COMPARATIVE ANALYSIS OF LABOR LAW: LEARNING FROM THE WORK PRODUCTS OF A MODEL COLLABORATIVE DESIGN

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I. THE METHOD

Almost forty years ago, Benjamin Aaron organized what perhaps has been the single most fruitful scholarly undertaking in the comparative study of labor and employment law. As a result of his encouragement and, undoubtedly, some cajoling, five additional respected labor law scholars[1] from the same number of industrial nations joined him in a collaborative project to examine the variety of legal rules and procedures by which similar work relationships and conflicts were resolved in their respective countries. In the course of approximately twelve years, under the collective name of The Comparative Labor Law Group, Professors Aaron, Blanc-Jouvan, Giugni, Ramm, Schmidt, and Wedderburn published four books describing the laws, regulatory mechanisms, and practices in the authors' countries.[2]

The Group's approach used a collaborative procedure that helped the authors clarify and enhance their respective understanding of the details and settings of each country's approach and, most importantly, provided the background for their search to explain the differences and similarities among the six labor law systems. The latter characteristic—comparatively searching for commonalities and differences and the reasons therefore—distinguished their

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1. Xavier Blanc-Jouvan, Gino Giugni, Thilo Ramm, Folke Schmidt, and K.W. Wedderburn. A sixth scholar, Paul Davies, collaborated with Wedderburn in preparing a study of the development of Britain's dispute resolution procedures.

2. The books were K.W. WEDDERBURN & PAUL L. DAVIES, EMPLOYMENT GRIEVANCES AND DISPUTES PROCEDURES IN BRITAIN (1969); LABOR COURTS AND GRIEVANCE SETTLEMENT IN WESTERN EUROPE (B. Aaron ed., 1971); INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY (B. Aaron & K.W. Wedderburn eds., 1972); and DISCRIMINATION IN EMPLOYMENT (F. Schmidt ed., 1978).

undertaking from the national studies that were, and remain, the bulk of "comparative" labor law research. Although national studies are a necessary beginning phase of comparative labor law studies, too often they have been the totality of such efforts.[3] Regrettably, as demonstrated in the final portion of this paper, American labor and employment law scholarship continues to largely neglect the core challenge of identifying the factors that cause or contribute to the differences and similarities discovered through such comparisons or of assessing the possibilities and dangers of particular efforts at transplantation or harmonization.

The introductions to the books that emerged from the Group's collaboration describe how, facilitated by grant and institutional financial assistance, the authors' efforts were enhanced by the extended opportunities for face-to-face interpersonal exchanges.[4] The first such exchange was a planning meeting held in Stockholm. Thereafter, each taught at UCLA during the same academic quarter and used the opportunity for extensive discussions about their respective systems, and at the end of the quarter they participated in a UCLA-sponsored conference on dispute resolution procedures. Finally, each author's work was critiqued by the other collaborators prior to completion—a process that Aaron explains continued to include extended face-to-face meetings to review the final texts in order to get clarifications and improve accuracy.

About a decade after the first series of the Group's publications, a somewhat larger Group of labor law scholars from various countries engaged in a much too abbreviated effort to duplicate this technique.[5] Although the final work product of that effort has expanded and matured, it reflects its authors' much more limited opportunity for intensive collaboration. Nevertheless, the face-to-face meetings among this later group of collaborators further demonstrated the value of such meetings as a way to reduce misunderstandings respecting other legal systems and practices, stimulate deeper, more

3. C. Summers, *Comparative Labor Law in America: Its Foibles, Functions and Future*, *in* LIBER AMICORUM REINHOLD FAHLBECK 547, 548–49 (2005).

4. A comprehensive description is found in the Foreword to WEDDERBURN & DAVIES, *supra* note 2.

5. Around 1981, Roger Blanpain recruited nineteen scholars to prepare comparative chapters for *Comparative Labor Law and Industrial Relations*. Each prepared a draft that was circulated to the other authors. In early 1982, with funding assistance from INSEAD, Kluwer Publishers and Catholic University of Leuven, he organized a two day conference attended by twelve of nineteen authors (including one of the authors of this paper) who discussed the goals of comparative analysis, corrected misstatements respecting their own legal systems, and offered critiques of the respective chapters. The book, which in later editions has been expanded and refined, was published later that year.

challenging exploration, and encourage more courageous efforts to propound analytic models or conclusions. There have, of course, been other, generally well executed, comparative studies but they, too, have not been enriched by extended face-to-face discussions among the authors. As a result, they have tended to be less detailed in their national study portions, and while differences and similarities are noted among the systems, there has been less emphasis upon synthesis and explorations for explanations of those differences or similarities.[6]

Although the Internet increases the speed and ease of long distance communication among scholars, it has not displaced face-to-face consultation that allows one to discern when an inquiry unduly intrudes upon another's attention to competing responsibilities and, therefore, may not elicit a full or well-considered response. Nor does the Internet permit a participant to interrupt to correct misperceptions or cut to the chase,[7] nor allow assessment through nonverbal means of the level of certainty or conviction as to what has been said, nor enable mutual diversions that revive diminishing attentiveness or enthusiasm.

