



Fall 9-1-1982

Labor Relations Law In The United States From A Comparative Perspective*

Benjamin Aaron

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Comparative and Foreign Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Benjamin Aaron, *Labor Relations Law In The United States From A Comparative Perspective**, 39 Wash. & Lee L. Rev. 1247 (1982).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol39/iss4/2>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

WASHINGTON AND LEE LAW REVIEW

Volume 39

Fall 1982

Number 4

The Annual John Randolph Tucker Lecture

LABOR RELATIONS LAW IN THE UNITED STATES FROM A COMPARATIVE PERSPECTIVE*

BENJAMIN AARON**

I. TRADITIONAL ATTITUDES TOWARD OUR LABOR RELATIONS SYSTEM

The modern era of labor relations law in the United States may be said, somewhat arbitrarily, to have begun with the adoption of the Norris-La Guardia Act of 1932.¹ There followed in swift succession the 1934 amendments to the Railway Labor Act² and the Wagner Act of 1935.³ The national labor relations policy was fleshed out still further by the Taft-Hartley Act of 1947⁴ and the Landrum-Griffin Act of 1959.⁵ With one exception in respect of state right-to-work laws,⁶ the Wagner and Taft-Hartley Acts established the supremacy of federal law over state laws in the labor relations field.

* This is an expanded version of the thirty-fourth annual John Randolph Tucker lecture, delivered at the Washington and Lee University on 8 May 1982.

** Professor of Law, University of California, Los Angeles.

¹ Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)).

² Railway Labor Act, ch. 347, 44 Stat. 577 (1926), *as amended by* ch. 426, 48 Stat. 926 (1934) (current version at 45 U.S.C. §§ 151-188 (1970)).

³ National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1976)).

⁴ Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-168 (1976)).

⁵ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (current version at 29 U.S.C. §§ 401-531 (1976)).

⁶ Section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b) (1976), provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

During this period and well beyond, the attitude of American courts, legislatures, labor law scholars and practitioners, and employers and unions toward our labor relations system can best be described as solipsistic: our system was regarded as the only reality, and almost no interest was shown toward labor relations laws and practices in other countries, except to the extent that we sought to impose versions of our own laws on our defeated enemies, notably Japan, at the conclusion of World War II. The occasional reference by our Supreme Court to foreign labor laws was no less remarkable for its rarity in 1963⁷ than it was in 1944.⁸ When the first American labor law casebook to include extensive notes on foreign labor law appeared in 1953, the notice in the *Harvard Law Review*⁹ did not even mention that aspect of the book, while the notice in the *Columbia Law Review*,¹⁰ although describing the foreign law materials as "interesting and provocative" to full-time labor law practitioners, thought they "raise[d] the level of discussion somewhat higher than is useful to students."¹¹

II. RECENT CHANGES IN ATTITUDES TOWARD FOREIGN EXPERIENCE

In more recent times the picture has changed. The sharp rise in the number of American companies doing business abroad, the development of international law firms based in the United States, the more frequent exchanges between American and foreign labor law and industrial relations scholars, and the general shrinking of the world in terms of international communication and travel have all helped to arouse our interest in the ways other countries handle labor relations problems similar to ours. It has come as a shock to many of our labor law specialists, however, to learn that some features of our system, far from exemplifying the international norm, are regarded by foreign observers as anomalous, if not downright peculiar.¹² Only relatively recently have we begun to study our labor law system with a view to understanding why some of its fundamental aspects are virtually unique, and how they came to be that way. Such an understanding, of course, must begin with some

⁷ *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 123-29 (1963).

⁸ *J. I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944).

⁹ Reilly, Book Review, 67 *HARV. L. REV.* 532, 532-36 (1954) (*LABOR RELATIONS AND THE LAW* (R. Mathews ed. 1953)).

¹⁰ Iserman, Book Review, 54 *COLUM. L. REV.* 302 (1954).

¹¹ *Id.* at 303. That judgment now seems quaintly amusing; it reminds one of the scene in Oscar Wilde's play, "The Importance of Being Earnest," in which Miss Prism, the governess, directs her pupil to read her book on political economy but to omit the chapter on the Fall of the Rupee, because it is "somewhat too sensational." "Even these metallic problems," she adds, "have their melodramatic sides."

¹² The emergency disputes procedures in the Labor Management Relations Act, §§ 206-209, 29 U.S.C. §§ 176-179 (1976), for example, are frequently criticized. See Wedderburn, *Industrial Action, the State and the Public Interest*, in *INDUSTRIAL ACTION: A COMPARATIVE LEGAL SURVEY* 320 (B. Aaron & K. Wedderburn eds. 1972).

knowledge of the way various problems common to industrialized countries are handled in other systems of labor relations law; and it is the use of that knowledge to illuminate our own experience and to examine it from a new perspective that is the essence of the comparative method.

III. PIONEERS OF COMPARATIVE LABOR LAW IN THE UNITED STATES

Contemporary students of comparative labor law in the United States must acknowledge their special debt to three fellow countrymen who have pioneered in this area of the American wilderness. The first, Arthur Lenhoff, was a naturalized citizen, who left his native Austria, where he had been a successful lawyer, university professor, and judge of the Constitutional Court, and came to the United States at the age of 52 as a refugee from Nazi persecution. Like the late Professor Sir Otto Kahn-Freund in England, Lenhoff, who died in 1965, mastered our alien system of law with astonishing rapidity and then built a second distinguished career as professor of law, scholar, and legal practitioner. In the field of labor law his writings are remarkable for this explication of differences between American laws and those of continental European countries—differences of which most American labor scholars had previously been unaware.¹³ In the words of one of his contemporaries at the Buffalo School of Law,

Dr. Lenhoff's work may still be seen as part of that great influx of European ideas into the stream of American legal scholarship. At times these ideas influenced court decisions directly; more often they made creative contributions to the growing critical spirit . . . which eventually influenced teachers, scholars, students, lawyers, legislators and courts alike.¹⁴

Another to whom we are particularly indebted is Derek C. Bok, formerly professor of law and dean of the Harvard Law School, and currently president of Harvard University. Bok's brilliant and comprehensive article, *Reflections on the Distinctive Character of American Labor Law*,¹⁵ has gained a high and lasting place in the literature of comparative labor law.

