RECONCILING DIFFERENCES DIFFERENTLY: REFLECTIONS ON LABOR LAW AND WORKER VOICE AFTER COLLECTIVE BARGAINING

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I. INTRODUCTION

Paul Weiler's vision of labor law has always been an optimistic one. He hopes that through collective bargaining, differences between workers and employers might be reconciled, that perhaps something approximating distributive justice might be achieved in American workplaces, and at worst, that workers might acquire a collective "voice" with which to assert their interests and defend their rights.[1] Indeed, the issue of worker "voice" is central to the Weiler vision: without voice there can never be genuine reconciliation, only paternalism or palliative measures. The question I address in this article is whether, and if so how, worker "voice" is likely to survive the decline of the statutory collective bargaining system that for seven decades has given it legitimacy and form in North American workplaces.

Collective bargaining is the project in which Weiler has invested much of his formidable intellectual, political, and persuasive skills. However, collective bargaining in the United States is a shadow of its former self, embracing some 8% of the private sector workforce rather than nearly 30% as it did in the 1960s when Weiler began his scholarly career. In Canada, union density has stagnated at about

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1. PAUL C. WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW (1980).

18% of the private sector workforce, well below its peak of over 30% in the 1970s and 1980s.[2]

The fault is, of course, not Weiler's; nor is it exclusively or primarily the fault of those who drafted, administered, and interpreted the *National Labor Relations Act* or its Canadian progeny, which he has worked so hard to reform, if not reinvent.[3] Rather, the decline of labor law is very much the result of the fundamental transformation of the political economies of the industrialized West, and of technological, sociological, and cultural changes that have undermined working class solidarity, trade union movements, and labor's economic power and electoral influence.[4] These transformations, in turn, have produced new constellations of government policies, new strategies of employer resistance, new patterns of individual and collective worker behavior.

Consequently, while those of us who shared in, admire, and still stubbornly support Weiler's project must continue to think optimistically about labor law, we must begin to think about labor law after collective bargaining. We must explore new ways to provide workers with some measure of industrial justice, for promoting sensible and orderly resolution of workplace conflicts, and especially for ensuring that states, markets, and employers are accurately informed about and responsive to the needs and preferences of workers. All of these require a voice mechanism of some description. In this essay, I nominate labor standards legislation as a "dark horse" candidate for selection as an alternative or additional vehicle for worker voice; in her companion essay, Daphne Taras elaborates on this notion, and identifies several other possibilities.[5]

2. COMM'N FOR LABOR COOPERATION, BRIEFING NOTES (Aug. 2003), *available at* http://www.nalc.org/English/pdf/apr_03_english.pdf

3. Weiler was one of the principal architects of the groundbreaking Labour Code of British Columbia and the first chair of the innovative B.C. Labour Relations Board. His experiences are recounted in WEILER, *supra* note 1. He was also a major contributor to the work of the Dunlop Commission, the most ambitious (albeit unsuccessful) attempt to modernize the U.S. National Labor Relations Act. *See* DUNLOP COMM'N, U.S. DEP'T OF LABOR, SEC'Y OF LABOR AND SEC'Y OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGER RELATIONS: FINAL REPORT (1994).

4. I have traced some of these changes in Harry Arthurs, *What Immortal Hand or Eye?—Who Will Redraw the Boundaries of Labour Law?*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK (G. Davidov & B. Langille eds., 2006).

