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Industrial Democracy: America's Unfulfilled Promise

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ARTICLES

INDUSTRIAL DEMOCRACY: AMERICA'S UNFULFILLED PROMISE*

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I. THE PROMISE MADE

IN 1797, WHEN ALBERT GALLATIN, LATER SECRETARY OF THE TREASURY, established a profit sharing plan in his glass works, he declared, "The democratic principle on which this nation was founded should not be restricted to the political process, but should be applied to the industrial operation as well."[1] The theme that our system of political democracy should be matched by a system of industrial democracy has been an irrepressible one in our history.[2] This theme is not ours alone, for in every political democracy there is recognition that decisions of the work place may be more important to the worker than decisions in the legislative halls.[3] Democratic principles demand that workers have a voice in the decisions that control their working lives; human dignity requires that workers not be subject to oppressive conditions or arbitrary actions. A review of the history of organized labor in the United States illuminates the tenacity of this deeply rooted idea.

During the last half of the nineteenth century, efforts to achieve industrial democracy took diverse forms. In the 1860's, William Sylvis of the Iron Molders Union advocated worker ownership of factories and advanced money to members for the establishment of foundries in several cities. Workers purchased shares of stock, had the right to vote, selected management, and determined major policies through group discussion. The Knights of Labor sought to ultimately establish "cooperative institutions, such as [would] supersede the wage system" and "eventually make every man his own master — every man his own employer."[4] This goal of direct worker

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[1] M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965, at 6 (1970).

[2] The development of the idea of industrial democracy in its many variations has been admirably charted by M. Derber. *Id.* Much of the historical discussion here has been drawn from Derber's work and sources.

[3] *See generally Industrial Democracy in International Perspective*, ANNALS, May 1977; F. BASAGNI & F. SAUZEY, EMPLOYEE PARTICIPATION AND COMPANY REFORM (1976); COMMISSION OF THE EUROPEAN COMMUNITIES, EMPLOYEE PARTICIPATION AND COMPANY STRUCTURE, BULL. OF THE EUROPEAN COMMUNITIES (Supp. Aug. 1975) [hereinafter cited as COMMISSION OF THE EUROPEAN COMMUNITIES]; F. GAMILLSCHEG, U.A., MITBESTIMMUNG DER ARBEITNEHMER (1978); INTERNATIONAL INSTITUTE FOR LABOUR STUDIES, BULL. No. 5 (1968); *id.*, BULL. No. 6 (1969); *id.*, BULL. No. 7 (1970); *id.*, BULL. No. 9 (1972); B. & S. WEBB, INDUSTRIAL DEMOCRACY (1965); W. WEDDERBURN ET AL., DEMOCRAZIA POLITICA E DEMOCRAZIA INDUSTRIALE (1978).

[4] T. POWDERLY, THIRTY YEARS OF LABOR 1859-1889, at 464 (1890), *cited in* M. DERBER, *supra* note 1, at 48.

control was echoed by scholars and social reformers. In contrast a different theme, professed by Edward Bellamy and other socialists, sought to achieve democracy in industry by subjecting ownership and control of industry to the political process.

These approaches were ultimately discarded, and the path chosen by the American Federation of Labor was followed. Workers were to achieve a voice by forming strong independent trade unions, the economic strength of which would compel employers to listen. Participation through collective bargaining was the method of determining terms and conditions of employment with the employer; the rules governing the workplace were those mutually agreed upon and expressed in the collective agreement.

The predominant response of employers to these demands for industrial democracy was that the owners were endowed by law, if not by God, with authority and responsibility to manage the business. Insistence by workers for a voice in management decisions was a violation of property rights and the moral order. A few progressive employers proposed profit sharing but without any power sharing. Andrew Carnegie even declared the right of workers to form unions to be "sacred" and advised against the use of strikebreakers. Yet he stood by while workers were killed at his Homestead plant and strikebreakers destroyed the union.

The courts reinforced the employers' view. Strikes and picketing were declared invasions of property rights.[5] The labor injunction was created and refined to curb union action,[6] and the legal rule that a worker could be discharged without cause and without notice was judicially articulated.[7] The employers' autocratic control was raised to a constitutional right when the Supreme Court rebuffed Congress' attempt to outlaw "yellowdog" contracts[8] or regulate the maximum hours of work.[9]

Despite the opposition of employers and courts, the idea of industrial democracy did not die. By the turn of the century, hope of achieving it focused on unionization and collective bargaining. This view found its most forceful expression in the Final Report of the Industrial Commission of 1902:[10]

> By the organization of labor, and by no other means, it is possible to introduce an element of democracy into the government of industry. By this means only the workers can effectively take part in determining the conditions under which they work. This becomes true in the fullest and best sense only when employers frankly meet the representatives of the workmen, and deal with them as parties equally interested in the conduct of affairs.
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> . . . Only experience with democratic forms and methods can develop the good that is in democracy; but so far as employers take a

[5] Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).

[6] Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 832 (1926).

[7] Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-47 (1974).

[8] Adair v. United States, 208 U.S. 161 (1908). A "yellow dog" contract is an employment agreement which forbids employee membership or participation in a labor union or organization.

[9] Lochner v. New York, 198 U.S. 45 (1905).

[10] XIX FINAL REPORT OF THE INDUSTRIAL COMMISSION, H.R. Doc. No. 380, 57th Cong., 1st Sess. (1902).

> long look ahead, and act in the interest of the ultimate welfare of society, it is believed that they will encourage rather than repress the growth of democratic government in their industries. . . . If they adopt a repressive policy they may perhaps succeed in it; but so long as the tradition of freedom is strong in the minds of the working people they can not destroy the aspiration for a measure of self-government in respect to the most important part of life. If the working people are prevented from introducing an element of democracy into industrial life by way of labor organization, they will undertake to introduce it in another way.[11]

This declaration for industrial democracy was answered by the employers with the "Open Shop" movement[12] and by the courts with paralyzing decisions. Unions were found liable for treble damages for boycotting hats made in non-union shops;[13] Samuel Gompers was found guilty of contempt for publishing an "unfair" list;[14] and a federal court declared that unions were illegal combinations violating the Sherman Anti-Trust Act.[15] Woodrow Wilson's "New Freedom" brought the Clayton Act with its ringing declarations that "the labor of a human being is not a commodity or article of commerce" and that unions should not "be held or construed to be illegal combinations . . . under the anti-trust laws."[16] Samuel Gompers hailed this as "the Industrial Magna Carta,"[17] apparently unaware that the feudal barons, not the serfs, won at Runnymede. He soon discovered, however, that the workers had acquired no new rights under the Clayton Act and that the courts continued to protect the industrial barons.[18]

The second major declaration for industrial democracy was by the Commission on Industrial Relations, which in 1915 called for "the rapid extension of the principles of democracy to industry."[19] It stated that "[w]hat each [wage earner] shall eat, what he shall wear, where he shall live, and how long and under what conditions he shall labor, are determined by his industrial status and by relation individually or collectively to the person or corporation employing him."[20] "Political freedom," it declared, "can exist only where there is industrial freedom; political democracy only where there is industrial democracy."[21] The Commission emphasized that "the struggle of

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[11] *Id.* at 805.