¹³ Among Lenhoff's writings in English on labor law, the following are particularly noteworthy: *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941); *A Century of American Unionism*, 22 B.U.L. REV. 357 (1942); *The Right to Work: Here and Abroad*, 46 ILL. L. REV. 669 (1951); *Some Basic Features of American and European Labor Law: A Comparison*, 26 NOTRE DAME LAW. 389 (1951) [hereinafter cited as *Labor Law*]; *Basic Features of Foreign Labor Law*, in LABOR RELATIONS AND THE LAW 63 (R. Mathews ed. 1953) [hereinafter cited as *Basic Features*]; and *The Problem of Compulsory Unionism in Europe*, 5 AM. J. COMP. L. 18 (1956) [hereinafter cited as *Compulsory Unionism*].

¹⁴ Touster, *Reflections on the Emigré Scholar: In Memory of Arthur Lenhoff*, 16 BUFFALO L. REV. 1, 3 (1966).

¹⁵ 84 HARV. L. REV. 1394 (1971) [hereinafter cited as Bok].

Finally, we are obligated to Professor Clyde Summers, of the University of Pennsylvania Law School, for his seminal essay, *American and European Labor Law: The Use and Usefulness of Foreign Experience*,¹⁶ which, although less comprehensive than Bok's article, was nevertheless one of the first to demonstrate the "insularity and uniqueness" of American Labor law, as well as to point out both the value and the limitations inherent in the comparative study of labor law.

Some of what follows is derived from the writings of these distinguished scholars.

IV. PRIMARY INFLUENCES ON THE AMERICAN LABOR RELATIONS SYSTEM

Bok's thesis, with which I concur, is "that the patterns of behavior and the institutions that make up our system of industrial relations have had a more fundamental influence than any other factor on the major lines of substantive law in this country."¹⁷ The lack of class-consciousness among American workers, their resistance to organization, their preoccupation with so-called business—or "bread-and-butter"—unionism, and their relative lack of involvement in politics contrast sharply with the behavior of their counterparts in Europe. Thus, workers in Europe are more closely identified with political parties—Social-Democratic, Communist, Christian, and a number of others across the entire political spectrum—than they are with particular unions.¹⁸ Indeed, as Lenhoff remarked of labor organizations affiliated with the Social-Democratic Party in pre-World War I Germany and Austria, "the unions were the Party's creatures rather than its masters;"¹⁹ whereas American workers have traditionally elevated loyalty to their unions over adherence to political parties, and have largely been content to follow the admonition of their leaders to reward their friends and punish their enemies.²⁰

Similarly, the tendency of American employers to go it alone and their traditional reluctance to organize into associations for the purpose of dealing with unions have led to a decentralized pattern of industrial relations in this country that is markedly different from the highly centralized system of bargaining that is characteristic of European countries.²¹ Moreover, American employers have shown a far more persistent

¹⁶ 16 BUFFALO L. REV. 210 (1966) [hereinafter cited as Summers].

¹⁷ Bok, *supra* note 15, at 1400. *But see* Summers, *supra* note 16, at 221: "[E]xplaining labor law as the product of social institutions and attitudes oversimplifies the linkage of cause and effect."

¹⁸ *See Basic Features*, *supra* note 13, at 63-66.

¹⁹ *Id.* at 65.

²⁰ For the origin of the phrase "reward your friends and punish your enemies," see 2 J. COMMONS & ASSOCIATES, HISTORY OF LABOUR IN THE UNITED STATES 531 (1918).

²¹ *See* Bok, *supra* note 15, at 1405: "In all of the other countries surveyed [England, France, Italy, Germany, Belgium, Holland, Sweden, Norway, Denmark, Australia, and New Zealand], negotiations with trade unions have been conducted in the main through associations representing a single industry or a group of related industries."

and militant resistance to unions than their European counterparts, which accounts in part for the fact that a lower percentage of workers in America is organized than is the case in any industrialized country in Western Europe.²²

V. EUROPEAN INTERVENTIONISM AND AMERICAN VOLUNTARISM

In Europe, especially in Germany, the early involvement of workers in politics led to the system of government "interventionism," that is, the process of translating political strength into protective social legislation.²³ By contrast, workers and their unions in the United States, especially prior to the advent of the New Deal in the 1930s, had a deeply ingrained suspicion of government and were thus committed to "voluntarism," the philosophy that economic and social gains must be achieved without interference or aid from government. In the words of Samuel Gompers,

The mass of the workers are convinced that laws necessary for their protection against the most grievous wrongs cannot be passed except after long and exhausting struggles; that such beneficent measures as become laws are nullified by the unwarranted decisions of the courts; that the laws which stand upon the statute books are not equally enforced; and that the whole machinery of government has frequently been placed at the disposal of the employers for the oppression of the workers.²⁴

When the American Federation of Labor, virtually crushed by the Great Depression of the 1930s, was finally forced to support the statutory labor program of the New Deal, it did not wholly abandon voluntarism; nor was there any occasion to do so, for the United States did not follow the European pattern of interventionism. Although the Wagner Act created the framework for collective bargaining and made it an unfair labor practice for employers to engage in various efforts to frustrate the formation of unions or to subvert the bargaining process,²⁵ the substantive terms of collective agreements were not dictated by government. With the exception of the Fair Labor Standards Act of 1938 (FLSA),²⁶ which imposed mandatory, nonwaivable minimum wages, over-

²² Organized labor as a percent of the nonagricultural labor force in 1976 was 23 percent in the United States; 44 percent in Australia; 67 percent in Austria; 21 percent in Canada; 60 percent in Finland; 31 percent in the German Federal Republic; 65 percent in Denmark; 80 percent in Sweden; and 40 percent in the United Kingdom. N. CHAMBERLAIN, D. CULLEN & D. LEWIN, *THE LABOR SECTOR* 125 (1980).