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

II. LABOR STANDARDS AND COLLECTIVE BARGAINING LEGISLATION: AN AMBIGUOUS HISTORY

From the 1930s in the United States and the 1940s in Canada, practitioners and theorists of collective bargaining have been ambivalent in their view of legislated labor standards. On the one hand, they generally concede that such standards are necessary. They provide at least minimum protection for those who are most likely to be denied voice: low skill, low wage workers; workers in service industries and small enterprises; women workers and young people; and workers with non-standard employment arrangements. Members of these groups—so the reasoning runs—either lack marketable skills, are located in marginal enterprises or sectors, or work in conditions in which they are difficult to recruit into unions. On the other hand, perhaps for those very reasons, participants in the collective bargaining system came to regard legislated labor standards with some condescension, as "labor law's little sister" (Judy Fudge's phrase)—a member of the labor law family, to be sure, but something of an embarrassment.[6] The result, as Fudge notes, has been that women workers (and by extension other vulnerable workers) have received neither appropriate legal protection, nor appropriate levels of attention from policy makers, scholarly analysts, and the union movement. Looked at in a longer historical perspective, however, legislated labor standards might equally be regarded as "labor law's older—and morally superior—sibling."

As E.P. Thompson and others have shown, claims of entitlement to "fair wages" based on custom or statute were commonplace among elite tradesmen in 18th and early 19th century Britain.[7] The ethical norm of "fair wages" rapidly disappeared (or was disappeared, in the Latin American sense of the term) during the early years of industrial capitalism. However, the idea of ethical labor standards did not vanish altogether, notwithstanding the growing dominance of free markets and free market ideology. The U.K. Factories Acts of 1802–1833—antecedents of contemporary labor standards legislation—also rested on an ethical premise: that conditions of work must meet fundamental standards of decency.[8] Even at the height of "robber baron" capitalism in late 19th century America, ethics animated many

6. JUDY FUDGE, LABOUR LAW'S LITTLE SISTER: THE EMPLOYMENT STANDARDS ACT AND THE FEMINIZATION OF LABOUR (1991)

7. *See*, *e.g.*, E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1977).

8. The legislation is reviewed in H.W. ARTHURS, "WITHOUT THE LAW" ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND 103 (1985).

supporters of legislated labor standards: workers who campaigned for the eight-hour day and day-of-rest legislation; "respectable people" outraged by harrowing accounts of "sweated labor"; progressive scholars and journalists deeply concerned about workers' moral as well as material wellbeing; new political parties—Progressives, Farmer-Labor, Liberals, Social Democrats—proposing legislation to ensure that workers enjoyed their "fair share."[9]

As this brief historical sketch suggests, during the 19th century worker voice—expressed in the context of industrial and political mobilization—came to play an important role in the formation of labor standards. In short, it was not only that workers sought and accepted legislated standards that made those standards legitimate, but also that they were widely perceived as the appropriate—the ethical—response to the excesses of industrial capitalism. Indeed, as late as the 1930s, collective bargaining and labor standards legislation were perceived as complementary—not mutually exclusive—strategies not only for ensuring decent conditions for workers but also for restoring vitality to the economy. The New Deal, it must be remembered, launched not only the National Labor Relations Act, but the National Industrial Recovery Act and the Fair Labor Standards Act.[10]

Nonetheless, in North America's golden age of collective bargaining—say from 1940 to 1970—legislated labor standards lost their moral *cachet*. Once seen as a floor below which workers would not be allowed to fall for reasons of public morality or civic decency, they came to be regarded as a floor above which workers were expected to rise through the exercise of their individual or collective bargaining power. No longer did legislated labor standards epitomize the just entitlements of the industrial proletariat; they represented the subsistence rations left over for its camp-followers and reserve battalions. This was a crucial shift in perception for which the labor movement itself bears some responsibility. After all, unions had to persuade workers that collective bargaining was a better way to advance their interests than any alternatives—including legislation and revolution. And unions had to be seen to be strong in their faith that one day all workers would embrace collective bargaining, and that in the "great by and by" there would be no need for legislated standards.

9. DANIEL RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998).

10. National Industrial Recovery Act, § 90, 48 Stat. 195 (1933); National Labor Relations Act, § 372, 49 Stat. 449 (1935) (Wagner Act), Fair Labor Standards Act, 29 U.S.C. § 201 (1938).

