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Past Premises, Present Failures, and Future Needs in Labor Legislation

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PAST PREMISES, PRESENT FAILURES, AND FUTURE NEEDS IN LABOR LEGISLATION

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I. PAST PREMISES OF LABOR LAW

Fifty years ago this spring, Congress passed the Norris-La Guardia Act, one of our milestones in labor legislation.[1] Although this statute was cast in the form of defining the jurisdiction of the federal courts, it articulated for the first time, in its statement of purpose, the basic policy on which our labor law has since been based. Section 2 of that statute declared:

> Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . it is necessary that he have full freedom of association, self organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment. . . .

These words articulated two propositions. The first proposition is the historic foundation for all labor legislation, both before and after Norris-La Guardia: Individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain acceptable terms of employment.[2] When there is

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1. Act of March 23, 1932, 47 Stat. 70, 29 U.S.C. §§ 101-115 (1976).

2. *See generally,* J.R. COMMONS & J. B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION (4th rev. ed. 1936).

> But in any modern industrial community, large numbers of unorganized workers are found, still bargaining individually, employed at low wages and apparently unable to make any effective efforts themselves to improve their condition. If they are to be helped toward an equality in bargaining power with the employer, the state must take the initiative.

Id. at 43.

such economic inequality, it is the function of the law to protect the weaker party.[3] This was the explicit premise of legislation fixing maximum hours of work and minimum wages, prohibiting child labor, requiring safety and health protection, and mandating compensation for work injuries. The law would not leave workers to merciless market forces, but would come to their aid as the weaker party and shield them from the dominant economic power of the employer.

The second proposition articulated by the Norris-La Guardia Act was that the bargaining weakness of individual employees was to be overcome by allowing them to organize and bargain collectively through representatives of their own choosing.[4] As a concrete example, Section 3 barred employers from using their bargaining power to extract from individual employees "yellow dog contracts" which bound them to forego their right to organize and bargain collectively.[5]

These two basic propositions—that the law should protect the individual worker as the weaker party, and that the best protection against individual weakness was collective action—have been the basic premises of our labor law for fifty years.

The Norris-La Guardia Act assumed that if the law refused to recognize "yellow dog contracts" and withheld the use of injunctions, workers could, without more, form unions and establish collective bargaining. This under-estimated the determination and ability of employers to use their control over jobs, terms of employment, and the workplace to prevent unionization and block collective bargaining. Experience soon demonstrated that the law must provide more protection if workers were to overcome individ-

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3. "In this opinion [Holden v. Hardy, 169 U.S. 366 (1898)] the court recognized what has been dimly seen or implied from the beginning of labor legislation, that inequality of bargaining power is a justification under which the state may come to the aid of the weaker party to the bargain . . . . Inequality of bargaining power has long been a ground for legislative and judicial protection of the weaker party . . . ." *Id.* at 529.

4. "Once we recognize that the right of combination by workers is in itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power, the consequences of making the power of unions effective will be seen in truer perspective." F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 205 (1930). In describing § 2 of the Act, the authors declared, "This pronouncement recognizes the futility of freedom *of* contract in the absence of freedom *to* contract." *Id.* at 211.

5. "The whole bill flows logically from its avowed public policy. By particularization, it aims to give that policy content and meaning. Thus Section 3 seeks to effectuate the rights of free association and to secure genuine representation in collective bargaining." *Id.* at 212.

ual weakness through collective strength.[6]

In the Wagner Act of 1935,[7] Congress made more specific findings of the social costs resulting from "inequality of bargaining power between employees . . . and employers," and "the denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining." Congress explicitly declared the national policy to be one of "encouraging the practice and procedure of collective bargaining."[8] To effectuate this policy Congress curbed the employers' use of their control over workers and the workplace to "interfere, restrain or coerce employees" in their "right to self-organization . . . and to bargain collectively through representatives of their own choosing."[9]

The national policy of "encouraging the practice and procedure of collective bargaining" was to serve three interlocked purposes. First, and most explicitly, collective bargaining would provide a better balance of bargaining power. The workers' weakness in individual bargaining was to be replaced by their strength in collective bargaining. The intolerable inequality of the individual labor market was to be remedied by creating a collective labor market.[10] There was no assumption that the collective labor market would provide perfect parity, but rather an assurance that the collective market would give the worker increased protection and

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6. *See generally, Hearing on S. Res. 266 Before the Subcomm. of the Senate Comm. on Education and Labor*, 74th Cong., 2d Sess. (1936-37) [commonly referred to as the La Follette Committee Hearings]; LEVINSON, I BREAK STRIKES! (1935); HUBERMAN, THE LABOR SPY RACKET (1937); R. BROOKS, WHEN LABOR ORGANIZES (1937).

7. Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. § 151-168 (1976).

8. National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1976).

9. Section 1, Findings and Policy. The Wagner Act was patterned substantially on the Railway Labor Act of 1926, 44 Stat. 577 (with its important amendments in 1934, 48 Stat. 1185) and on experience (with Section 7(a) of the National Industrial Recovery Act of June 16, 1933, Ch. 90, 48 Stat. 195). *See generally*, I. BERNSTEIN, NEW DEAL COLLECTIVE BARGAINING POLICY ch. 5 (1950).

10. Long ago we stated the reasons for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; . . . that union was essential to give laborers opportunity to deal on equality with their employer . . . . Fully recognizing the legality of collective action on the part of employees to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). *See also*, Frey, *The National Labor Relations Act Should Not Be Amended At The Present Session of Congress*, 33 ILL. L. REV. 658 (1939).

provide an acceptable balance of bargaining power.[11]

The second purpose of encouraging collective bargaining was to provide a measure of industrial democracy and individual justice. One of the historic functions of unionization was "to introduce an element of democracy into the government of industry."[12] As the Commission on Industrial Relations of 1915 had declared, "the struggle of labor for organization is not merely to secure an increased measure of the material comforts of life, but is part of the age long struggle for liberty . . . even if men were well fed they would still struggle to be free."[13] Senator Wagner, explained the philosophy of the Act in these terms:

> The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.[14]

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11. For an articulate statement of the underlying philosophy of the statute, *see* Frey, *The Logic of Collective Bargaining and Arbitration*, 12 LAW & CONTEM. PROB. 264 (1947).

12. THE INDUSTRIAL COMMISSION, FINAL REPORT on H.R. 380, 57th Cong. 1st Sess. 805 (1902). *See* Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979).

