J. Brudney†

As part of Germany's ongoing regulation of temporary employment, recent legislation prohibits agencies from contracting for temporary workers to be used as striker replacements in labor disputes.¹ In this essay, I use Professor Monika Schlachter's succinct defense of the new law² as a starting point for reflecting on the issue of striker replacements under U.S. law and practice. The doctrinal and policy focus of U.S. labor law has been on permanent striker replacements as distinct from all other approaches to performing or replacing struck work. Schlachter's contribution gives rise to interesting questions about differences in treatment between permanent and temporary striker replacements from international and comparative law perspectives.

I. COMPARATIVE LAW TAKEAWAYS FROM SCHLACHTER

Schlachter observes that the employers' traditionally favored tool to combat workers' withdrawal of their labor was the lockout.³ The strategy of locking out the nonstriking portion of the workforce is recognized in law or accepted in practice in many countries,⁴ although not in all.⁵ Lockouts—

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1. See *Arbeitnehmerüberlassungsgesetz (AÜG)* [Law Amending the Temporary Work Act], Apr. 1, 2017, art. 11(5). The new law includes other restrictions on temporary personnel unrelated to strikes, such as an eighteen-month limit on temporary workers' deployment for the same hirer, and pay equal to comparable regular employees of the hirer after nine months. See André Zimmermann, *New Restrictions for Temporary Agency Work in Germany in 2017*, EMPLOYMENT LAW AND LITIGATION (Oct. 28, 2016), <https://blogs.orrick.com/employment/2016/10/28/new-restrictions-for-temporary-agency-work-in-germany-in-2017/>; Rolf Kowanz and Stefan Osterkorn, *Germany: Transformational New Rules on Hiring Temporary Workers*, EVERSHEDES-SUTHERLAND (Oct. 18, 2016), https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Diversified-industrials/Germany_Temporary_workers_Oct2016.

2. Monika Schlachter, *Replacement of Striking Workers By Temporary Workers: In Violation of International Standards*, 39 COMP. LAB. L. & POL'Y J. 545 (2018)

3. *Id.* at 548-49

4. See THE RIGHT TO STRIKE: A COMPARATIVE VIEW 63, 92, 252 (Bernd Waas ed., 2014) (citing law or practice in Argentina, Czech Republic, France, Germany, Ireland, Israel, Slovenia); IA INTERNATIONAL LABOR AND EMPLOYMENT LAWS, at 7-56, 7-57 (William L. Keller & Timothy J. Darby

whether responding to a strike or anticipating one—are lawful under the National Labor Relations Act (NLRA).⁶ Schlachter explains that in recent decades, German employers have concluded that because lockouts often create negative side effects by enlarging the scope of the conflict, engaging striker replacements is a more efficient strategy for combatting a strike.⁷ This conclusion is not as obviously applicable to the U.S. setting,⁸ although the difference may be due to a steep decline in the frequency of strikes rather than a substantial rise in the number of lockouts.⁹

Still, even if employers regard striker replacements as preferable to lockouts, it does not follow that the public will welcome their use. Broad-based cultural support for the right to strike may well mean that businesses engaging strikebreakers suffer in reputational terms, which can translate to their bottom line. Schlachter identifies the importance of whether replacement workers are viewed as socially acceptable by noting that social resistance to strikebreakers remains strong in certain countries in northern Europe.¹⁰ In the United States, the acceptability of hiring replacements changed dramatically after 1980, for reasons I discuss below.

A final notable point made by Schlachter is the systemic effect that replacement workers have for the functioning of a collective bargaining system.¹¹ While the reality or prospect of replacement actions is likely to chill the individual exercise of freedom of association rights by current or potential striking workers, Schlachter points to the broader importance of protecting strikes as collective pressure that enables the collective bargaining process to function. This last point resonates in particularly dramatic terms under the U.S. system that allows for permanent replacement of striking workers.

eds., 4th ed. 2013); IIA INTERNATIONAL LABOR AND EMPLOYMENT LAWS, at 16-50, 42-46 (William L. Keller & Timothy J. Darby eds., 4th ed. 2013) (adding Spain, Netherlands, Switzerland to this list).

5. See Waas, *supra* note 4, at 63, 277, 300 (citing law or practice in Greece, Hungary, Italy, and Poland); IIA Keller & Darby, *supra* note 4, at 10-80 (adding Bulgaria to this list).

6. See *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); see also 29 U.S.C. §158(d)(4) (2012). A lockout may not always be lawful—for instance, if imposed prior to bargaining impasse or in conjunction with employer unfair labor practices. See generally THE DEVELOPING LABOR LAW 20-28, 31-33 (John E. Higgins Jr. ed., 7th ed. 2017).

7. Schlachter, *supra* note 2, at 549

8. See Michelle Chen, *When Corporations Lock Out Their Own Workers*, THE NATION, July 8, 2016 (reporting that lockouts represented over 10% of total work stoppages in the U.S. in 2010, as opposed to 4% in 1990).