[12] Perlman & Taft, *Labor Movements*, in 4 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 129-37 (1935).

[13] Lawlor v. Loewe, 235 U.S. 522 (1915); *see also* Loewe v. Lawler, 208 U.S. 274 (1908).

[14] Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

[15] Hitchman Coal & Coke Co. v. Mitchell, 202 F. 512 (N.D. W. Va. 1912), *rev'd*, 214 F. 685 (4th Cir. 1914), *rev'd on other grounds*, 245 U.S. 229 (1917).

[16] Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (codified at 15 U.S.C. § 17 (1976)).

[17] Gompers, *The Charter of Industrial Freedom, Labor Provisions of the Clayton Antitrust Law*, 21 AM. FEDERATIONIST 957, 971 (1914).

[18] *See* Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Duplex Printing Co. v. Deering, 254 U.S. 443 (1921).

[19] U.S. COMMISSION ON INDUSTRIAL RELATIONS, FINAL REPORT OF THE COMMISSION ON INDUSTRIAL RELATIONS 1 (1915) [hereinafter cited as FINAL REPORT (1915)].

[20] *Id.* at 2-3.

[21] *Id.* at 2.

labor for organization is not merely an attempt to secure an increased measure of the material comforts of life, but is a part of the age-long struggle for liberty; . . . even if men were well fed they would still struggle to be free."[22]

The Commission quoted at length the classic statement of Louis D. Brandeis on the necessity for industrial democracy:

> We must bear in mind all the time that however much we may desire material improvement and must desire it for the comfort of the individual, that we are a democracy; and that we must have, above all things, men; and it is the development of manhood to which any industrial and social system must be directed. . . . And therefore the end toward which we must move is a recognition of industrial democracy as the end to which we are to work. . . .
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> No mere liberality in the division of the proceeds of industry can meet this situation. There must be a division not only of the profits, but a division of responsibilities; and the men must have the opportunity of deciding, in part, what shall be their condition and how the business shall be run.[23]

Some employers experimented with various forms of employee representation. Employers such as Filene; Hart, Schaffner & Marx; and the Colorado Fuel & Iron Company initiated worker representation plans without unions.[24] Some plans even adopted the title "Industrial Democracy."[25] With the coming of World War I, many other companies adopted or had such plans thrust upon them by the National War Labor Board or other government agencies.[26] Although the National War Labor Board adopted the principle of "the right of workers to organize and bargain collectively through chosen representatives," it refused to allow unions to take advantage of the war to force recognition.[27] Instead, the Board encouraged the establishment of employee representation committees and insured representation rights for non-union employees. Unions were recognized as but one among many ways in which workers might find industrial democracy, and by 1919 there were more than two hundred employee representation plans covering a half million workers.[28] The unions did not protest the creation of these representation committees but hoped to convert them into union organizations at the end of the war.[29]

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[22] *Id.* at 80-81.

[23] Testimony of Louis D. Brandeis before the Commission on Industrial Relations. *Id.* at 81, 83-84 [hereinafter cited as Testimony of Louis D. Brandeis].

[24] *See* E. BURTON, EMPLOYEE REPRESENTATION (1926); A. L. FILENE, A MERCHANT'S HORIZON (1924); NATIONAL INDUSTRIAL CONFERENCE BOARD, WORKS COUNCILS IN THE UNITED STATES, RESEARCH REPORT No. 21 (1919) [hereinafter cited as NICB]; B. SELEKMAN & M. VON KLEECK, EMPLOYEE REPRESENTATION IN THE COAL MINES (1924).

[25] *See, e.g.*, J. LEITCH, MAN TO MAN, A STORY OF INDUSTRIAL DEMOCRACY (1919). This plan was patterned after the federal government, with a house elected by the workers, a senate elected by foremen, and a cabinet made up of top executives.

[26] E. BURTON, *supra* note 24, at 29; NICB, *supra* note 24, at 6-8.

[27] W. LAUCK & C. WATTS, THE INDUSTRIAL CODE 56 (1922); W. STODDARD, THE SHOP COMMITTEE 13-14 (1920).

[28] NICB, *supra* note 24.

[29] M. DERBER, *supra* note 1, at 213; Lescohier, *Working Conditions*, in 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 346 (1935); TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT 77 (1935).

At the President's Industrial Conference in 1919, battle lines were drawn as to which form industrial democracy should take. The American Federation of Labor insisted that workers were entitled to select representative bodies, even outside unions "of their own choosing." Employers, however, hoping to forestall the emergence of powerful, independent union officials, sought to limit the choice of representation to those within the ranks of their employees.[30] The intractability of employers signalled three things: the employers' rejection of collective bargaining with independent unions, their intention to make employee representation plans captives of employer control, and their intent to use the employee representation plans to defeat unionization.

Through the 1920's employers embraced employee representation plans, and by 1928 more than a million and a half workers were covered by such plans.[31] The number diminished during the Depression years, but the passage of the National Industrial Recovery Act, which gave employees the right to organize, spurred a new drive creating company unions in order to forestall organization by trade unions. Within six months the number of company unions doubled,[32] and by 1935 nearly two and a half million workers were in such unions.[33]

Although employers often created company unions in the name of industrial democracy, company unions seldom gave the workers any effective voice. Because they were confined to individual plants they had little economic strength, and because they were economically dependent upon the employer they had no financial resources. The workers elected had no training or experience to be effective representatives. They had no one whom they could call for help, and they were completely subservient to the employer's control because they had no protection against retaliation for speaking up.[34] Instead of providing industrial democracy, company unions provided an empty form which served to obstruct collective bargaining.[35] They had to be removed if real industrial democracy was to be achieved.

Finally, in 1935 the irrepressible plea for industrial democracy, given voice by the Commission Reports of 1902 and 1915, became an affirmed promise by the federal government. The National Labor Relations Act in its all-important section 7 declared that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

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[30] The proceedings of the First Industrial Conference are described in *National Industrial Conference, Washington, D.C.*, 9 MONTHLY LAB. REV. 1342 (1919). *See also* W. LAUCK & C. WATTS, *supra* note 27, at 25-26, 108-11.

[31] NATIONAL INDUSTRIAL CONFERENCE BOARD, COLLECTIVE BARGAINING THROUGH EMPLOYEE REPRESENTATION 16 (1933).

[32] NATIONAL INDUSTRIAL CONFERENCE BOARD, INDIVIDUAL AND COLLECTIVE BARGAINING UNDER THE N.I.R.A. 24 (1933).

[33] TWENTIETH CENTURY FUND, *supra* note 29, at 79. For example, United States Steel, which had previously refused to have any form of employee representation, began the movement towards company unions in June, 1933. By the end of 1934, nearly one hundred formal representation plans were in existence, covering 90-95% of all steelworks. I. BERNSTEIN, TURBULENT YEARS, 1933-1941, at 455 (1969).

