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Foreword: Foreword

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What follows is a conversation—rich in analytical detail, subtle in argument, and mostly among friends—about the legal future of employee representation. All the participants agree that a need for effective representation exists; the question is how best to fill it in an economy in which a variety of factors have combined to dampen resort to collective bargaining, the only model of representation the law currently requires. What, as Michael Gottesman puts it,[1] is a labor law for the unorganized?

Why employees should be able to secure representation if they desire—as expert as possible and with as little cost or delay as necessary—was captured by the United States Supreme Court in addressing the rights of the industrially accused: "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors."[2] Yet the only alternative available to the unrepresented, namely individual self-representation, expects the single at will employee—intelligent but inexpert, perhaps inarticulate, and quite possibly a little diffident in the face of authority—to deal knowledgeably and confidently with her employer. With whom is the employee expected to deal and about what? With a manager of employee benefits concerning the actuarial bases for contributions to her pension? With a manager of industrial health and safety concerning the toxicology of substances to which she might be exposed? With a manager of human resources over the reliability of a psychological test she might be required to take? With an officer of industrial security concerning the factual basis for her discharge?

The authors assay a range of legal choices. One option, supported by Samuel Estreicher,[3] viewed skeptically by Clyde Summers,[4]

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1. Michael Gottesman, *In Despair Starting Over: Imagining A Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 70 (1993).

2. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 262-63 (1975).

3. *See* Samuel Estreicher, *Labor Law Reform in A World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993).

refined by Alan Hyde,[5] and favorably commented upon by Joel Rogers[6] and Michael Gottesman, concerns a relaxation of the company union prohibition of section 8(a)(2) of the National Labor Relations Act.[7] Professor Estreicher points to three changes in the workforce and the workplace as setting the stage for a lessening of the restraints on employee participative plans, so long as the plans are not sham arrangements to avoid traditional unionization:

> From the perspective of a predominantly nonunion work force, it [the law] affirmatively discourages what the law should encourage: enhanced employee voice in nonunion shops. Moreover, under current social conditions—a better educated workforce, minimum wage and other protective legislation, and a rights-conscious legal culture — it is doubtful that permitting employers to institute consultative arrangements or to use employee representatives in grievance procedures would have the effect of preventing employees from making an uncoerced decision over whether they wish to be represented by an independent union.[8]

Though Estreicher and several of the contributors deal with global economic change, which has affected the United States, some prefatory comment on these three conditions will place the larger conversation in a domestic context. Today's workforce is better educated than the workforce of the fifties, at roughly the apogee of union density, as the data supplied in Table 1 shows:

TABLE 1
EDUCATIONAL ATTAINMENT OF THE LABOR FORCE
1959-1991

Year	Labor Force Total (in thousands)	Percent Distribution					Median School Years Completed
		elementary	high school		college		
		0-8	1-3		1-3	4 or more	
1959	65,842	30.5	19.8	30.7	9.3	9.6	12.0
1969	76,753	18.6	17.8	38.4	12.6	12.6	12.4
1979	103,478	8.9	16.0	39.9	17.6	17.6	12.6
1991	116,886	4.6	9.8	39.0	22.1	24.5	12.9

Source: U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES Table 6.1 (1992); NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPT. OF EDUCATION, DIGEST OF EDUCATION STATISTICS Table 364 (1992).

4. *See* Clyde Summers, *Employee Voice and Employer Choice: A Structural Exception to Section 8 (a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

5. *See* Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993).

6. *See* Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97 (1993).

7. National Labor Relations (Wagner) Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988).

8. Estreicher, *supra* note 3, at 24, 25.

Over the past three decades the significant component of the workforce that had only an elementary education has evaporated, and the percentage of college graduates has more than doubled. Thus if one assumes that those with truly advanced educations—for example engineers and computer scientists—are better able to discern real participation and to discount its sham, it may be that the law should take account of this heightened level of formal educational attainment. But the quality of contemporary postsecondary education, no less than secondary education, has not wanted for critics;[9] and it is not at all obvious that because the median component of the workforce is now composed of persons with a year of postsecondary education, one should presume the workforce as a whole to possess greater discernment.