9. See Matt Phillips, *American Labor-Union Strikes are Almost Completely Extinct*, QUARTZ (Feb. 11, 2015), <https://qz.com/342311/american-workers-have-pretty-much-stopped-using-their-most-powerful-weapon/>. I address the relationship between this steep decline and the use of permanent replacements in Part II.

10. Schlachter, *supra* note 2, at 551 See Waas, *supra* note 4, at 61-62 (observing that in Sweden, although it is not unlawful for employers to seek to hire striker replacements, there have been no such instances in recent decades).

11. Schlachter, *supra* note 2, at 547, 550.

II. STRIKER REPLACEMENTS UNDER U.S. LAW

The right to strike has never been embraced or vibrantly recognized under U.S. labor law. More than ninety years ago, the Supreme Court ruled that, “neither the common law nor the Fourteenth Amendment confers the absolute right to strike.”¹² The Court later added that, “the right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a ‘fundamental right.’”¹³ In statutory terms, Congress expressly protects the right to strike in the private sector but in the same sentence recognizes governments’ capacity to impose limitations or qualifications on that right.¹⁴

Despite its less than robust legal status, the strike was the primary method for resolving industrial disputes during much of the twentieth century when private employers and unions were unable to agree on the terms of a collective agreement. And the threat of a strike was often the primary force driving both parties toward settlement of their contractual differences. But while U.S. workers have the right to exert economic pressure in the form of strikes, employers retain rights, under property and contract law, to defend their own economic interests.

In seeking to maintain all or part of business operations during a strike, U.S. employers for many decades pursued a range of short-term options. These included reliance on supervisors or managers to undertake portions of struck work; transferring performance of such work to another of their facilities; hiring temporary replacement workers; subcontracting with a third party for performance of struck work; and stockpiling inventory in advance to minimize the impact of work abandoned during the strike. The various stopgap strategies were consistent with the view of labor-management relations as a form of controlled economic warfare.¹⁵ Both

12. *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926).

13. *International Union, U.A.W. v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259 (1949). *See also Lyng v. Auto. Workers*, 485 U.S. 360 (1988) (upholding constitutionality of federal statute that denied eligibility for food stamps to households of strikers).

14. *See Labor Management Relations (Taft-Hartley) Act*, 29 U.S.C. § 163 (2012). Because federal law does not apply to public employers and employees, the right to strike and its limitations are regulated under the laws of fifty different states. My focus in this article is on the right to strike in the private sector.

15. *See generally Higgins, supra* note 6, at 28-29 (reporting that use of temporary replacements during an otherwise lawful lockout does not violate NLRA). Given that temporary replacements during a lockout are not deemed inherently destructive of employees’ rights under the NLRA, it would seem clear that temporary replacements also were not viewed as presumptively unlawful on their own. In this regard, the contrast between temporary and permanent replacements was understood from the first days of the NLRA. *See Leonard Boudin, The Rights of Strikers*, 35 Ill. L. Rev. 817, 831 (1940-1941) (observing that “Of course an employer, in the absence of unfair labor practices, has the right to hire

sides use economic weapons to augment their leverage and/or diminish the effectiveness of the other side's tactics. At the same time, both sides understand that a business must survive, if not flourish, in order for workers to retain decent jobs and employment conditions—hence the economic strategies being used ought not degenerate into nuclear-scale economic warfare.

Soon after the NLRA was enacted in 1935, the Supreme Court casually added another weapon to employers' arsenal—the right to hire permanent replacements for strikers. In a 1938 decision,¹⁶ the Court stated in dicta that an employer had the right to fill the places left vacant by strikers in order to “protect and continue his business,” and that he could treat those replacements as permanent employees thereby displacing workers who had participated in the strike.¹⁷ The Court established an employer's need for permanent replacements as a legal matter with no reference to empirical support. One might imagine that the need to offer replacements permanent status is especially persuasive in factual terms with respect to remote rural areas (where temporary replacements are harder to find than in cities), or for highly skilled workers (requiring investment in extensive training unlikely to be pursued for short-term replacements). The Court's dicta, however, asserted the right to protect one's business as a proposition of law that requires no showing on the employer's part.

The law was later clarified to establish that a permanently replaced striker is not quite the same as a terminated striker. She remains a member of the bargaining unit for an extended period, eligible for recall to fill job vacancies and also to vote on union matters.¹⁸ Still, the fact that an employee who exercises her right to strike may be deprived of her employment relationship as a lawful consequence has been regularly criticized since its inception,¹⁹ and is probably the most notorious dicta in U.S. labor law.

outsiders to do the work of the strikers. *It does not follow, however, that he can retain the strikebreakers when the strikers request reinstatement*” [emphasis in original].