[34] R. DUNN, COMPANY UNIONS (1927); B. SELEKMAN & M. VON KLEEK, *supra* note 24; TWENTIETH CENTURY FUND, *supra* note 29, at 65-113.

[35] Lescohier, *supra* note 29, at 355-57.

representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[36]

The purposes of the National Labor Relations Act were many: to enable workers to obtain a larger share of the products of industry, to reduce industrial conflict, to increase mass purchasing power, to achieve more equal distribution of income, and to resolve disputes over union recognition. However, the primary purpose was to give employees an effective voice, through collective bargaining, in determining the terms and conditions of their employment. It echoed the historic declarations that political democracy should be matched by industrial democracy. In the congressional debates, Senator Wagner, author of the act, justified the principle that the employer should be required to recognize and bargain with the majority union in the following terms: "[D]emocracy in industry must be based on the same principles as democracy in government. Majority rule, with all its imperfections, is the best guaranty of worker's rights, just as it is the surest guaranty of political liberty that mankind has yet discovered."[37] In explaining the undergirding philosophy of the statute, Senator Wagner stated:

> 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.[38]

The expectation and promise of the Wagner Act was to make possible for all employees a system of industrial democracy. Collective bargaining would become the established and accepted form of industrial relations. Through collective bargaining employees would have an effective voice, would be able to protect their own interests, and would achieve human dignity. They would find freedom from the autocratic control of employers, and unilateral dictation would be replaced by mutually accepted rules. The divine right of employers would give way to democratic industrial government.

This was the promise of our national labor policy — industrial democracy through collective bargaining.

II. The Promise Performed

The promise of industrial democracy as a correlative of political democracy has not been an empty one. Collective bargaining "through representatives of their own choosing" has provided millions of workers an effective voice in industrial government and has brought due process and human dignity to their working lives.

Between 1935 and 1940, union membership nearly doubled,[39] and by 1974

[36] Ch. 372, § 7, 49 Stat. 452 (1935) (Wagner Act, codified at 29 U.S.C. § 157 (1976)).

[37] 79 Cong. Rec. 7570 (1935).

[38] M. Derber, *supra* note 1, at 321 (citing N.Y. Times, April 13, 1937, at 20, col. 1).

[39] In 1935, union membership in the United States was 3,609,300; in 1940 it was 7,055,000. L. Troy, Trade Union Membership, 1897-1962, at 1 (1965).

it was nearly six times that in 1935 when the national commitment was made.[40] It is estimated that at present nearly 25 million workers are covered by collective agreements.[41] Coverage of production workers is almost complete in basic steel, automobile, aircraft, electrical machinery and transportation.[42]

Collective agreements typically provide a comprehensive system of benefits beyond wages and hours. These benefits include paid holidays and vacations, sick leaves and personal leaves, clothing allowances, severance pay, medical insurance, and pensions. With pregnancy leaves, bereavement pay, and death benefits, they reach from before the cradle to after the grave.

Beyond these economic benefits collective agreements establish rules which protect the individual from arbitrary treatment. Selection of employees for transfers, promotions, or layoffs are governed by established rules, not the unchecked preferences or whims of foremen or personnel managers. Employees are protected against discharge by provisions which require employers to prove just cause by clear and convincing evidence.

The collective agreement not only creates a system of rules governing the workplace but also establishes in the grievance procedure an administrative structure for interpreting, elaborating, and enforcing those rules. Arbitration provides a judicial process for resolving disputes as to the application of the agreement and the custom and practices which constitute the law of the shop. The collective agreement, with its grievance procedure and arbitration, can be fairly characterized as a constitution of industrial government, a government bounded by a system of law and permeated with principles of equality and procedural due process.

This industrial government is one in which the employees have an effective voice. The union which represents them is selected by the majority of the employees. Unions are typically constructed on the democratic model, with officers elected by the members and policies decided by the members or their elected representatives. In many unions, ratifying an agreement or calling a strike requires approval by referendum, and processing grievances is subject to direct membership control. Much of the decision-making of the union, particularly in those matters of most immediate concern to individuals, is exercised by the local union where there is the greatest opportunity for direct participation.

The law, building on the principle of industrial democracy, requires periodic election of union officers in open and fair elections and guarantees basic democratic rights within the union, including the right to equal participation; the right of free speech, free press, and free assembly in the political processes of the union; the right to a fair hearing; the right to an accounting of union funds; and a right that union officers serve the members as trustees. Senator McClellan, in justifying the Landrum-Griffin Act,[43] explained:

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[40] Union membership, including employees' associations, was 22,600,000 in 1974. U.S. DEP'T OF LABOR, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEES ASSOCIATIONS, BULL. No. 1937, at 57-58 (1975) [hereinafter cited as DIRECTORY OF NATIONAL UNIONS].

[41] *Id.* at 79 n.2.

[42] *Id.* at 70.

[43] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (Landrum-Griffin Act) (codified in scattered sections of 29 U.S.C. §§ 153-531).

> [T]he justification and certainly the desirability for unionization is the fact that the individual worker in an industrial economy has little or no power, when he stands alone, to deal effectively with his corporate employer. It is through unionization and bargaining collectively that he is able to make himself heard at the bargaining table. It seems clear, therefore, that this justification becomes meaningless when the individual worker is just as helpless within his union as he was within his industry, when the tyranny of the all-powerful corporate employer is replaced by the tyranny of the all-powerful labor boss.
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> . . . If unions are to have such federally bestowed, tremendous powers in industrial government, they should be compelled by law to represent their members in accordance with democratic principles and to accord to them the basic rights of liberty, freedom, and justice.[44]

To be sure, not all unions are democratic. Some union leaders flaunt the law and destroy democracy while promising it. They make the practice of democratic forms a charade and manipulate procedures to preserve entrenched bureaucracies. Nor has the law been fully effective in protecting and encouraging union democracy. However, the unions of this country, at least in comparative terms, are more democratic, more responsive to the desires of their members, and more sensitive to individual rights than the unions in any other country.[45]

Our collective bargaining process, despite its few repressive and renegade unions, is in general a highly democratic system which allows for a large measure of participation and assures protection of individual rights. Where collective bargaining exists, it has provided a remarkably effective system of industrial democracy. The promise, in that measure, has been largely fulfilled.

III. The Promise Unfulfilled

Whence comes, then, my title, — "The Unfulfilled Promise"? The title comes from the unpleasant fact that our success has caused us to overlook our failures; our cup runneth over, but the well is dry. We have declared a national labor policy of industrial democracy through collective bargaining, but we have widely rejected it in practice. We have developed a remarkable system of industrial democracy, but most workers do not enjoy it.

The vitality of collective bargaining in transportation and among production workers in mass production industries causes us to forget that seventy percent of employees in the private sector have no collective bargaining.[46] The automobile assembly lines are organized, but most of the white

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[44] 105 Cong. Rec. 6472 (1959).

[45] *See generally* A. Carew, Democracy and Government in European Trade Unions (1976); J. Edelstein & M. Warner, Comparative Union Democracy (1975).

