THE CRISIS IN WORKPLACE GOVERNANCE SPECIAL ISSUE IN HONOR OF PAUL C. WEILER

Over the past three decades, Paul C. Weiler of Harvard University has stood among the foremost scholars not only of labor law in North America, but also of sports law, entertainment law, medical malpractice, and Canadian constitutional law. In addressing labor law and workplace governance in the twenty-first century, this special issue has sought to tackle a key and urgent contribution of Weiler to contemporary legal thought, but it should be conceded from the outset that it is just a modest part of his multi-faceted intellectual legacy.

During 1983 and 1984, Weiler made a crucial impact with two contributions to the *Harvard Law Review* called "Promises to Keep" and "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation." In a speech at Harvard on December 1, 2006, Jon Hiatt, chief counsel for the AFL-CIO, observed that these two articles "framed the debate about our labor laws that continues today" and are the basis for regarding Weiler as "the preeminent scholar of U.S. labor law of the last quarter century." These forays culminated in the publication of *Governing the Workplace: The Future of Labor and Employment Law*.[1] In this work, Weiler explored in depth such topics as "The Transformation of Labor and Employment Law," "The Declining Fortunes of Collective Bargaining," "The Sources and Instruments of Workplace Governance," "Alternative Futures for Worker Participation," and "A Future Course for American Labor Law."

The United States and Canada have been the focal point of his scholarship, but Weiler's reform agenda has been informed by Western European practices and influenced a variety of students from the Pacific Rim. Hence, this collection goes beyond the United States and Canada in taking up the intricacies of workplace governance.

1. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

As Weiler has elaborated, there is a historical context for the contemporary crisis in workplace governance. In the early postwar epoch, U.S. corporate interests and their conservative allies already mounted an aggressive campaign in the public arena animated by the idea that the New Deal had tilted the playing field too far in favor of unions and employees. The Taft-Hartley Act of 1947 and the Labor-Management Reform and Disclosure Act of 1959 (better known as Landrum-Griffith) soon became part of the legislative scaffolding designed to contain union power. Weiler observes that the employer offensive against worker organizing well antedated the election of Ronald Wilson Reagan, who is frequently blamed for introducing labor's time of troubles in conventional accounts. Ironically the only former union president to occupy the Oval Office, Reagan undoubtedly kicked off the 1980s with a more combative and confrontational approach to what was already a labor movement in significant decline. With secular decline turning into a rout, Weiler argued that there would need to be new rules of governance to counteract the magnification of managerial power and the suppression of labor rights in the contemporary workplace.

Looking over the impending shriveling of the House of Labor to single digit percentages of union density in the private sector, Weiler set out a new agenda for leveling the playing field so that the significant percentage of U.S. employees who want collective bargaining, greater workplace participation, and even union representation might have a chance of achieving those aims. In 2005, Hart Research reported to the AFL-CIO that among non-managerial workers 53% would definitely or probably vote for union representation, with 38% voting no. Back in 1993, only 39% favored union representation, still triple the rate of unionization in the private sector. Hired by the anti-union Public Service Research Foundation, Zogby polls have claimed lower rates of union support, though critics express frustration at this polling firm's failure to disclose how it phrases the question or whether it separates out managerial respondents from regular line workers.[2]

Weiler's program had a tripartite structure encompassing what he called regulatory, reconstructive, and constitutive models of labor law reform. From the *regulatory* model, Weiler indicated that employers needed to face much stiffer penalties for illegally firing and harming the careers of employees who sought to exercise the democratic right

2. Ruy Teixeira, *Labor Day 2005: Workers Are Unhappy Campers*, PUBLIC OPINION WATCH, *at* http://www.americanprogress.org/issues/2005/08/b1013709.html.

of forming a union. From the *reconstructive* model, he highlighted the need for a swifter, more efficient election process so that employers would not have the generous amounts of time to hire consultants and wage campaigns of fear and sabotage designed to chop down initial worker support for unions. Finally, from the *constitutive* model, he proposed a participatory path toward greater workplace democracy via Employee Participation Committees (EPCs).