16. NLRB v. Mackay Radio & Telegraph Co. 304 U.S. 333 (1938).

17. *Id.* at 345-46. In *Mackay Radio*, the employer, faced with a strike in its San Francisco office, had brought in employees from its other locations to maintain operations. Because some transferred workers remained in San Francisco after the strike ended, the employer offered to retain certain strikers and not others—and specifically disfavored those who had been active leaders in the strike. The Labor Board held that this rehiring preference was unlawful discrimination, and the Court unanimously upheld that ruling. There were no permanent replacements (i.e. workers hired from outside the company and offered permanent employment) in the case.

18. See *Laidlaw Corp.*, 171 NLRB 1366 (1968) (holding that economic striker is entitled to reinstatement to a vacant position); 29 U.S.C. § 159(c)(3) (2012) (stating that economic strikers remain eligible to vote on bargaining unit matters for twelve months after commencement of a strike).

19. See, e.g., Boudin, *supra* note 15, at 830-32; George Schatzki, *Some Observations and Suggestions Concerning a Misnomer—“Protected” Concerted Activities*, 47 TEX. L. REV. 378, 383 (1969); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal*

Given the historical context, though, the Court's willingness in 1938 to recognize a permanent replacement doctrine is not altogether surprising. In the late 1930s, employment at will remained the unquestioned common law rule,²⁰ and the NLRA was considered radical in large part because it intruded on this doctrine by directing that employees could no longer be fired for joining a union and engaging in lawful concerted activities. Moreover, the NLRA had barely survived a constitutional challenge in 1937, premised on commerce clause and due process arguments.²¹ Accordingly, the Court may not have viewed it as a radical departure to express in offhanded terms that employers had a right to protect their business operations through the use of replacement workers, a right that included displacing current striking employees by offering the replacements permanent positions.²²

Over the ensuing decades, however, U.S. law developed an understanding that workers have a genuine and substantial stake in maintaining their employment relationship when engaged in lawful conduct. This was exemplified in the public sector by federal court decisions holding that public employees may have a constitutionally protected property and/or liberty interest in their jobs.²³ It was evidenced in the private sector by judicial fashioning of various contract and tort law exceptions to employment at will.²⁴ And it was dramatically illustrated at the statutory level as Congress and state legislatures enacted scores of laws protecting against various forms of discrimination²⁵ and prohibiting

Consciousness, 1937-1941, 62 MINN. L. REV. 265, 301-02 (1978); Julius G. Getman, *THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS* 55-57 (2016).

20. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 129-35 (1976).

21. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-49 (1937) (upholding law by 5-4 vote).

22. Although Congress did not expressly endorse the permanent replacement doctrine in the aftermath of *Mackay Radio*, it since has indirectly recognized the doctrine's existence. See 29 U.S.C. § 159(c)(3) (added in 1947 and refined in 1959) (referring to "employees engaged in an economic strike who are not entitled to reinstatement"). Following the explosion of permanent replacement usage in the 1980s (see *infra* pp. 562-63 and accompanying notes 32-35), there were serious efforts in Congress between 1989 and 1993 to override the Court's decision. An override bill twice passed the House of Representatives but fell several votes short of the supermajority required to invoke cloture in the Senate. See James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 81-82 (1999).

23. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Paul v. Davis*, 424 U.S. 693, 707-10 (1976); *Goetz v. Windsor Central School District*, 698 F.2d 606, 609-10 (2d Cir. 1983).

24. On contract law exceptions, see for example, *Pugh v. Sees Candies, Inc.*, 171 Cal. Rptr 917 (Cal. App. 1981); *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1976). On tort law exceptions, see for example *Gantt v. Sentry Insurance*, 824 P.2d 680 (Cal. 1992); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Kessler v. Equity Mgmt. Inc.*, 572 A.2d 1144 (Md. Ct. Spec. App. 1990).

25. See for example, Title VII of the 1964 Civil Rights Act, Pub. L. No. 88-352, the 1967 Age Discrimination in Employment Act, Pub. L. No. 90-202, and the 1990 Americans With Disabilities Act, Pub. L. No. 101-336.

employer retaliation when workers report unlawful or suspicious employer activities.²⁶ Given these developments, the permanent replacement doctrine under the NLRA was revealed as at best anachronistic: it is difficult to call a lawful strike protected activity when one can lose one's job for engaging in it.