Nonetheless, to give the labor movement its due, collective agreements were often the proving ground for innovative arrangements such as paid vacations and overtime premiums, which were later made universal and compulsory by labor standards legislation. Indeed, in Quebec, legislation has long permitted the government to issue decrees extending collectively bargained terms to cover unorganized employers in a given sector such as construction or the garment industry.[11] Finally, unions generally supported and sometimes led campaigns by social and anti-poverty movements to secure improvements in minimum wage, maximum hours, health and safety and other statutory regimes. This not only enhanced labor's self-image as a progressive social movement; it also reinforced its bargaining power by ratcheting up the minimum that employers were legally entitled to offer in collective negotiations.

That said, it is difficult to explain why labor law and industrial relations scholars largely chose to ignore labor standards. Perhaps, as Fudge implies, labor standards were ignored as a field of inquiry because those who mainly benefited from them did not conform to the ideal-type of white, male semi-skilled and skilled industrial workers who populated the domain of collective bargaining.

Or perhaps scholars were carried away by their own hyperbolic characterization of collective bargaining as the instantiation of quasi-constitutional values. Collective bargaining legislation, they claimed, had ended the employer's absolute rule in the workplace, introduced democratic elections that permitted workers to select their bargaining representatives, mandated those representatives to participate in a quasi-legislative negotiating process that would establish their terms and conditions of employment, and guaranteed "citizens at work" the same rights of due process and free speech that they enjoyed in the rest of their lives. By contrast, labor standards—a minimum wage of *x* dollars per hour, maximum work weeks of *y* hours per week, paid vacations of *z* days per year—seemed to express more prosaic, less transcendent values.

Or perhaps scholars genuinely believed that collective bargaining was more likely to advance workers' interests than legislated standards because collective bargaining was more consonant with the assumptions of a free market economy. Collective bargaining after all, was still *bargaining*; countervailing power was still *power*; and as

11. J-G Bergeron & D. Veilleux, *The Quebec Collective Agreement Decrees Act: A Unique Model of Collective Bargaining*, 22 QUEEN'S L.J. 135 (1996). However, as the authors note, the application of the decree system has been considerably curtailed in recent years.

things turned out, business unionism was still *business*. Moreover, as Weiler and others have noted, collective bargaining plays an important function not only in the wider labor market but also in the internal labor market of individual firms. If they have no other way to do so, workers can signal their dissatisfaction with wages or working conditions only by "exiting" or quitting, thus depriving the firm of their knowledge and skill, and of its sunk investment in their recruitment and training. However, if they have access to a "voice" mechanism, workers can bring their concerns to management's attention so that it can respond in a timely and positive fashion and avoid the loss of valued workers. Collective bargaining has traditionally provided workers with that "voice."[12] Thus, whether approached from an external or internal labor market perspective, collective bargaining uses the rhetoric and respects the logic of free enterprise. By contrast, labor standards legislation uses more normative rhetoric, and expresses the logic of the activist state—rhetoric and logic whose persuasive power remains extremely limited, especially in the United States.

Or perhaps its proponents were actually convinced that collective bargaining offered workers greater agency, greater empowerment, in the workplace, than they were likely to achieve in the wider political process within which labor standards would have to be debated and, ultimately, enacted. This belief, for many industrial relations scholars, was grounded not so much in beguiling constitutional rhetoric as in an observable sociological phenomenon. Every complex social field, whatever its formal structures of governance, is to some extent ruled by informal, implicit, and often invisible norms and decision-making processes.[13] The workplace—whose operations depend on the close cooperation of hundreds or thousands of actors, in fast-changing circumstances, over long periods of time, and despite often conflicting interests—is inevitably replete with such informal, implicit, invisible norms and processes. What collective bargaining does is to make many of these formal, explicit, and visible, to confer legitimacy on them, and to mediate between them and the established structures of corporate governance. In doing so, it makes clear that workers have a substantial role to play in creating and enforcing the normative regime of the workplace. By contrast, under labor standards legislation,

12. R. Freeman & J. Medoff, *The Two Faces of Unionism*, 57 PUB. INT. 69 (1979).

13. The literature is reviewed in H.W. Arthurs, *Landscape and Memory: Labour Law, Legal Pluralism and Globalization*, *in* ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT 21 (T. Wilthagen ed., 1996).

workers are usually perceived as the mere passive beneficiaries of actions taken by legislators on their behalf.

