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Industry and Humanity Revisited: Everything Old is New Again: Review of Paul C. Weiler, Governing the Workplace

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BOOK REVIEWS
CHRONIQUE BIBLIOGRAPHIQUE

Pauline Lesage-Jarjoura, *La cessation de traitement : au carrefour du droit et de la médecine*, Cowansville, Yvon Blais, 1990. Pp. 246 [32,50$]. Commenté par Isabelle Panisset*

Depuis plusieurs années, l'euthanasie active ou passive et la cessation de traitement, ont suscité de nombreuses discussions tant éthiques que légales et demeurent sources d'incertitude quant au comportement médical à adopter.

Ce sujet provoque l'expression d'opinions fortement opposées, sinon inconciliables. Qu'il s'agisse des croyances religieuses ou des positions philosophiques face à la vie et à la mort, il est très difficile d'arriver à un consensus sur ce sujet, tant sur les plans éthique que médical. On peut cependant aspirer à la naissance d'une approche éthique pluraliste, si non homogène, pour tendre à une responsabilisation individuelle et collective à l'égard de la valeur donnée par la société à la vie humaine[1]. L'avancement de la science médicale et de la technologie biomédicale a contribué à modifier les attitudes populaires face à la vie, la maladie et la mort. Cette évolution a donné lieu au prolongement de la vie de malades autrefois condamnés, ainsi qu'au concept d'acharnement thérapeutique qui entraîne inévitablement le sujet de la cessation de traitement[2].

La notion de cessation de traitement s'insère également dans la philosophie d'une éthique utilitariste à l'égard de la distribution des soins de santé qui donne préséance au bien-être collectif au détriment de l'individu pour tenter de répondre aux impératifs économiques du système de santé[3]. À cet égard, la récente parution du livre *La cessation de traitement : au carrefour du droit et de la médecine*[4] de Pauline Lesage-Jarjoura arrive à point au moment où l'on revendique le droit du patient en phase terminale de refuser des traitements qu'il juge inutiles, et le droit de mourir dans la dignité.

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[1]G. Bourgeault, *L'éthique et le droit face aux nouvelles technologies biomédicales*, Montréal, Presses de l'Université de Montréal, 1990 aux pp. 154-55.

[2]H. Doucet, « L'euthanasie un concept piégé » (1990) Frontières 6 à la p. 7.

[3]G. Mooney et U.J. Jensen, « Changing Values and Changing Policy » dans U.J. Jensen et G. Mooney, éd., *Changing Values in Medical and Health Care Decision Making*, Chichester, John Wiley & Sons, 1990 aux pp. 182-83.

[4]P. Lesage-Jarjoura, *La cessation de traitement : au carrefour du droit et de la médecine*, Cowansville, Yvon Blais, 1990 [ci-après *La cessation de traitement*].

Le livre de Lesage-Jarjoura poursuit la discussion entamée par la Commission de réforme du droit du Canada en 1982[5], relative à la fin de vie mais cette fois limitée à la cessation de traitement en milieu hospitalier. L'auteure distingue la cessation de traitement de l'euthanasie en ce qu'elle considère la première comme un « abrègement du processus de mourir » et la seconde comme un « abrègement de la vie »[6].

Le but de ce livre n'étant pas de faire une analyse exhaustive du droit en matière d'interruption de traitement, Lesage-Jarjoura, médecin de profession, a voulu exposer les tendances médicales et juridiques que l'on retrouve au Canada et au Québec, dans le but de préciser les différents aspects de la cessation de traitement et ainsi tenter de faciliter le processus décisionnel médical. Son analyse se limite aux adultes capables et incapables, atteints d'une maladie terminale, incurable ou en état neurovégétatif. Fortement influencée par les opinions médicales et légales américaines, l'auteure veut

> exposer quelques lignes directrices, susceptibles d'orienter le clinicien et au besoin le juriste dans le processus décisionnel en regard de la cessation ou l'abstention de traitement[7].

L'abondance de la documentation américaine sur le sujet a incité l'auteure à s'inspirer fortement des décisions judiciaires et de la littérature américaines l'identifiant comme source à laquelle les législateurs et tribunaux canadiens pourraient puiser des solutions et comme fondement pour établir le droit de l'avenir.

L'étude proposée par Lesage-Jarjoura complète le travail déjà effectué par la Commission de réforme du droit du Canada en ce qu'elle analyse plus avant l'interruption de traitement, sujet que la Commission de réforme du droit du Canada avait abordé auparavant[8]. Ce livre se divise en trois parties : une première partie décrit des notions préliminaires qui se rattachent au contexte de la cessation de traitement ; une seconde partie analyse le droit de refus du point de vue du patient et enfin une troisième partie fait état du rôle du médecin dans la perspective du droit de refus exprimé par le patient et dans la décision de cesser les traitements.

Dans une première partie, l'auteure souligne, dans son chapitre premier, l'importance des notions du caractère sacré de la vie, de la qualité de la vie ainsi que du respect dû à l'individu pour lui permettre de mourir dans la dignité.

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[5]Commission de Réforme du Droit du Canada, *Euthanasie, aide au suicide et interruption de traitement*, Document de travail 28, Ottawa, Ministère des Approvisionnements et Services Canada, 1982.

[6]*Supra*, note 4 à la p. 30.

[7]*Ibid.* à la p. 4.

[8]*Supra*, note 5 ; Commission de Réforme du Droit du Canada, *Euthanasie, aide au suicide et interruption de traitement*, Rapport 20, Ottawa, Ministère des Approvisionnements et Services Canada, 1983.

Dans un deuxième chapitre, elle définit ce que l'on entend par cessation de traitement dans le but de situer le lecteur et d'identifier les enjeux particuliers. L'auteure distingue la cessation de traitement de l'euthanasie. Dans le cadre particulier de la cessation de traitement, le malade est dans une situation irréversible face à laquelle la médecine est impuissante si ce n'est que pour lui fournir des « traitements de soutien » ou en d'autres termes des moyens pour soulager sa douleur ou lui garantir un minimum de confort et lui permettre de mourir dans la dignité. L'euthanasie se distinguerait de la cessation de traitement en ce qu'elle « consiste en un abrègement de la vie et la cessation de traitement, en un abrègement du processus de mourir »[9]. Il s'agit en fait de l'interruption de traitements considérés médicalement inutiles pour le patient.