²³ See *Basic Features*, *supra* note 13, at 64.

²⁴ Quoted in G. HIGGINS, *VOLUNTARISM IN ORGANIZED LABOR IN THE UNITED STATES, 1930-1940*, at 31 (1944), cited in I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 23 (1950).

²⁵ National Labor Relations (Wagner) Act, ch. 372, § 8(a)(1)-(a)(5), 49 Stat. 452 (1935) (current version at 29 U.S.C. § 158(a)(1)-(a)(5) (1976)).

²⁶ Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-219 (1976)).

time pay provisions, and restrictions on child labor, the federal government passed virtually no laws regulating wages, hours, and other terms and conditions of employment. Organized workers were entitled to whatever benefits their unions could exact from employers in collective bargaining; unorganized workers received only what the FLSA required and what their employers were willing to dispense in their unfettered discretion. Although most collective agreements provided that employees could not be disciplined or discharged except for just cause, unorganized employees without individual contracts of employment for fixed terms were considered in law to be employed "at will," subject to discharge at any time for any reason or no reason.²⁷

The contrasting situation in continental European countries was described by Lenhoff as one in which

every employee, whether a member of a union or not, enjoys by statute many of the rights and privileges which in . . . [the United States] can be acquired only by contract. [These include] [n]ot merely protection against abrupt discharge, but also vacations with pay, wages during absence due to illness or other urgent, personal reasons, and during a period of idleness caused by reduction of plant operations, pay upon permanent discharge, and many other benefits. . . .²⁸

VI. DISTINCTIVE FEATURES OF AMERICAN LABOR LAW

A. *Exclusive Representation*

The difficulty in organizing American workers and the enduring resistance of American employers to unionism, together with the strong jurisdictional rivalries among unions, resulted in perhaps the most distinctive feature of collective bargaining in the United States: the principle of exclusive representation. In order to insure that the collective bargaining power of employees had the best chance of matching that of the employer, the Wagner Act established the principle that a union representing an uncoerced majority of employees in a bargaining unit shall be empowered to act as the exclusive representative of all employees for purposes of collective bargaining, including those who refused to join or who actively opposed the union.²⁹ This is an arrangement manifestly impracticable in those countries in which unions are organized on political or religious lines; it is also unnecessary where, as

²⁷ The dubious authority for the "employment at will" rule is H. WOOD, MASTER AND SERVANT § 134 (1877). See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-43 (1974).

²⁸ *Basic Features*, *supra* note 13, at 66.

²⁹ National Labor Relations (Wagner) Act, ch. 372, §§ 9(a) & 8(a)(5), 49 Stat. 452 (1935) (current version at 29 U.S.C. §§ 159(a) & 158(a)(5) (1976)). See also *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

in most other countries, employers have long since ceased their active resistance to unionism and where basic terms and conditions of employment are fixed by statute rather than by individual or collective agreements.

As Summers has observed, "uniqueness tends to beget uniqueness."³⁰ Constitutional considerations led inevitably to the requirement that a union clothed with the statutory powers of exclusive representation must be required to represent all employees in the bargaining unit—union members and nonmembers alike—fairly and without hostile or invidious discrimination.³¹ The duty of fair representation, in turn, exacerbated the unions' hostility to so-called free riders—those who enjoy the benefits of the collective agreement but refuse either to join the union or to pay their fair share of its collective bargaining costs. This helps to explain why union security, in its various manifestations, remains a major issue in our labor relations system,³² whereas, for reasons already indicated, it is not sought by unions in most other countries and is in fact illegal in many of them.³³ Finally, awareness of the economic power that unions derived from the right of exclusive representation gave impetus to the demand that their internal laws and procedures be fair and democratic. And just as union security is not an issue in most European countries, so there is little or no legislation regulating internal union affairs.

B. *Industrial Conflict*

Industrial conflict is, of course, a universal phenomenon. In the words of Kahn-Freund, the greatest of all modern comparative law scholars: "The conflict between capital and labour is inherent in an industrial society and therefore in the labour relationship. Conflicts of interests are inevitable in all societies. There are rules for their adjustment, there can be no rules for their elimination."³⁴

This obvious truth does not explain, however, why the problem of regulating industrial conflict has for so long been such an overwhelming preoccupation of American labor law. Writing in 1951, Lenhoff found the

³⁰ Summers, *supra* note 16, at 218.

³¹ The doctrine of fair representation was first enunciated by the U.S. Supreme Court in *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 199-208 (1944), a case arising under the Railway Labor Act. The doctrine was subsequently applied to cases arising under the National Labor Relations Act. See especially *Vaca v. Sipes*, 386 U.S. 171 (1967). See Aaron, *The Duty of Fair Representation: An Overview*, in *THE DUTY OF FAIR REPRESENTATION* 8 (J. McKelvey ed. 1977).

³² "Union security" is used to describe any agreement with an employer that compels members of a bargaining unit, as a condition of continued employment, either to join the union representing that unit or to contribute a fair share of the costs of collective bargaining. Opponents of union security prefer the term, "compulsory unionism."

³³ See *Compulsory Unionism*, *supra* note 13, at 18-43.