Inspired by the West German experience with Works Councils, as well as several Canadian counterparts, Weiler's vision of EPCs reflected what has been called his "radically moderate" approach to legal problems. For Weiler, the EPCs would give U.S. workers legal access to *information* and *consultation*, but they would not have the same *decisionmaking* prerogatives as West German workers through what came to be known as "codetermination." When management and labor representatives flat out disagreed in West Germany, the Works Council could call for a binding resolution from a decisionmaker regarded as a neutral party. Even in Germany, as Georgetown labor law professor Michael H. Gottesman points out, "Codetermination is not applicable to certain entrepreneurial decisions such as the decision to relocate."[3] Weiler's enthusiasm for EPCs stirred up opposition from both corporate and labor leaderships, but it reflected his desire to create a path for restoring worker voice in the U.S. industrial relations system. Though many have decried it as an idea thoroughly alien to the United States, surveys of workers such as those conducted by the Worker Representation and Participation Study (WPRS) highlighted in Richard B. Freeman and Joel Rogers's *What Workers Want* indicate that a majority of U.S. workers answered affirmatively to the idea of having joint employee-management committees with either "somewhat independent" or "strongly independent" components for workers.[4]

In this collection of essays on "The Crisis in Workplace Governance," Weiler's colleagues indicate that many of his ideas still have life. Even when they take an alternative direction, these scholars have been compelled to confront the big questions raised by his works.

MIT's Thomas Kochan in "Updating American Labor Law: Taking Advantage of a Window of Opportunity" provides an account

3. Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 180 YALE L. REV. 2807 (1991).

4. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (1999).

of the major historic openings for labor law reform, and what are the prospects for a breakthrough in the current political conjuncture. For Kochan, the recent triumph of finance capital's view that corporations are mainly about maximizing shareholder wealth has led to abuses of the public interest and generated counter-movements disenchanted with this entrenched orthodoxy. While not averse to labor law reform, David Weil of Boston University in "Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters" argues that a great deal could be accomplished by renewed efforts to enforce much of the legal and regulatory statutes already in place. He adds that even many well-intentioned reformers operate under faulty assumptions such as targeting large corporations as the worst violators of occupational safety and health regulations when there are many smaller-fry operators engaged in cost-cutting maneuvers that imperil lives. Regulatory responsiveness to genuine complaints by workers may miss the larger problem of dangers lurking in places where employees lack voice and avoid reporting the most egregious breaches in the law.

Through observation of labor's travail in the United States, Canada, and the European Union, Harry Arthurs of the University of Toronto explores Paul Weiler's optimism for the future triumph of reform in part I of "Reconciling Differences Differently." Arthurs's title is a playful variant of Weiler's work *Reconcilable Differences: New Directions in Canadian Labour Law*. While it is commonly claimed that support for legislative intervention in lifting labor standards exhibits an absence of realism in the face of neoliberal triumph, Arthurs sketches some evidence for an alternative outcome. Already he notes: "A new body of research suggests a positive correlation between high labor standards, labor market flexibility, productivity, and economic growth. If that research survives analysis and critique, employers and governments may well come to appreciate that legislated labor standards are not the enemy of a dynamic economy."[5]

In a part II companion piece to Arthurs's work sub-titled "Employee Voice in Public Policymaking and Workplace Governance," Daphne Taras of the University of Calgary remarks how in Canada and the United States unions and management are able to have "voice," including in such high-profile deliberations on

5. Harry Arthurs, *Reconciling Differences Differently: Reflections on Labor Law and Worker Voice after Collective Bargaining*, 28 Comp. Lab. L. & Pol'y J. 155, 164 (2007); PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW (1980).

labor law reform as the U.S. Dunlop Commission of 1994 and Canada's Arthurs Commission of 2006. She explores ways for the state to engage the majority of workers who currently lack representation. Taras also confirms Weil's assertion that big firms are often not the worst violators of workplace standards: "Size matters. Banks, which account for 30% of Canada's total federal workforce, are responsible for only 0.5% of violations," she notes.[6] "One reason is that such large employers have departments that oversee standards and ensure compliance. Employees in such firms know to whom to direct questions and complaints, and human resource departments have a duty to respond."[7]