III. WORKER RIGHTS, POWER, VOICE, AND AGENCY: THE FUTURE OF LABOR STANDARDS

Whatever the reason, labor law and industrial relations scholars were never able to muster the same enthusiasm for labor standards as for collective bargaining, nor did they develop equally elaborate justificatory theories for labor standards or advocate equally plausible political and legal strategies. Now the situation has changed. Whatever collective bargaining was meant to accomplish—the projection of democratic rights into the workplace, the rebalancing of external labor markets through the introduction of countervailing power, the use of "voice" to make internal labor markets more efficient, the legitimization of workers' participation in management decision-making—these things can no longer be accomplished by collective bargaining alone, or perhaps at all. Scholars will have to explore alternative strategies.

The moment is not propitious. The decline of collective bargaining has contributed to growing economic inequality. It has also coincided with, and likely helped to cause, a decline in the quality of workers' lives, as pensions, medical insurance, paid vacations, sociable hours of work, job security, and other collectively-bargained benefits become available to fewer and fewer North American workers. And finally, the decline of collective bargaining—both a cause and a consequence of the decline of working class solidarity—has left a black hole in the political firmament. Unions once had some success in mobilizing workers' support for pro-labor parties and legislation, and exercised considerable political leverage through their participation in progressive coalitions. With the decline of collective bargaining, and of the union movement, those coalitions have now largely ceased to exist. So too, to a significant extent, has organized labor's capacity to influence public policy.

Hence two questions: First, might legislated labor standards serve as the functional equivalent of collective bargaining? Second, if so, what are the prospects that in the present climate, the moral appeal of decent labor standards might again—as it once did—help to rally workers' strength and solidarity, and to enlist public concern about workers' needs and interests?

The answer to the first question is clearly "yes." Workers denied decent wages and working conditions or recourse against arbitrary

and discriminatory treatment might be guaranteed all of these by labor standards legislation. Indeed, they already enjoy such guarantees to some extent, especially in Canada; new legislation could in principle fill gaps and up antes. For example, in several Canadian jurisdictions, workers are protected by labor standards legislation against unjust dismissal, workplace bullying, and pay policies that disfavor women, while a number of U.S. states and cities have recently adopted "fair wage" or "living wage" laws.

Of course employers and others object to legislated labor standards because they supposedly increase labor costs and lead to dis-employment—arguments also used against collective bargaining. However, just as collective bargaining produces positive outcomes in external and internal labor markets to offset anticipated higher costs, so too does labor standards legislation. For example, "fair," "living," or minimum wages enhance the purchasing power of low wage workers, triggering multiplier effects across the local economy. Legislated standards can facilitate the operating of labor markets by forcing inefficient enterprises, which now compete on the basis of exploitative working conditions, to compete instead on the basis of improved technology or better sales strategies. Workers displaced from their jobs in these enterprises might help to alleviate the labor shortages that loom over some sectors of the economy. Legislated standards that require employers to provide training, or to give workers time off to participate in the training programs of state or private providers, can enhance the productive capacities of many businesses. Improved attention to training can also make the workforce more mobile and adaptable, with long-term outcomes that are positive not only for workers but for employers and for the economy as a whole. Legislated standards requiring that employers respect the need of workers to attend to home and community responsibilities may lead to lower levels of absenteeism, less stress and stress-induced illness, and consequently higher productivity. And laws that effectively reduce stress in the workplace, forbid excessive working hours, and provide periods of rest and relaxation may in the end reduce the health care costs of the employer whether paid as premiums for private health insurance or as taxes to support a public health care system.