³⁴ O. KAHN-FREUND, *LABOUR AND THE LAW* 17 (2d ed. 1977).

explanation "in the fact that contractualism still constitutes the soul and life-blood of American labor law. . . ."³⁵ He contrasted the situation in Germany and France, where social legislation was the product of "the conquest of political power by socialistic parties," with that in the United States in the 1930s, when our basic labor laws were primarily influenced by the economic theories of Keynes and Hansen, conceived of "in terms of an increase in purchasing power among industrial workers *as consumers* rather than in terms of a revolutionary democratization of business enterprise."³⁶ The emphasis remained on the exercise of bargaining power by unions and their contractual relations with employers. The prevailing view continued to be that government should not attempt to interfere with market forces by fixing the substantive terms of employment, but should allow them to be set through collective bargaining. The corollary of that principle was that collective agreements must be mutually enforceable, and tactics by employers and unions, especially the latter, that interfered too drastically with the operation of the so-called free market, or created wide-scale interruptions in production or services that threatened the national health or safety, must be prohibited or extensively regulated by law. Those ideas found their expression in a plethora of statutory provisions dealing with strikes, lockouts, secondary boycotts, "featherbedding," jurisdictional disputes, and the like.³⁷

These laws can be explained as the natural outgrowths of our history, institutions, and political and economic philosophy; but that is hardly a reason for our supposing that they represent the best, if not the only, way to deal with industrial conflict. The weakness of that assumption has been exposed by Summers:

The proposition that collective agreements should be binding on employer and union alike, and that legal remedies should be available, is accepted by many in this country as being as unquestionable as the Euclidean theorem. But when we learn that in England the collective agreement is legally binding on neither party; that in Belgium the employer is bound but there is no legal remedy against the union; that in Germany the union is bound but it has no effective remedy against the employer; that in France the employer has no legal remedy against the worker; and that in Sweden there are legal remedies against the union, the employer and the individual worker — when we learn this, we are compelled to recognize that our self-evident assumptions are self-generated.³⁸

³⁵ *Labor Law*, *supra* note 13, at 391.

³⁶ *Id.* at 407-08 (italics in original).

³⁷ *E.g.*, National Labor Relations Act, 29 U.S.C. § 158(b)(6) ("featherbedding"); § 158(b)(4) (boycotts); § 158(b)(7) (picketing) (1976).

³⁸ Summers, *supra* note 16, at 222 (citations omitted).

C. *Strikes by Government Employees*

Our laws against secondary boycotts, among others, also lack the logical necessity commonly attributed to them in this country; but perhaps the greatest gap in this general area is between our laws and those of European countries relating to government employees. Although a number of European countries bar strikes by limited groups of public servants, such as police, armed forces, the judiciary, postal workers, and air traffic and harbor authorities, only a few have so pervasive a prohibition on such strikes by government employees as exists in the United States, and in some of those countries the rule is not enforced.³⁹ In our country the total ban on strikes by federal employees is strictly enforced, as air traffic controllers recently learned to their sorrow, and in only eight of the fifty states have government employees even a limited right to strike—so limited, in fact, that it is virtually ineffective.⁴⁰ In the remaining states the right to strike is forbidden either expressly by statute or by common law. This circumstance is remarkable in that many states have enacted laws permitting collective bargaining by government employees modeled after the National Labor Relations Act (NLRA), which recognizes the right to strike as fundamental to the process of collective bargaining and which only marginally limits its exercise.⁴¹ The prevailing policy is remarkable, too, in that it persists in the face of a steadily increasing number of illegal strikes by government employees at state, county, and municipal levels.⁴²

³⁹ Krück, *The Freedom to Organize of Public Servants*, in 2 THE FREEDOM OF THE WORKER TO ORGANIZE 1297, 1305-08 (1980) [hereinafter cited as Krück].

⁴⁰ Eight states—Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin—provide a limited right to strike to some groups of government employees. An example of the limitations imposed even when the right to strike exists is offered by the Hawaiian statute, HAWAII REV. STAT. § 89-12 (1976 & 1981 Supp). Under Hawaiian law, strikes are permitted by employees who are members of an appropriate bargaining unit represented by a certified bargaining agent, provided that no procedure to settle the dispute by binding arbitration is available and that the employees involved are not "essential." Before striking, employees must comply in good faith with the statutory impasse procedures; wait until 60 days after the findings and recommendations of a fact-finding board are made public; and give 10 day's notice of a desire to strike to the Public Employment Relations Board (PERB) and the employer. Even then, if the PERB finds that there is imminent danger to the health and safety of the public, it must set requirements, including the designation of certain positions as "essential," that must be complied with to avoid or remove such danger.

⁴¹ Section 13 of the National Labor Relations Act, as amended, provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1976).

⁴² Data from the U.S. Department of Labor, Bureau of Labor Statistics show, for example, that in 1958 there were 15 strikes involving 1.7 thousand federal, state, and local government employees for a total of 7.5 thousand days idle. The corresponding figures for 1975 were 478, 318.5, and 2,204.4, respectively. Most of these strikes were illegal. See H. EDWARDS, R. CLARK & C. CRAVER (eds.), *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 493 (2d ed. 1979).