Un passage intéressant sur la définition de la mort fait ressortir toute l'ambiguïté de la situation des patients en état neurovégétatif. En effet, comme le souligne l'auteure, le standard actuellement reconnu par les médecins ainsi que par les tribunaux est la mort cérébrale, c'est-à-dire

> l'arrêt des fonctions corticales et du tronc cérébral, ce qui se traduit par deux pertes irréversibles : perte de la capacité d'intégration et d'interaction, perte de conscience et perte de la capacité respiratoire[10].

Elle ajoute cependant que cette définition de la mort ne répondrait pas à la situation sociale particulière des patients en état neurovégétatif médicalement désignée mort corticale. Ces patients sont privés d'une vie relationnelle et affective mais conservent une vie biologique. Il n'existe pas de consensus face à la position à prendre à l'égard de cette dernière définition de la mort. Comme le mentionne l'auteure, le problème de la cessation de traitement dans de semblables cas demeure entier. Pour que la définition de la mort corticale soit acceptée, il faudrait un consensus médical, légal et social qu'il y aurait avantage à provoquer pour répondre aux cas particuliers des patients en état neurovégétatif.

La seconde partie de l'ouvrage est consacrée à l'analyse de la reconnaissance du droit du patient de refuser un traitement. L'auteur étudie ce concept en quatre chapitres consacrés respectivement à l'existence du droit de refus, à ses limites, à l'affirmation de ce droit en phase terminale d'une maladie et enfin à l'étendue de ce droit.

Bien que le droit de refus ne soit pas encore reconnu au Canada, l'auteure argumente, en prenant exemple sur l'expérience américaine, que ce droit serait une confirmation des droits à l'autodétermination et à l'inviolabilité de la personne humaine. Selon elle, le droit à l'autodétermination de la personne humaine permettrait au patient de refuser un traitement inutile ou autoriserait un représentant légalement reconnu de le refuser pour lui. Ces choix étant person-

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[9] *Supra*, note 4 à la p. 30.
[10] *Ibid.* à la p. 36.

nels, ils ne devraient pas être évalués en fonction des normes sociales de « raisonnabilité » ou de normalité[11].

Considérant que les limites habituellement opposées au droit de refuser ne s'appliquent pas au cas particulier de la cessation de traitement, l'auteure est d'avis que les paramètres légaux du droit de refus, dans ce contexte, se situent dans l'application du principe de l'inviolabilité de la personne humaine, tandis que les paramètres médicaux résultent d'une attitude paternaliste du corps médical.

À cet égard, selon l'auteure, la vulnérabilité du droit de refus, dans le cadre de la relation médecin/patient, proviendrait, d'une part du paternalisme médical, et d'autre part, de la diminution des facultés du patient de consentir en raison de son état pathologique. Il faudrait, d'une part, éviter les abus paternalistes de certains médecins et donner plus de place au patient qui est au terme de sa vie. D'autre part, il faudrait concilier paternalisme du médecin et autonomie du patient. D'après l'auteure il est possible d'y parvenir en donnant au médecin le pouvoir de choisir pour le patient mais avec l'accord de ce dernier et par son choix. Ceci s'appellerait le « paternalisme avec permission, le consentement négocié, le modèle fiduciaire ou le modèle de conscience »[12].

On peut douter de la justesse de l'opinion de l'auteure à l'effet que le paternalisme médical est une limite justifiée, même s'il s'agit de « paternalisme avec permission » car ce concept fait encore une fois référence au concept de « raisonnabilité » d'une décision qui ne devrait appartenir qu'au patient. Ainsi, le droit de refus devrait aller aussi loin que de permettre, particulièrement à l'égard de malades en phase terminale, le risque que ces personnes prennent une décision même déraisonnable et ce dans le plus grand respect d'un ultime acte autonome. En effet, ce « paternalisme choisi » peut cacher une décision unilatérale du médecin qui, ne l'oublions pas, conserve une influence certaine sur son patient.

Bien que le but de ce paternalisme soit d'amener le patient à accepter la fin de tout traitement, il est difficile de concevoir que cette décision ne revienne, en quelque sorte, qu'au médecin. Il serait peut-être préférable de recueillir les avis et opinions émis par des tiers entourant le malade dans ses derniers moments — parents, amis, médecin et autres professionnels de la santé. Le médecin ne peut, malgré toute la bonne volonté du monde, évaluer de façon unilatérale, la qualité de la vie de son patient[13]. Cette réflexion vaut également pour les personnes qui sont incapables de saisir la gravité de leur état en raison de leur pathologie ou en raison de leur absence d'interaction avec leur environnement immédiat.

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[11] *Ibid.* à la p. 47, citant *In re Peter*, 529 A. 2d 419 (N.J. 1987).

[12] *La cessation de traitement, ibid.* à la p. 58.

[13] *Supra*, note 1 aux pp. 162-63.

Comme le souligne l'auteure, les moyens utilisés pour permettre d'exercer le droit de refus soulèvent plus de controverses lorsque le médecin est face à un patient incapable d'interagir avec son entourage. Lorsque le patient a exprimé ses volontés antérieurement, cela peut aider le médecin dans la décision de cesser tout traitement. Cependant comme la pratique des « living wills » n'est pas reconnue légalement au Canada comme elle l'est au États-Unis il serait plus opportun d'adopter une loi déterminant les principes de la responsabilité du médecin dans de telles circonstances.

L'auteure reprend l'opinion proposée par la Commission de réforme du droit du Canada à l'effet que des dispositions précisant que le médecin ne saurait être tenu responsable de la mort d'un patient lorsqu'il a cessé les traitements considérés inutiles et que les inconvénients reliés à ces traitements étaient plus importants que les bénéfices pouvant en être tirés, auraient avantage à être adoptées plutôt que de légaliser la pratique des testaments de vie.