13. U.S. COMMISSION ON INDUSTRIAL RELATIONS, FINAL REPORT 80-81 (1915).

14. M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965, at 321 (1970) (citing N.Y. TIMES, April 13, 1937, § 1, at 20). On another occasion, Wagner declared:

> Modern nations have selected one of two methods to bring order into industry. The first is to create a supergovernment. Under such plan, labor unions are abolished or become the creatures of the state. Trade associations become the cartels of the state . . . . That is what is called the authoritarian state . . . . The second method of coordinating industry is the democratic method. It is entirely different from the first. Instead of control from the top it insists on control from within. It places the primary responsibility where it belongs and asks industry and labor to solve their mutual problems through self-government. That is industrial democracy, and upon its success depends the preservation of the American way of life.
>
> The development of a partnership between industry and labor in the solution of national problems is the indispensable complement to political democracy. And that leads us to this all important truth; there can no more be democratic self-government in industry without workers participating therein than there could be democratic government in politics without workers having the right to vote . . . . That is why the right to bargain collectively is at the bottom of social justice for the workers as well as the sensible conduct of business affairs. The denial or observance of this right means the difference between democracy and despotism.

Keyserling, in THE WAGNER ACT: AFTER TEN YEARS 13 (L. Silverberg ed. 1945).

The third purpose of encouraging collective bargaining was to minimize governmental controls. Inequality in the individual labor market cried out for legislation to protect the weaker party. The experience of the National Recovery Act (NRA), however, had shown the complexity of such controls,[15] and the current examples of Russia, Italy, and Germany warned of the dangers of suffocating statism.[16] The solution of the Wagner Act was to replace the individual labor market with a collective labor market and then leave the determination of terms and conditions of employment to market forces. The role of the law could be limited to constructing the collective markets; workers would obtain sufficient bargaining power and a measure of industrial democracy, and governmental regulation of terms and conditions of employment could be avoided.

Focusing on the underlying premises and original purposes of the Wagner Act provides us a valuable, and often lost, perspective of the role of law in the labor market. The law has not been, and in a society which values equality and individual worth, cannot be, neutral as between employers and their employees. Nor can it leave them to the market forces of individual bargaining. The historic role of the law has been to protect the employee as the weaker party. Nor has our declared national policy been one of neutrality between individual bargaining and collective bargaining. The purpose of the Wagner Act was to encourage collective bargaining, not out of favoritism to unions, but in furtherance of the law's functions of remedying inequality of bargaining power and promoting industrial democracy. Collective bargaining was encouraged as a substitute for governmental control; it was a private process constructed to serve public purposes for which the law was

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15. *See* TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT Ch. 10, 11, & 12 (1935) (hereinafter cited as TWENTIETH CENTURY FUND).

16. Senator Wagner argued that the National Labor Relations Act constituted "the only key to the problem of economic stability if we intend to rely upon democratic self-help by industry and labor, instead of courting the pitfalls of an arbitrary or totalitarian state." J. HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 195 (1968). Although he pressed for the Fair Labor Standards Act, he considered it "merely the foundation upon which can be built the mutual efforts of revived industry and a rehabilitated labor. To expect the government to do more would run the risk of creating a despotic state." The major reliance must be left to private labor management relations, "worked out on the basis of true equality of representation. 'That is why the cultivation of collective bargaining is not merely an abstract matter of freedom for the workers,' Wagner insisted, 'but rather a concrete foundation for the general welfare'." *Id.* at 203-04.

ultimately responsible.

II. Present Failures of the Premises

The implicit assumption of the Wagner Act was that collective bargaining would become the dominant, if not universal, method of determining terms and conditions of employment. The collective labor market was substantially to supplant the individual labor market and provide the pattern for all employment relations. Only in this way could the purposes of the Wagner Act be fully achieved.[17]

This assumption has significantly shaped our labor legislation since the passage of the Wagner Act. Prior to that time, primary emphasis was on protective legislation fixing boundaries to individual bargaining. From 1933 to 1935, the NRA codes sought to regulate wages, hours, homework, child labor, safety, and health. Subsequent to 1935, reliance has been placed on collective bargaining. To be sure the Fair Labor Standards Act of 1938[18] set a "floor" for wages, but it has been a dirt cellar floor which does not provide even poverty level subsistence. The maximum hour law does not protect against long hours, but only requires premium pay, and the "stretch out"[19] continues with low hourly rates. The one significant federal worker-protection law in the last forty years is the Occupational Safety and Health Act.[20] No other term and condition of employment is given legal protection.[21] We have left worker protection to the market, with an assumption that because we have

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17. *See* G. Taylor, Government Regulation of Industrial Relations (1948). Professor Taylor lamented that no consideration had been given to "gradually repealing the Wagner Act as its limited purposes were achieved. Yet the Act could logically enough be viewed as a protective tariff to help an infant industry. The protection it accorded employees in their organizational efforts might safely have been removed as unions were organized and permanently established." *Id.* at 6.

18. 54 Stat. 1060, 29 U.S.C. §§ 201-18.

19. For example, in one textile dye plant, employees worked at little more than minimum rates, but worked 65-80 hours per week, receiving as much as $350-400 a week gross pay.

20. 84 Stat. 1591, 29 U.S.C. §§ 651-78.

21. Two significant statutes which protect rights of individual employees, but which do not establish any standards for terms and conditions of employment are Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e which prohibits discrimination in employment because of race, color, religion, sex or national origin, and the Employment Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. §§ 1001-1144. Both of these are equally limiting on individual and collective bargains.

provided by law for collective bargaining, the market will provide adequate protection.

Unfortunately, this assumption, implicit in the Wagner Act, has not been realized. Fifty years after declaring a national policy of collective bargaining, less than thirty percent of the employed work force is covered by collective agreement.[22] An illusion of a flourishing system is created by the broad coverage in transportation, mining, steel and auto; but reality includes the wastelands of the service industries, textiles, food products, printing, banking, insurance, and other white collar industries. Out of thirty-four industry categories used by the Department of Labor, in only ten are even a majority of workers covered by collective agreements.[23] Ours is not a system of collective bargaining; it is predominantly one of individual bargaining.

The implications of this uncomfortable fact are obvious. Seventy percent of all employed persons are still subject to the inequalities of the individual labor market. They lack the bargaining power to protect their own interests and the law has failed to provide protection. Seventy percent of employed workers have no effective voice in determining their terms or conditions of employment and no guarantee against arbitrary treatment. For them there is no industrial democracy; there is at best the studied benevolence of modern personnel management which promises consideration but grants no rights. Our national policy, relying on collective bargaining rather than legislative protection, has left the great majority of employees protected by neither.

The failure of collective bargaining to cover more than a fraction of the work force is due primarily to the ugly fact that from the beginning most employers have refused to accept the national policy of encouraging collective bargaining. On the contrary, many of them have bitterly resisted all efforts by employees to establish

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22. The exact percentage of employed workers covered by collective agreements is uncertain. In 1978, the total labor force was 102.5 million, with 84.5 million non-agricultural employees. Collective agreements of unions and employee associations covered 25.1 million employees, or 29.7% of the non-agricultural employees and 28.4% of all employees. U.S. DEPT. OF LABOR, DIRECTORY OF NATIONAL LABOR UNIONS AND EMPLOYEES ASSOCIATIONS, Bull. No. 2044 (1979) 59, 73-74. The percentage covered by collective agreements is now less, for in 1978, 22.3% of the labor force were members of unions and employees associations, but in 1981 this had dropped to 20.9%. 105 MONTHLY LAB. REV. 26 (January, 1982).