Clyde Summers argues that unless operational constraints are placed upon a loosening of section 8(a)(2), many employees will be deceived or be left with a shell of representation.[10] But Joel Rogers, Alan Hyde, and Michael Gottesman argue that so long as an uncoerced choice for participation in management-sponsored bodies is made, there is no reason for the law to intervene. Does it follow that because employees are better educated, assuming that to be so, they are also more autonomous, are freer to accept or reject an employer sponsored system?

However, Estreicher also points out that labor protective law has increased significantly, presumably militating toward greater employee independence. Since the fifties, Congress has enacted sweeping antidiscrimination in employment laws, welfare and pension benefits protections, occupational safety and health laws, and a cluster of discrete whistleblowing and antiretaliation laws. Federal law has regulated wage assignment, discharge for garnishment, interception of telephone communications, and the use of polygraphs. It has provided for notice of plant closings or mass layoffs, and required the granting of family and medical leave. State laws have paralleled the growth of federal labor protective law. To take the domestic jurisdiction as illustrative, by the fifties Illinois, like a great many states, had come to regulate wage payment and assignment, occupational health

9. *See, e.g.*, Denise K. Magner, *A Biting Assessment: A Report Chides Colleges for Neglecting Undergraduate Education*, CHRON. HIGHER EDUC., Dec. 8, 1993, at A26 (covering a report issued by the Wingspread Group on Higher Education decrying undergraduate education that produces too many graduates who "cannot read or write very well, too many whose intellectual depth and breadth are unimpressive, and too many whose skills are inadequate in the face of the demands of contemporary life.").

10. Summers, *supra* note 4, at 139.

and safety, child labor and homework, and to provide workers unemployment compensation. Today Illinois also regulates employee access to personnel documents maintained by the employer, whistleblowing, the use of lawful products off the premises (that is, tobacco and alcohol), and smoking in the workplace. In addition, Illinois' courts have recognized employee dignitary interests as a matter of common law. To return to the industrially accused, an employer may conduct an interrogation of an employee suspected of theft in such a manner as to render the employer liable for the wrongful infliction of emotional distress.[11]

These protections, however, often technical and legally complex, depend for their vindication upon the imponderable of the individual's ability to retain counsel. Thus Michael Gottesman explores the possibility of employees contracting with "service providers," who have "the expertise to understand the complex information and the pertinent legal constraints applicable to many of the subjects embraced by the employment relationship,"[12] to deal with their employers. But he shrinks from requiring employers to deal with them. That, he recognizes, would be a form of nonmajority representation; an idea I play out statutorily, that Joel Rogers discusses sympathetically, and that Alan Hyde develops creatively. Estreicher objects to "'watchdog' committees serving as in-house instruments of state policy,"[13] but he does not expand upon his objection. Employee-generated committees or employee subscription to a service provider would not be called into being by the State, nor would they be acting for it. Employees, by joining or subscribing, would be acting on their own felt needs and interests, the importance of which the State may have acknowledged by legislation or common law.

Estreicher also mentions the related emergence of a "rights-conscious legal culture."[14] But as the discussion of service providers evidences, the question is of how best to vindicate those rights. It remains to be seen how effective occasional litigation, or the prospect of litigation, is given the imponderable of the availability of counsel. And even assuming the individual employee is able to secure legal counsel, absent insulation for that resort an employee who insists upon legal representation—or who retains counsel in the face of po-

11. National Loss Control Serv. Corp. v. Dotti, 467 N.E.2d 937, 942 (Ill. App. Ct. 1984).
12. Gottesman, *supra* note 1, at 80-81.
13. Estreicher, *supra* note 3, at 29 n.95.
14. *Id.* at 25.

tential adverse action by the employer—is left helpless for having made that resort.[15]