Finally, like collective bargaining, legislated standards need not operate on a "one size fits all" basis—as witness the many variations and exceptions typically permitted under existing labor standards statutes. Given that so many employers seek temporary or permanent relief from labor standards, it may be possible to induce or require

them to consult their workers on scheduling, overtime, vacations, and similar matters. Not only would this re-introduce a voice mechanism into workplaces from which unions have disappeared; it would likely decrease quits, absenteeism, poor work performance, and other manifestations of "exit" behavior. Moreover, a system of legislated standards that explicitly encouraged "regulated flexibility" at the level of individual enterprises or at a sectoral level might, like collective bargaining, respond to the special requirements of particular kinds of business operations.

Legislated standards, in short, could help to initiate a virtuous circle in which workers enjoy improved conditions at work and enhanced control over their daily routines, employers experience improved productivity, and the community and economy benefit as well—all goals shared by collective bargaining. And, if recent evidence is to be believed, they could accomplish all this without encumbering the economy with labor costs that cannot be recaptured through improved economic performance. However, while legislated standards could do some of the work of collective bargaining, they depend crucially on the willingness of elected politicians to enact them. This brings us to the second question posed above: Is it conceivable that labor standards might prove to be a political rallying point not only for low wage workers but also for their more privileged colleagues and their sympathizers in the broader society?

On the one hand, it must be acknowledged that legislative solutions in general have not attracted much support in recent years when market forces have come to be widely accepted as the public policy instrument of choice. And labor standards specifically have engendered little overt enthusiasm: neo-classical economists disparage them as a constraint on labor market flexibility; progressive scholars and analysts who ought to be their most enthusiastic advocates treat them with disdain; and even workers (their principal beneficiaries) often seem indifferent to their potential advantages. Some standards are repealed by hostile legislators; others, such as the minimum wage, are left un-amended for years and consequently provide diminished protection; still others go unenforced by administrators who lack resources or zeal, or are rendered innocuous by ignorant or unsympathetic judicial interpretations.[14]

14. For a particularly egregious example, see Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) and Circuit City v. Adams, 532 U.S. 105 (2001) upholding the right of employers to require workers to arbitrate their claims under protective labor legislation rather than pursue their statutory remedies. Recent decisions make clear that *Gilmer* and *Circuit City* apply to

It might seem, then, that there is no more chance of legislating high labor standards than there is of reforming labor relations legislation in order to breathe new life into collective bargaining. However, in the optimistic spirit of Paul Weiler, another scenario can be imagined.

A new body of research suggests a positive correlation between high labor standards, labor market flexibility, productivity, and economic growth.[15] 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. New "flexicurity" strategies in the European Union are already proving that legislated labor standards, in combination with other policy instruments, can improve the performance of labor markets.[16] New experiments with "high performance workplace systems" are already demonstrating to employers the productivity-enhancing potential of humane HR policies and of empowering workers and listening to their voice.[17] New evidence and argument may even come to persuade labor leaders and academics that legislated standards can operate alongside, in support of, or, at worst, in lieu of collective bargaining.

Ironically, many leading enterprises seem to share that belief in practice if not in principle. For example, a 2005 survey of Canadian federal jurisdiction employers shows that many of the largest firms pay considerably more than minimum wage, offer longer vacations and more holidays than required by legislation, and are experimenting with new employee-friendly working-time strategies, many of which respond to worker preferences as expressed through surveys and focus groups.[18] In many of these firms, to be sure, worker "voice" is expressed neither through unions nor through non-union employee associations; it is therefore less authentic or influential than it might be. On the other hand, given that many employers accept the need to

claims under the Fair Labor Standards Act. *See*, *e.g.*, Bailey v. Ameriquest Mortgage, 346 F.3d 821 (8th Circ. 2003); Carter v. Countryside Credit, 362 F 3d 294 (5th Circ. 2004).