23. DIRECTORY OF NATIONAL LABOR UNIONS AND EMPLOYEES ASSOCIATIONS, *supra* note 22, at 66.

collective bargaining, and where it has been established they have sought to undermine and eliminate it. They have pounded the National Labor Relations Board and the courts with legal arguments to justify their anti-collective bargaining conduct and have exploited legal rules to defeat the policy of the National Labor Relations Act.[24] When legal means have not been sufficient many employers have been prepared to break the law rather than to accept collective bargaining.[25]

Explicit in the employers' arguments and activities against unions is a denial that collective bargaining serves any public purpose. The election campaign is cast as a private contest between the union and the employer, with the employer asserting his "property rights" to bar union organizers from the plant, hold "captive audience" speeches, and compel foremen to urge rejection of the union. The premises of national policy are turned inside out. The union which seeks to represent the employees is portrayed as an intruder in the enterprise, support of the union is viewed as an

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24. For descriptions of the various tactics used, including seminars on how to defeat unions sponsored by employers associations and taught by professional labor relations consulting firms, and employment of law firms who advertise their special techniques of defeating unions, along with the particular devices used to cling to the brink of claimed legality, *see Oversight Hearings on the National Labor Relations Act: Hearings before the Sub-Comm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong. 2d Sess. (1976) [hereinafter cited as *Oversight Hearings*]; *See* J. HUNT, EMPLOYERS GUIDE TO LABOR RELATIONS (1979); L. JACKSON & R. LEWIS, WINNING NLRB ELECTIONS, MANAGEMENT'S STRATEGY AND PREVENTATIVE PROGRAMS (1972) [hereinafter cited as WINNING NLRB ELECTIONS].

25. One of the most notorious systematic violators of the law is J.P. Stevens, although others are equally deserving of such notoriety. The long chain of violations of J.P. Stevens is set out in NLRB v. J.P. Stevens & Co., 563 F.2d 8 (2d Cir. 1977). This was the second contempt proceeding, termed by the court "Stevens XVIII in the long list of Stevens litigation." *Id.* at 25. This, however, was not the end. In J.P. Stevens v. NLRB, 638 F.2d 676 (4th Cir. 1980), the court upheld Board findings of discriminatory discharge, coercive speeches, and retaliation against employees who filed unfair labor practice charges. The court noted that this was "the *twenty-second* case in which the employer has been found guilty of unfair labor practices." *Id.* at 687, n.8. And in Marshall v. Stevens People and Friends for Freedom, 669 F.2d 171 (4th Cir. 1981), the court upheld a subpoena to obtain evidence of company financial support of a group created for the purpose of persuading its employees not to join the union, under Section 203(b) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 433 (1976). At a 1976 stockholders meeting, company officials reported that fighting the union cost more than $1.3 million in back pay and lawyers fees over a period of 15 years, but that this amount was not significant. *Oversight Hearings, supra* note 24, at 193. An increase in wages of 1¢ per hour would, in the same period, cost nearly 10 times as much. *See* K. Kovach, *J. P. Stevens And The Struggle for Unionization*, 29 LAB. L.J. 300 (1978).

act of disloyalty, and the bargaining process is described as an unnecessary burden. The employer's opposition to the union is presented not only as an expression of his self-interest, but also an expression of the employees' interest and the public interest.[26]

The adamant refusal by employers to accept collective bargaining has bent the National Labor Relations Act from its original premises and purposes. Legal arguments cast in terms of balancing the interests of the union and the employer have caused the Board and the courts to view themselves as mere referees and to ignore the national policy of encouraging the practices and procedures of collective bargaining. Private claims for the primacy of "property rights" and "management prerogatives" have overriden the social claims for equality of bargaining power, providing industrial democracy, and guaranteeing individual justice. Employers, acting as self-appointed surrogates of individual rights, have misappropriated those rights for their own benefit to defeat collective bargaining and deprive employees of individual rights. The end result is that the legal rules developed by the Board and the courts do not express or implement the premises and purposes of the statute. Our labor law today is not one which encourages the practices and procedures of collective bargaining; it is at best one of declared indifference.

The indifference of the law is matched by an indifference, if not hostility, in public attitudes, shaped in large measure by the employers' unremitting campaign at the workplace, in the public press, and in the legislative halls. Large sectors of the public see only the costs and inconvenience of collective bargaining, and many employees are persuaded that for them unionization is inappropriate or that they would fare better without a union than with one. We no longer have a strong and articulate public commitment to collective bargaining which will provide a hospitable climate for its extension.

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26. The book by JACKSON & LEWIS, WINNING NLRB ELECTIONS, *supra* note 24, states as its purpose to explain to lawyers and their client employers, "how the client may best reach his objective of remaining unorganized." *Id.* at 1. The election is described as "a contest for the allegiance of employees," and an employer is told he "can take pride" that his employees are not represented by the union. *Id.* at 2. The employer is advised to hold "captive audience" speeches, but not answer questions of employees at the meeting, and the union should not be allowed to reply or debate. *Id.* at 42. Individual employees should be told about benefits to "remind the employee of what he often takes for granted." *Id.* at 46. Supervisors should be required to aid the employer in opposing the union. *Id.* at 49 *et seq.*

Whatever may be the reasons, the stubborn fact remains that only thirty percent of the employed work force is covered by collective agreements. The assumptions on which our labor law have been based for half a century have not been realized and its purposes have not been fulfilled.

III. Future Needs

Our present failure measures our future needs. The most pressing question in labor law and labor legislation is not how we shall improve the processes of collective bargaining, much as that may be needed. The important questions are not ones of arbitrability of grievances, enforceability of no-strike clauses, or applicability of anti-trust law to unions—all intriguing and challenging. Even the fundamental question of what are bargainable subjects, which defines the reach of industrial democracy, is relevant only to those who bargain collectively. The most pressing and difficult question for labor law is what we shall do for the seventy percent of employees who are not now covered by collective agreements. How shall we protect them from the helplessness of unequal bargaining power? How shall we provide them a process of industrial democracy? How shall we guarantee them against arbitrary treatment which denies their human dignity? This is the problem which we have too long ignored and must now confront.

Before turning to substantive suggestions, I want to venture a word about the role of law schools and labor law teachers in developing labor law. I have no illusions that as teachers or scholars we make much law. Students forget most of what we teach long before they confront a specific problem in practice and most judges find our preachments less persuasive than ill-considered precedents. But the problems we treat as important in law school become those the students will see as important when they become lawyers. The questions we ask our students are the ones our graduates will consider worth answering. What we write may illuminate issues when precedents are not yet born or deserve to die.