A partial difficulty in the conversation on the "company union" question is the more or less interchangeable use of words—participation, representation—that may have different meanings. The idea of representation, as the image of the industrially accused conjures up, is grounded on a potential conflict of interest and a disparity between the employee and the employer in economic resources and expertness; on the need of an individual employee for protection from her employer. The idea of participation, drawing upon the theory and practice of human resource management, seeks to enlist the employee—to "tap the insights and ingenuity of the workforce"[16]—in improving the efficiency of the firm and the quality of the product. But Marc Linder has recently reminded us of Philip Selznick's admonition of two decades ago—that "to think of a man as a 'human resource' is to affront his personality."[17]

To Peter Sherer, writing from the vantage point of industrial relations—and human resource management (HRM)—the watchword of the law should be "flexibility." He discusses the variety of ways people are today engaged for the production of goods and services—one dare not say "employed," for that assumes a legal category (and conjures up the image of an on-going relationship) that has often been replaced by independent contractors, leased workers, homeworkers and contingent employees. Even the distinction between representation ("voice") and participation ("work") is collapsing.[18] The law, he argues, should accommodate a variety of models of representation; and he seems as sympathetic to internal participative plans as to external service providers—so long as there is a suitable fit.[19]

Sherer makes a powerful case, rooted in the realities of late twentieth century capitalism. But one still has to ponder whether there is a

15. An employee who appears at a disciplinary interrogation accompanied by counsel has no right under the National Labor Relations Act to insist upon the presence of counsel. TCC Ctr. Co., 275 N.L.R.B. 604, 609 (1985). Neither would such insistence be protected under state law. Winkley v. Bristol-Myers Squibb Co., 793 F. Supp. 738, 741 (E.D. Mich. 1992). In fact, an employee accused of sexual harassment may be discharged for having retained counsel to defend him against the charge. *See* Erickson v. Marsh & McLennan Co., 569 A.2d 793, 804 (N.J. 1990).

16. PAUL C. WEILER, GOVERNING THE WORKPLACE 192 (1990).

17. Marc Linder, *Governing the Workplace: The Future of Labor and Employment Law*, 9 LAW & INEQ. J. 343, 353 (1991) (book review) (quoting PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 96 (1969).

18. Peter D. Sherer, *Reflections on Employee Voice and Representation for the Future*, 69 CHI.-KENT. L. REV. 249, 250 (1993).

19. *Id.* at 257.

normative role for law in the matter of representation. Since the publication of Selznick's words, we have witnessed the rise of efforts to create comprehensive corporate cultures. Some managements have labored systematically to drench employees in a corporate ideology, not only to keep unions out, but of employees unlikely to unionize—the very engineers and computer scientists adverted to earlier—to internalize a complete identification with the company. Gideon Kunda sees these efforts as the culmination of a historical trend in managerial theory:

> [S]haping the employees' selves in the corporate image is thought to be necessary in order to facilitate the management and increase the efficiency of large-scale bureaucratic enterprises faced with what the managerial literature refers to as "turbulent environments": rapid technological change, intense competition, and a demanding and unpredictable labor force.[20]

Are the practical consequences of these efforts—"a sort of creeping annexation of the workers' selves"[21]—of societal concern? Apart from whether or not these pervasively propagandized employees are truly "free" actors, should the law carve out an area exempt from managerial control, for employees to speak and act on matters of workplace concern through means completely independent of company sponsorship or participation?

Tom Kohler takes a very different perspective, that of a general degradation of what he terms "mediating institutions"[22] in the larger society. He reminds us of the importance not of individual but of collective activity, of the imperative role of sodalities, including unions, in the Nation's social fabric. Consequently, he distinguishes meaningful participation from "dropping a check in the mail."[23]

There is no doubt that the coming together of diverse members of the community in the making of a common cause is indispensable for effective social and political action. Indeed, the establishment of in-

20. GIDEON KUNDA, ENGINEERING CULTURE: CONTROL AND COMMITMENT IN A HIGH-TECH CORPORATION 13 (1992).

21. *Id.* at 12.