That the perceptual and communications difficulties of comparisons among different legal systems are substantial and persistent is shown by the fact that despite all the care the Comparative Labor Law Group took to remove ambiguities and gaps, a few remained. To offer two examples, though minor ones, the text does not make clear whether at the time of the studies German labor courts treated a stoppage during the life of a collective agreement as just cause for dismissing the striking workers and there was some inconsistency respecting the extent to which a peace obligation was enforceable in rights disputes in Germany.[8] A search to ascertain the current status of a contractual peace obligation in Italian grievance processes was equally frustrating (perhaps indicating that a clear rule has yet to be established). However, it appears that at this time in

6. For example, MICHELE COLUCCI, THE IMPACT OF THE INTERNET AND NEW TECHNOLOGIES ON THE WORKPLACE: A LEGAL ANALYSIS FROM A COMPARATIVE POINT OF VIEW (2002); EMPLOYMENT SECURITY: LAW AND PRACTICE IN BELGIUM, BULGARIA, FRANCE, GERMANY, GREAT BRITAIN, ITALY, JAPAN AND THE EUROPEAN COMMUNITIES (R. Blanpain, T. Hanami, M. Biagi eds., 1994); INDUSTRIAL CONFLICT RESOLUTION IN MARKET ECONOMIES: A STUDY OF AUSTRALIA, THE FEDERAL REPUBLIC OF GERMANY, ITALY, JAPAN, AND THE USA (T. Hanami & R. Blanpain eds., 1984); W. ALBEDA, R. BLANPAIN & G. VELDKAMP, TEMPORARY WORK IN MODERN SOCIETY (1978); Women and Labor: A Comparative Study (R. Blanpain ed., 1978).

7. This is a culturally influenced preference; others, of course, might condemn such interruptions as a breach of etiquette, no matter how efficient.

8. Gino Giugni, *The Peace Obligation*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 159, 169, 171, 173 (Benjamin Aaron & K.W. Wedderburn eds., 1972).

Germany violation of a peace obligation is grounds for dismissal, but the right to dismiss such employees may be lost if the employer provoked the walkout or if it was authorized by the union. The latter rule, of course, is in sharp contrast with the U.S. approach. Perhaps more important is the current observation that German employers seldom respond to such violations by dismissing employees.[9]

Nevertheless, whatever occasional, minor uncertainties there may have been in the presentations, they did not detract from the obvious diligence and success with which the Group approached what was a more daunting undertaking than may have been anticipated. And, after more than three decades, it is interesting and challenging to return to some of the comparative observations and predictions of these work products to see how well they continue to reflect the state of labor and employment law in these countries and what continued guidance they offer regarding comparative analysis of the patterns of variation. It is with that goal that the inquiry that follows revisits some of the information and discussion found in the Group's study *Industrial Conflict: A Comparative Legal Survey*.[10]

II. STUDYING SIMILARITIES AND DIFFERENCES

Schmidt's comparative survey, which opened the book, examined the role of labor organizations and employers' associations in industrial actions. Among other observations, he identified and characterized as a fundamental difference two competing approaches respecting the obligation of employees to abide by a peace obligation. The first approach, found in Sweden, Germany, and the United States, was to accept as a basic principle that during the life of a collective agreement the parties should postpone addressing interests disputes by refraining from work stoppages and that they should resolve rights disputes through the labor courts or arbitration. The competing approach, found in Britain, France, and Italy, was to accept the proposition that labor organizations are entitled to strike at any time, including during the life of a collective agreement.[11] Schmidt in part explained the presence of this rule in France as a corollary of the

9. Manfred Weiss & Marelene Schmidt, *Germany*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW ¶ 430 (2000).

10. Aaron & Wedderburn, *supra* note 2.

11. Folke Schmidt, *Industrial Action: The Role of Trade Unions and Employers' Associations*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 66 (Benjamin Aaron & K.W. Wedderburn eds., 1972). It should be noted, however, that Guigni's description of the Italian situation indicates it was too unsettled to fully support Schmidt's characterization. Giugni, *supra* note 8, at 152–53.

perception that a strike is a mode by which individuals jointly express their displeasures.[12] The explanation is less clear with respect to Italy and Britain.

In the intervening years, the peace obligation has been strengthened in Sweden where statutory restrictions regarding the obligation have been added to contractual undertakings.[13] In Germany, the peace obligation continues to be regarded as implicit in the collective agreement and, in practice, some parties have gone further by contractually expanding the no stoppage obligation for a specified number of weeks after the agreement's expiration or until specified conflict resolution procedures have been exhausted after the collective agreement's expiration.[14] In contrast, although strike activity in Italy, as elsewhere, has declined, the law and practices of that country appear to treat peace clauses as unnecessary or not legally enforceable, at least with regard to interests disputes.[15] On the other hand, in France there may be some "watered-down" contractual peace obligations but, otherwise, there appears to be no change. Those "watered-down" inroads are in the form of procedural prerequisites to instituting strikes and an obligation on unions to not encourage stoppages.[16] And, while peace obligations have begun to appear in collective agreements in Britain, enforcement is difficult because employees are not bound by such provisions unless, among other requirements, the provision is impliedly or expressly incorporated into the individual's own employment contract.[17] Thus, in the group of countries under discussion, the observed dichotomy respecting the role of a peace obligation continues although there has been some drift in the direction of added restrictions to self-help by those protected by collective agreements.