The problems we have pursued, the questions we have asked, and the issues we have illuminated are almost exclusively related to the collective bargaining process.[27] We have largely treated the

27. *See, e.g.*, A. Cox, D. Bok, R. Gorman, Cases and Materials on Labor Law (9th ed. 1981); J. Getman, Labor Relations Law, Practice and Policy (1978); D. Leslie, Cases and

problems of seventy percent of the work force as if they did not exist.[28] Is it not time for us to develop new courses for the needs of the majority? Is it not time for us to devote at least a portion of our time to confronting the problem of what should be done for those who have not been reached by collective bargaining?

My purpose here is not to produce answers or even to submit an agenda. My very limited purpose is to open discussion. To that end, I would like to suggest three lines along which we might work, lines which are not mutually exclusive but which can be pursued simultaneously. First, we should reshape the National Labor Relations Act so as to effectuate the policy of encouraging collective bargaining and thereby extend collective bargaining. Second, where collective bargaining does not exist, we should provide for other systems of worker representation. Third, we should extend by law to all employees some of the basic rights which have become commonly accepted in collective bargaining.

A. *Extending Collective Bargaining*

Although collective bargaining may never become the dominant characteristic of our labor market, we should seek to bring as many employees as possible under its protective cover. Whatever its present inadequacies, it provides those covered with more nearly equal bargaining power, a significant measure of industrial democracy, and more protection of individual rights. Nor does extension of collective bargaining preclude pursuit of other methods in areas collective bargaining has not reached.

How might the law better extend collective bargaining? The potential measures are multitudinous; some might be effectuated

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MATERIALS ON LABOR LAW (1979); B. MELTZER, LABOR LAW CASES, MATERIALS AND PROBLEMS (2d ed. 1977); W. OBERER, K. HANSLOWE, J. ANDERSEN, LABOR LAW, COLLECTIVE BARGAINING IN A FREE SOCIETY (2d ed. 1979); R. SMITH, L. MERRIFIELD, T. ST. ANTOINE, LABOR RELATIONS LAW, CASES AND MATERIALS (6th ed. 1979); C. SUMMERS, H. WELLINGTON, A. HYDE, CASES AND MATERIALS ON LABOR LAW (2d ed. 1982).

28. Apart from casebooks on employment discrimination, there are few current published teaching materials which deal with the individual employment relation. One exception is W. MALONE, M. PLANT, J. LITTLE, CASES AND MATERIALS ON WORKMEN'S COMPENSATION AND EMPLOYMENT RIGHTS (2d ed. 1980). In 1957, the Labor Law Group published EMPLOYMENT RELATIONS AND THE LAW (Aaron ed. 1957). In the 1970s, the Group developed an eleven unit set of materials to cover a broad range of topics. One unit was devoted to employment discrimination. Apart from this there were 20 pages in Unit 9, dealing with rights of unorganized employees. *See* LABOR RELATIONS AND SOCIAL PROBLEMS, INDIVIDUALS AND THE UNION (Dunsford, Alleyne & Morris eds. 1973).

by the Board and the courts, and others might require legislation such as the aborted Labor Reform Act of 1978.[29] The fundamental need, however, is to reaffirm the declared purpose of the National Labor Relations Act to "encourage the practices and procedures of collective bargaining," and to keep in the forefront the premise that collective bargaining serves important social purposes. This requires recognition that many employers will use all the resources at their command to defeat the statutory purpose, and the law must be adequate to meet this challenge. Viewed from this perspective, legal issues take on a different shape. A few examples are suggestive.

In *NLRB v. Babcock & Wilcox*,[30] the Supreme Court held that an employer could prohibit a union organizer from distributing literature in the plant parking lot, even though that distribution in no way interfered with production or plant security. The employer's property right to exclude non-employees outweighed the employees' right to organize in circumstances where the union had other methods of reaching the employees. The effect was to permit the employer to use his control of the plant premises to defeat the purposes of the statute.

The Board and the courts have recognized that the most appropriate place to discuss organization and solicit union membership is the workplace. Experience has made clear that, because of employer hostility, employees are often fearful of revealing their union sympathies, particularly in the beginning stages of organization. The use of outside organizers is, therefore, imperative if collective bargaining is to be achieved, and initial contact at the workplace is the only efficient method of developing an organizational core. When we view this problem from the perspective of the statutory purpose of encouraging collective bargaining, the public interest in giving union organizers access to the plant premises is

29. The Labor Reform Bill is particularly suggestive, for its purpose was to make possible the extension of collective bargaining by removing some of the obstacles to union organization, to give unions increased ability to campaign before representation elections, and to provide more effective sanctions for employer violations of the Act. *See generally, Labor Reform Act of 1977, Hearings on H.R. 8410, Before the Sub-Comm. on Labor Management Relations of the Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977); *Hearings on S. 1883 Before the Sub-Comm. on Labor of the Comm. on Human Resources*, 95th Cong., 1st Sess. (1977). *See also* Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755 (1979).

30. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

substantial and the encroachment on the employers' property interest is minimal. The legitimate concerns for productivity, plant discipline, and security can be met by limiting the time and place of access.

Similarly, in *Livingston Shirt*,[31] the Board held that an employer could engage in "captive audience" speeches without giving the union equal time to address the employees. Again, the employer was allowed to use his control of the employees' work time and work place to discourage unionization. The employer, of course, must be free to state his views. Further, the employer can bar all discussion of organization and all solicitation for or against the union during working time. But if the employer decides that the issue of organization is of such importance that it should be discussed on working time, he ought not to be able to use his economic control over the employees to decide what they shall hear. This reinforces the employees' awareness of the employer's dominant position and his willingness to use his economic control to discourage and defeat collective bargaining. If the Board and the courts had focused on the purpose of the statute, they would have reached a different result in *Livingston Shirt*.

Not only the substantive rules but the remedies should be reshaped to implement the policy of encouraging collective bargaining. This policy is now frustrated by employers' tactics of interminable delay, which not only postpones bargaining, but often totally defeats it. In *Darlington*,[32] where a plant was closed for the very purpose of preventing bargaining, the case was settled only after twenty-six years of litigation. A third of the discharged employees were dead, most of the rest retired, and the union leader was eighty years old.[33] Board remedies too seldom give birth to collective bargaining and too often place a tombstone on its grave.

When there is reasonable cause to believe that an employer is illegally opposing the establishment of collective bargaining, the policy of the statute warrants, if not requires, a temporary injunction against continued violations. When a union uses secondary pressure or organizational picketing, the statute mandates a temporary injunction. The establishment of collective bargaining is

31. Livingston Shirt Co., 107 N.L.R.B. 400 (1953).

32. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

33. For a history of the litigation, *see* Eames, *The History of The Litigation of Darlington As An Exercise in Administrative Procedure*, 5 U. TOL. L. REV. 595 (1974).

certainly no less worthy of timely protection against employer coercion, discriminatory discharge, and deliberate refusals to bargain in good faith. Enjoining employer violations would place no significant burden on an employer, for it would require only that he cease violating the law and defeating the purposes of the statute.