22. Thomas Kohler, *The Overlooked Middle*, 69 CHI.-KENT L. REV. 229, 235 (1993).

23. *Id.* at 238. It should be noted that sodalities can also work to maintain the social and economic status quo. Cincinnati's fraternal organizations of the 1850s, the Odd Fellows, Masons, and Red Men, though voluntary organizations, were dominated by the well-to-do and "served as social mechanisms for inculcating men with the dominant ideals of hierarchy, deference, temperance, and self-discipline." STEVEN J. ROSS, WORKERS ON THE EDGE: WORK, LEISURE, AND POLITICS IN INDUSTRIALIZING CINCINNATI 1788-1860, at 165-66 (1985). So too did organized religion sometimes offer contending ideas on class loyalty. *Id.* at 166. *See also* DAVID G. HACKETT, THE RUDE HAND OF INNOVATION: RELIGION AND SOICAL ORDER IN ALBANY, NEW YORK 1652-1836 (1991).

dustrial labor unions is the product of just such a phenomenon.[24] From that standpoint, Kohler makes a persuasive argument that mere subscription to a service provider is a poor substitute at best for active collective engagement. But the human desire for respect and equality in the employment relationship has been a consistent theme in the emergence of wage labor.[25] Would requiring an employer to deal with the employee's chosen representative—even a lawyer paid by subscription—not conduce toward that end?

Sanford Jacoby sounds a sobering note of political reality: He doubts the prospect of any significant legislative reform, as has Willard Wirtz.[26] Wirtz argues that much could be done without legislation, with special emphasis on the leadership role of the federal government. And Martin Malin reminds us at the close of this Symposium of the ongoing even if diminished importance of the Labor Act, with a couple of helpful hints for its better administration in the matter of representation.[27] But the conclusions to be drawn from the economic diagnoses of Jacoby and the other contributors is bleak, whence Jacoby's jeremiad: "What is needed . . . is less imagination and more practicality."[28]

Does our failure adequately to take account of the political realities render this conversation, pejoratively, an "academic" exercise?

24. Such is the thrust of a superb study, *see* LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO 1919-1939 (1990).

25. This has been so from the "manly" artisan of the New Republic to the deskilled industrial operative of a century later, as a random snapshot of occupational studies across this period to time will show. *See, e.g.*, SUSAN PORTER BENSON, COUNTER CULTURES: SALES WOMEN, MANAGERS, AND CUSTOMERS IN AMERICAN DEPARTMENT STORES, 1890-1940, at 138 (1986) (persistent complaints about fines imposed on employees evidence that "managers did not easily learn the lesson of more respectful conduct toward their employees."); EDWIN GABLER, THE AMERICAN TELEGRAPHER, A SOCIAL HISTORY, 1860-1900, at 165 (1988) (describing a consequence of the 1883 strike, one telegrapher told a journalist, "'We were formerly spoken to as if we were a lot of animals; but we can talk to the chief operators without falling on our knees . . . .'"); MARK A. LAUSE, SOME DEGREE OF POWER: FROM HIRED HAND TO UNION CRAFTSMAN IN THE PREINDUSTRIAL AMERICAN PRINTING TRADES, 1778-1815, at 119 (1991) (noting that journeymen printers "began with the egalitarian premise that they should be treated as their employers' equals . . . ."); MARC LENDLER, JUST THE WORKING LIFE: OPPOSITION AND ACCOMMODATION IN DAILY INDUSTRIAL LIFE 102 (1990) (study of one company's workforce in the 1970s reporting that a substantial number want "'respect'" in the employment relationship); DAVID A. ZONDERMAN, ASPIRATIONS AND ANXIETIES: NEW ENGLAND WORKERS AND THE MECHANIZED FACTORY SYSTEM 1815-1850, at 113 (1992) ("One theme that continually emerged in the operatives' critiques was that of factory 'tyranny.' These workers saw the hierarchial system of authority as a threat to the American republican ideals of justice and equity.").