[46] The exact percentage of employed workers covered by collective agreements is uncertain. In 1974, the total labor force was 93.2 million, with 78.4 million non-agricultural employees and 3.5 million agricultural employees, or a total of 81.9 million employed workers. Collective agreements of unions and employees' associations covered 24.7 million employees, or 30.1% of the employed work force. *See* Directory of National Unions, *supra* note 40, at 63, 79; U.S. Dep't of

collar and professional employees of the auto companies have no representation. Men who drive trucks have a union to speak for them, but the waitresses in the restaurants where they eat have no spokesperson. The steelworker can challenge a mere reprimand through a grievance procedure, but his garage mechanic can be discharged without notice or reason. Clerical employees, bank employees, textile workers, agricultural laborers, and workers in the service trades for the most part have no representation, no voice, no rights, and no protection.

The promise of industrial democracy has not been fulfilled because collective bargaining has not become the accepted and established method of conducting industrial relations. Instead, it is the exception, covering only thirty percent of employed workers. Furthermore, it is not expanding. Over the last twenty years the absolute number of union members has steadily increased. Yet the percentage of workers who belong to unions has steadily decreased so that it is only three-fourths what it was in 1954.[47] The proportion of workers covered by collective agreements has similarly declined. When one takes into account the expansion of public employee bargaining, the decline in the private sector is even more marked.[48]

This discussion leads to the questions: Why has the promise not been fulfilled, and why has collective bargaining remained confined to such a limited field? The primary reason, in my judgment, is because the overwhelming majority of employers has never accepted the basic premise of industrial democracy, the premise that their employees have a right to an effective voice in "what shall be their condition and how the business shall be run."[49] Rather than supporting and encouraging industrial democracy, employers have vigorously resisted it.

When representation elections are held and the issue is whether there shall be collective bargaining in the plant, the employer commonly campaigns against collective bargaining. He distributes literature in the plant urging employees to vote "No Union" while prohibiting union organizers from entering the plant to distribute union literature. Foremen talk against the union during working hours, while, at the same time, employees are

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LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS, 1977, BULL. No. 1966, at 21, 293.

[47]

Year	*Union Membership* (thousands)	*Non-Agricultural Employees* (thousands)	*Percent Union Members*
1954	17,022	49,022	34.7
1955	16,802	50,675	33.2
1960	17,049	54,234	31.4
1965	17,299	60,815	28.4
1970	19,381	70,593	27.5
1975	19,564	76,945	25.4
1978	20,238	85,763	23.6

Sources: U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS, 1975, BULL. No. 1865, at 389 (for years 1954 through 1970); GOV'T EMPL. REL. REP. (BNA), No. 827, at 35 (Sept. 10, 1979) (for years 1975 and 1978).

[48] Between 1968 and 1978, public sector union membership increased by 1,472,000, while private sector unions grew by only 54,000 members. Between 1976 and 1978, union membership in the public sector increased by 613,000 while private sector unions actually decreased by 8,000. GOV'T EMPL. REL. REP. (BNA), No. 827, at 34 (Sept. 10, 1979).

[49] Testimony of Louis D. Brandeis, *supra* note 23, at 84.

prohibited from soliciting union support. The employer conscripts employees in a captive audience to listen to reasons why they should vote against the union but denies the union equal time to argue for collective bargaining. Throughout his campaign the employer characterizes a vote in favor of collective bargaining as a vote against the employer.[50]

The fact that these anti-collective bargaining activities are legal does not make them any less a rejection of industrial democracy. Freedom of speech, in our constitutional system, is guaranteed equally to those who believe in democracy and those who would deny or disable it.

However, not all employers stay within the limits of the law. Substantial numbers of employers willingly violate the law; they prefer to risk legal sanctions rather than to accept industrial democracy. Employees are prohibited from even discussing unionization in the plant; union sympathizers are reprimanded, demoted, or discharged; and employees are told that if they vote for collective bargaining, benefits will be taken away or the plant will be closed. If, in spite of this, the union wins, then the employer refuses to meet and negotiate.[51] In one year, more than 27,000 unfair labor practice charges were filed with the National Labor Relations Board against employers. Back pay of more than $13 million was ordered to 8,000 workers, and 5,500 workers were ordered reinstated.[52] Orders of the Natonal Labor Relations Board and court decisions are appealled or even defied until the employees are discouraged and the union has disintegrated.

The unending resistance of J. P. Stevens and Co., with its history of repeated violations, is notorious;[53] unfortunately it is not an isolated case but a

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[50] These tactics are illustrated by numerous concrete examples in *Oversight Hearings on the NLRA: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Oversight Hearings*].

There are consulting firms whose primary business is to advise employers how to prevent unionization or defeat unions in an election. These firms have developed comprehensive anti-union programs and sophisticated techniques. One such firm participates in thirty to thirty-five anti-union campaigns a month with charges ranging to $250,000 and more. Hauser, *The Union Busting Hustle*, NEW REPUBLIC, Aug. 25, 1979, at 16.

The Practising Law Institute has published and distributed a work entitled L. JACKSON & R. LEWIS, WINNING NLRB ELECTIONS: MANAGEMENT'S STRATEGY AND PREVENTATIVE PROGRAMS (1972). The book's stated purpose is to explain to lawyers and their client employers "how the client may best reach his objective of remaining unorganized." *Id.* at 1. A representation election is described as "a contest for the allegiance of employees," and the employer is told that he should "take pride" in his employees not being represented by a union, for it evidences that "he is an enlightened employer" who "attends to his employees' needs." *Id.* at 2. *See also* W. KRUPMAN, BASIC LABOR RELATIONS (1974), which addresses the same audience and says, "[w]e have found the most effective campaign is one that gets the employees to vote against the union rather than for the employer." *Id.* at 31.

[51] See *Oversight Hearings, supra* note 50, for a full range of examples of deliberate and repeated violations of the law to defeat unionization.

[52] 43 NLRB ANN. REP. 8-12 (1978).

[53] For a brief sketch of J. P. Stevens' repeated violations of the law, see NLRB v. J. P. Stevens & Co., 563 F.2d 8 (2d Cir. 1977). This was the second contempt proceeding, denominated by the court "*Stevens XVIII* in the long list of Stevens litigation." *Id.* at 25. Since that contempt order the company has twice been found guilty of multiple unfair labor practices. 240 N.L.R.B. No. 35 (1979); 239 N.L.R.B. No. 95 (1978). At a 1976 stockholders meeting, J. P. Stevens officials declared that the cost of fighting the union over a period of fifteen years, including payment to employees for back pay of over $1.3 million, was not significant. *Oversight Hearings, supra* note 50, at 193. An increase in wages of 1¢ per hour would, in the same period, have cost $12 million. *See also* Kovach, *J. P. Stevens and the Struggle for Union Organization*, 29 LAB. L.J. 300 (1978).

dramatic example of all too common practices.[54] It is not surprising, in the face of this employer opposition, that unions win less than half of the representation elections held by the Board.[55]