Lorsque le patient n'a pas exprimé sa décision face à la cessation de traitement, l'auteure propose d'avoir recours au jugement substitué pris dans le meilleur intérêt du patient, fondé sur les critères de la décision prise par une personne raisonnable, en fonction de l'utilité du traitement ainsi que la balance des bénéfices et inconvénients reliés au traitement. À cet égard, l'auteure propose un modèle de concertation entre les éléments médical (dans la détermination du pronostic), familial, légal et social pour parvenir à une décision qui reflète le meilleur intérêt du patient[14]. Le rôle du comité d'éthique n'entrerait en jeu dans le processus décisionnel que pour répondre, dans la plupart des cas, aux dilemmes éthiques auxquels est confronté le médecin et à sa demande.

Quant à l'étendue de ce droit de refus de traitement en fin de vie, l'auteure propose une analyse de ce que sont ces traitements. Ce que les médecins peuvent cesser en tant que traitements inutiles et ceux qu'ils ne doivent pas cesser : la distinction est intéressante pour qualifier les traitements dits ordinaires qui sont reconnus comme obligatoires et les traitements extraordinaires ou facultatifs. Selon l'auteure la distinction entre traitement ordinaire et extraordinaire ne constitue pas une référence valable compte tenu du fait que chaque cas est un cas d'espèce et que des traitements considérés ordinaires dans un cas peuvent être considérés extraordinaires dans un autre. Selon l'auteure, la distinction aurait avantage à être effectuée en fonction de critères d'utilité du traitement et des avantages pouvant en être tirés par le patient, donc sur un concept de ce qui est proportionné et disproportionné.

L'auteure favorise la reconnaissance des procédures d'alimentation et d'hydratation artificielle non pas comme des soins de base mais comme des traitements pouvant être cessés lorsqu'ils sont considérés inutiles par le médecin.

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[14]*Supra*, note 4 à la p. 87-89.

Il n'existe cependant pas de consensus médical à cet effet, tout au plus une tendance se dégage-t-elle, à l'effet de cesser de tels traitements en assurant toutefois le confort du patient.

Le droit canadien et québécois étant silencieux sur la question, l'auteure propose de prendre exemple sur un courant jurisprudentiel américain qui est en faveur de reconnaître le droit de demander la cessation de ce type d'acte comme on peut refuser tout traitement médical inutile, en fondant ce droit sur le droit à la vie privée[15]. Cependant, lorsque le patient n'a pu faire part de sa décision en raison de son incapacité ou de l'impossibilité de connaître, les tribunaux américains sont réticents à autoriser la cessation de l'alimentation et l'hydratation, à moins que les traitements globaux soient inefficaces, que le pronostic soit clair, que la famille ou le représentant ne souhaite plus continuer les traitements et que le patient n'ait pas exprimé d'opinion contraire.

La troisième partie du livre est consacrée à l'analyse du rôle du médecin dans la perspective du droit de cesser un traitement et du droit de refus du patient. Le premier chapitre trace les grandes lignes des devoirs du médecin face à son patient ; le chapitre deuxième est quant à lui une ébauche de la responsabilité pénale et civile médicale.

Selon l'auteure, le médecin a le devoir de préserver la vie dans les limites du possible en respectant l'autonomie du patient lorsqu'il peut encore émettre son opinion, ainsi que l'opinion de la famille. Le respect dû au patient exige du médecin qu'il informe ce dernier des avantages et des inconvénients des traitements et soins. Il doit également jouer un rôle important dans le soulagement de la douleur et du réconfort à apporter au patient et ne pas l'abandonner lorsque les traitements sont inefficaces. Certaines lignes directrices ou règles de conduite émises par des organismes médicaux sur les soins et traitements à prodiguer aux patients en phase terminale ou comateux, donnent quelques repères aux médecins dans leur processus de décision. Ces règles de conduite ne créent cependant pas de consensus au sein de la pratique médicale mais demeurent des outils nécessaires et utiles dans l'élaboration de la décision médicale. Elles sont également utiles lorsque, d'un point de vue légal, il s'agit d'établir quels sont les standards de pratiques médicales qui sont conformes aux données de la science médicale pour évaluer si la conduite médicale est justifiée et non fautive.

Le deuxième chapitre analyse brièvement la responsabilité médicale sous ses aspects pénal et civil. À juste titre, l'auteure souligne le fait qu'

> [i]l appartient sans doute davantage aux professionnels eux-mêmes, guidés par des principes éthiques, de déterminer les aspects particuliers à l'intérieur des para-

[15] *Ibid.* aux pp. 115-16.

> mètres fixés par le droit et ainsi de conditionner leurs décisions à ces grands principes plutôt qu'aux seules sanctions ou poursuites possibles[16].

En conclusion, l'auteure fait donc ressortir les tendances actuelles véhiculées en grande partie par les américains à l'effet de reconnaître le droit du patient de refuser un traitement qu'il considère inutile, le droit du médecin de cesser un traitement jugé inutile compte tenu de l'état du patient ainsi que le droit d'administrer des soins palliatifs au risque de raccourcir l'expectative de vie du patient. En raison des incertitudes et des ambiguïtés relatives à la cessation de traitement, il est vrai que certains favorisent une clarification législative. L'auteure reconnaît la légitimité de ce souhait et recommande que des précisions médicales soient entreprises pour définir

> le cadre de la cessation de traitement et développer à l'intérieur de leur profession un consensus, afin de donner à la technologie la place qui lui revient, et non toute la place, afin de circonscrire, repenser et redéfinir son application[17].

Une première remarque ayant trait à la tendance généralisée ressortant de cet ouvrage provient de la place prépondérante laissée aux médecins dans l'appréciation de ce qui est bon pour le patient. Le rôle du médecin face au mourant est-il à ce point primordial que l'on doive ignorer le rôle joué auprès du malade par les autres professionnels de la santé ? Ne serait-il pas opportun de reconnaître que le personnel infirmier joue un rôle important auprès du patient, ne devrait-on pas leur reconnaître un droit de parole dans la prise de décision pour justement éviter que la dure décision de cesser les traitements ne revienne qu'à une seule et même personne ?

En effet, bien que le médecin soit investi des capacités professionnelles permettant d'établir ce qui est médicalement justifié, il n'en demeure pas moins qu'il doive avoir recours au personnel infirmier pour connaître les désirs du patient et de la famille. Une approche particulière pour une décision éthique pourrait être suggérée. Une démarche éthique proposée par le Docteur Nicole Léry du Centre d'éthique et de droit de Lyon suggère une ouverture vers le pluralisme tant culturel que disciplinaire pour garantir la qualité de la réflexion éthique[18]. La première étape de cette démarche exige d'abord et avant tout une compétence technique conforme aux données actuelles de la science médicale. Ces éléments seront utiles à l'évaluation de l'équation bénéfice/risques/coûts. Ce qui sous-entend l'apprentissage de ses propres limites et ainsi « apprendre à oser faire appel aux spécialistes afin de bien situer le questionnement dans sa juste réalité".[19]

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[16]*Ibid.* à la p. 170.