Although legal scholars consistently criticized the doctrine,²⁷ empirical studies indicate it had little practical effect before the 1980s.²⁸ Employers' reluctance to invoke their legal right was due to a range of factors,²⁹ but an important element was the social culture referred to by Schlachter. Unions were perceived by the general public as beneficial institutions from the 1950s into the 1970s.³⁰ Furthermore, managers often had extensive ties within their local communities, and employers tended to regard it as socially unacceptable to terminate workers who had spent years contributing to their company over a temporary—even if intense—economic dispute.³¹

Starting in the early 1980s, employers substantially increased their use of permanent replacements during economic strikes. While a number of factors once again contributed to this shift, changes in the social culture played an important role. President Reagan's permanent replacement of 12,000 striking air traffic controllers in 1981 dramatically affected the way the American public and many U.S. employers viewed strikes.³² That strike by federal employees was unlawful, but a new generation of corporate

26. See, for example, Sarbanes Oxley Act of 2002, Pub. L. No. 107-204; Michigan Whistleblowers' Protection Act, 1980 Mich. Pub. Acts 469; Maine Whistleblower Protection Act, M.R.S.A. § 839.

27. See e.g. Schatzki, Klare, & Getman, *supra* note 19.

28. See CHARLES R. PERRY et al., OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENT REGULATIONS iii, 38, 64, 123 (1982) (identifying use of permanent replacements during strikes as a "relatively new phenomenon" and explaining that firms studied were reluctant to resort to the use of outside replacements); William Serrin, *Industries, in Shift, Aren't Letting Strike Stop Them*, N.Y. TIMES, Sept. 30, 1986, at A18 (quoting management and union representatives as agreeing that use of permanent replacements was a rarity before the 1980s).

29. These included employers' fear of antagonizing unions and workers and also their concern about being unable to secure outside replacement workers. See Perry et al., *supra* note 28 at 38, 64; Getman, *supra* note 19, at 193-94.

30. See generally Lydia Saad, *Americans' Support for Labor Unions Continues to Recover*, GALLUP (Aug. 17, 2015), <http://news.gallup.com/poll/184622/americans-support-labor-unions-continues-recover.aspx?version=print> (reporting that public approval for labor unions was over 70% from the 1950s into the early 1970s, but declined to 55-60% during the 1980s; it has hovered between 48% and 58% since 2009, with far more respondents preferring that unions have lesser influence than they are perceived to exercise today, rather than greater influence).

31. See Serrin, *supra* note 28 (reporting that from the 1950s through the 1970s, managers did not regard hiring replacements as socially acceptable); S. REP. NO. 103-110, at 6-8 (1993) (discussing economic and morale reasons for the limited use of permanent replacements prior to 1980).

32. See *Harris Poll Finds Most Oppose the Air Strike*, N.Y. TIMES, Aug. 21, 1981, at A18 (reporting that 69% of adults contacted felt Reagan Administration had a right to dismiss the controllers); Serrin, *supra* note 28 (describing President Reagan's action as "[a]n important signal to employers that hiring replacements could not only be effective but could be widely viewed as acceptable conduct").

managers regarded the popular support accorded to the President's action as an invitation to pursue more aggressive responses to lawful strikes. By contrast, when federal postal workers had staged an unlawful strike a decade earlier in 1970, another Republican President, Richard Nixon, did not permanently replace them. The strike was extremely disruptive given the universal reliance on mail services, and the President ordered the National Guard to deliver the mail. Despite this temporary displacement of postal workers, not one striker was fired.³³

Even more significant than changes in the social culture, the 1980s witnessed major changes in the structure and mobility of corporate capital. In an era of takeovers, mergers, leveraged buyouts, and increased foreign competition, many employers seeking wage concessions and flexible job classifications were persuaded to adopt a strongly anti-union policy. New management at times seemed to treat newly acquired workers as mere assets to be jettisoned or abandoned.³⁴ Corporate managers often perceived ongoing relationships with a recently acquired workforce, or a local community to which they had no real ties, as less important than short-run economic returns.³⁵

This discussion about permanent replacements presupposes that their impact is different in kind, rather than simply in degree, from temporary replacements and other short-term employer strategies invoked to counter a strike. In the U.S. setting, that is emphatically the case. Regular access to permanent replacements dramatically alters the system of labor-management relations. Schlachter makes a similar point regarding replacements generally, but the distinct impact of permanent replacements in the U.S. setting is evident at multiple stages.

During an organizing campaign, employers may well explain to their workers that even if the union wins the election, it cannot compel any

33. See *The Strike that Stunned the Country*, TIME MAGAZINE, Mar. 30, 1970; *U.S. Postal Strike of 1970*, WIKIPEDIA, https://en.wikipedia.org/wiki/U.S._postal_strike_of_1970 (last edited Mar. 12, 2018, 7:50 AM).

34. See AARON BERNSTEIN, *GROUNDING: FRANK LORENZO AND THE DESTRUCTION OF EASTERN AIRLINES 71-78* (1990) (describing how Lorenzo in the late 1980s initiated a series of sales and spinoffs at Eastern Airlines, stripping money and resources from the company and eliminating many union jobs); RICHARD VIGILANTE, *STRIKE: THE DAILY NEWS WAR AND THE FUTURE OF AMERICAN LABOR* 16, 25, 258-64 (1994) (describing Tribune Company's unsuccessful efforts in late 1980s to extract major concessions from unions, and reporting that purchaser who stepped in during a bitter strike in 1991 secured union concessions—including the loss of over one-third of jobs—that went beyond what Tribune Company had demanded).