In "Recrafting a Trojan Horse: Thoughts on Workplace Governance in Light of Recent British Labor Law Developments," James J. Brudney of the Ohio State University discusses how Britain in 2000 adopted a statutory union recognition procedure sharing many parallels with the U.S. National Labor Relations Act (NLRA) of 1935. With unhappiness at the NLRA reaching peak levels among trade unionists in the United States, British labor supporters may have feared the Blair era reforms as a transatlantic Trojan Horse. Seven years into its operation, however, the British law has not resulted in the dysfunction and crumbling prospects for workplace organizing that seemingly characterizes the United States. While conceding that British management harbors less hostility to unions than their U.S. counterparts, Brudney suggests that there may be features of British administrative practice and industrial relations that would improve the functioning of existing labor law in the United States.

Immigration issues remain sources of considerable political strife and calls for reform in many Western democracies. The German legal scholar Peter Hanau provides a brief overview of the issues confronting the wealthy but aging Federal Republic of Germany. In recent years, Germany has pursued a more restrictive immigration policy than the United Kingdom and Ireland, lands that have thrown "their door wide open for workers from Poland, the Czech Republic, and other countries." Persistent high unemployment in Germany

6. Daphne Taras, *Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance*, 28 COMP. LAB. L. & POL'Y J. 167, 184 (2007).

7. *Id.* When Taras refers to "Canada's total federal workforce," she means those employees under Part III of the *Canada Labour Code*, which gives the federal government the power to regulate labor standards for particular sets of private sector industries. Only 6% or 840,000 employees in Canada are subject to Part III labor standards, among them banks (30%), telecommunication and broadcasting companies (18%), airlines (12%), and road transportation companies (12%). There is a high concentration of ownership among these firms, as they represent only 1% of Canada's employers but 6% of the workers.

remains a major obstacle to obtaining a liberalized immigration policy for the twenty-first century.

The Toronto-based legal practitioner Mary Cornish continues her global project of improving the prospects for female workers in "Closing the Global Gender Pay Gap: Securing Justice for Women's Work." Despite widespread ratification of ILO Conventions 110 and 111, pay equity probably remains "one of the most violated labor and human rights standards."[8] Cornish's work discusses the way in which nations eagerly sign the Conventions, but then fail to implement national legislation and institutions to attack this deep-seated injustice in the global economy. While noting that labor unions have produced victories for women in disparate nations such as Ghana, the Republic of Korea, Mexico, and Spain, she observes that the informalization of work which remains pronounced in the developing world and growing in many advanced industrial nations provides special organizing challenges for achieving pay equity.

In "Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan," Takashi Araki of the University of Tokyo explains how Japan has taken a different reform path from the recent decentralizing labor legislation of other advanced industrial nations in the Pacific Rim such as Australia and New Zealand. While committed to a stakeholder system of corporate governance, Japan already possessed a more decentralized framework than many other nations. Meanwhile, the nation has in the past few years taken additional steps to protect workers from dismissal, measures alien to the fire-at-will flexibility of U.S. labor law. While the implosion of the bubble economy led many to make premature claims that the lifetime employment practices of Japanese corporate enterprises were dead, the latest reforms have given workers a variety of protective measures and institutions: 1) employment protection during corporate mergers and restructurings, 2) provisions nullifying abusive dismissals, 3) whistleblower protection, and a 4) labor tribunal or *Rodo Shinpan* system.

Former chair of the National Labor Relations Board William Gould of Stanford University combines the study of labor and sports law in an analysis of the globalization of baseball. Studying the recent negotiations that allowed the Boston Red Sox baseball franchise to sign Japanese pitching ace Daisuke Matsuzaka, Gould discusses a range of extraterritorial aspects of labor law, which have had

8. Mary Cornish, *Closing the Global Gender Pay Gap: Securing Justice for Women's Work*, 28 COMP. LAB. L. & POL'Y J. 219, 220 (2007).

implications for longshoremen and many other workers in a globalized economy. Paul Weiler has been the dominant force in constructing sports law as a legal discipline, and Gould's trans-Pacific exploration reflects how labor and antitrust law can intersect in this flourishing new field.