[17]*Ibid.* à la p. 203.

[18]N. Lery, « Droit et éthique de la santé : l'expérience d'une consultation » (1990) 48 Médecine et Hygiène 2161.

[19]*Ibid.* à la p. 2162.

Dans le processus d'une décision éthique, les repères juridiques ont une importance certaine. Viennent ensuite les repères déontologiques, ainsi que les déclarations internationales des droits et les recommandations de comités d'experts. L'originalité de cette approche provient de l'importance accordée aux repères culturels et moraux de chacun des acteurs dans le processus décisionnel. On doit ici recueillir les courants de pensées spirituelles et laïques qui sous-tendent les décisions du patient ou de la famille du patient. Il s'agit sans doute de l'étape la plus ardue à intégrer dans le processus décisionnel. La décision éthique sera la résultante de l'addition de tous ces repères. La difficulté d'élaborer une décision éthique provient de la confrontation de toutes ces valeurs et tous ces principes. Mais une décision éthique sera bien fondée non pas si elle s'appuie sur un système unique de valeurs mais sur le résultat d'un amalgame de valeurs pour tenter de proposer les meilleurs fondements à une décision qui, malgré un processus solidaire, demeure solitaire lorsqu'appliquée à un cas particulier. Comme le mentionne un auteur,

> la pluralité ou la diversité deviennent ainsi les garants de la liberté et de son exercice, tandis que l'unité et l'homogénéité conduisent le plus souvent, comme nous le montre trop abondamment l'histoire, aux totalitarismes asservissants[20].

Le livre de Lesage-Jarjoura répond sans doute à une inquiétude omniprésente au sein du corps médical relativement aux conséquences des décisions qui concernent les patients en phase terminale. L'argumentation faite par l'auteure en faveur de la reconnaissance d'un droit de refus est intéressante ; cependant, il faut aller plus loin en invoquant le droit du patient de prendre une décision déraisonnable.

À titre de livre de référence ce livre connaît certaines limites. Ainsi, dans le contexte actuel, les préoccupations des médecins à l'égard de semblables décisions, l'abondance de documentation américaine ainsi que la proximité des États-Unis peuvent expliquer le choix de l'auteure de ne prendre que cet exemple ; ce dernier s'avère toutefois insatisfaisant à plusieurs égards. En effet, bien que les normes de la pratique médicale présentent certaines similarités, on ne peut transposer aussi mécaniquement les concepts et principes du droit américain au Canada. Malgré la présence de concepts en apparence identiques, les fondements sont différents en raison des philosophies particulières et inhérentes à chacun de ces pays en matière légale et judiciaire. À cet effet, il est regrettable de constater que l'auteure ne s'en tienne qu'aux articles du *Code criminel*[21] et du *Code civil du Bas-Canada* comme sources légales du droit canadien et québécois, particulièrement dans l'analyse du traitement des incapables. Il aurait été intéressant de vérifier les solutions possibles issues des lois et de la jurisprudence des provinces de *common law* et d'approfondir l'étude de la jurispru-

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[20]*Supra*, note 1 à la p. 154.
[21]L.R.C. 1985, c. C-46.

dence québécoise ainsi que des nouvelles dispositions du *Code civil du Québec* sur les régimes de protection des majeurs.

Dans cette perspective, il faut de plus regretter l'absence de référence au contexte européen relativement à cette question vécue de façon similaire par tous les médecins occidentaux. Les solutions proposées au plan international auraient pu étoffer l'analyse de l'auteure.

Il n'en demeure pas moins que l'analyse faite par l'auteur conserve un certain intérêt pour les personnes ayant à prendre des décisions aussi difficiles que de cesser tout traitement à l'endroit d'un individu en phase terminale ou en état neurovégétatif.

Paul C. Weiler. *Governing the Workplace: The Future of Labor and Employment Law*. Cambridge: Harvard University Press, 1990. Pp. x, 317 [$29.95]. Reviewed by Eric Tucker*

Industry and Humanity Revisited: Everything Old is New Again

The decline of American unionism is now a well-documented phenomenon.[1] Its causes and consequences, however, remain the subject of intense debate.[2] Regardless of one's view of this development, it clearly poses a challenge to the traditional techniques for the legal regulation of the employment relationship, and especially for state-sponsored collective bargaining which has been the centrepiece of American labour policy since the enactment of the *Wagner Act* in 1935.[3] It is this crisis in American labour and employment law which Paul C. Weiler seeks to address in his new book, *Governing the Workplace: The Future of Labor and Employment Law*.[4]

Of course, Weiler is not the first "Canadian" labour relations expert to step onto the American labour scene at a critical juncture in its history. A little over seventy-five years ago, William Lyon Mackenzie King was asked by John D. Rockefeller Jr. to develop a long-term remedy for his labour problems. Those problems were severe indeed. Violence in the Colorado coalfields, including the infamous Ludlow massacre, had left eighteen strikers, ten guards, nineteen scabs, two militiamen, three non-combatants, two women and twelve children dead. King accepted Rockefeller's invitation and was actively engaged in American labour relations for a substantial part of the next five years.[5] In his book

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[1]The literature is vast. For a good overview, see M. Goldfield, *The Decline of Organized Labor in the United States* (Chicago: University of Chicago Press, 1987) [hereinafter *The Decline of Organized Labor*].

[2]For a range of views, see S.M. Lipset, ed., *Unions in Transition – Entering the Second Century* (San Francisco: Institute for Contemporary Studies Press, 1986); C.C. Heckscher, *The New Unionism – Employee Involvement in the Changing Corporation* (New York: Basic Books, 1988) [hereinafter *The New Unionism*]; K. Moody, *An Injury to All: The Decline of American Unionism* (London: Verso, 1989) [hereinafter *An Injury to All*]; M. Davis, *Prisoners of the American Dream* (London: Verso, 1986).