After identifying the pattern, Schmidt did not attempt to answer the core comparative question of "why" these differences exist. Is it

12. Schmidt, *supra* note 11, at 47.

13. Axel Adlercreutz, *Sweden*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW ¶¶ 590–94 (1997).

14. Weiss & Schmidt, *supra* note 9, ¶¶ 360, 384.

15. T. Treu, *Italy*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW ¶¶ 474–88 (2006). On the other hand, Guigni indicated, at least at the time of his writing, there was some basis for disciplining employees who disregard a peace obligation. Giugni, *supra* note 8, at 159, 169.

16. A.T.J.M. Jacobs, *The Law of Strikes and Lockouts*, *in* COMPARATIVE LABOR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 558 (R. Blanpain ed., 8th ed. 2004); Michel Despax & Jacques Rojot, *France*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW ¶¶ 577, 678 (1987).

17. Bob Hepple et al., *Great Britain*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW ¶ 476 (2006).

possible that the explanation may be found in cultural differences among these nations?

Those who study culture identify several characteristics that differentiate one culture from another. Among those characteristics is whether people within a society assess their interests primarily from their own individual perspective, or from the perspective of the community with which they identify.[18] One might expect a peace clause to be more readily accepted in cultures in which greater weight is given to a person's communal relationships (communal orientation) than in cultures in which greater weight is given to a person's individual interests (individualistic orientation). Does that cultural differentiation explain the dichotomy observed by Schmidt?

Although generalized characterizations of cultures should be accepted with caution, since personalities within a society cluster around rather than fit the cultural norm,[19] respected behavioral scientists have nevertheless conducted studies that place different national cultures in a rank order based on the respective emphasis given to communal versus individualistic orientation. In that rank ordering of the six national cultures represented by the Group's study, U.S. culture is ranked as being the most individualistic, followed by Britain, Italy, Sweden, France, and Germany, in that order.[20] At least based on those rankings, the communal/individualistic cultural dichotomy does not provide much explanation for the differences in approach to the peace provision. At best, in attempting to find guidance from the communal/individualistic cultural orientation dichotomy, it can be observed that the law of the most individualistic culture, the United States, allows for contractual avoidance of a peace obligation, while the law of the relatively more communal German culture not only imposes the obligation as a matter of law but in practice has used collective agreements to expand the obligation's scope.

18. Nancy Adler & Mariann Jelnek, *Is "Organization Culture" Culture Bound?*, *in* CULTURE, COMMUNICATION AND CONFLICT: READINGS IN INTERCULTURAL RELATIONS 115, 120 (Gary Weaver, ed., 1994); Geerte Hofstede, *The Cultural Relativity of the Quality of Life Concept*, *in* CULTURE, COMMUNICATION AND CONFLICT: READINGS IN INTERCULTURAL RELATIONS 131, 132-33 (Gary Weaver, ed., 1994). *See generally* GEERTE HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS ch. 5 (2001).

19. ALVIN GOLDMAN & JACQUES ROJOT, NEGOTIATION: THEORY AND PRACTICE 288–92 (2003).

20. Hofstede, *supra* note 18, at 215. Of 53 cultures rank ordered, the United States was number 1 (most individualistic orientation), Britain number 3, Italy number 7, Sweden number 10/11 (tied with France at that rank order), and Germany number 15.

When we examine the law in other countries on the rank order list, there is similar lack of correlation between the relative communal/individualistic cultural orientation and a national labor law system's acceptance or rejection of a mandatory peace provision as a means of supporting the stability of relations under collective agreements. For example, Canada, with a relatively individualistically oriented culture, imposes a peace obligation as does the Netherlands, another relatively individualistic culture. Less surprisingly, Japan and Argentina, with much more communal cultural orientations, also impose a peace obligation.[21] Of course, this may simply show that the peace obligation has been so widely accepted as a useful tool for fostering stable industrial relations, that cultural orientation of itself is a factor of insufficient magnitude to cause its rejection. Thus, we must fall back on a broader proposition when trying to understand the role of peace clauses in the six countries studied by the Group. Speaking of the variety of laws and practices respecting industrial actions, Aaron stated that "their ultimate origins are part of the 'seamless web of history,' and their present manifestations are understandable only as parts of the entire political, economic and social framework within each country."[22]

Ramm, in his effort to answer the question of why there are differences among the six national labor law systems, suggested that an important factor influencing how different systems draw lines to protect particular industrial actions is whether, in that nation, such actions "are essentially considered to be class struggles in which at least all workers act or should act in solidarity, or to be part of collective bargaining and therefore principally restricted to the parties to bargaining."[23] On the face of Sections 8(b)(4), 10(l), and 303 of the Labor Management Relations Act, it would appear that the U.S. system falls in the latter category. However, inconsistent with the Congress' apparent preference for viewing labor disputes as market, rather than class, struggles, later U.S. court decisions treated otherwise protected consumer product picketing as unlawful if located

21. Jacobs, *supra* note 16, at 557; Tadashi Hanami & Fumito Komiya, *Japan*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW ¶ 280 (Roger Blanpain ed., 2005); Mario Ackerman & Adrian Goldin, *Argentina*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW ¶ 1214 (Roger Blanpain ed., 2005). The source for the assertion regarding Argentina is less reliable because the monograph is dated 1991. Canada and the Netherlands are rank ordered 4/5 while Japan and Argentina are rank ordered 22/23. Hofstede, *supra* note 18.