35. See John Schmeltzer, *Key Management Weapon: Threat to Replace Workers*, CHI. TRIB., Aug. 11, 1997, at 13 (reporting that since 1981, permanent replacements have become a "regular consideration within a corporation's arsenal of weapons" in response to a strike); Serrin, *supra* note 28 (describing a new generation of managers willing to hire permanent replacements as part of cost-cutting efficiencies).

concessions during bargaining without engaging in a strike.³⁶ The employer then adds that a strike raises the possibility of being permanently replaced, an action the employer might (however reluctantly) be forced to take. This lawful threat of “job loss for joining the union” significantly chills the exercise of employee free choice.

Assuming the union prevails in an election and is certified, negotiating a first contract traditionally presents special challenges. Employees, flush with victory but lacking experience in collective bargaining, may expect to secure substantially improved conditions with minimal friction; the union must integrate workers’ competing priorities from within the unit into a negotiating package; and perhaps most important, employers involved in collective bargaining for the first time tend to be deeply skeptical as to its benefits.³⁷ In these circumstances, the permanent replacement doctrine leaves employers free to offer harsh or parsimonious proposals and then wait for the union and its membership either to capitulate or to strike and face losing their jobs.

If the union does strike and the employer hires permanent replacements, the replacement workers have full voting rights within the bargaining unit while the strikers retain their voting rights for only twelve months under the statute.³⁸ An employer who waits twelve months can then effectively engineer a decertification election, with a fair chance that the union will be decertified based on the replacement voters.³⁹ The possibility of breaking the union through striker replacements is more likely in the U.S. context, where—especially after 1980—bargaining has taken place at the company or even the plant level.⁴⁰ By contrast, in countries with

36. See generally *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953) (holding that employer has right to give noncoercive “captive audience” speeches during a union campaign while employees are on working time, and it need not provide the union with comparable access at the worksite).

37. See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 353-57 (1984) (reporting that in 1980, unions that had been certified as majority representatives succeeded in negotiating a first contract only 63% of the time).

38. See 29 U.S.C. § 159(c)(3) (2012).

39. The Supreme Court has held that the Labor Board need not adopt a presumption that striker replacements oppose union representation. See *NLRB v. Curtin Matheson Scientific, Inc.* 494 U.S. 775 (1990). Nonetheless, even absent a required presumption of anti-union preference, the likelihood is high that most permanent replacements will be hostile to the union.

40. Industry-wide or “pattern” bargaining characterized major unionized industries beginning shortly after World War II. But by the early 1980s, firms faced with rising costs and increased global competition became unwilling to negotiate agreements that applied uniformly to most or all firms in an industry, or even most or all facilities within a firm. See Audrey Freedman & William E. Fulmer, *Last Rites for Pattern Bargaining*, 60 HARV. BUS. REV. 30, 40 (1982) (describing the breakdown of pattern bargaining in auto and rubber industries); Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3, 11 (1993) (reporting abandonment of pattern bargaining in steel industry, and describing shifts to plant-level bargaining and away from firm-wide agreements in auto, tire, and airline industries).

sectoral bargaining,⁴¹ it is difficult if not impossible for one employer to break a union by replacing strikers. The employers' federation would have to decide to replace strikers, an improbable scenario.

Finally, assuming a strike occurs over serious economic issues and a large number of strikers are permanently replaced, resolving the strike becomes far more difficult. The union will almost certainly insist on getting jobs back for its members as a condition for a strike settlement. Even if the employer wants to back down, the permanent replacements may well have contract rights under state law that must be preserved.⁴²

Empirical studies show that strikes are longer and more contentious when permanent replacements have been hired—they are converted from a limited though intense dispute about economic issues to a broader and deeper confrontation about the retention of jobs and the union's existence at the facility.⁴³ Importantly, a union faced with entrenched permanent replacements may no longer view its members' prosperity as tied to the prosperity of this employer. Instead, it is only by displacing management or compelling the sale of the firm that the union can hope to obtain re-employment for its replaced members. The resulting scorched earth strategy may be effective in some instances, but it is deeply destabilizing of industrial relations in a manner neither contemplated nor endorsed by the NLRA.

In the end, the rise of permanent replacements has been accompanied by a precipitous decline in the number of strikes. That number fell by over 90% between 1980 and the early 1990s, and it has remained at an extremely low level ever since.⁴⁴ While there are multiple reasons for this decline,⁴⁵

41. See generally BRIAN BERCUSSON, *EUROPEAN LABOUR LAW 78-94* (1996) (discussing importance of sectoral-level collective bargaining in Europe, with exception of the United Kingdom).