[3]Ch. 377, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

[4]P.C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge: Harvard University Press, 1990) [hereinafter *Governing the Workplace*].

[5]For a detailed account of these events and King's related activities, see H.M. Gitelman, *Legacy of the Ludlow Massacre – A Chapter in American Industrial Relations* (Philadelphia: University of Pennsylvania Press, 1988) [hereinafter *Legacy of the Ludlow Massacre*]. Also see F.A. McGre-

Industry and Humanity,[6] first published in 1918, King articulated the principles upon which labour relations should be reconstructed.

There are some other coincidences and similarities that link these two men. When Weiler was first appointed to Harvard it was as a Mackenzie King Professor of Canadian Studies. Both were educated at the University of Toronto and Harvard and both had recently held positions as senior administrators of Canadian industrial relations schemes which they themselves had helped design prior to their American engagements. However, if the similarities between the two men ended there, they hardly would be worth mentioning.

The more important similarity is that they are engaged in a common project, informed by a shared set of ideological premises which, not surprisingly, produce a remarkably similar set of prescriptions for reform considering the momentous changes which have occurred in the seventy-two years separating the publication of *Industry and Humanity* and *Governing the Workplace*. The common project might be characterized as a hegemonic one, in the sense that they both wish to establish a regime of labour regulation which induces workers to consent to a social order in which they remain subordinate to their employers. Because the achievement of this goal entails concessions, both moral and material, to workers, its promoters are usually characterized as liberals, especially when compared to advocates of more coercive strategies for maintaining capital's domination. Both King and Weiler benefit in that regard by the historic moment of their appearance on the American scene: King after Ludlow and Weiler after Reagan.

Not all hegemonic strategies, however, are the same. What draws King and Weiler even closer is their mutual adherence to the premises of industrial pluralism, the ideology *par excellence* of conventional North American industrial relations in the twentieth century. What is even more remarkable, however, is the way that Weiler has, in the face of the current crisis of collective bargaining, turned back towards the prescriptions of the pre- World War II institutionalists.[7]

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gor, *The Fall & Rise of Mackenzie King: 1911-1919* (Toronto: Macmillan, 1962); S.J. Scheinberg, "Rockefeller and King: The Capitalist and the Reformer" in J. English & J.O. Stubbs, eds, *Mackenzie King: Widening the Debate* (Toronto: Macmillan, 1978); and D. Montgomery, *The Fall of the House of Labor – The Workplace, the State and American Activism, 1865-1925* (Cambridge: Cambridge University Press, 1987) [hereinafter *Fall of the House of Labor*] at 343-47.

[6]W.L. Mackenzie King, *Industry and Humanity – A Study in the Principles Underlying Industrial Reconstruction* (1918) (Toronto: University of Toronto Press, 1973) [hereinafter *Industry and Humanity*.

[7]King was largely responsible for the establishment of the Department of Labour. He was Canada's first Deputy Minister of Labour and, following his election in 1908, became the first Minister of Labour when the Department was made independent. He served as Minister of Labour until he and the government were defeated in 1911. While Deputy Minister, King played an active role as a mediator under the *Conciliation Act*, S.C. 1900, c. 24 and designed the *Industrial Disputes Investigation Act*, S.C. 1970, c. 20 which was passed in 1907 and served as the centrepiece of Canadian

In what follows, I will explore first the common ideological terrain occupied by King and Weiler and show how it drives them in the same direction as reformers. Then, I will try to show the inadequacy of that perspective as a way of understanding labour conflict and how it limits the options for reform quite narrowly. The apparently "liberal" reforms being suggested mask an extremely conservative agenda. Finally, I will suggest an alternative analysis of the crisis of labour, one which is ignored by Weiler, which leads to very different political agendas than the ones he promotes.

I. Industrial Pluralism From King to Weiler: The Circle is Unbroken

Industrial conflict was not a new phenomenon in the twentieth century, but its character and dimensions were changing and growing in the wake of what has been called the second industrial revolution. Through the merger movement, capital was increasingly consolidated into large corporations. They were able to exercise greater control over their environment than had their more fragmented predecessors. One feature of the new corporate agenda was the imposition of a new structure of work organization and labour management, characterized by a shift in control over the labour process from workers to their employers. However, labour unions also grew rapidly in the first years of the twentieth century, peaking in 1920. Growth occurred in both the traditional craft unions and in the newer industrial ones. Not surprisingly, industrial conflict increased and was particularly sharp in the western resource sectors.[8]

From a classical laissez-faire perspective, the appropriate response to these developments was to resist combinations of workers because they unreasonably

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industrial relations policy until the Second World War. On King's intellectual formation and activities, see *Legacy of the Ludlow Massacre*; B. Russell, *Back to Work: Labour, State, and Industrial Relations in Canada* (Scarborough: Nelson, 1990) [hereinafter *Back to Work*] at 64-80 & 90-98; P. Craven, *'An Impartial Umpire' – Industrial Relations and the Canadian State 1900-1911* (Toronto: University of Toronto Press, 1980) at 31-73 & 208-40; R. Whitaker, "The Liberal Corporatist Ideas of Mackenzie King" (1977) 2 Labour/Le Travailleur 137; and P. Craven, "King and Context: A Reply to Whitaker" (1979) 4 Labour/Le Travailleur 165.

Weiler conducted a labour arbitration practice while he was on the faculty of Osgoode Hall Law School in Toronto. After the New Democratic Party came to power in British Columbia in 1972, Weiler assisted in drafting a new labour code and became the first chair of the British Columbia Labour Relations Board established by the Code. He remained in that position for five years. See P.C. Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) at 1-11.

For an excellent discussion of this Gramscian concept and its application to contemporary developments, see L. Haiven, S. McBride & J. Shields, eds, *Regulating Labour: The State, Neo-Conservatism and Industrial Relations* (Toronto: Society for Socialist Studies, 1991) [hereinafter *Regulating Labour*].