Interestingly enough, the country at the opposite pole from the United States in this regard is Sweden—a nation whose system of labor relations is regarded by many Americans as a model of civilized and sophisticated accommodation of conflicting interests. The Swedish legal system recognizes that the right to strike is the same for government as for private employees, the only limitation on government employees being that strikes for the purpose of influencing internal political matters are not allowed, nor are strikes in support of employees in the private sector.⁴³ The Swedish government has also succeeded in excluding certain highranking officials from the universal right to strike, but only by negotiating provisions for such exclusions in its collective agreements with unions.⁴⁴

D. *Grievance Arbitration*

One feature of labor relations in the United States that seems to have the support of most employers and unions in the organized sector of the economy is the principle, embodied in legislation,⁴⁵ that disputes arising out of the interpretation and application of collective agreements should be settled through the grievance and arbitration procedures typically included in such agreements. Disputes of this type are known in this country as “grievances,” and in other countries as disputes over “rights,” or “legal” disputes. There is a widely recognized distinction between rights disputes, on the one hand, and disputes over the terms of initial or new collective agreements, commonly referred to as “interests” disputes, on the other. In this country and in Canada, most strikes over grievances are illegal, whereas most strikes over interests disputes are lawful. At the same time, the handling of an interests dispute by means of the grievance-arbitration procedure during the life of a collective agreement is a rarity, the idea being that all such issues should be reserved for the negotiation of a new agreement.

This system works well for us; it may be our most successful invention in the labor relations field. Contrary to the belief of many Amer-

⁴³ Hemstrom, *The Freedom of the Worker to Organize in Sweden*, in 1 *THE FREEDOM OF THE WORKER TO ORGANIZE* 771, 787 (1980).

⁴⁴ Krück, *supra* note 39, at 1307.

⁴⁵ *E.g.*, Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173 (1976), provides in part: “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over application or the interpretation of an existing collective-bargaining agreement. . . .” Section 3 of the Railway Labor Act, 45 U.S.C. § 153 (1970) requires that all disputes “growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions” shall be submitted to final and binding adjudication by either the appropriate division of the National Railroad Adjustment Board or by a system, group, or regional board of adjustment established by the parties. Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108 (1976), provides in part: “No restraining order or injunctive relief shall be granted to any complainant . . . who has failed to make every reasonable effort to settle [a labor dispute] . . . with the aid of . . . voluntary arbitration.”

icans, however, it has no exact analogue outside of North America. Although highly idiosyncratic forms of arbitration are used to a limited extent in some other countries, labor courts are by far the most common mechanism for adjudicating rights disputes.⁴⁶ Why is a system that seems so reasonable and efficient to us viewed with scepticism in so many other countries? The answer is that it makes sense only in a context that is peculiarly American. Consider all the preconditions required to make it work. There must first be an acceptance on the part of the bargaining parties, supported by law, that agreements to arbitrate and arbitration awards shall be specifically enforceable by the courts. There must also be an understanding—usually explicit, but sometimes implicit—that there will be no strikes or other interruptions of work during the life of the agreement over matters that are subject to arbitration.⁴⁷ This means, in turn, that collective agreements must be for fixed terms; otherwise parties would be unwilling to postpone indefinitely the exercise of their right to engage in strikes, lockouts, or other forms of industrial action permissible in interests disputes. Finally, because grievances involve terms and conditions of an existing collective bargaining agreement, and because the parties to that agreement are the employer and the union, the latter must be in complete control of the grievance-arbitration procedure. Subject only to its duty of fair representation, the union must be allowed exclusively to decide whether to file a grievance, settle it, or take it to arbitration.

This being understood, it is at once apparent why our grievance-arbitration system is unacceptable in Britain, for example, where collective bargaining contracts are regarded as gentlemen's agreements, unenforceable in court, and are open-ended, rather than for fixed terms. The latter characteristic has, in turn, resulted in the obliteration of the distinction between rights disputes and interests disputes as well as the absence of no-strike provisions in collective agreements.⁴⁸ Consequently, even where grievance and arbitration procedures exist, the occurrence of a dispute over the interpretation or application of the agreement is frequently marked by a partial or general stoppage of work⁴⁹—the very circumstance that the grievance-arbitration system in this country is designed to prevent.

For somewhat different reasons, our system is unacceptable in a

⁴⁶ Aaron, *Arbitration and the Role of Courts: The Administration of Justice in Labor Law*, in I PROCEEDINGS OF THE IXTH INTERNATIONAL CONGRESS, INTERNATIONAL SOCIETY FOR LABOR LAW AND SOCIAL SECURITY 27 (1979).

⁴⁷ See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁴⁸ See K. WEDDERBURN & P. DAVIES, *EMPLOYMENT GRIEVANCES AND DISPUTES PROCEDURES IN BRITAIN* (1969), especially *Forward*, at vii.

⁴⁹ The overwhelming number of strikes in Britain are "unofficial," i.e., "they take place in disregard of an existing agreement laying down a procedure for the attempted settlement of a dispute before strike action is taken." ROYAL COMM'N ON TRADE UNIONS AND EMPLOYERS ASS'NS 1965-1968 (DONOVAN COMM'N), Para. 367 (Cmnd. 3623, 1968).

number of continental European countries. Fundamentally, the problem is that grievance-arbitration procedures in the United States are voluntary and private, and are typically negotiated at plant level between single companies and local unions.⁵⁰ Contrast this situation with that in France, for example, where labor disputes are not settled within the enterprise.

Internal organizations representing workers have only limited powers; they may promote voluntary settlement of a grievance or act as a screening agency, but they . . . cannot really take part in the final settlement of a dispute. . . . Union participation is more or less insignificant because of . . . union pluralism and the rule that unions can represent their members only . . . and because settlement procedures are usually prescribed by statutory law rather than by collective agreement. . . . [I]n French law . . . all employees are entitled to the same minimum protection, which must be furnished by the legislature. Thus, existing procedures tend to accommodate state agencies, such as judges and government officials, rather than unions or private individuals, and the French system may be characterized as one of public order in which the state is almost omnipresent.⁵¹

Comparisons of Western European labor court systems with the American arbitration system reveal that the former tend to dispose of most rights disputes more quickly and cheaply than does the latter, but that the remedies available, notably reinstatement for wrongful dismissal, are broader in the United States.⁵² Against that advantage, however, must be weighed the availability of the European labor courts to all employees, whereas in the United States, with statistically insignificant exceptions, arbitration of grievances is available only to organized workers and, even then, is subject to considerable control by their exclusive bargaining representatives.