The need for reshaping remedies is illustrated even more clearly in *H. K. Porter*.[34] After the union had won an election the employer dragged out bargaining for five years, twice being found guilty of refusing to bargain in good faith. The second time the employer was found to have refused the union's request for a checkoff "solely to frustrate the making of any collective bargaining agreement." The Supreme Court held that this deliberate frustration of bargaining could not be remedied by ordering the employer to grant the checkoff in return for some reasonable concession.

The basic purpose of the statute to establish a system of collective agreements was set aside by denying that the statute authorized the only remedy which would achieve its purpose. The statutory mandate to recognize the union and bargain in good faith was made empty words by invoking the verbiage of "free collective bargaining" to shield a defiant employer whose bargaining was designed to discredit the union and make reaching an agreement impossible.

Similarly, where employers have engaged in frivolous appeals from representation elections and orders to bargain for the purpose of postponing bargaining, they have been allowed to profit from their deliberate frustration of the statute. When the employer engages in such tactics, he should be ordered to pay at least a portion of any increase in wages or other benefit he predictably would have paid if he had complied with the national policy, accepted collective bargaining, and bargained in good faith.[35] Such a remedy

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34. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). The Supreme Court's statement of the facts glosses over the employer's illegal activities by attributing the eight years of delay to "the skill of the company's negotiators in taking advantage of every opportunity of delay." *Id.* at 100. The "skill" consisted of committing multiple violations, refusing to comply with Board orders so as to require an enforcement order by the Court of Appeals, and then continuing its illegal bargaining tactics so as to require new Board proceedings. *Id.* at 107.

35. *See* Tiidee Products, Inc., 194 N.L.R.B. 1234 (1972); *modified* I.U.E. v. NLRB, 502 F.2d 349 (D.C. Cir. 1974); Morris, *The Role of the NLRB and The Courts in The Collective Bargaining Process; A Fresh Look at Conventional Wisdom and Unconventional Remedies*, 30 VAND. L. REV. 661 (1977); Dell, *The Use of Section 10(J) of the Labor Management*

would not only make the employees whole, but it would "effectuate the policies of [the Act]"[36] by furthering the establishment of collective bargaining.

These modest changes could be achieved without legislation if the Board and the courts gave full weight to the purpose of the statute and did not feel imprisoned by their precedents. Other changes not within the words of the statute would help fulfill its purposes. For example, the protection of the statute could be extended to supervisors who presently, in defiance of plain fact, are defined as non-employees. Supervisors have the same need for collective bargaining as other employees—as individuals they lack the bargaining power to protect their interests, they have the same claim to participate in industrial democracy, and they are entitled to the same basic rights. To be sure, they owe a duty of loyalty to the employer, but so do all employees; and collective bargaining is not an act of disloyalty. Their special relation to other employees can be accommodated by requiring that they be represented through separate unions, as are plant guards. Almost every other country recognizes that supervisors should have the same right to bargain collectively as other employees.[37] Our system would be better served if supervisors were recognized as employees with rights instead of relegating them to the status of servile pawns of employers.

These are but a few suggestive examples of how the law might be reshaped to extend collective bargaining. Many others will become apparent when we view the law from the perspective of its role in establishing a system of collective bargaining to serve the public purpose.

B. *Alternative Forms of Representation*

While seeking to extend collective bargaining, we should si-

Relations Act in Employer Refusal-to-Bargain Cases, 1976 U. ILL. L.F. 845.

36. National Labor Relations (Wagner) Act § 10(c), 29 U.S.C. § 160(c) (1976).

37. In Sweden, for example, supervisors have the same protected right of association as other employees, but the employer can require that they not be members of the union representing those employees being supervised. In practice, the supervisors have their own national union. *See* F. SCHMIDT, LAW AND INDUSTRIAL RELATIONS IN SWEDEN 75-77 (1977). In France and Germany, supervisors may be members of the same unions as the employees they supervise. *See* Despaux & Rojot, *France* 180, and Ramm, *Federal Republic of Germany* 151, in INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS (Blanpain ed. 1979) [hereinafter cited as INTERNATIONAL ENCYCLOPEDIA].

multaneously seek to devise alternative forms of representation where collective bargaining does not exist. These should not be conceived of as substitutes for full collective bargaining, nor should they be allowed to serve as obstacles to extending collective bargaining. On the contrary, they should be acknowledged as second best solutions and should be designed to facilitate transition to full collective bargaining.

Here we must break the bonds of habitual thinking, for we have long insisted that the Wagner Act model is the only legitimate form of representation. Other countries, however, have other models as a part of, or parallel to, their systems of collective bargaining. These may stir our imagination to see new forms suitable for our special needs, though they may at first seem foreign to our thinking. I would suggest three possibilities worth exploring.

1. *Representation by a minority union.* The first possibility is to simply graft onto our present system a requirement that, in the absence of a majority representative, the employer bargain with any union which has substantial support as a representative of its members. This would in no way encroach on the exclusive representation status of a majority union, for it would impose a duty to bargain with a minority union only when there was no majority union. "Members only" contracts have always been permissible under the statute in the absence of a majority representative; the proposal is to make them an integral intermediate step.

The majority rule principle has its statutory origin in the Railway Labor Act.[38] Its function was not to determine whether there would be collective bargaining—that was assumed by the statute. Indeed, ballots in representation elections under the Act do not include a choice of "No Union."[39] If a majority of employees vote, the winning union is certified.[40] The purpose of majority rule was only to avoid multiple or proportional representation by designating an exclusive representative.

Majority rule was carried over into the Wagner Act to serve the same purpose. Experience under the NRA had shown that em-

38. 45 U.S.C. §§ 151-63 (1976).

39. Brotherhood of R.R. & S.S. Clerks v. Ass'n for Benefit of Non-Contract Employees, 380 U.S. 650, 658 (1965).

40. A failure to vote is treated as a vote against representation. If a majority of eligible employees fails to vote, then no union is certified. If a majority votes, then the union with the most votes is certified. *Id.* at 671.

ployers could manipulate plural representation to play unions against each other to avoid reaching an agreement. To bargain most effectively, employees needed a single representative and that representative should be selected by majority rule.[41]

The fact that some employees, or even a majority, prefer individual bargaining ought not to reduce the rights of others to bargain collectively for themselves through representatives of their own choosing. The purpose of majority rule was to facilitate collective bargaining, not frustrate it. The minority has always had the right to engage in concerted activity, including striking, to compel bargaining until a majority selected an exclusive representative. What is lacking is recognition of an affirmative obligation of the employer "to meet at reasonable times and confer in good faith"[42] with representatives of minority groups. The proposal is simply to make explicit that affirmative obligation.[43]

Requiring an employer to bargain with a minority union for its own members presents unfamiliar problems, but none beyond the reach of practical solution. In other countries, bargaining with minority unions is commonplace, and in Sweden and Britain is legally required.[44] The most obvious problem is determining the amount of support which the union must show before the employer must meet and bargain with it. The British solution is to require "adequate" support and leave the question of what is "adequate" to administrative determination.[45] The relevant test could be whether

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41. Houde Engineering Corp., 1 N.L.R.B. (old) 87 (1934); TWENTIETH CENTURY FUND, *supra* note 15, at 241-45.