[8]For an overview of developments in the United States, see D.M. Gordon, R. Edwards & M. Reich, *Segmented Work, Divided Workers - The Historical Transformation of Labor in the United States* (Cambridge: Cambridge University Press, 1982) at 100-64. On Canada, see B.D. Palmer, *Working-Class Experience: The Rise and Reconstitution of Canadian Labour, 1800-1980* (Toronto: Butterworths, 1983).

restrained trade and interfered with freedom of contract. Direct state regulation was opposed on similar grounds. Instead, industrial relations should be governed by individual contracts of employment negotiated against the backdrop of a competitive labour market. However, for many, this perspective was no longer seen to be a useful or appropriate way to analyze the "labour problem." The English historical and the American sociological schools developed an alternative perspective which accepted the primacy of private property and the basic compatibility of the interests of labour and capital, but rejected the idealized labour market as a sufficient regulatory mechanism for the conduct of industrial relations. Following Arnold Toynbee and Richard T. Ely, the people associated with these schools wished first to introduce an ethical orientation (typically Christian) which they found lacking in the classical perspective. Second, they rejected the abstract and static premises of laissez-faire in favour of a practical and institutional analysis of the actual operation of markets and other regulatory mechanisms. When examined from this perspective, a mojor cause of the labour problem was that the unregulated market failed to provide an equitable distribution of the fruits of industrialization and, when left to its own devices, did not generate a system of workplace governance which allowed employees proper representation of their interests. However, if attitudes could be changed and institutional arrangements altered, the common interests of labour and capital would prevail, and industrial peace and prosperity could be achieved. King in Canada and John R. Commons in the United States were two of the leading exponents of this perspective.[9]

In the introduction to *Industry and Humanity*, King set out these themes. A new spirit needed to be infused into industry which "discern[ed] between *economic* and *human* values."[10] The treatise was

> devoted to the principles underlying right relations in Industry, and to a consideration of the rules of conduct and methods of organization by which fundamental principles may be practically applied.[11]

Technical progress and the enormous concentration of capital which had been recently brought about were not to be opposed, but welcomed. They made possible increases in the production of wealth which could provide the material foundation for peace and prosperity. In King's view,

> [i]t is not against the *form*, but against the possible *abuses* of industrial organization, whatever the system, that protests should be uttered.[12]

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[9]On King, see *supra*, notes 6 & 7. On Commons, see M. Shalev, "Labor Relations and Class Conflict: A Critical Survey of the Contributions of John R. Commons" (1985) 2 Advances in Industrial Relations 319. More generally, see P.J. McNulty, *The Origins and Development of Labor Economics – A Chapter in the History of Social Thought* (Cambridge: M.I.T. Press, 1980) at 153-76.

[10]*Industry and Humanity*, *supra*, note 6 at 10, emphasis in original.

[11]*Ibid.* at 12.

[12]*Ibid.* at 76.

One cause of abuse was the pressure increasing global competition was placing on capital. Indeed, King asserted, "[t]he mobility and fluidity of capital lie at the root of most of the problems of industry."[13] For labour, unrestrained competition drove down standards. King cited his investigation of the sweating system for the Canadian government in 1898 as an example of the detrimental effects the "Law of Competing Standards" could have on working conditions.[14] Protection against inhumane standards was required. Indeed, although generally sceptical about state compulsion, in part because

> [t]he inherent ubiquity of capital sets limits to what may be possible under regulation ... imposed by authority of the municipality, the state, or the nation,[15]

King recognized the need for it to protect the health of workers against these effects of competition. More generally, he saw the distribution of wealth becoming increasingly disproportionate and recognized the need for a more equitable division.[16]

Another abuse King identified was that concentrated industry failed to develop a system of governance which allowed the parties to industry adequate representation. Too often only two of the parties King identified, capital and management, exercised autocratic authority, without any participation in decision-making by the other two, labour and the community. The case for participation by labour was both moral and pragmatic. Workers did not just invest a commodity in industry from which they could be separated. Rather, they invested their lives and should, therefore, be given a voice in controlling industry.[17] Moreover, if workers were given a say, industry could operate on a more co-operative basis leading to industrial peace and economic prosperity. This goal was to be achieved through the adoption of the principles and practices he had developed for Rockefeller in the Colorado Industrial Plan. The rule of law in the workplace was to be achieved by giving workers a "Magna Charta of Industrial Liberties"[18] setting out the rules and regulations, a grievance procedure, and representation on joint committees concerned with issues such as conciliation, accidents, health and education.

King was remarkably vague about the role of trade unions in this scheme. A non-discrimination clause in the rules would protect the right of employees to join trade unions, but no provision was made for their recognition by employers. This reflected King's personal ambivalence about trade unions and the political situation in which he found himself. King drew a sharp distinction

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[13]*Ibid.* at 44.
[14]*Ibid.* at 56-57.
[15]*Ibid.* at 43.
[16]*Ibid.* at 78-79 & 220.
[17]*Ibid.* at 32-33 & 237.
[18]*Ibid.* at 133.

between legitimate trade unions and leaders who accepted the capitalist social order and illegitimate unions and leaders who sought to transform society. The latter should be crushed while the former should find a place in the industrial system. Just what this place should be, however, was unclear. Recognition strikes were abhorrent in King's eyes but he was opposed to compulsory recognition. Perhaps King hoped that his preferred solution, employee representation plans, would diminish the appeal of trade unions and the problem would disappear.

The basic premise of King's analysis was that there was no *material* basis for class conflict in capitalism. Indeed, capitalism, because of its ability to increase total social wealth, provided the material foundation for the overcoming of economic conflict. It followed, therefore, that industrial conflict was the product of misunderstanding and mistaken beliefs. "The basic problem of relations between the parties to Industry is one of attitude."[19] Institutional adjustments, preferably but not necessarily of a voluntary nature, which promoted education, investigation and conciliation would permit the parties to recognize their overriding common interests.

In short, secularize *Industry and Humanity* and we find King has articulated the philosophy of liberal pluralism which has remained the touchstone of conventional North American industrial relations theory and practice. The major changes which have occurred in the last seventy years have less to do with basic premises than with altered views of the institutional arrangements necessary to achieve co-operation between labour and capital. The most important change, of course, has been the acceptance of trade unions and state-sponsored collective bargaining overseen by expert administrators as the primary institutional arrangement for the conduct of industrial relations. The reasons for the adoption of this policy need not detain us here, other than to note that it was premised on a recognition that employee representation plans had, by and large, failed to achieve their intended goals of reducing industrial strife, ensuring a more equitable distribution of the fruits of production, and providing workers with a meaningful voice in industrial government.[20]

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[19]*Ibid.* at 100.