VII. RECENT CHANGES IN THE SUBSTANCE OF AMERICAN LABOR LAWS

So far, I have attempted, through the use of several examples, to show some of the distinctive features of American labor relations laws; to explain, albeit rather superficially, why they differ so widely from laws of European countries relating to the same general subjects; and to suggest that a study of foreign solutions to common problems may give us new insights into our own. I shall return to the last of these points at the end of this essay.

Before doing so, however, I want to draw attention to what seems to

⁵⁰ Bok, *supra* note 15, at 1409.

⁵¹ Blanc-Jouvan, *The Settlement of Labor Disputes in France*, in *LABOR COURTS AND GRIEVANCE SETTLEMENT IN WESTERN EUROPE* 13-14 (B. Aaron ed. 1971).

⁵² Aaron, *Labor Courts: Western European Models and Their Significance for the United States*, 16 U.C.L.A. L. REV. 847 (1969).

me to be significant, indeed profound, changes in the content of labor laws in this country—changes that bring them into closer harmony with their European counterparts than ever before.

Increasingly, in the last twenty years, the federal government has enacted laws vitally affecting the employment relations that are general in application and make no distinction between organized and unorganized workers. The best known of these laws is Title VII of the Civil Rights Act of 1964, as amended,⁵³ which prohibits employers, employment agencies, and unions from discriminating in hiring, employment conditions, or membership because of any individual's race, color, religion, sex, or national origin. Other laws include the Equal Pay Act of 1963,⁵⁴ which bans pay discrimination between employees on the basis of sex; the Age Discrimination in Employment Act of 1967, as amended,⁵⁵ which bars employers, employment agencies, and unions from discriminating in hiring, employment conditions, or membership because of age against any individual between the ages of forty and seventy; the Rehabilitation Act of 1973, as amended,⁵⁶ which, among other things, declares that no otherwise qualified handicapped individual shall be discriminated against, solely by reason of his handicap, under any program or activity receiving federal financial assistance, or conducted by any executive agency or by the United States Postal Service; the Employment Retirement Income Security Act of 1974, as amended,⁵⁷ designed to promote and to regulate the fiscal soundness and financial and social integrity of privately funded employee retirement programs; and the Occupational Safety and Health Act of 1970,⁵⁸ which requires virtually all private employers to furnish workers with an environment that is free from recognized hazards likely to cause death or serious harm. In addition, there are other protective laws and numerous executive orders directing various government agencies to take affirmative action in aid of certain group of employees, again without regard to whether they are union members.

Despite the exceptions and exemptions found in all of these statutes and orders, they comprise a body of employment or social legislation that is comparable to that in existence in European countries. The element of contractualism that remains in our laws permits the waiver of the rights they create, whereas the comparable provisions in European laws are generally nonwaivable.⁵⁹

⁵³ 42 U.S.C. §§ 2000e to 2000e-17 (1976) (original version at Pub. L. No. 88-352, 78 Stat. 241 (1964)).

⁵⁴ Pub. L. No. 88-38, 77 Stat. 56 (1963) (current version at 29 U.S.C. § 206 (1976)).

⁵⁵ 29 U.S.C. §§ 621-634 (1976) (original version at Pub. L. No. 90-202, 81 Stat. 602 (1967)).

⁵⁶ 29 U.S.C. §§ 701-795i (1976 & 1981 Supp.) (original version at Pub. L. No. 93-112, 87 Stat. 355 (1973)).

⁵⁷ 29 U.S.C. §§ 1001-1381 (1976) (original version at Pub. L. No. 93-406, 88 Stat. 829 (1974)).

⁵⁸ Pub. L. No. 91-596, 84 Stat. 1590 (current version at 29 U.S.C. §§ 651-678 (1976)).

⁵⁹ See *Basic Features*, *supra* note 13, at 68-69: "Centuries of interventionism led the way to the present European labor law, under which the parties cannot alter, modify, or exclude what the statute provides for."

The long-range effect of this newly created body of social legislation in the United States is bound to be of the greatest importance. Union membership (exclusive of Canada), as a percentage of both the total labor force and the nonagricultural labor force, has declined steadily from 22.7 percent and 32.6 percent, respectively, in 1954 to 19.7 percent and 23.6 percent, respectively, in 1978.⁶⁰ Thus, an increasing percentage of employees have had to look to the government, rather than to unions and collective bargaining agreements, for employment protection. If these trends of increased social legislation and diminished union membership continue, the basic role of unions in this country may come more closely to resemble that of their European counterparts, namely, to propose social legislation and to seek to gain political power sufficient to insure that such legislation is enacted; to police the enforcement of that legislation against employers; and to attempt, through collective bargaining, to improve upon the minimum terms and conditions of employment fixed by that legislation.

One of the most distinctive features of American labor law is the lack of statutory protection against unfair and abusive treatment, including discharge, of unorganized employees. Among the industrialized countries of the world, the United States has the dubious distinction of standing virtually alone in this regard. Even here, however, there are signs that the old rules may be changing. Although attempts in a few states to enact statutes requiring that the discharge of unorganized employees be only for just cause⁶¹ have so far been unsuccessful, and in my view are not likely to be enacted in the foreseeable future,⁶² some courts have shown a disposition to insist upon that requirement.⁶³ Indeed, one prominent academic authority, Professor Cornelius J. Peck, has boldly predicted

that American courts will abandon the principle that, absent some consideration other than the services to be performed, a contract of employment for an indefinite term is to be considered . . . terminable at will by either party, with the consequence that

⁶⁰ U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS, BULL. No. 2070, Table 165, at 412 (1980).