The refusal of employers to accept collective bargaining as a form of industrial democracy was vividly illustrated in 1978 by the defeat of the Labor Reform Bill.[56] Without entering into a debate on the details of that legislation as it came before the Senate, the bill could be fairly characterized as doing nothing more than making organization and the winning of elections marginally easier for unions and making more effective sanctions available against employers who violate the National Labor Relations Act.[57] It would have slightly reduced the ability of employers to defeat collective bargaining by lawful means and would have increased the costs of employers' obstruction by unlawful means. It would have had no impact on employers who favored collective bargaining or who wished to remain neutral. Nevertheless, employers presented a solid phalanx of opposition, even to the point of supporting a filibuster in the Senate to block the majority will. The opposition included the National Chamber of Commerce,[58] the National Association of Manufacturers,[59] the National Small Business Association,[60] the American Trucking Association,[61] the Aerospace Industries Associations,[62] and the American Hospital Association.[63]

Of critical importance is the fact that this opposition was supported by employers who had engaged in collective bargaining for thirty or forty years. The law would not have touched their established bargaining relationships;

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[54] Among the other chronic offenders, or "rogue employers," are Litton Industries, *see Oversight Hearings, supra* note 50, at 125-48; Dow Chemical Corporation, *id.* at 337-454; and Monroe Auto Equipment Company, *id.* at 76-124.

[55] *See* 43 NLRB ANN. REP. 14 (1978).

[56] 124 CONG. REC. S9410-12 (daily ed. June 22, 1978). *See generally Labor Reform Act of 1977, Hearings on H.R. 8410 Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977); *Hearings on S. 1883 Before the Subcomm. on Labor of the Comm. on Human Resources*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Labor Reform Act of 1977, Hearings*].

[57] 124 CONG. REC. S8814 (daily ed. June 8, 1978). The Senate Committee on Human Resources reported a bill, S. 2467, for Senate consideration. S. REP. No. 95-628, 95th Cong., 2d Sess. (1978). This bill, however, was never debated by the Senate but was replaced by a substitute bill. Various provisions were designed to speed the processes of the NLRB by increasing the number of board members to seven, providing for summary judgment proceedings in routine cases, and setting mandatory election deadlines. The most hotly debated provisions of the substitute bill were as follows: those which would have given unions a narrowly limited right to reply when an employer made a captive audience speech; those which would have provided a possible, though closely restricted, "make whole" remedy when an employer persisted in refusing to bargain with the union; those which would have permitted debarment from government contracts of employers who wilfully violated Board or court orders (but such debarment would have been limited to facilities where the violations occurred and would be lifted as soon as there was compliance with the order); and those which would have permitted the Board to assess back pay liability of one and one half times the loss of earnings suffered where the discriminatory discharge occurred during the period the employees were seeking union representation and during the period the union was seeking its first contract.

[58] *Labor Reform Act of 1977, Hearings, supra* note 56, at 524.

[59] *Id.* at 144.

[60] *Id.* at 502.

[61] *Id.* at 243.

[62] *Id.* at 737.

[63] *Id.* at 764.

instead it would have increased the likelihood that others, including their competitors, would be forced to accept collective bargaining. They could, of course, have believed that the bill was not an effective or appropriate way of achieving its declared goals, but they made no alternative proposals for encouraging or extending collective bargaining, nor even any proposals for strengthening the enforcement of employer unfair labor practices. No employer was willing to declare itself in favor of industrial democracy through collective bargaining. All committed their political weight to prevent its extension.[64] The message is clear and unmistakable. Employers have not accepted industrial democracy. Their hope is not for its fulfillment but its containment, if not its ultimate demise.

The limited success of collective bargaining, however, cannot be attributed entirely to employer opposition. There seems to be a deep-rooted reluctance among a substantial number of workers to join unions or to vote for union representation. This reluctance is particularly pronounced among certain categories of white collar and professional employees, and it seems to be present among workers in rural areas and in certain sections of the country.

The roots of this reluctance are difficult to trace, but they grow, in major part, out of certain perceptions which many workers have of unions. In some circumstances, unions are perceived as ineffective in providing economic benefits, a useful voice, or substantial protection. The risk of strikes and the cost of dues is not seen as being worth what the union provides. In other cases, union leaders are perceived as bureaucratically indifferent, intolerant of dissent, dictatorial or dishonest, and more interested in institutional or personal promotion than in industrial democracy or the workers' welfare. These perceptions — or misperceptions — are cultivated and encouraged by employer anti-unionism and the community climate which that anti-unionism creates. Some union leaders seem determined to cooperate in confirming this image and, by their conduct, to etch it more deeply in the public mind. These perceptions are largely the product of minor defaults which are magnified by the mass media. However mistaken these defaults may be, they are nevertheless real. Apart from these misperceptions, many workers are reluctant to join or support unions because of the unions' support of particular political programs and candidates. Many workers do not want to intermingle representation at the workplace with representation in the political forum.

The fact that so many workers seem reluctant to join unions and willing to vote "No Union" in representation elections does not necessarily show disinterest in industrial democracy or satisfaction with being subject to the employer's unilateral control. In a number of cases employees have voted to reject the union and then sought to establish some other form of representation. With few exceptions the National Labor Relations Board has found such representation structures to be unlawful employer-dominated unions,[65] even though they were the free choice of the employees.[66] Because

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[64] *See id.*

[65] 29 U.S.C. § 158(a)(2)(1976) prohibits employer dominated unions.

[66] *See generally* Sangerman, *Employee Committees: Can They Survive under the Taft-Hartley Act?*, 24 LAB. L.J. 684 (1973); Note, *Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the NRLA?*, 49 IND. L.J. 516 (1974); Note, *New*

historically employee representation schemes were shams to forestall unionization and give employees no real voice,[67] the legal rules created under the National Labor Relations Act require employees to choose either representation by a union which bargains at arms length on an adversarial basis with the employer or no representation at all. Intermediate devices of employee-management committees or other alternatives are frowned upon. The only permissible form of industrial democracy is collective bargaining conceived as an adversarial collective bargaining process. Employees are forced to a choice, not between industrial democracy and no industrial democracy, but between unions and no industrial democracy.

Even where collective bargaining exists, the promise of industrial democracy has only been partially fulfilled, for neither the law nor the practice has accepted employees as full partners in the enterprise. The legal scope of mandatory bargaining — shared decision-making, if you will — does not extend to many decisions which vitally affect the workers. In *Fibreboard v. NLRB*,[68] Justice Stewart characterized the statutory words defining the duty to bargain as "words of limitation."[69] He declared that many decisions which imperil or destroy the job security of employees are solely for management. Decisions to continue subcontracting,[70] to close one of several plants,[71] to build a new plant,[72] to liquidate assets,[73] to sell a part or all of the enterprise,[74] or to become part of a conglomerate[75] are all decisions which may be more important to the employees than wages or hours of work. Nevertheless, the courts have held that the employees have no right to be notified, no right to discuss, and no right to use their concerted efforts to affect these types of decisions.[76] The impact on the employees' livelihoods and their futures may be far greater than the impact on the stockholders or management, but the employees have no voice. They do not even have a right to know the business facts on which the decision was based; they are told only of the consequences which they must bear because of a unilateral management decision.