42. See *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (holding that the NLRA does not preempt the state law contract rights of permanent replacement workers). In addition to strengthening the job security of permanent replacements in *Belknap*, the Supreme Court in 1989 held that when incumbent bargaining unit members cross the picket line to take more advantageous jobs during an economic strike, their more senior striking coworkers have no right to displace them from the preferred positions at the end of the strike. See *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989). For a thorough discussion and analysis of these two Supreme Court decisions and related developments in the lower courts and before the NLRB, see Matthew W. Finkin, *Labor Policy and the Evneration of the Economic Strike*, 1990 U. ILL. L. REV. 547 (1990).

43. See Cynthia L. Gramm & John F. Schnell, *The Empirical Relations Between Employers' Striker Replacement Strategies and Strike Duration*, 47 INDUS. & LAB. REL. REV. 189 (1994) (finding that for strikes between 1985 and 1989, employers' permanent replacement of striking workers was associated with longer strikes than would otherwise have occurred, and that when employers permanently replaced strikers, the probability of settlement fell approximately 30%).

44. See Phillips, *supra* note 9; *Work Stoppages Involving 1,000 or More Workers, 1947-2017*, BUREAU OF LABOR STATISTICS (Last Modified Date: Feb. 9, 2017), available at <https://www.bls.gov/news.release/wkstp.t01.htm>.

45. See Brudney, *supra* note 22, at 78-80 (discussing the loss of union power in the 1980s linked to the end of pattern bargaining in major industries, the rise of global competition, and growing tensions between international unions and their local affiliates over how to address these challenges).

the business community's strong and steady appetite for permanent replacements has played an important role.

III. PERMANENT AND TEMPORARY REPLACEMENTS IN A LARGER LEGAL CONTEXT

As just described, U.S. law and practice traditionally viewed an employer's right to continue operations on a short-term or temporary basis as presumptively part of its property and business rights. Unlike permanent replacements, these short-term strategic responses to lawful strikes did not jeopardize strikers' job security, nor were they viewed as undermining the system of organizing and collective bargaining put in place by Congress in the 1930s. Although the tradition of using temporary rather than permanent replacements has been effectively demolished under U.S. law and practice since 1980, the possible vitality of this difference in larger doctrinal and policy terms gives rise to certain intriguing questions.

One question involves whether international labor norms, promulgated by the International Labour Organization (ILO), recognize any distinction between permanent and temporary replacements. Convention No. 87 on Freedom of Association does not expressly provide for the right to strike, but ILO supervisory mechanisms⁴⁶ have recognized this right within the Convention for decades.⁴⁷ Although the United States has not ratified

46. The Committee of Experts (CEACR) is a neutral body of twenty jurists, legal academics, and labor and human rights attorneys, established in 1926 and charged with monitoring countries' compliance with the conventions they have ratified. The CEACR has analyzed the existence of and limitations on the right to strike through individual country Observations dating back many decades, and through General Surveys on Convention No. 87. See INTERNATIONAL LABOUR OFFICE (ILO), GIVING GLOBALIZATION A HUMAN FACE 46-65 (2012) [2012 General Survey]; ILO, FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING 61-78 (1994) [1994 General Survey]. The Committee on Freedom of Association (CFA) is a tripartite body established in 1951 for the purpose of examining complaints about violations of freedom of association based on Convention No. 87 and Convention No. 98 (addressed to Collective Bargaining), whether or not the country concerned has ratified the relevant conventions. The CFA has recognized the right to strike in scores of decisions over the years, many of which are summarized or referenced in its periodic digests. See ILO, FREEDOM OF ASSOCIATION 109-136 (5th rev. ed. 2006) [2006 Digest].

47. The CEACR and CFA have done so mainly on the basis of article 3, which sets out the right of workers' organizations to organize their activities and to formulate their programs, and article 10, which establishes that the definition or objective of a workers' organization is to further and defend the interests of workers. In more recent years, the international employers' group has raised questions and concerns about the scope and contours of the right to strike as explicated by the two committees. See generally Janice R. Bellace, *Back to the Future: Freedom of Association, the Right to Strike and National Law*, 27 KING'S L.J. 24 (2016); Claire La Hovary, *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, 42 INDUS. L.J. 338 (2013); Jean-Michel Servais, *The Right to Take Industrial Action and the ILO Supervisory Mechanism Future*, 38 COMP. LAB. L. & POL'Y J. 375 (2017). This Essay does not address the ongoing debate among the ILO constituencies regarding limitations or qualifications on the right to strike.