42. National Labor Relations (Wagner) Act § 8(d), 29 U.S.C. § 158(d) (1976).

43. The words of section 8(a)(5) could be interpreted to require bargaining with a minority union, subject to the existence of a majority union which, under section 9(a), would have exclusive bargaining rights. In the early days of the Wagner Act, it was argued that the statute imposed the duty to bargain with minority unions. *See* Latham, *Legislative Purpose and Administrative Policy Under the National Labor Relations Act*, 4 GEO. WASH. L. REV. 433, 452-54 (1936). The Board apparently never tried to enforce such a duty.

44. In Sweden the employer is required to negotiate with any union which has any members employed by the employer. LAW AND INDUSTRIAL RELATIONS IN SWEDEN, *supra* note 37, at 102. In Great Britain the employer is required to recognize and negotiate with unions recommended by the Advisory Conciliation and Arbitration Services (ACAS). The statutory criterion for recognition is, "promoting the improvement of industrial relations and in particular of encouraging the extension of collective bargaining and the development and where necessary, reform of collective bargaining structures." P. DAVIES & M. FREEDLAND, LABOUR LAW, TEXT AND MATERIALS (1979) 66-70.

45. The test applied by ACAS is whether there was evidence of adequate support within a group of workers to sustain effective collective bargaining by the union making the

the union had enough members to justify burdening the employer with the costs of meeting and bargaining with the union. This could be decided by the NLRB at the regional level with the aid of mechanical rules developed by experience. There would be no need to define an appropriate unit. The employees, by joining the union, would have declared their common interest. Those who have not joined will not be bound; they can choose another union or bargain individually.

A second problem arising from requiring employers to bargain with minority unions is prescribing the subjects of bargaining. It would seem that all mandatory subjects would be presumptively appropriate, but no agreement reached could legally bind non-members. This would limit the making of binding seniority clauses or other relative rights provisions, but it would not preclude negotiating on those subjects and finding mutually satisfactory solutions. The duty to meet at reasonable times, the duty to provide information, the conduct required at the bargaining table, and the duty to put in writing any agreement reached would be the same as in bargaining with a majority union. The duty would be to bargain in good faith.

What would be gained by representation through a minority union? Of course, a minority union bargaining for members only would have less bargaining strength than a majority union with exclusive representation status, but the minority union would have much more bargaining strength than an individual employee. It could speak for its members, making their voices heard, however weakly, providing for them the form and some of the substance of industrial democracy.[46] Though the concessions it would win might be small, the collective agreement would substitute enforceable rules for employer arbitrariness and its grievance procedure would provide a system for enforcing those rules and representing employees in day-to-day problems. Bargaining by a minority union would provide in smaller measure many of the same values as bargaining by a majority union.

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reference. *Id.* at 71-73.

46. The practical situation of a minority union may not be significantly different from that of many certified unions where the bargaining unit is for only a minor segment of the work force in the enterprise. A number of minority unions, each bargaining for members only, may be much like a number of certified unions bargaining for separate units in the same plant.

Beyond these values, requiring the employer to recognize and deal with a minority union would give the union a presence and status in the plant. As a recognized representative of employees, it could not be dismissed as an officious outsider. More important, election campaigns would take on different significance, for there would be collective bargaining both before and after the election, regardless of the outcome. The function of the election would not be to determine whether there should be collective bargaining, but only whether one union should become the exclusive representative. As a result, the employer's interest in campaigning against the union, and the effects of employer opposition, would be significantly reduced.

It is difficult to foresee in detail how such a combined system of members only and exclusive representation bargaining might evolve. But requiring employers to bargain with minority unions could provide a useful form of employee representation where no union has acquired a majority. It would not obstruct, but would facilitate, movement toward full collective bargaining through an exclusive representative. It is a possibility which I believe deserves serious study.

2. *Statutory safety committeee.* The Occupational Safety and Health Act[47] offers an opportunity for a more limited, but desperately needed, form of representation. This Act presently provides a wide range of functions for an "organization of employees" or "representative of employees" in the enforcement of the statute. This includes filing requests for standards,[48] initiating inspections,[49] accompanying the inspector on his walk around the premises,[50] challenging the abatement period,[51] or bringing mandamus to compel the Secretary of Labor to enjoin imminent dangers.[52] These provisions, written into the statute on the insistence of unions, serve the dual purpose of giving employees an active voice in safety and health matters and policing compliance with the statute at the workplace.

Where employees are represented by the union, these provi-

47. 84 Stat. 1590, 29 U.S.C. §§ 651-78 (1976).
48. § 6(b)(1), 29 U.S.C. § 655(b)(1).
49. § 6(f)(1), 29 U.S.C. § 657.
50. § 6(e)(1), 29 U.S.C. § 657(e).
51. § 10(c), 29 U.S.C. § 659(c).
52. § 13(d), 29 U.S.C. § 662(d).

sions can serve their purposes. But in the majority of workplaces there is no union representative and the statute makes no provision for designating representatives.[53] Employees are left without any representation in these life and death matters of health and safety, and policing is left to infrequent inspections and individual complaints.

To achieve the dual purpose of the statute, we might follow the lead of Western European countries and statutorily require the establishment of safety committees in work places where there is no union representative.[54] The experience of the European countries suggests some of the necessary elements if such committees are to be effective. The members of the committee must be elected by the employees, for their function is to represent the employees in all safety and health matters. Committee members must be given reasonable time off from work, with pay, to make inspections, investigate complaints, discuss safety and health problems with the employer, and carry on other work of the committee. They must be provided necessary office facilities, administrative support, and research resources. And they must be given technical and practical training, on paid time, in order to enable them to perform their safety work with competence. The costs of the safety committee should be borne by the employer, for its work is as much a cost of production as safety equipment, accident prevention programs, or workmen's compensation. Finally, members of the safety committee must be guaranteed that they will not be discriminated against because of their activities on the committee and that they will not be denied promotions or other benefits because

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53. The Department of Labor has proposed regulations for the voluntary creation of employee participation programs to help achieve the purposes of the statute. *See* 47 Fed. Reg. 2796-2801. January 19, 1982. The voluntary programs suggested include no provision for their being created on the initiative of the employees, no provision as to how the employee members are to be chosen, no suggestion that representation of management and employees would be equal, and no requirement that employees be allowed paid time for their work.