Employers are not prohibited from sharing such decision-making with

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Standards for Domination and Support under Section 8(a)(2), 82 YALE L.J. 510 (1973) [hereinafter cited as *New Standards*]. The courts have not all been as rigid as the NLRB in outlawing employee representation structures. *Compare* NLRB v. Tappan Stove Co., 174 F.2d 1007 (6th Cir. 1949) (employer's participation in union reorganization influenced independent employee association) *with* Hertzka v. Knowles, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) (employer participation in in-house committee not interference).

[67] *See* Lescohier, *supra* note 29; TWENTIETH CENTURY FUND, *supra* note 29.

[68] 379 U.S. 203 (1964).

[69] *Id.* at 220 (Stewart, J., concurring).

[70] NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[71] Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976); *cf.* Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3rd Cir. 1978) (plant closing held not to be a mandatory subject of bargaining).

[72] American Can Co. v. NLRB, 535 F.2d 180 (2d Cir. 1976).

[73] Darlington Mfg. Co. v. NLRB, 380 U.S. 263 (1965).

[74] United Auto Workers v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

[75] I.A.M. v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972).

[76] *See generally* R. SWIFT, NLRB AND MANAGEMENT DECISION MAKING (1974); Rabin, Fibreboard *and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971).

their employees, and there are examples where employers either have sought the aid or advice of the union in such decisions or have consulted fully with the union so that the employees' interests are fully considered. Few employers go beyond the requirements of the law; indeed, most attempt to narrow the area of joint decision-making by broad management rights clauses in their collective agreements. The dominant attitude of employers, it is fair to say, is that sharing decision-making with the representative of their employees amounts to surrendering control of the enterprise to an alien force. Their attitude toward the union is not unlike that of James I toward Parliament; the divine right of employers leaves little room for industrial democracy.

Our proclaimed national policy of collective bargaining has not only failed to provide seventy percent of employees any effective voice in industrial government, it has caused us to neglect their need for protection against oppressive conditions and arbitrary treatment which denies their human dignity. Those not covered by collective agreements get little effective protection from the law. They are covered by minimum wage laws, but a minimum wage will not provide the worker's family subsistence, much less decency.[77] They are covered by maximum hour laws, but those laws provide only extra pay for overtime and do not limit the number of hours they can be required to work. They are nominally protected by health and safety legislation, but inspections are rare, enforcement officers few, and remedies largely ineffective.[78] Many have no paid vacations, paid holidays, or paid sick leave. They can be subject to favoritism, abusive treatment, and arbitrariness by their supervisors with no reliable method of redress. Finally, they are made wholly subservient by the employer's nearly absolute right to discharge without reason and without notice.[79]

The bitter irony is that this failure to protect the human dignity of individual workers is at least in part because of the promise of industrial democracy. Workers were to obtain these benefits for themselves through collective bargaining, and industrial self-government was to make legal protection unnecessary. Where collective bargaining exists, it does perform this function quite fully, and this dulls our sense of need to provide these protections by law. The very success of unions in protecting those covered by collective agreements has deadened their demands for general legislation. Indeed, unions have at times opposed legislation which would give to every employee the benefits which unions have achieved by collective bargaining.

It is painfully clear that despite the promise of industrial democracy, incorporated in the Wagner Act in 1935, seventy percent of employees have no industrial democracy. They have no participation in industrial government through collective bargaining, and they do not have protection against oppressive conditions or arbitrary treatment which denies their human dignity. This is the measure of our failure; this is the unfulfilled promise.

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[77] The Social Security Administration's poverty line for a city family of four in 1975 was an annual income after taxes of $5,500. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, THE MEASURE OF POVERTY 9 (1976). At that time the minimum wage was $2.10 an hour. A person fully employed on a forty hour week would provide an annual income before taxes of $4,368.

[78] *See* N. ASHFORD, CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY (1976).

[79] Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

IV. Possibilities For Fulfillment

We now must face the question of what might be done to achieve a greater measure of industrial democracy. The starting point is a recommitment to that goal. The following statement, made in 1915 by the Industrial Relations Committee, is as true today as it was in 1915: "Political freedom can exist only where there is industrial freedom; political democracy where there is industrial democracy."[80] But our emphasis on efficiency of production, our dispute over division of shares, and our concern with industrial conflict have caused us largely to forget the more fundamental values of democracy and human dignity. These are the values which must again become central in developing our national labor policy. The words of Brandeis must again become our guide: "[I]t is the development of manhood to which any industrial and social system must be directed. . . . And therefore the end to which we must move is a recognition of industrial democracy as the end to which we are to work. . . ."[81]

There are at least three paths along which we might move toward that end, paths which are not mutually exclusive but rather complementary. First, we can take steps to extend industrial democracy by extending collective bargaining. Second, we can devise other forms of industrial democracy where collective bargaining has not become established. Third, we can provide legal protection for basic rights of individual workers. I can only sketch out here what might be done along each of these paths.

The first path, extending industrial democracy through collective bargaining, already has the rudimentary steps quite clearly marked. Unions should have the fullest opportunity to communicate with workers and persuade them of the advantages of collective bargaining. They should have access to the employees in the natural forum for discussion of that subject — the workplace. The legal rule that union organizers seeking to contact employees can be barred from the parking lot or plant is an unjustified obstacle on the path toward industrial democracy. Employer prohibitions against employees soliciting union support or distributing literature on non-working time should be allowed only in the most compelling circumstances. If the employer uses the workplace or work time to present arguments against industrial democracy, then the union should have at least equal access and time to present the arguments for industrial democracy.[82]

Many of the existing legal rules concerning organizational campaigns and much of the discussion of legislation in this area are permeated with the assumption that the law should remain neutral in the debate whether the employees should choose collective bargaining. In the name of "neutrality," the employer is allowed to invoke legal claims of "property rights" to limit speech on behalf of collective bargaining while he exploits his position to speak against it.[83] To be sure, the employer has the right of free speech to

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[80] Final Report (1915), *supra* note 19, at 2.

[81] Testimony of Louis D. Brandeis, *supra* note 23, at 83.

[82] For a discussion of the development of the law and the changes needed to protect free speech and to provide equal access, see Note, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. Pa. L. Rev. 755 (1979).

[83] *See, e.g.*, Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

oppose collective bargaining, and the employees have the right to choose whether to accept or reject collective bargaining. However, a society which seeks both political and industrial democracy cannot be indifferent to the outcome. Certainly, it need not give a legal advantage to those who work to defeat those goals.

The second and most crucial step toward our goal is providing more effective remedies for violation of employees' rights.[84] Significantly expediting the administrative process is probably impossible, but protecting employees' rights from continuing violations in the interim *is* possible. Temporary injunctions against employer violation of employee rights should be at least as available as injunctions against union violations of employer rights.[85] Certainly, the Board should have the injunctive power of the courts immediately available to protect the process of electing representatives. Discharged employees should be ordered reinstated pending Board proceedings unless the employer can show by clear and convincing evidence that the discharge was for just cause.[86] When the employer has been found guilty of a statutory violation, there should be available in appropriate instances punitive remedies sufficient to discourage employers from repeated violations. The rights being violated are individual rights of the employees and encompass the right to industrial democracy. The employers' violations are not only violations of basic rights of citizenship but offenses against the democratic process itself. The remedies should be appropriate to the rights violated.