22. Benjamin Aaron, *Methods of Industrial Action*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 70 (Benjamin Aaron & K.W. Wedderburn eds., 1972).

23. Thilo Ramm, *The Legality of Industrial Actions and the Methods of Settlement Procedure*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 276 (Benjamin Aaron & K.W. Wedderburn eds., 1972).

at the premises of an employer that is too closely allied with the target of a labor dispute.[24] That is, American case law has determined that when the product or services are sold or used by an entity that has a largely dependent relationship with the producer of the product or services, the user is entitled to be insulated from picketing that is urging a boycott of the entity that is the target of the primary dispute. Accordingly, in some instances, American labor law does more to protect solidarity with those who are distant from the dispute than to protect solidarity among those most directly affected by the dispute. This, of course, does not disprove Ramm's postulate. Rather, it demonstrates that lapses in logic can be as important as principles of industrial relations in determining labor law rules—at least in the United States.

Because the perception of the legal relationship of enterprises and employees in the European countries covered by the Group's study is based on the worker's individual contracts with the enterprise, when a lawful strike is instituted, a theoretical determination must be made as to what status a striker has in relation to the employer. Is the relationship terminated or merely suspended during the strike since this affects whether the returned striker has a legal right to continue to receive longevity-based benefits such as longer vacations or preferred treatment in promotion, transfer, and recall decisions? The doctrinal approach in France, Italy, Sweden, and the United States treats the employment contract as suspended during a lawful strike and resumed at the end of the strike. Although the rule was less clear respecting Germany when the Group conducted its studies, subsequent developments there confirm that the employment contract of strikers is deemed suspended, not terminated.[25] Thus, for example, relative longevity status among the workers is unaffected by a strike.

An alternative legal analysis is to regard the employee's continued relationship with, and status in, the place of employment as an equitable interest that is uninterrupted by the termination of the employment contract. Thus, though contract rights might be terminated by the stoppage, the equitable claim to status as an enterprise employee is unaffected and supports the right to resume working at the end of the stoppage under a new contract with all equitable benefits (such as seniority) intact.

24. *See*, *e.g.*, NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco), 447 U.S. 607 (1980); Local 14055 United Steelworkers v. NLRB (Dow Chemical Co.), 524 F.2d 853 (D.C. Cir. 1975).

25. Weiss & Schmidt, *supra* note 9, ¶ 428.

In Britain, however, the courts regarded a strike as a termination of the employment contract and relationship even though, in practice, employers commonly treated returning strikers as entitled to resume their former status.[26] Despite that pattern of employer practice; despite Britain's membership in the European Union, with its resulting increased ties to other European legal systems; and despite the interpretation of the ILO's Committee of Experts respecting the implications of the fundamental nature of the right to strike;[27] it appears that the British bench persists in its narrow, contract-based conceptual approach to a striker's status when a strike ends.

There are, of course, a variety of sources of authority that can guide the choices made in adopting labor law rules. In a common law system, judicially developed rules should enforce normative expectations that are socially beneficial. In theory, over time those legal rules should adjust with normative changes or with new perceptions of what benefits society. A more recent development in British labor law rules regarding strikers reinforces the expectation that when judges fail to make such adjustments, eventually the legislature will react. Accordingly, recent legislation has made a partial inroad on the judicial approach by providing an eight week right to return for those engaged in lawful strikes.[28]

In the course of his comparative examination of the six labor law systems, Aaron stated that "the propensity to strike is a fluctuating phenomenon for which we do not have any really reliable explanation"—an observation as true today as it was thirty years ago.[29] However, it has become a bit less apparent that the future will confirm his accompanying statement that it is more likely than not that strikes, lockouts, and related forms of industrial action will continue to undergo changes to insure survival and continue to be used as a force for adjusting wages, hours, and working conditions. Although work stoppage data in the United States and elsewhere suffer from considerable inaccuracy, available figures indicate that over the decades intervening since the study, in all of the economies under discussion, stoppages diminished dramatically as a force that drives the adjustment of the social partners' interests. While that reduction

26. Benjamin Aaron, *Methods of Industrial Action*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 87–88 (Benjamin Aaron & K.W. Wedderburn eds., 1972).