54. In Sweden, the Working Environment Act of 1977 requires that a safety representative be elected in every workplace employing five or more employes, and a safety committee be elected in every workplace employing more than fifty employees. *See generally,* DANIELSON, WORK ENVIRONMENT LEGISLATION, STANDARDS AND ENFORCEMENT PRACTICE IN SWEDEN (1980). In Belgium, worker safety committees are mandated by statute in establishments of more than fifty employees. Blanpain, *Belgium* 169, in INTERNATIONAL ENCYCLOPEDIA, *supra* note 37. In Western Germany, the statutorily created works councils have authority and responsibiity in safety matters. Ramm, *Federal Republic of Germany* 183, in *id.*

of time they devote to safety work.

The functions of the safety committee would include all those now provided in the statute for a "representative of employees," but it could include much more. Perhaps most important, the committee should have the authority to order suspension of work where there are immediate and serious dangers to life or health—an authority long exercised by union safety committees in the coal mines. Following the Swedish model, the committee's functions might include negotiating standards in addition to those in the statute, supervising safety measures, and participating in the planning of new premises, appliances, or work processes. The scope of their concern could be broadened, as in Sweden, to encompass all aspects of the work environment, whether creating risks to safety and health or not.[55]

The value of statutory safety committees is self-evident; they would provide a structure of employee representation where none now exists. Of course, committees would not be established in every workplace, many would be moribund and few would be as effective as committees established by collective bargaining. But where safety and health problems are substantial, and where employees felt a need for representation, a structure would be available. Safety committees would not encroach on collective bargaining; instead they would provide unions a point of entry for organization and an avenue leading toward full collective bargaining.

3. *Statutory works councils.* Safety and health is but one condition of employment and safety committees are only a piecemeal alternative form of representation. Again, forms of employee representation in Western Europe are suggestive; we could consider providing by law for the establishment of works councils to represent employees more broadly concerning terms and conditions of employment where there is no majority union.[56] The elements necessary for safety committees would be equally essential for works councils—election by the employees, time off for conducting works council affairs, provision for training, and protection of works council members. The functions of works councils could be legally defined in terms paralleling the functions of a majority union

55. *See* DANIELSON, *supra* note 54.

56. W. KOLVENBACH, EMPLOYEE COUNCILS IN EUROPEAN COMPANIES (1978).

under the National Labor Relations Act. Constructing a works council system would obviously present many problems, but there is a variety of working models to provide guides in working out a solution suited to our special situation.

Works councils cannot, of course, be full substitutes for collective bargaining. Their confinement to a single enterprise and their lack of outside support severely limit their bargaining power. They are not intended, however, as an alternative to representation by a union, but as an alternative to no representation at all. Their bargaining power, while less than that of a union representative, is still greater than that of the individual employees. There are obvious dangers of employer domination, but these can be largely eliminated where the works councils are statutorily created and their financial support is statutorily required. The works council would not be dependent on the employer for existence, but would have legal rights against the employer to secure its operation.

Works councils can be constructed so as not to block unionization and collective bargaining. In Germany, works councils have the right to consult union representatives and invite them to attend council meetings.[57] Unions actively participate in works council elections and works council members are often union members.[58] Within our system, works councils would provide the training ground and building blocks for union organization. When the employees found the works council inadequate they would recognize the advantages of having a union; and when the union obtained a majority, it could absorb or supplant the works council.

There are, no doubt, a variety of other forms of representation which we might devise if we let our minds run free. My purpose here is not to plead for any specific proposals, but rather to urge that we cease being prisoners of our parochialism and search for new forms of representation to serve that seventy percent of employees who have too long been left unrepresented. My proposals are intended only to suggest that the search need not be in vain.

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57. Ramm, *Federal Republic of Germany* 186-87, in INTERNATIONAL ENCYCLOPEDIA, *supra* note 37.

58. Summers, *Worker Participation in U.S. and West Germany: A Comparative Study From An American Perspective*, 28 AMER. J. COMP. L. 367, 389-90 (1980).

C. *Legislative Guarantee of Basic Rights and Benefits*

Despite our best efforts to extend collective bargaining and despite our greatest ingenuity in creating new forms of representation, many employees will remain without the bargaining power to protect their interest. For them, labor legislation should meet its historical responsibility of protecting the weaker party by guaranteeing certain basic rights.

The threshold question is what rights and benefits are to be guaranteed, for the law cannot prescribe the entire employment contract. The beginning benchmark should be those rights and benefits which have become broadly accepted in collective agreements. Their acceptance in collective bargaining evidences their importance to employees, their feasibility for employers, and a common recognition that their value to employees is greater than their cost to the employer. This benchmark further focuses on reducing the inequality between those covered by collective agreements and those not covered. The following rights and benefits are ones, other than wages, which I consider have prior claim to legislative protection.

1. *Right to fairness in dismissals.* The most fundamental employee right needing protection, apart from the right to a safe and healthy workplace, which has been recognized at least nominally by the law, is the right not to be dismissed except for just cause. This right has long been recognized by almost every collective agreement. Unions insist on it as non-negotiable and employers accept it as inevitable, for it is worth far more to employees than any trade-off the employer will offer. In spite of this demonstrated value and practicality of protection, the majority of employees work under the Damoclean common law rule that they can be discharged at any time with no reason and without notice.[59]

We should prohibit by law discharge without just cause, giving all employees substantially the same protection enjoyed by those covered by collective agreements. Almost every other democratic country recognizes this as a basic right and provides legal protec-

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59. *See* Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). For recent softening around the edges of this procrustean doctrine, *see* Comment, *Protecting At Will Employees against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981).

tion. We are much more able to design protective measures than other countries were when they enacted their statutes, for we have developed standards and procedures through our experience with arbitration under collective agreements which can provide guides for statutory protection. Indeed, we can build directly on our existing system of arbitration to give all employees protection. There is no need to spell out here how this may be done; that has been done elsewhere and I believe that a practical solution is readily at hand.[60]

A necessary corollary of the right not to be unjustly discharged is the right not to be arbitrarily selected for layoff. Under our collective agreements, layoffs are governed by seniority. In other countries, factors such as age, economic need, and family status are used.[61] The law need not impose on the employer any particular standard, for the protection required is only from arbitrary action. The law need only require the employer to apply a standard which is relevant, capable of objective measurement, and stated in advance. Effective protection of this right presents no insuperable problems.

There are two subsidiary rights not generally recognized by collective agreements which deserve our consideration. One is the right to reasonable notice of termination so that an employee is not put out on the street without warning.[62] Every other democratic country has such a notice requirement; in England it developed as a common law rule.[63] The notice period is often related to the length of service and the type of work, and may vary from one week to more than a year. In this country customs of notice are observed, particularly as to white collar employees; and for a favored few, such as college professors, a full year's notice may be required by the institution's rules. The need is for legislation which will give all employees a legally enforcible right to a definite period of notice.