[20]On the circumstances surrounding the adoption of state sponsored collective bargaining in the United States, see C.L. Tomlins, *The State and the Unions – Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (Cambridge: Cambridge University Press, 1985) at 103-47 and J.B. Atleson, *Values and Assumptions in American Labor Law* (Amherst: University of Massachussetts Press, 1983) at 35-43. On Canada, see *Back to Work, supra*, note 7 at 169-244 and J. Fudge, "Voluntarism, Compulsion and the 'Transformation' of Canadian Labour Law during World War II" in G.S. Kealey & G. Patmore, eds, *Canadian and Australian Labour History* (Sydney: A.S.S.L.H./C.C.L.H., 1990) 81. On the practice of employee representation in the United States, see *Legacy of the Ludlow Massacre, supra*, note 5 at 331-39; *Fall of the House of Labor, supra*, note 5 at 411-64; S.M. Jacoby, "Union-Management Cooperation in the United States: Lessons from the 1920s" (1983) 37 Ind. & Labor Rel. Rev. 18; and, D. Nelson, "The Company Union

The theorists of the post- World War II industrial relations system endorsed collective bargaining as the preferred institution of regulation for a number of reasons. First, there was the claim that power in American society was widely dispersed and equally balanced among organized, competing interest groups. Labour unions provided workers with a countervailing power to that of their employers and thus were a legitimate and necessary institution in this pluralist universe. Second, collective bargaining was preferable to direct regulation because it allowed for bi-lateral rule-making between the parties most directly involved. This had two benefits. First, it de-politicized labour-management conflict in the broad sense by re-delegating its resolution to the parties themselves. The state provided procedures for the resolution of conflict but did not directly dictate its results. This left substantial room for the market to operate. Second, bi-lateral rule-making gave workplace governance a democratic aura. In the words of Archibald Cox,

> [b]y this "collective bargaining" the employee shares through his chosen representatives in fixing conditions under which he works, and a rule of law is substituted for absolute authority.[21]

Third, collective bargaining was endorsed because it institutionalized and contained industrial conflict in a variety of ways. In addition to facilitating the resolution of disputes through negotiation, collective bargaining law itself gave the state authority to structure collective bargaining relationships and regulate the use of economic sanctions in ways which would promote the overriding "public interest" in industrial peace. More important than state manipulation of the systems' levers, though, was the belief that this semi-autonomous industrial relations system would help construct a common ideology consisting of a shared set of beliefs about the legitimacy of the socio-economic order and the place of workers in it.[22] In other words, the industrial relations system could become self-regulating and self-legitimating while maintaining conditions favourable to capitalist accumulation. It became *the* institutional vehicle for the realisation of industrial pluralists' hegemonic project.

Canadian industrial relations ideology drew its inspiration from the American model. Academics in industrial relations centres and law schools led the

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Movement, 1900-1937: A Re-Examination" (1982) 56 Bus. His. Rev. 335. For Canada, see J.G. Fricke, "Worker Participation in Canada – Some Lessons from the Past" (1988) 43 Rel. Ind. 633 and B. Scott, "A Place in the Sun: The Industrial Council at Massey-Harris, 1919-1929" (1976) 1 Labour/Le Travailleur 158.

[21]A. Cox, "Some Aspects of the Labor Management Relations Act, 1947" (1947) 61 Harvard L. Rev. 1.

[22]In addition to Cox, *ibid.*, see A. Cox & J.T. Dunlop, "Regulation of Collective Bargaining by the National Labor Relations Board" (1950) 63 Harvard L. Rev. 389; J.T. Dunlop, *Industrial Relations Systems* (New York: Holt, 1958); and D.E. Feller, "A General Theory of the Collective Bargaining Agreement" (1973) 61 Calif. L. Rev. 663. For a useful summary, see G. England, "Some Observations on Selected Strike Laws" in K. Swinton & K. Swan, eds, *Studies in Labour Law* (Toronto: Butterworths, 1983) at 225-34.

way.[23] The mainstream view was given its clearest expression in a task force report issued in 1968 entitled *Canadian Industrial Relations*.[24] Collective bargaining was seen to be an indispensable mechanism in an increasingly pluralistic society.[25] The report emphasized the role collective bargaining played in promoting worker participation and industrial democracy.[26] Moreover, the system was effective in obtaining worker consent to the status quo. Only a "fringe element" of the trade unions were "more interested in revolutionizing than reforming the present socio-economic-political system."[27] Indeed, the price of containment was rather low. The report found there was little evidence supporting the claim that trade unions had brought about a more equitable distribution of income.[28] Moreover, union inroads into management prerogatives were relatively limited.[29] Rather,

> [t]he collective bargaining process becomes a means of legitimizing and making more acceptable the superior-subordinate nexus inherent in the employer-employee relationship.[30]

Weiler is an heir to these traditions. Indeed, in a dust jacket endorsement John T. Dunlop declares,

> Paul Weiler is a worthy successor to my long-time colleagues, Archibald Cox and Derek Bok, in the fields of labor law and public policy.[31]

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[23]As part of his efforts to promote employee representation schemes, in 1922 Rockefeller began providing funds to universities which established industrial relations sections. Queen's University was a recipient of Rockefeller funds and established Canada's first industrial relations section in the School of Commerce and Administration in 1937. See *Legacy of the Ludlow Massacre*, *supra*, note 5 at 333 and Queen's University, Industrial Relations Section of the faculty of Commerce and Administration, *Industrial Relations*, (Kingston: Queen's University, 1937). B. Laskin, an early and influential law academic did graduate work at Harvard. For discussions of the American influence on Laskin and his influence on Canadian labour law, see W.L. Hunter, "Bora Laskin and Labour Law: The Formative Years" (1984) 6 Sup. Ct. L. Rev. 431 and D.Beatty & B. Langille, "Bora Laskin and Labour Law: From Vision to Legacy" (1985) 35 U.T.L.J. 672. H.W. Arthurs was also a Harvard graduate. His work in the 1960's made him one of Canada's most prominent labour law specialists. His pluralist perspective is clearly articulated in H.W. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45 Can. Bar Rev. 786. For an overview of the development of labour studies in Canada, see G.S. Kegley, "Canadian Labour in History: A Case of Uneven Development" in *Canadian and Australian Labour History*, *supra*, note 20, 21.