27. Jacobs, *supra* note 16, at 578.

28. Hepple et al., *supra* note 17, ¶ 475, 477.

29. Aaron, *supra* note 26, at 123.

has been less dramatic in some of the countries than in others, the trend is the same.[30]

Although the extensive reliance on stoppages may have experienced a long term modification, this reduction, even if it continues, does not refute Aaron's observation respecting the fluctuating propensity of workers to strike. Fluctuation continues to characterize strike activities but there appears to be a generally reduced potency of the work stoppage weapon.[31] One explanation for this reduction was foreshadowed by Ramm's assertion that "the restrictive tendency of modern law must be regarded as an attempt to decrease the efficiency of industrial actions, or more specifically, of strikes."[32] That observation has been confirmed by the later development of the American law of strikes that reduced the ability of labor organizations to sustain work stoppage support.[33] For some countries, there is evidence that an additional factor is structural improvements in labor-management coordination.[34] The pressure of increased global competition likely is another force that has altered the overall pattern of stoppages because it presents workers with the added threat of seeing struck work exported.[35] Still another factor, especially in the United States, may be the increase in debt-financed consumer spending because it increases the striker's potential sacrifice by threatening loss of whatever equity has been invested or built-up in goods purchased on credit.[36] And, particularly in the United States, another deterrent to strikes may be the high degree of dependency upon employment-based medical insurance to meet the growing costs of such care for an aging workforce.[37]

Experienced commentators in the field of comparative labor law often warn that the various national approaches are not transferable. But as one authority explains: "This does not . . . mean that we cannot

30. Among the group of nations studied, the ILO Data Base on the number of stoppages excludes the United States and Germany. For the rest of the countries, if we compare the figure for 1975 with the most recent figure (2001 for France, 2003 for Italy, and 2004 for Sweden and Britain), for France the number of stoppages was 45% less, for Italy 80% less, Sweden almost 90% less, and Britain almost 95% less. Bureau of Labor Statistics data for stoppages involving 1,000 or more workers show that the number for 2003 was about 94% less than in 1975.

31. *Study Links Low Strike Level to German Bargaining System*, 382 EUROPEAN IND. REL. REV. 29, 32 (2005).

32. Ramm, *supra* note 23, at 279.

33. For example, Pattern Makers' League v. NLRB, 473 U.S. 95 (1985); Trans World Airlines v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989).

34. *Study Links Low Strike Level to German Bargaining System*, *supra* note 31, at 30.

35. *Id.*

36. Larry Moran & Clinton McCully, *Trends in Consumer Spending 1959–2000*, SURVEY OF CURRENT BUSINESS 18 (Mar. 2001).

37. Although a stoppage does not sever such insurance, it can shift the full burden of premium payments to the worker.

adopt solutions that have proved successful in other countries, nor that there is no case for introducing rules that will not be rejected, but integrated."[38] Moreover, when seeking analytical guidance, much can be gained from examining the reasoning others use for resolving similar problems no matter how different their legal systems. Accordingly, in early decades of American legal development, the bench often examined foreign decisions and treatises in their effort to reach sound decisions.[39] However, that practice disappeared long ago and for too many years, either due to American judicial arrogance or the impact of the narrow scope of our legal education system, American case decisions rarely draw upon foreign sources of analysis. Clearly, our failure to seek such guidance is a lost opportunity for improving our own jurisprudence.

For example, Guigni examined in some detail the issue of how the six different labor law systems provide for enforcement of statutory and contractual peace obligations, a question that often has been presented to the NLRB, judges, and labor arbitrators in the United States.[40] In addition to determining whether a peace obligation will be imposed as a matter of law, a labor law system must decide the extent to which it will enforce contractual obligations to refrain from stoppages, and, if enforceable, must also decide the degree of specificity required of a peace obligation to be enforced in particular circumstances.

Guigni stated that the law in Germany is guided by the related propositions that work stoppage is the weapon of last resort and a strike supporting a grievance "is deemed to be unlawful (under the doctrine of social adequacy (S*oziale adäquanz*)) in so far as other remedies are available, namely resort to Labor Courts."[41] He noted, too, that the U.S. Supreme Court reached an approach similar to that taken in Germany when it ruled that the mere presence of a contractual arbitration remedy that encompasses a grievance is sufficient grounds to imply a no work stoppage obligation.[42]

38. Roger Blanpain, *Comparativism in Labor Law and Industrial Relations*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 3, 18 (8th ed. 2004).

39. The issue of whether American courts should seek guidance from foreign authorities has been hotly debated in recent years. *See*, *e.g.*, the Court's opinion and Justice Scalia's dissent in Atkins v. Virginia, 536 U.S. 304 (2002). *See also*, Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INTL. J. CONST. L. 519 (2005).

40. *See*, *e.g.*, Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974).

41. Giugni, *supra* note 8, at 133.

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

Nevertheless, there are two important differences between these systems.

One difference is that in the United States a peace obligation with respect to grievances is contractual.[43] Therefore, once the Supreme Court decided what it will or will not imply from an arbitration provision, the parties were left with the power to negotiate out of or into the related peace obligation. Thus, while the choice made by the U.S. Supreme Court affected which party would have to extract the desired bargaining concession (a decision that, thereby, modified the respective bargaining power of the parties) to modify the arbitration provision's presumed effect, it was not imposing an indelible imprint on the relationship. Hence, the U.S. Supreme Court's intrusion into the law of labor-management relations was less of an imposition than had been that of the German Labor Court. Whether this difference in approach is related to the previously discussed difference in cultural orientation is a matter for speculation.