The final two papers provide empirical analysis and observations about the evolving role of contract in contemporary U.S. labor relations. In the first paper called "Governance of the Workplace: The Contemporary Regime of Individual Contract," Kenneth G. Dau-Schmidt and Timothy A. Haley of the Indiana University School of Law display survey data that shows the wide gulf between the at will status of employees under individual contract and the "just cause" provision for firing those covered under collective bargaining. Their work indicates that there have been some modifications to the dominant fire at will doctrine of U.S. employment, as some thirty-four U.S. states provide variations on whistleblower protection. Nevertheless, the gap between collective bargaining and individual contract remains substantial: "Fifty-two percent of individual employment contracts expressly specify an at will relationship while an additional 33% do not specify a standard for discipline, resulting in at will relationships under the default American rule. In contrast, 92% of the collective bargaining contracts expressly reserve a just cause standard for employee discipline."[9]

Closing out this special issue is New York University professor Cynthia Estlund's exploration entitled "Something Old, Something New: Governing the Workplace by Contract Again." Estlund provides a survey of Paul Weiler's recommendations for U.S. reform in the early 1990s, showing their promise but the disappointing failure of the nation's political leadership to seize this agenda to improve worklife. She then gives reasons for embarking on new approaches centered in enforcement of wider-reaching contracts and codes of conduct. Labor law reform has proven to be divisive among legislators, but Estlund holds that a revamped contractual order could rally the necessary alliances for future breakthroughs.

As this collection will attest, Paul Weiler has traveled many paths in seeking resolution to the crisis in workplace governance. Instead of asking what is best for unions or, among rival legal practitioners, what is best for management, he has followed as the guiding star of his inquiries: what is best for the worker? As the chair of the British

9. Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 348 (2007).

Columbia Labour Board from 1974–1978, he entered a province convulsed by what he described as "the most turbulent" industrial relations on the continent, with a workforce of less than one million people clocking "nearly two and one-half million" days of lost work in 1972 "due to strikes, a ratio I have never known to be attained elsewhere."[10] Yet, during his many years as a law professor, Weiler witnessed the United States go from a nation with 424 strikes of 1000 or more workers in 1974 to only 14 large-scale strikes by 2003.[11]

Weiler did not confuse this latter-day quiescence of workers with a greater satisfaction in the workplace governance regimes of twenty-first century capitalism. He understood that the labor peace at the immediate surface hid deeper structures of discontent and dissatisfaction for many workers. In two decades of surveying 5000 U.S. households, the Conference Board reports job satisfaction today is at its lowest levels ever ("less than half of all Americans say that they are satisfied with their jobs").[12] Cautioning against the "romantic exhortation for everyone to labour for the common good of the enterprise," Weiler recognized that managers and workers frequently have differences. But instead of structures of hierarchy and artificial harmony, a mature capitalism and social democracy should create institutions of participation and deliberation that might open new wells of creativity and productivity with a less alienated workforce. With that in mind, this special issue seeks to carry on the spirit of participation and deliberation at the heart of the Weiler legacy.

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10. WEILER, *supra* note 5, at 1.

11. The Bureau of Labor Statistics reports this data at the following location under *No. of Work Stoppages Idling 1,000 Workers or More Beginning in Period*, http://data.bls.gov/cgi-bin/surveymost. In 2006, the BLS has given a preliminary total of 20 strikes of 1000 or more workers.

12. The Conference Board, *U.S. Job Satisfaction Declines, The Conference Board Reports*, press release of Feb. 23, 2007. Diane Stafford, *Fewer happy with their jobs: In a new survey, only 47 percent express job satisfaction, down from 61.1 percent in 1987*, KANSAS CITY STAR, Feb. 24, 2007.