Convention No. 87, 154 countries have done so (out of 188 ILO members), including all European members.⁴⁸

Schlachter suggests that the CEACR and CFA do not differentiate between temporary and permanent replacements in their critical stance.⁴⁹ While some evidence supports her suggestion,⁵⁰ there are also indications from the CEACR and CFA of a more nuanced understanding as to possible differences between the two types of replacement workers. For instance, the CEACR in 1994 stated as follows:

A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on *legal* strike. **The difficulty is even worse if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute.** The Committee considers that **this type of provision or practice** seriously impairs the right to strike and affects the free exercise of trade union rights.⁵¹

Elsewhere, the committees emphasize, when addressing replacement workers, that “maintaining of the employment relationship is a normal legal consequence of recognition of the right to strike,”⁵² and that allowing striker replacements is “a serious impediment to the right to strike, *particularly where strikers are not able in law to return to their employment at the end of the dispute.*”⁵³

To be sure, the CFA and CEACR have expressed the view that temporary replacements should be used only in situations when strikes themselves may be restricted or prohibited—such as if minimum services

48. In addition to the United States, the thirty-four nonratifying countries include China, India, and Brazil, covering a substantial portion of the global population.

49. Schlachter, *supra* note 2, at 546-47 & notes 7-12.

50. See, e.g., CFA 2006 Digest, *supra* note 46, at ¶ 632; CEACR 1994 General Survey, *supra* note 46, at ¶ 175; 360th Rep. of the CFA, Case No. 2770 (Chile), ¶ 372 (2011); 357th Rep. of the CFA, Case No. 2638 (Peru), ¶ 797 (2010).

51. CEACR 1994 General Survey, *supra* note 46, at ¶ 175 (emphasis in first sentence in original; bolded typeface added). The bolded sentence includes a footnote to a CFA case addressing striker replacement law and practice in the United States. For CFA cases condemning the use of permanent replacements, see, for example, 333rd Rep. of the CFA, Case No. 2281 (Mauritius), ¶ 633 (2004); 374th Rep. of the CFA, Case No. 3030 (Mali), ¶ 539 (2015); 372nd Rep. of the CFA, Case No. 3011 (Turkey), ¶ 651.

52. CEACR 2012 General Survey, *supra* note 46, at ¶ 152; 1994 General Survey, *supra* note 46, at ¶ 139. The 1994 General Survey paragraph includes a footnote to a United Kingdom case decided by the CFA.

53. CEACR 2012 General Survey, *supra* note 46, at ¶ 152 (emphasis added). See also 1994 General Survey, *supra* note 46, at ¶ 139 (stating that striker replacements raise “a particularly serious issue in the case of dismissal, if workers may only obtain damages and not their reinstatement”); CFA 2006 Digest, *supra* note 46, at ¶ 633 (stating that the use of striker replacements for an indeterminate period [not specifying permanent or temporary] “entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights”) (emphasis added).

are not being maintained; during a lawful strike in essential sectors or services; for certain disputes in the public service; or in situations where the suspension of services or industries would lead to an acute crisis.⁵⁴ Still, this acceptance of temporary replacements in limited circumstances contrasts with the two committees' position that permanent replacements are never permissible, because they result in the termination of the strikers' employment relationship.⁵⁵

Many countries that have ratified Convention No. 87 do allow for striker replacements in particular circumstances. Most provide for this expressly by law,⁵⁶ while others permit it as a matter of practice even when rarely invoked.⁵⁷ Importantly, a number of these countries specifically prohibit the use of permanent replacements.⁵⁸

Stepping back, an array of national laws provide that lawful economic strikes have the effect of suspending employment contracts. Strikers are not compensated or otherwise "covered" as employees during a strike, but they resume the contractual relationship with their employer at the end of the strike, absent unusual unlawful or violent conduct.⁵⁹ This broadly endorsed legal principle—that the employment relationship is suspended but not terminated during a strike—suggests that hiring permanent striker replacements poses a distinctive threat in both law and practice. It would seem apparent that any country authorizing or permitting the use of permanent replacements is acting in a manner incompatible with CEACR and CFA interpretations of Convention No. 87. Whether, or in what circumstances, countries that have ratified Convention No. 87 and allow for short-term replacement workers are acting consistent with the Convention poses a separate and interesting question. But the fact that it is a separate question suggests that international labor law does not view the two types of replacement workers in identical terms.

The possibility of distinctive treatment for temporary replacements gives rise to a related set of comparative law questions involving possible

54. See, e.g., 360th Rep. of the CFA, Case No. 2770 (Chile) ¶ 372, 374, 376 (2011); CEACR 2011 Observation on Chile regarding Convention No. 87 (published 2012, in Rep. of the CEACR, 101st Session of Int'l Labour Conference, vol. 1A at 104-05).

55. See CEACR and CFA sources *supra* note 51;

56. See Keller & Darby, *supra* note 4, vol. IA, at 50-128 (South Africa), vol. IIA at 10-80 (Bulgaria), 42-48 (Switzerland). See Waas, *supra* note 4, at 61-62, 136, 253, 359 (discussing law in Finland, Poland, Russia, Ireland, Israel, Chile, Germany, Japan).