The other difference between the U.S. Supreme Court's approach and that of the German Labor Court is that in reaching its decision to find a peace obligation implicit in a contractual grievance-arbitration procedure, the U.S. Court did not rely on a doctrine of "social adequacy." Although Guigni did not specify what the German Court meant when it used that term, it can be described as a rule that is both acceptable to a maximum number in the target community and that caters to anticipated as well as present needs.[44] For an American this is an interesting concept since it reflects the common law notion that the judiciary should enforce those normative expectations that promote public interests.[45]

Had the U.S. Supreme Court borrowed the social adequacy doctrine as an analytic tool in weighing whether to find an implicit peace obligation, it would have had to weigh the extent to which such a rule is acceptable to a maximum number in the target community. If the target community is labor-management relations throughout the nation, the widespread practice of adopting such peace clauses could be used either to support the result reached, because the rule selected

43. The issue becomes more complex, of course, respecting interests disputes since LMRA § 8(d) imposes a statutory no stoppage obligation.

44. Nikki Slocum & Luk Van Langennove, *The Meaning of Regional Integration*, United Nations University, e-Working Papers W-2003/5 at 32. Manfred Weiss of the Universität Frankfurt am Main assured one of the authors that this is a good definition of the term as used by German labor courts.

45. It should be noted that Ramm, the German scholar in the Group, appeared to condemn the concept as nothing more than the Labor Court's assertion of final authority to judge the legitimacy of industrial actions. Ramm, *supra* note 23, at 277.

by the Court was consistent with the consensus, or to reject it on the ground that had the parties so intended, most likely they would have imitated the conduct of most others and included an express no stoppage provision in their contract. However, if, in applying the social adequacy approach the Court had found that the target community should be the particular industry, the facts may have supported a conclusion opposite to the one it reached since the worker in question was employed in a unit of drivers and warehousemen and was represented by the drivers' union, a union that had a reputation of relying on its economic power. Accordingly, it is possible that in that industry only a minority of contracts included a peace obligation.

Additionally, had the U.S. Supreme Court taken guidance from the concept of social adequacy, its analysis would have had to explore the realities of whether arbitration generally offers a socially adequate avenue for relief. Because, unlike a labor court system, in American labor arbitration the parties themselves pay its costs, in some instances financial pressures may leave union leaders of cash-strapped organizations feeling that arbitration is an undesirable avenue for relief. In such circumstances, financial realities can dictate abandoning meritorious grievances even though local indignations and sympathies regarding the grievance might sustain a walkout of several days or weeks. Accordingly, had the U.S. Supreme Court borrowed the German analytic approach to this issue, it possibly would have crafted a more nuanced decision rather than impose its broad brush blackletter rule of always implying a peace obligation that tracks the scope of the contractual dispute resolution mechanism.

Another aspect of the doctrine that there is a continuing relationship between striker and employer is the right of a striker to return to his or her work when the stoppage ends. Blanc-Jouvan observed that as a matter of judicial decision in France and Italy, lawful strikers are clearly protected from being permanently replaced for economic reasons, that this might be the law in Germany, and that it has been the contractual requirement under strike settlement agreements in Sweden. Blanc-Jouvan also noted the contrasting proposition under U.S. law that allows lawful strikers to be permanently replaced.[46] He did not explore the gap between the language of the governing American legislation and American judicial

46. Xavier Blanc-Jouvan, *The Effect of Industrial Action on the Status of the Individual Employee*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 206–09 (Benjamin Aaron & K.W. Wedderburn eds., 8th ed. 1972).

decisions that have substantially reduced the protection afforded organized labor in the United States.

Had Blanc-Jouvan examined the development of the American rule, he would have found that *in dicta* in *Mackay Radio*,[47] the Supreme Court assumed, without offering any analysis, that an employer can permanently replace lawful strikers. In so doing, the Court ignored NLRA section 7's broadly stated protection of concerted employee activities. Together with its companion provision of § 8(a)(1), on its face the Act prohibits an employer from imposing a disadvantage on someone who resorts to the concerted activity of striking since an employer who does not reinstate a returning striker penalizes the worker for exercising the protected right to act in concert for mutual aid. The Court's underlying explanation in *Mackay*, which was announced without explanation based on the statutory language or history, asserted that the Act entitles an employer to keep its business operating during a strike.[48] Nor did the Court examine the proposition that, even if an employer can try to continue to operate during a work stoppage, the employer ought to have the burden of demonstrating that the only way it can keep its business operating is if it hires permanent replacements.

But, as observed, the U.S. Supreme Court has rarely sought guidance from labor law doctrines developed in other countries. Thus, it has not noted the alternative conclusions reached in other labor law systems that have explored the logical extensions of the proposition that a striker's employment is in a state of suspension. Had it done so in its later decisions in which it elevated the *Mackay* "rule" to holding,[49] perhaps the U.S. Court would have used a more exacting logic and, in the name of NLRA section 7 rights and the stated purposes of the Labor Relations Act, would have paid greater attention to the realities of relative economic strength and the potentially devastating impact of striker replacement upon the ability of employees to organize and sustain labor organizations.

Another aspect of the same discussion of the peace obligation provides an added lesson in how comparative law helps us learn from others. An especially interesting observation offered by Guigni was that there might be a relationship between the way legal thinkers

47. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

48. Fragments of the legislative history, drawn from statements of some who helped bring about the statute's adoption, supports the Court's interpretation. However, they were not cited or discussed by the Court. Julius Getman & Thomas Kohler, *The Story of* NLRB v. MacKay Radio & Telegraph Co., *in* LABOR LAW STORIES 13, 19, 25–26 (Laura Cooper & Catherine Fisk eds. 2005).

49. Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

conceptualize issues in different countries and the rules they follow. He noted that in Sweden and Germany, where creating and maintaining a cooperative relationship between labor and management are highly valued, commentators are comfortable with the term "peace obligation," whereas in France and Italy, where notions of class struggle play a larger role among legal thinkers, the preferred term is "truce clause." Similarly, while Germans (and Americans) perceive the changed terms of a collective agreement as a compilation of the exchanges made to resolve the parties' conflicts, in Italy the changed terms of a collective agreement are perceived as the exchanges made to resolve only the most recent conflict.[50]

Therefore, as Guigni revealed, searches for semantic clues that accompany different labor law approaches can offer insights not only into how we differ but also to how we might change. For example, elsewhere it has been argued that to attain or sustain industrial democracy it would be preferable to speak not of collective agreements but of "jointly promulgated codes" of employment standards and relations.[51]

Among the problems common to any system of labor law is the issue of how to measure damage remedies that are afforded when one side or the other breaches its statutory or contractual obligations. Whether constraints should be imposed on damages in labor disputes can be viewed as a reflection of whether the system's goal includes allowing the parties free range to destroy one another in their effort to achieve momentary equilibrium in a free market struggle, or whether the goal is to achieve an atmosphere of cooperation so as to maximize mutual interests.

At an early stage, American attitudes toward remedies in labor disputes were influenced by the experience of the *Danbury Hatters* case in which, under antitrust law, a union was held liable for treble damages because it had urged consumers to boycott stores that sold hats manufactured by a company whose workers the union was trying to organize. Steps were taken to enforce the large damages judgment against individual union members and their financial dilemma was relieved only through a national campaign to raise voluntary contributions that saved them from foreclosure of their savings accounts and homes.[52] Ramm's chapter contained an extended

50. Giugni, *supra* note 8, at 169–70.

51. Alvin Goldman, *Industrial Democracy: Slogan or Metaphor?*, *in* LABOR LAW AND INDUSTRIAL RELATIONS AT THE TURN OF THE CENTURY 747 (C. Engels & M. Weiss eds. 1998).

52. Loewe v. Lawlor, 208 U.S. 274 (1908); WALTER MERRITT, DESTINATION UNKNOWN: FIFTY YEARS OF LABOR RELATIONS 24 (1951).

analysis of this problem in which he observed that damages actions have diminished in importance in the studied countries largely because "the real economic losses caused by an industrial action are never paid and mostly they are not even demanded."[53] Nevertheless, although damages actions are often used primarily as a means of obtaining a declaration of respective legal rights, the potential of such suits poses a Sword of Damocles in the parties' bargaining relationship.[54] Although the law in most of the countries imposes liability only for proven material damages, in Sweden damages can include personal suffering and other consequential injuries.[55]

Ramm expounded that in such cases the trier of fact should look at the business realities—what effect, if any, did the stoppage have over time on the enterprise's ability to sell its product or services to customers? That is, if the stoppage merely delayed fulfilling demand, there has been little or no loss. Similarly, if contract performance has been excused by a legal or contractual waiver of liability to customers for work stoppage disruptions, there may not have been a loss. By judicial decision, legislation, or collective agreement, in some jurisdictions a cap was placed on liability in relation to the size of the judgment debtor labor organization's membership.[56] In Sweden and Germany damages liability for illegal stoppages was available against individual employees and employers. However, in Sweden there was a cap on an individual employee's liability and in Germany employers were reported to be reluctant to collect such damages.[57] In Germany that reluctance appears to be unchanged.[58] Similarly, although Swedish law removed the cap on an individual employee's damages in 1992, in practice the amount imposed appears to continue to be restricted to considerably less than actual damages.[59]

In his comparative essay, Ramm posed some interesting contrasts. For example, while U.S., British, German, and Italian law condemn sit-down strikes, they were legally tolerated in France (and by some Italian courts) if the workers simply remained in the workplace. This was explained on the ground that in France the

53. T. Ramm, *The Legality of Industrial Actions and the Methods of Settlement Procedure*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 255, 306 (Benjamin Aaron & K.W. Wedderburn eds., 8th ed. 1972).

54. Ramm provided some German examples. Ramm, *supra* note 23, 306–07.

55. *Id.* at 307.

56. *Id.* at 310.

57. *Id.* at 311–12.