⁶¹ *E.g.*, Connecticut: Committee Bill No. 8738, Gen. Ass., Jan. Sess. (1973); Committee Bill No. 5179, Gen. Ass., Jan. Sess. (1974); Committee Bill No. 5151, Gen. Ass., Jan. Sess. (1975); Michigan: Unjust Discharge Bill (unpublished draft) (1979); New Jersey: Ass. No. 1832 (1980). *See generally* Summers, *Administration of Unjust Dismissal: A Preliminary Proposal*, in *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 159 (J. Corrage, V. Hughes & M. Stone, eds. 1976).

⁶² *See* Aaron, *The Ownership of Jobs: Observations on the American Experience*, in *JOB EQUITY AND OTHER STUDIES IN INDUSTRIAL RELATIONS* 50, 85-86 (W. Fogel ed. 1982).

⁶³ *E.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 610 P.2d 1330 (1980); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

the employer may discharge an employee for any cause, no cause, or even bad cause. Instead, courts will require that employers have just cause for terminating the employment relationship. A further consequence will be that courts will also require proof of just cause for any serious disciplinary action by employers.⁶⁴

Other academic writers, although perhaps not so confident in their predictions, have argued in favor of the outcome described by Peck.⁶⁵ Should his vision of the future prove to be correct, unions would be deprived of one of their most persuasive organizing arguments, namely, that only they can protect workers from the abusive powers of employers. That circumstance might well have an inhibiting effect on union growth.

VIII. USES AND MISUSES OF COMPARATIVE LAW

At the outset of this essay I referred to a relatively newly awakened interest in this country in comparative labor law. As sometimes happens, however, when scholars, students, and practitioners of labor law, as well as employers and unions, are exposed to new theories and empirical data, they react to them with automatic hostility or uncritical enthusiasm. The latter of these reactions is, perhaps, more dangerous than the former: hostility can yield over time to persuasion, if the new ideas prove to be practical and workable; but uncritical enthusiasm may lead to efforts to adopt exogenous theories or practices that cannot take root in alien soil. To mention but one example, the British Industrial Relations Act, 1971, which incorporated some concepts from the American Taft-Hartley Act that were totally at odds with British experience, turned out to be a major disaster and had to be repealed.⁶⁶ In the United States the danger lies less in the possibility of enacting into legislation foreign solutions unsuited to our political, economic, and social environment than in the too ready acceptance by some employers and unions of concepts in the labor-management field that seem to be working well in other countries. I shall mention only one example—the substantial current interest in worker participation schemes.

Worker participation in management is pervasive throughout most

⁶⁴ Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J. 1, 1-2 (1979).

⁶⁵ E.g., A. BERLE, THREE FACES OF POWER 39-41 (1967); Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, PROCEEDINGS OF THE 32ND ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASS'N 155 (B. Dennis ed. 1979); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

⁶⁶ See Sandison, *A Rejected Transplant: The British Industrial Relations Act (1971-1974)*, 3 IND. REL. L. J. 247 (1979).

of the industrialized world, not the least so in the United States. It may come as a surprise to some that unions in this country have a statutory right to participate in managerial decisions far exceeding that of their counterparts in most other countries. Sections 8(a)(5) and 9(a) of the NLRA require employers to bargain in good faith with the exclusive bargaining representatives of their employees on "rates of pay, wages, hours of employment, or other conditions of employment."⁶⁷ Decisions of the NLRB, enforced by the courts, have expanded this duty to embrace virtually every managerial decision that affects the employment relation.⁶⁸ Even within the small area still reserved for unilateral determination by the employer, such as the decision to close down a plant or a department for bona fide economic reasons, management will still have to bargain over the impact of such closure on the employees affected.⁶⁹

Of course, the duty to bargain in good faith does not require that agreement be reached at any cost; Section 8(d) of the NLRA specifically declares that "such obligation does not compel either party to agree to a proposal or require the making of a concession."⁷⁰ Nevertheless, bargaining in good faith by both parties produces agreement in the great majority of cases.⁷¹ In addition, grievance-arbitration procedures insure the right of unions to enforce whatever substantive agreements have been reached. It is not surprising, therefore, that American unions have found this system of participation in management preferable to foreign versions in which workers' representatives participate in varying degrees with management in making initial decisions.⁷²

In an outstanding review of United States experience with workers' participation in management, Professor Adolf F. Sturmthal summarized his findings in part as follows:

1. The United States system of industrial relations rejects in principle, and almost always in practice, all forms of workers'

⁶⁷ National Labor Relations Act, 29 U.S.C. § 159(a) (1976).

⁶⁸ Terms and conditions of employment for which employers have a duty to bargain in good faith include: Christmas bonuses; pension and other welfare programs; profit-sharing and stock-purchase plans; merit wage increases; seniority, promotion, and transfers; union security; plant rules; subcontracting; and partial closure of business and plant relocation. See generally R. GORMAN, BASIC TEXT ON LABOR LAW ch. XXI (1976).

⁶⁹ See *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

⁷⁰ National Labor Relations Act, 29 U.S.C. § 158(d) (1976).

⁷¹ In 1979 there were only 4800 work stoppages in the United States; only 1.6 percent of the total of employed workers was involved, and the percent of estimated working time lost resulting from strikes was only .15. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS, BULL. No. 2070, Table 167 (1980).

⁷² The literature on the subject of worker participation in management is extensive. See, e.g., BULL. OF COMP. LAB. REL. No. 8, *Worker's Participation in the European Company* (1977); INTERNATIONAL INSTITUTE FOR LABOUR STUDIES, BULLS. No. 2, 64-125 (Feb. 1967), No. 5, 136-220 (Nov. 1968), No. 6, 54-186 (June 1969), No. 7, 153-285 (June 1970), No. 9, 129-207 (1972); W. OUCHI, THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE (1981).

representation in official managerial bodies. The union wishes to be a critic rather than a partner in management, and union influence is exerted almost exclusively by negotiation and grievance handling. . . .