26. *See* Sanford Jacoby, *Reflections on Labor Law Reform and the Crisis of American Labor Law*, 69 CHI-KENT L. REV. 219 (1993); Willard Wirtz, *Labor Unions: Not Well But Alive*, 69 CHI.-KENT L. REV. 259 (1993) (reviewing CHARLES B. CRAVER, CAN UNIONS SURVIVE? (1993)).

27. Martin Malin, *Afterword: Labor Law Reform: Waiting for Congress?*, 69 CHI.-KENT L. REV. 277 (1993).

28. Jacoby, *supra* note 26, at 227.

Jacoby confronts us with the difficult question of the role of scholars when off on reform.

In the Foreword to an earlier labor law symposium, Paul Hays warned that too much labor law scholarship was unconnected to the problems of the real world.[29] But Jacoby's criticism is different. We have attended to real problems, but we have failed in "calibrat[ing the] political feasibility" of our solutions.[30] Maybe so. But politically infeasible ideas, even thought chiliastic at one time may become commonplace by another.[31] Whether they become so or not depends upon an interaction of political and social forces—the arrival of an historical moment—over which the scholar has little influence and, perhaps, less foresight. Should the scholar, as must the politician, tailor his prescription to the prevailing political realities which, if un-

29. Paul R. Hays, *Foreword*, 59 COLUM. L. REV. 1 (1959).

30. Jacoby, *supra* note 26, at 229.

31. The "Platform of the Socialistic Labor Party" of 1883 pronounced the following "social demands":

> 1. The United States shall take possession of the railroads, canals, telegraphs, telephones, and all other means of public transportation.
> 2. The municipalities to take possession of the local railroads, of ferries, and of the supply of light to streets and public places.
> 3. Public lands to be declared inalienable. They shall be leased according to fixed principles. Revocation of all grants of lands by the United States to corporations or individuals, the conditions of which have not been complied with or which are otherwise illegal.
> 4. The United States to have the exclusive right to issue money.
> 5. Congressional legislation providing for the scientific management of forests and waterways, and prohibiting the waste of the natural resources of the country.
> 6. The United States to have the right of expropriation of running patents, new inventions to be free to all, but inventors to be remunerated by national rewards.
> 7. Legal provision that the rent of dwellings shall not exceed a certain percentage of the value of the buildings as taxed by the municipality.
> 8. Inauguration of public works in times of economical depression.
> 9. Progressive income tax and tax on inheritances; but smaller incomes to be exempt.
> 10. Compulsory school education of all children under fourteen years of age, instruction in all educational institutions to be gratuitous, and to be made accessible to all by public assistance (furnishing meals, clothes, books, etc.). All instruction to be under the direction of the United States and to be organized on a uniform plan.
> 11. Repeal of all pauper, tramp, conspiracy, and temperance laws. Unabridged right of combination.
> 12. Official statistics concerning the condition of labor. Prohibition of the employment of children in the school age, and the employment of female labor in occupations detrimental to health or morality. Prohibition of the convict labor contract system.
> 13. All wages to be paid in cash money. Equalization by law of women's wages with those of men where equal service is performed.
> 14. Laws for the protection of life and limbs of working people, and an efficient employer's liability law.
> 15. Legal incorporation of trades-unions.
> 16. Reduction of the hours of labor in proportion to the progress of production; establishment by Act of Congress of a legal work-day of not more than eight hours for all industrial workers, and corresponding provisions for all agricultural laborers.

Reprinted in RICHARD T. ELY, THE LABOR MOVEMENT IN AMERICA 366, 368-70 (1886).

promising, is to seek little for the little to be sought? Or does the University not also serve by being "an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world."[32]

32. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* FREEDOM AND TENURE IN THE ACADEMY 391, 400 (W. Van Alstyne ed., 1993).