58. Weiss & Schmidt, *supra* note 9, ¶ 431.

59. Aldercreutz, *supra* note 13, ¶ 607.

perception of trespass involves coerced entry.[60] More recently it has been reported that sit-ins in France are permitted if short-lived and the workers leave at the end of work hours, but not if it is a permanent occupation of the premises.[61] And, in Italy, although sit-ins are illegal and subject to forced ejection, criminal penalties are reserved to those instances in which the occupation of an employer's premises is of prolonged duration.[62]

Wedderburn's discussion of the place of political strikes offers another interesting contrast in approaches, a contrast that might provide a foundation for reexamining the verities of an established doctrine of American labor law—the status of political strikes. One difficulty Wedderburn noted is the problem of distinguishing political from economic strikes.[63] In the late 1960s and early 1970s, advanced economies were experimenting with a variety of techniques to control inflation and expand employment. The resulting national policies had a considerable potential negative impact on worker earnings that caused workers and labor organizations to seek effective ways to express their displeasure. In some of the countries studied, brief stoppages protesting these policies were tolerated regardless of whether they technically were unlawful.[64]

Although political strikes seldom have been used in the United States, it is generally accepted that they are unprotected. Hence, employees can be dismissed for engaging in such strikes, under some circumstances the strike can be enjoined, and participants may be subject to damages liability.[65] But should that always be the case? Perhaps, here, too, our judiciary should borrow a page from the law of other nations. Why should there not be room in our law for the underprivileged, including workers, to use short, peaceful mass stoppages to symbolically but effectively reveal to political leaders (and their political campaign financiers), the level of discontent with particular government policies? As a society, have we not gained from the impact of mass demonstrations that focused attention on the

60. Ramm, *supra* note 23, at 275.

61. Despax & Rojot, *supra* note 16, at ¶ 666.

62. Treu, *supra* note 15, ¶ 509.

63. K. Wedderburn, *Industrial Action, the State and the Public Interest*, *in* INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 321–42 (Benjamin Aaron & K.W. Wedderburn eds., 8th ed. 1972).

64. *Id.* at 325, 334, 338.

65. The most recent U.S. Supreme Court decision respecting political strikes involved a less than typical use of the mechanism since the protest was in support of national policy. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association, 457 U.S. 702 (1982) (longshore workers, protesting the Soviet invasion of Afghanistan, refused to handle cargo from Russian ships).

injustices of racial and gender discrimination, the inadequacies of environmental protections, the mistreatment of homosexuals, or the misuse of the nation's military might? Although they may have broader purposes than improving wages, hours, and working conditions, cannot such protests be said to involve concerted employee activity for "other mutual aid or protection" and, therefore, be within the scope of the rights guaranteed by NLRA Section 7?

III. THE GROUP'S INFLUENCE ON COMPARATIVE LABOR RESEARCH

One would have expected the richness of the information, ideas, and paradoxes presented by the Comparative Labor Law Group's publications to have stimulated extensive interest in generating further work of this sort. In the decades that followed there probably has been an increase in the numbers of American law teachers who occasionally have studied other labor law systems. This, of course, is the starting point for comparative work. Very few, however, have undertaken to expand their efforts into analysis that compares, contrasts, assesses, and attempts to discern "why the differences." In an effort to ascertain just how much work of this sort is being done, one of the authors surveyed publications by American labor and employment law professors for the past ten years.

An initial list was compiled by selecting every eighth person listed as a labor law teacher for six or more years in the *AALS Directory of Law Teachers* from 1995 to 2005. A ten-year published literature[66] search was made for the resulting thirty-five individuals. After deciding that a larger sample was desired, another list was compiled by removing the names of the thirty-five already sampled teachers and selecting every sixth person from the remaining list, and a ten-year published literature search was then conducted for these labor law teachers. As a result, the published literature search was done for a total of seventy-four listed labor law teachers. The literature search was conducted using the Westlaw, Lexis, LegalTrac, WorldCat, Index Master, and Google Scholar databases.

Of the total of 424 publications,[67] 230 appeared to be labor or employment law related.[68] Of these, only 30 appeared to involve discussion of comparative labor law, international labor standards, or

66. Included were text and course books, book chapters, articles, and reviews.
67. An average of 5.73 publications per teacher over the ten year period.
68. An average of 3.11 publications per teacher over the ten year period.

the effects of globalization of labor markets.[69] Thus, the survey indicates that the latter category constituted only 13% of labor and employment law publications during the past decade.

With today's increased focus on transnational transactions and their affect on labor relations and employment conditions, there obviously is greater need for scholars to produce meaningful comparative studies and provide intensive comparative analysis of the law of work. Why is this not being done? While academic leaders of Aaron's quality may be rare, surely they have not disappeared. Rather, the explanation for the lack of American replications of projects similar to the Group's effort may in part be found in the dual career track of contemporary family life that further burdens the ability of scholars to commit to the extended away-from-home stays needed to maintain the sort of work efforts required to produce work products similar to those of the Comparative Labor Law Group. One means of partially overcoming that problem would be to link the opportunities to teach in summer-abroad student study programs, with their shorter overseas stays, to participation in appropriate multinational research projects.

Another cause of the difficulty in developing substantial new comparative labor law projects requiring long term commitments is to be found in the priorities too many law schools now give to improving their positions in the senseless law school rankings. The resulting mass mailings of annual faculty publications and guest speaker lists, and adoption of bean-counting productivity pressures imposed by what have become typical methods of annual merit evaluations favor short term projects and are a distraction and distortion of the scholar's mission and a waste of scarce resources. One can only hope that time and the failure of such "self-improvement" efforts will wilt attempts to displace true quality with marketing perceptions of the real thing.

69. The publication categories were determined largely by title. Where titles were considered to be ambiguous, a quick content check was made to ascertain whether there was a significant use of comparative or international materials or analysis or discussion of the effects of market globalization.