The third step in making collective bargaining a more effective instrument of industrial democracy is to extend the area of employee participation in the decisions of the enterprise. In principle, employees should have a right to be fully informed and to have a voice in all matters which affect their welfare; this goes far beyond the prices charged for food in the vending machine.[87] The employees have a vital stake in the financial health of the enterprise, its building of new plants and closing of old ones, its changes in products or production methods, and its merger with or sale to other companies. For the law to assert that they have no interest is to depart from reality.

Business needs for secrecy may be sufficiently compelling at times to affect the time when the employees can be informed or consulted; however, the

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[84] *See* D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices (1976); Note, *Employer Pre-election Coercion: A Suggested Approach for Effective Remedial Action*, 115 U. Pa. L. Rev. 1115 (1967).

[85] The National Labor Relations Act section 10 (l), 29 U.S.C. § 160 (l) (1976), mandates that the regional office of the National Labor Relations Board seek interim injunctions for union violations of sections 8(b)(4), 8(b)(7), and 8(e) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4), 158(b)(7), and 158(e)(1976). There is no such mandate for any employer violations. Indeed, the courts generally have been reluctant to grant injunctions except where the employer's violations were so flagrant as to be almost without doubt.

[86] The hardship of an employee being out of work while the case is pending is severe; any remedy often comes too late to repair his monetary loss and fails to repair the damage to him personally and to his family. The hardship on an employer to keep on an employee for whom he cannot prove just cause for discharge is not severe; it is the burden which all employers accept when they sign collective agreements with just-cause discharge clauses. Giving priority to the employer's interest in dismissing unliked employees is an echo of the anachronistic assumption that the employee has no interest in continued employment entitled to legal protection.

[87] Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).

need for secrecy is much less than is commonly claimed, and employee representatives can be legally bound to confidentiality. Some matters in which employees have a vital interest may not be appropriate for resolution by economic force or for inclusion in a collective agreement, but that should not bar employees from having some voice in those matters.[88] Democratic principles dictate that the employees have at least the right to know the facts, the right to discuss the issues, and the right to assert their conclusions on all these matters.

The second path toward increasing industrial democracy, that of devising new forms of worker participation, requires more imagination and more care. It requires creating new structures in those areas where collective bargaining does not exist and where, even with additional legal protection, it will not exist in the near future. Those new structures ought not to obstruct the extension of collective bargaining where and when it may come, but they should be available to serve in the interim, or as a second best. I sketch here three tentative possibilities, all of them no doubt provocative.

One step would be to allow employees, where there is no majority in favor of union representation, to create whatever structure of representation they might choose. The structure might include supervisory personnel and joint committees of employees and management. Its physical facilities and costs of operation could be paid by the employer. The only limitations would be that it be chosen by the employees and not imposed by the employer, that the employees be free at any time to amend or abolish the structure, and that any individual would be free not to participate. Such a structure should not be allowed to appear on the ballot in a Board election or be the exclusive representative of the employees unless it met the standards of a fully independent labor organization. Nor would any agreement negotiated by it be a bar to an election or limit any employee's right to strike or to be represented by a union.[89] However, its existence, and the employer's dealing with it, would not be an unfair labor practice.

Such a structure would, of course, be less than fully satisfactory in giving effective representation. It would lack full independence, be weak in bargaining, and unable to endure extended economic conflict. It would, of course, be no substitute for a union, but it is not intended to be. It is only a substitute for no representation at all and is grounded on the proposition that employees ought not be deprived of this alternative where they so choose. Such forms of representation may, in some cases, dull the appeal of unions, but

[88] NLRB and court decisions have created categories of "mandatory" and "permissive" subjects of bargaining. If a subject is "mandatory," the employer must bargain with the union on request, the employer cannot take unilateral action without first bargaining to impasse, and the union may use economic force to achieve its demands. If a subject is "permissive," none of these legal consequences apply. Common sense and practical considerations would suggest that separate categories be defined for each legal consequence. Particularly, the employer's duty to provide information and to discuss "mandatory" subjects on request might extend to a much broader range of subjects than the employer's duty not to act without first bargaining to impasse or the union's right to strike. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

[89] For a similar proposal, see *New Standards*, supra note 66; for a proposal which would go substantially further, allowing a joint employee committee to compete on an equal footing with a fully independent union, see Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809 (1977).

it should be remembered that in the steel industry and other places, employee representation plans provided the framework for union organization.[90]

Another step, much more limited, would be to establish statutory safety committees. The Occupational Safety and Health Act[91] provides a wide range of participation rights to an "organization of employees" or "representative of employees" in the enforcement of the statute. This participation includes filing requests for standards,[92] initiating inspections,[93] accompanying the inspector on his tour,[94] challenging the abatement period[95] and bringing mandamus to compel the Secretary to enjoin imminent dangers.[96] The purpose of these provisions is to give employees an active voice in safety and health matters and to police compliance with the statute at the workplace. Where employees are represented by a union, the effectiveness of the statute is significantly reinforced. Yet in the majority of workplaces the employees have no representative. Enforcement of the statute requires active and continuous participation by the employees, not as individuals but as a group acting through chosen representatives.

To achieve the purposes of the statute, provision could be made for the establishment of safety committees in workplaces where there was no union representative. These safety committees could be elected by the employees to act as their representative under the statute. The election of such a committee could be called for by any employee in accordance with regulations of the Secretary of Labor. Members of the committee would be entitled to reasonable time off from work, with pay, to make inspections, process complaints, and carry on other necessary work of the committee. The employer would be required to provide any necessary office or administrative costs and would be required to pay for training courses to enable the committee members to perform their function.[97] The costs of the safety committee, including the training of its members, should be considered one of the costs of production, the same as safety equipment, accident prevention programs, and workmen's compensation. It should be emphasized that statutory safety committees would be created only where there was no union representative, for the purpose is to provide representation where none other exists.

Safety and health is but one condition of employment requiring employee

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[90] *See* I. BERNSTEIN, *supra* note 33, at 455-68.

[91] 29 U.S.C. §§ 651-678 (1976).

[92] Section 6(b)(1), 29 U.S.C. § 655(b)(1)(1976).

[93] Section 8(f)(1), 29 U.S.C. § 657(f)(1)(1976).

[94] Section 8(e), 29 U.S.C. § 657(e)(1976).

[95] Section 10(c), 29 U.S.C. § 659(e)(1976).

[96] Section 13(d), 29 U.S.C. § 662(d)(1976).