The other right worth considering is the right of every em-

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60. *See* Summers, *Individual Protection Against Unjust Dismissal: Time for A Statute*, 62 VA. L. REV. 481 (1976).

61. *See* Despaux & Rojot, *France* 110, in INTERNATIONAL ENCYCLOPEDIA, *supra* note 37; Ramm, *Federal Republic of Germany*, 137, in *id.*; Trev, *Italy*, 84, in *id.*

62. *See, e.g.*, Blanpain, *Belgium* 95-99, in INTERNATIONAL ENCYCLOPEDIA, *supra* note 37, Despaux & Rojot, *France* 94-96, in *id.*; Ramm, *Federal Republic of Germany* 133-35 in *id.*

63. P. DAVIES & M. FREEDLAND, *supra* note 44, at 329-31.

ployee who is terminated to a letter stating the reasons for termination.[64] In a discharge for cause, this would prevent the employer from relying on post hoc justifications. In other terminations, it would aid the employee in obtaining another job.

2. *The right to relief from work.* Among the common provisions in collective agreements are those granting paid vacations, paid holidays, and paid sick leave; and many employers not bound by collective agreements provide similar benefits. But there are a substantial number of workers for whom the only vacation is unemployment, holidays are a loss of a day's pay, and sickness brings doctor bills and empty pay envelopes. These workers are predominantly those who do the most burdensome work, receive the lowest pay, and struggle from payday to payday. They are the ones who most need relief from work without loss of pay.

In most European countries these rights are provided by statute for all employees, from cleaning women and taxi cab drivers to insurance salesmen and engineers.[65] The statutes do not preclude unions from bargaining for more or employers from granting more, and such bargaining is customary. But the pattern of collective agreements provides guides for the statutory benefits. Thus, when the statutory vacation was two weeks, unions increasingly bargained for three weeks. And when the pattern of collective agreements became three weeks, the statutory vacation was raised to three weeks, and some unions then bargained for four weeks. It is time that we in this country consider developing similar legislation, both as a matter of equity and as a matter of recognizing a basic human need.

There is a similar, and even more pressing, need to protect workers from excessively long work days and work weeks. The requirement of time-and-a-half for hours over forty per week does not necessarily discourge oppressive work schedules, but may only lower the hourly base rate. Workers may still be required to work sixty or seventy hours a week where there is no union to protect them. We should consider following the European example of supplementing our present time-and-a-half requirement with fixed maximums on the number of hours an employee could be asked to

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64. *See, e.g.*, MO. ANN. STAT. § 290.140 (Vernon 1965) which requires corporate employers to provide employees who are terminated a letter of dismissal.

65. *See, e.g., Belgium* 77, in INTERNATIONAL ENCYCLOPEDIA *supra* note 37; *France* 75-76, in *id.*; *Federal Republic of Germany* 100, in *id.*; *Netherlands* 36, in *id.*

work.[66]

3. *The right to a safe and healthy workplace.* The elemental individual right to physical integrity is not now adequately protected, either by collective agreements or by legislation. One avenue for giving greater protection is to recognize that violations of health and safety standards are more than violations of public law; they are violations of individual rights. For example, employees who suffer industrial disease or injury because of an employer's violation of health and safety regulations ought not to be limited in their recovery to the inadequate awards available under workmen's compensation. Employers should be required to pay at least the actual economic loss suffered by the employee.[67] Employees should have the right to be regularly informed of the substances with which they work or come in contact and all the known health hazards which those substances present.[68] Employees should not be subject to discipline or discharge for refusing to work where they, in good faith, believe there is substantial risk of injury to safety and health;[69] and an employee who has filed a claim of violation should not be subject to discipline or discharge unless the employer affirmatively proves just cause for discharge. These are but beginning examples of how we might increase the individual's ability to protect his right to a safe and healthy workplace.

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66. *See, e.g., Belgium* 72-75, in INTERNATIONAL ENCYCLOPEDIA, *supra* note 37; *France* 71-73, in *id.*; *Federal Republic of Germany* 95-96, in *id.*; *Italy* 54-55, in *id.*; *Netherlands* 37, in *id.*

67. *See* Comment, *Occupational Health Risks and the Worker's Right to Know*, 90 YALE L.J. 1792 (1981).

68. In Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), the Supreme Court upheld a regulation of the Secretary of Labor providing that under certain circumstances employees would be protected against disciplinary action for refusing to perform hazardous work. 29 C.F.R. § 1977.12(b)(2) (1980). The protection is limited, however, to situations where the work would subject the employee to "serious injury or death." The condition must be "of such a nature that a reasonable person . . . would conclude that there is real risk of death or serious injury, and that there is insufficient time . . . to eliminate the danger through resort to regular statutory enforcement channels," and where possible the employee must have also sought from his employer and been unable to obtain, a correction of the dangerous condition. *Id.* Silver, *National Labor Policy And The Conflict Between Safety and Production*, 23 B.C.L. REV. 1 (1981).

69. Requiring the employee to prove the employer's motive for discipline or discharge places a deadening burden on the employee, particularly where the employee has no union to help obtain evidence and present the case. The burden should be on the employer to prove just cause, as under a customary discharge clause in a collective agreement.

CONCLUSION

The fundamental premise of labor legislation is that individual employees lack the bargaining power to protect their own interests and it is the responsibility of the law to aid them as the weaker party. The secondary premise, articulated in the Norris-LaGuardia Act and implemented by the Wagner Act, is that the best way for the law to fulfill that responsibility with a minimum of government intervention is to replace individual bargaining with collective bargaining. This would not only provide a better balance of bargaining power, but would provide a measure of industrial democracy and individual justice.

These premises, I believe, are still compelling. The law must aid the weaker party and this can best be done by establishing collective bargaining. Our failure has been to rely on collective bargaining and then neglect to establish it for seventy percent of the work force. The law has thereby failed to fulfill its fundamental responsibility.

The problem which we have comfortably ignored and must now confront is how we shall extend aid and protection to this seventy percent. These include those who have the most burdensome work, who are exposed to the most unsafe workplaces, who live in the greatest insecurity, and who are subject to the most arbitrary treatment. Their human dignity is every day denied. We can no longer turn our heads and pass by on the other side.

My purpose here has not been to present a program but to urge that we begin a process. I have sketched some possibilities, not with the conviction that they provide answers, but with the hope that they may spur imagination. They are at most a beginning toward an end.

I recognize that any such proposals these days are hopelessly unreal; they will not likely receive even serious hearing. But we should begin to work through such problems now, to develop a range of responses, and to open discussion so that when the political climate is more hospitable, we shall be prepared. Our concern is not with a transient, but a persistent, problem and our goals are not short run, but long run. I am well aware of the statement attributed to Keynes, "In the long run we are all dead." But death is not the end of life and the worth of the race is in the running.