2. The union does not accept formal responsibility for the life of the plant or the undertaking. Even when . . . unions make a major contribution to the efficient management of plants, . . . [they] have consistently refused to assume formal responsibility for plant management. . . .

* * * *

4. To the extent to which a union acts as a participant in managerial decision making, it does so without advancing any elaborate ideological claims beyond the basic union task of defending and improving its members' material interests as workers. . . .⁷³

Despite increasing awareness in this country of European and Japanese systems of worker participation, American unions have shown little interest in them. The insistence by the United Auto Workers that its president, Douglas A. Fraser, serve on the board of directors of Chrysler Corporation, as one of the conditions for giving the company the economic relief necessary to keep it afloat, was largely a symbolic gesture; it does not, in my opinion, mark the beginning of a trend.

Nevertheless, we hear much these days about improving the quality of work life, involving employees directly in the management of enterprises, and the "art" of Japanese management.⁷⁴ I find it significant that the most enthusiastic proponents of these ideas tend to be, with few exceptions, employers whose employees are not organized. As one astute observer has remarked,

This emphasis on the atmospherics of intimacy and trust at the workplace is hardly new to professional management in America. In their attempt to stem the rising tide of unionism during the first decades of the century, American managers adopted "work place cooperation" as their slogan, and devised an elaborate system of committees to represent worker interest. . . . By the mid-1930s the preeminent business journal, *Management Review*, was urging business leaders to give their employees "what every human being asks for in life: respect for his personality, his human dignity, an environment that he comprehends, and an assurance that he is progressing." . . .

Such trust and collaboration was of course nothing more than a means of motivating and manipulating the work force while maintaining professional control. . . .⁷⁵

⁷³ *Workers' Participation in Management: A Review of United States Experience*, in INTERNATIONAL INSTITUTE FOR LABOUR STUDIES, BULL. NO. 6, 149, 184 (1969).

⁷⁴ R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* (1981).

⁷⁵ Reich, Book Review, *THE NEW REPUBLIC*, June 27, 1981, at 27, 30-31.

It is unnecessary, however, and would in any case be unfair, to impugn the motives of all those who are searching for ways of ordering labor-management relations that will improve or even supplant collective bargaining. There is nothing sacred about collective bargaining; it is merely a means to an end, not the end itself. My point is only that methods of worker participation that appear to be working satisfactorily in other countries are based on social and industrial systems that are fundamentally different from our own. As unemployment and business failures mount, and as a growing number of workers are being replaced by robots, "which never go on strike, take no coffee breaks, pay no union dues and ultimately eliminate many of the jobs that unions are making contract sacrifices to preserve,"⁷⁶ the system of collective bargaining in this country is coming under increasing strain; it may have to be substantially changed, if not entirely replaced. I suggest, however, that whatever changes are introduced will have to be compatible with our societal values and industrial experience; attempts to graft onto our system patterns of labor-management relationships that are based on quite different assumptions and practices from those in this country simply will not work.

If, as I have attempted to show, the American system of labor law and industrial relations is so different from that of most of the rest of the world, of what value can it be to study corresponding systems in other countries? Is it ever possible to transplant foreign institutions to the United States? No one has written about this problem with greater insight and authority than Kahn-Freund. In his memorable essay, *On Uses and Misuses of Comparative Law*,⁷⁷ he observed that although we commonly speak of "transplanting" a human organ, such as a cornea or a kidney, from one human being to another, no one ever says that a carburetor or a wheel is "transplanted" from one automobile to another. He continued:

Transferring part of a living organism and transferring part of a mechanism are comparable in purpose, but in nothing else. . . . Our insight into the difference between the kidney and the carburetor is elementary and intuitive, but it is also very practical from the point of view of the lawmaker contemplating the use of foreign models. It makes sense to ask whether the kidney can be "adjusted" to the new body or whether the new body will "reject" it—to ask those questions about the carburetor is ridiculous.⁷⁸

⁷⁶ Raskin, *A Reporter at Large: Unionist in Reaganland*, THE NEW YORKER, Sept. 7, 1981, at 50. Senator Lloyd Bentsen (D-Tex.) has predicted that as a result of the "robotics revolution" there may be as many as one million jobs in the United States filled by robots by 1990. DAILY LAB. REP. (BNA) A-6 (Dec. 11, 1981).

⁷⁷ 37 MOD. L. REV. 1 (1974).

⁷⁸ *Id.* at 5-6.

Kahn-Freund took the position that, in the metaphorical language he was using, foreign institutions, as a class, are neither all living organisms nor all mere mechanisms; instead, they may fall at any point along a continuum, of which the kidney and the carburetor are opposite terminals. But repeating the warning sounded by Montesquieu in his great work, *De l'Esprit des Lois*, over two centuries ago, Kahn-Freund observed that it is "a great coincidence, a concatenation of circumstances which we can by no means take for granted that an organ for a living body fits into another, as we do take it for granted that parts of a mechanism are interchangeable."⁷⁹

Accordingly, when considering the adoption of labor laws or institutions of other countries—whether they be labor courts, work councils, some type of worker participation scheme, or anything else—we should first try to determine at what point along the organism-mechanism continuum the law or institution would lie. More often than not, the risks of rejection are likely to be too great to warrant the experiment. As I argued at the outset, however, the value in studying foreign methods of dealing with problems similar to ours is to be derived not so much from the possibility of finding foreign laws and institutions that we can adopt; rather, it is derived from the new perspectives on our own system that we gain from such a study—perspectives that may lead to changes compatible with our culture and experience.

⁷⁹ *Id.* at 7.