[97] The establishment of employee elected safety committees is required either by statute or by confederal agreements in almost every western european country. For example, in Belgium and France, worker safety committees are mandated by statute; in Sweden they were originally established by national agreements between the union and employer confederations but are now required by legislation; while in Western Germany the statutorily created works councils are given special authority and responsibility in safety matters. *See generally* Smitis, *Workers' Participation in the Enterprise-Transcending Company Law*, 38 MOD. L. REV. (1975); Note, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARV. J. LEGIS. 947 (1977).

participation. Industrial democracy requires workplace participation in all conditions of employment. Where the union is the majority representative, this function is performed by the union, its shop stewards, and its plant committees. But where there is no majority union, the employees have no representation at the workplace. They have no one to speak for them, no protection, and no procedure. This includes seventy percent of the employed work force. This country almost stands alone among democratic countries in leaving the majority of its workers without any representation at the workplace. Other countries have established by law works councils or similar structures to provide such representation.[98]

As a third step to achieving industrial democracy, we could provide by law for the establishment of works councils elected by the employees with certain prescribed functions and authority. There is no need to work out the details here; it is enough to say that there is a variety of working models in other countries to provide guides for working out a solution adapted to our own collective bargaining process. Again, such works councils would be statutorily required only where there was no majority union. When a union obtained a majority, it would incorporate or supplant the works council.

Unions, of course, look with suspicion on any form of representation other than through the union, and they understandably view any purely internal structure as employer dominated. The alternative, however, is to leave employees without any representation. The dangers of employer domination are largely eliminated where the structure is statutorily created and defined and the employer is required by law to provide administrative and financial support. The employee organization would not be dependent on the employer for existence or support but would have legal rights against the employer to secure its operation. The establishment of works councils would give employees experience in representation, articulate the social policy that employees should have a voice, and lead employees to have increased expectations of industrial democracy. The works councils could provide the training ground and the building blocks for union organizations. To the extent that the works councils failed to provide effective representation, the union's ability to capture or supplant them would be increased.

We can move toward increased industrial democracy by extending collective bargaining, but that will not likely carry us to the goal. We can move further by developing other forms of participation for areas where collective bargaining does not reach. Yet there will still be need for guaranteeing the basic rights of all individuals to humane conditions of employment and protection against arbitrary treatment. This is the third path we should explore.

The most fundamental individual right needing protection, apart from the right to a healthy and safe workplace, is the right not to be discharged except for just cause. This basic right is recognized and protected by almost every collective agreement; unions insist on it as non-negotiable, and employers accept it as inevitable. Yet, seventy percent of employees have no such pro-

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[98] *See* COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 3; I.L.O., *Worker Participation in Decisions within Undertakings*, Labour Management Relations Series, No. 948 (1976); A. STURMTHAL, WORKERS COUNCILS (1964).

tection but are subject to the anachronistic common law rule that an employer can arbitrarily discharge an employee with no reason and without notice. Practically every other democratic country provides legal protection against arbitrary discharge; the United States stands in unenlightened isolation.

It is time and past time that we legally prohibited discharge without just cause, giving all employees substantially the same protection enjoyed by those covered by collective agreements. We are more able now to undertake this legal protection 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. I will not try to describe here the details, for that has been done elsewhere. It is enough to say that the means are readily at hand.

The right not to be discharged without just cause is not only fundamental in itself, but protection of this right would give employees increased protection in their exercise of other rights essential to industrial democracy. An employee discharged for union activities would not need to prove the employer's motive; the burden would be on the employer to prove just cause. An employee would be less afraid to report safety violations because the employer could not use a spurious excuse to discharge him. An officer in an employee representation plan would not be so subservient to the employer, for he would have a statutory shield against dismissal. Protection against unjust discharge is basic for the human dignity of the individual worker, for it gives him some escape from subservience to the employer, allows him to speak his mind, enables him to demand his rights, and encourages him to assert himself as a person. It is a crucial first step toward the promised goal of industrial democracy.

The law could directly protect individual employees in other basic rights. For example, workers' health and safety could be given increased protection by not limiting their recovery for industrial disease and injury to workmen's compensation, where the disease or injury is the result of employer violation of health and safety regulations. Employers should be required to pay at least the actual loss caused by their violation of this basic right of employees to physical integrity. Employees' rights to reasonable hours of work could be protected by positively prohibiting an employer from requiring an employee to work more than a certain number of hours a week. The present penalty pay of time-and-a-half is not always enough to discourage oppressive work schedules. Workers' rights to rest and relaxation could be guaranteed with legally required paid vacations, and payment for legal holidays could be required so that no worker would be penalized on a holiday week with a reduced pay check. These examples are only suggestive of workers' rights which could be legally protected if we committed ourselves to guaranteeing all workers humane conditions of employment.

It should be emphasized that most of these rights are already recognized by collective agreements. Unions have insisted upon them as fundamental, and employers have accepted them as appropriate and feasible. Nevertheless, for those workers not covered by collective agreements, these rights are not guaranteed. The proposal is not to supplant collective

bargaining, but to guarantee a minimum level of basic rights where bargaining does not exist. Such legislation will not render unions or collective bargaining unnecessary, for unions will bargain for more than the legal minimum just as they now do on wages, safety measures, unemployment insurance and pensions.

V. SUMMARY

The demand for industrial democracy, as a complement to political democracy, has been a persistent one since the beginning of our Republic. After more than a half century of industrial conflict in which workers sought "to introduce an element of democracy into the government of industry," [99] and struggled not only to be well fed but to be free, the promise of industrial democracy was articulated in the Wagner Act of 1935.[100] There was to be "fair participation by those who work in the decisions vitally affecting their lives and livelihood," and that participation was to be achieved by collective bargaining through "representatives of their own choosing."[101]

The assumption of the Wagner Act was that collective bargaining would become the accepted and established method of decision-making in all branches of industry and commerce. That assumption has not been realized. After nearly half a century of organizing efforts, less than one-third of the workers are covered by collective agreements; more than two-thirds still have no participation in the decisions which vitally affect their working lives. In that large measure, the promise of industrial democracy remains unfulfilled.

If we continue to believe, as did Brandeis, that "the end toward which we must move is a recognition of industrial democracy," and that "[t]here must be a division not only of profits, but a division of responsibilities,"[102] we must find ways to fulfill the promise. One avenue is to foster and encourage the extension of collective bargaining by law. For the law should not be neutral or indifferent to achieving the goal of industrial democracy. This avenue alone, however, is not enough. Experience suggests that collective bargaining will not, at least in the foreseeable future, become universal. We must, therefore, devise new forms of worker participation and worker protection which will be applicable where collective bargaining does not exist.

We have relied so completely on collective bargaining that we have given almost no thought to other ways of moving toward the goal of industrial democracy. Indeed, there is almost an instinctive reaction to any suggestions of alternatives. We must now face the unwelcome fact that collective bargaining is incomplete, and we must fill the places it has not reached. This article has presented not so much proposals to be adopted, but possibilities to be explored. The purpose here is not to reach conclusions, but to urge a beginning.

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[99] *See* text accompanying note 11 *supra*.

[100] Wagner-Connery Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-166 (1976)).

[101] *See* text accompanying note 38 *supra*.

[102] *See* text accompanying note 23 *supra*.