57. See Keller & Darby, *supra* note 4, vol. IIA at 19-80 (Sweden); Henning Jakhelln, Kristine Fremstad Moen & Maarten Brandsnes Faret, Supp. 445 "Norway", *Part II, Ch. 6 Collective Bargaining, Strikes, Lock-Out and Other Legal Forms of Industrial Action* in THE INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, 372, 382 (Blanpain & Hendrickx eds. 2017).

58. See laws of Bulgaria, Switzerland, Sweden, Finland, Germany, Japan, referenced *supra* notes 56-57. See also Keller & Darby, *supra* note 4, vol. IIA at 16-49 (Netherlands).

59. See, e.g., Keller & Darby, *supra* note 4, vol. IA at 3-77 (Belgium); 4-63 (France); 5-78, 5-79 (Germany); 7-56 (Spain); 50-120, 50-126 (South Africa); and 75-62 (Brazil).

differences between temporary replacement workers engaged through an agency as distinct from directly by the employer. German law regulates temporary employment through agencies in numerous respects apart from as striker replacements.⁶⁰ And a number of other countries besides Germany that permit temporary replacements in certain circumstances expressly prohibit them with respect to temporary agency workers.⁶¹ Moreover, the ILO in its Recommendation Concerning Private Employment Agencies states that such agencies “should not make workers available to a user enterprise to replace workers of that enterprise who are on strike.”⁶²

Do temporary agencies pose particular concerns regarding the right to strike? There may be ways that temporary replacements brought in by third party entities are especially subversive of the right, making them more analogous to permanent replacements in this respect.

For instance, outsourcing the provision of temporary replacements enables the struck employer to avoid the costs and visibility associated with having to recruit and train them. The replacements can be brought in quickly and efficiently, without risk of prolonged exposure to public disapproval during a recruitment and training period. Temporary agency workers also relieve the struck employer of transaction costs involved in hiring and monitoring its own temporary staff. Subject to the terms of agreement with the agency, a struck employer has the flexibility to send back any replacements it deems unfit. Finally, having the replacements be outsiders rather than the employer’s own workers may lessen the risks of conflicts and violence between replacements and strikers or their supporters. An outside agency might even be contracted to transport replacement workers to and from separate gates, or to bring them in at pre-arranged times, thereby reducing tensions associated with having replacements hired by the employer cross picket lines individually each day.

Assuming that one or more of these factors is in play, use of agency-hired replacements can facilitate strikebreaking in ways that temporary replacements hired by the employer probably would not.

At the same time, outside replacements of any kind may pose more of a threat to the right to strike than other short-term employer strategies such as using supervisors, managers, or workers transferred from other facilities to perform struck work. In theory, any redeployment of the employer’s own

60. See *supra* note 1, identifying examples of this additional regulation.

61. See Waas, *supra* note 4, at 61-62 (citing law in Poland, Italy, and Chile); See also Keller & Darby, *supra* note 4, vol. IIA at 16-49 (Netherlands).

62. ILO Recommendation 188, *Private Employment Agencies Recommendation*, ¶ 6 (June 19, 1997). ILO Recommendations supplement the provisions of Conventions, but unlike Conventions they are not framed in mandatory terms.

personnel results in some diminution in its capacity to maintain pre-strike operational levels. The employer thus continues to feel the pain of an ongoing strike, and this may hasten its preparedness to negotiate a settlement. By contrast, temporary replacements from the outside more likely allow an employer to continue to perform other business functions at pre-strike levels. This in turn may make it easier to resist negotiating until the strikers' solidarity begins to deteriorate, leaving them in a weaker bargaining position.

Still, from the U.S. perspective, even temporary replacements recruited and engaged by an outside agency do not give rise to the entrenched individual rights and disproportionate systemic impact of permanent striker replacements. The fact that temporary replacement workers have no claims to job security at the end of a strike makes them less subversive of individual strikers' rights than permanent replacements clearly are. And their temporary status means that they are likely to be less disruptive of the collective bargaining system, for reasons explained in Part II.

CONCLUSION

Perhaps the most obvious lesson from U.S. labor law is that all striker replacements are not created equal. Temporary replacements in any form may allow employers to break particular strikes, but the reality and specter of permanent replacements allow the employer community to undermine an entire system of labor-management relations. International labor law does not seem insensitive to this distinction, while remaining skeptical (to different degrees) about both types of outside replacement workers.

The fact that many governments prohibit permanent replacements in law and/or practice may have reduced the need to address more directly differences between permanent and temporary strikebreakers under international law. At the same time, various countries accept the use of temporary replacements, while a number of those countries in addition to Germany refuse to do so for temporary agency workers in particular. Accordingly, it appears that legal and policy debate over the taxonomy of striker replacements will continue, at least in comparative law terms.