15. *See*, *e.g.*, J. Stiglitz, *Employment, Social Justice and Social Well-being,* 141 INT'L. LAB. REV. 9 (2002); R. Flanagan, *Labor Standards and International Competitive Advantage*, *in* INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY 13 (R. Flanagan & W. Gould eds., 2003).

16. *See*, *e.g.*, T. Wilthagen & F. Tros, *The Concept of "Flexicurity": A new approach to regulating employment and labour markets*, *at* http://www.tilburguniversity.nl/faculties/frw/research/schoordijk/flexicurity/publications/papers/fxp2003_4.pdf; P.K. Madsen, *The Danish Road to Flexicurity: Where are We And How Did We Get There?*, *in* EMPLOYMENT POLICY FROM DIFFERENT ANGLES (T. Bredgaard & F. Larsen eds., 2005).

17. *See*, *e.g.*, E. APPELBAUM ET AL., WHY HIGH-PERFORMANCE WORK SYSTEMS PAY OFF (2000).

18. STATISTICS CANADA, FEDERAL JURISDICTION WORKPLACE SURVEY (2005).

consult and respond to workers' needs and preferences, it is hard to see why they would object to innovative labor standards legislation designed to improve the clarity and accuracy of worker "voice."

However, it must be said that by no means all enterprises accept the need for relatively generous treatment of their workers, or make significant, if imperfect, efforts to consult them. Indeed, the same 2005 survey indicated that many smaller firms and firms in sectors such as trucking were in breach of one or more statutory labor standards, and that these firms also provided fewer benefits to their workers and, often, lower salaries. Other evidence suggests that lower standards are also relatively common in the manufacturing, service, and hospitality sectors, all of which come under provincial jurisdiction. And finally, whether attributable to the employment practices of any given set of employers or to broader developments across the economy, the negative effects of low labor standards are being experienced by significant numbers of some ordinary worker-citizens: static or declining real incomes; shorter, less secure, and more ambiguous job tenure; greater exposure to financial crises for those who lack disability or dental insurance or an adequate pension; less and less time after work for family, leisure, and civic activities.

If these observations are accurate, if more and more people are indeed coming to feel that their working conditions are unsatisfactory, unhealthy, or unfair, labor standards may again become the focus of wide-ranging public policy debate. Such a debate, indeed, has already begun. In the United States it has focused on the plight of vulnerable workers who face exploitation in the workplace and are not being paid a "fair" or "living" wage. In Canada it has been developing for some time as governments at all levels have gradually begun to update their labor standards legislation, presumably in response to public concerns and, it must be assumed, with some degree of employer acquiescence if not support.

Thus, there are two reasons to believe that labor standards may finally be able to claim a place on the public policy agenda. The first is that positive evidence is accumulating that attention to decent labor standards may help to improve economic performance; the second is that discontent with falling and occasionally exploitative standards may be emerging as a concern for a broad spectrum of workers and voters. Legislation that emerges from this renewed interest in labor standards will be very different from the legislation enacted sixty or seventy years ago to protect and project worker "voice" through collective bargaining. Nonetheless, labor standards legislation can hardly avoid the issue of "voice." If the object is to alleviate abusive

working conditions, workers must somehow be given a say in establishing their hours of work and other workplace routines. If the aim is to promote best practices, workers must be closely involved not only in establishing their own workplace routines but in a host of other issues relating to the employer's operations.

My own intuition is that attempts to introduce worker "voice" in North American workplaces by transplanting European works councils across the Atlantic are unlikely to succeed. In part this is because works councils are somewhat in disarray in Europe itself, in part because management structures and workplace practices differ considerably as between Europe and North America. But I believe that a period of experimentation with varied approaches to "voice" mechanisms with specific functions, tailored to specific contexts, is likely to demonstrate that such mechanisms are not only legitimate but valuable. Whether such mechanisms are also viable in the long term in the absence of strong unions and collective bargaining systems is a more difficult question. Whether success with these modest experiments might whet the appetite for more ambitious "voice" mechanisms, even for unions, is a more intriguing one.