[24]Task Force on Labour Relations, *Canadian Industrial Relations – The Report of Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968) [hereinafter *The Report of Task Force*]. Weiler was recruited by Arthurs to write a study for the task force on labour arbitration. See P.C. Weiler, *Labour Arbitration and Industrial Change* (Ottawa: Privy Council Office, 1969).

[25]*The Report of Task Force*, *ibid.* at 137-38, paras 430-31.

[26]*Ibid.* at 96-97, paras 296-300.

[27]*Ibid.* at 92, para. 278.

[28]*Ibid.* at 116, paras 376-77.

[29]*Ibid.* at 97, para. 299.

[30]*Ibid.* at 95, para. 291.

[31]Weiler's intellectual debt to Arthurs is generously acknowledged in *Reconcilable Differences*, *supra*, note 7 at vii-viii.

Like most pluralists, Weiler's starting point is that, while workers and their employers may have their differences, these do not arise out of irreconcilable class conflict. However, this proposition is largely assumed, rather than explicitly defended.[32] For example, when setting out the themes of the book, Weiler asserts,

> while both employers and employees, labor and capital need each other's contribution and cooperation for the success of their joint venture, these parties are constantly at risk of conflict over the terms of their relationship and how to share the fruits of their venture.[33]

Law arises to regulate this conflict, but the implicit assumption is that disputes arise over the terms of the joint venture, and not over its existence. It is, perhaps, a reflection of the political and ideological milieu in which Weiler finds himself that he sees no need to defend the left flank of his pluralist position.

Indeed, much of the book is devoted to a defence of industrial pluralism from criticisms being launched from libertarians and law and economics supporters on the right.[34] The degree of attention Weiler gives to the deficiencies of neo-classical analysis is one of the ways in which his work recalls that of the pre-War institutionalists. Moreover, he relies extensively on the work of their intellectual heirs, labour economists such as Freeman and Medoff.[35] For example, in a chapter on wrongful dismissal,[36] Weiler argues that the neo-classical model of the labour market as one in which workers easily move from job to job in response to changing economic forces bears little relationship to reality. Rather, both workers and employers have tangible interests in maintaining stable employment relations. This fact supports two arguments he wishes to make. The first is that, for workers, employment stability is not just an investment in, and the foundation for, their economic well-being; it also sustains familial, social and community networks. Moreover, employers encourage this reliance. This gives workers some moral entitlement to their jobs. Second, Weiler argues that there are systemic flaws in the labour market which produce a sub-optimal level of employment security.[37]

Weiler makes a parallel set of arguments in defence of collective bargaining.[38] This time he begins by challenging the neo-classical claims from

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[32]Even in his earlier book, *Reconcilable Differences*, *ibid.*, Weiler never defended the proposition explicit in the title.

[33]*Governing the Workplace*, *supra*, note 4 at 3-4.

[34]Weiler's principal intellectual adversaries are R.A. Epstein & R.A. Posner. See R.A. Epstein, "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation" (1983) 92 Yale L.J. 1357; and R.A. Posner, "Some Economics of Labor Law" (1984) 51 U. Chi. L. Rev. 988.

[35]R.B. Freeman & J.L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984).

[36]*Governing the Workplace*, *supra*, note 4, c. 2 "The Case of Wrongful Dismissal."

[37]*Ibid.* at 63-78.

[38]*Ibid.* at 118-52.

within their own frame of reference and then goes on to note its limits. His response to the claims made in favour of the efficiency of the labour market and the distorting effects that unions have on it is twofold. First, he argues that the individual contract of employment/labour market regime does not operate as perfectly as its supporters hypothesize. Rather, empirical study demonstrates that, because of the distinctive quality of the human commodity being exchanged, even the non-union labour market does not completely operate according to the price-auction model of adjustment as theory would have it do. Labour markets within firms have substantially encroached on external labour markets. Therefore, the baseline against which unionized labour markets must be measured are real, not ideal, markets. The second argument is that unions also do not operate according to the neo-classical model. That is, they are unable to suppress wage competition totally. Rather, according to Weiler, they operate as "permeable cartels."[39] As a result, the ability of unions to extract premium wages is limited. Competitive product markets limit the ability of employers to pass costs through to consumers. In this regard, Weiler does express reservations about industry-wide pattern bargaining, but finds comfort in economic forces which can be expected to limit the duration and effectiveness of these arrangements.

Weiler's external critique of the neoclassical framework is that its narrow focus on the efficient production of goods and services fails to respond to all of the problems workers experience.

> For the employee work is also a major source of personal identity and satisfaction, of his sense of self-esteem and accomplishment, and of many of his closest and most enduring relationships. ... And as their initial quest for decent compensation and protection on the job is gradually satisfied, workers feel and assert a further claim to meaningful involvement in and influence over the process by which is fashioned the web of workplace rules, with their often fateful human consequences for the employees' lives, both on and off the job.[40]

If he had seen that there might be a fundamental opposition between workers' "non-market" interests and the operation of a capitalist labour market, Weiler's pluralist assumptions would have had to be questioned by him. However, this confrontation is fortuitously avoided. As it turns out, the satisfaction of workers' non-market aspirations may actually promote economic efficiency. "The secret of a productive operation is not necessarily to be found in direct reliance on market forces ..."[41]

> Not only does the new worker find it natural to demand a more satisfying and interesting job, but also it is apparent that many employers treat their employees in a civilized and humane manner and still prosper. ... In sum, the employer may

[39] *Ibid.* at 124.
[40] *Ibid.* at 143.
[41] *Ibid.* at 150.

> receive its side of the employment bargain — a stable, trained, motivated, and cooperative team — only if it treats its work force in accordance with norms of behavior that exhibit respect for the employees as human beings.[42]

Moreover, a range of instruments for governing the workplace can be developed, applied and adjusted in order to insure that the interests of workers and employers are adequately represented and respected.

Following in the tradition of post-War pluralists, Weiler endorses collective bargaining as the best available means for protecting workers against their employers and giving them a say in workplace governance. Direct government regulation is less desirable because it is inherently limited in scope and because there is no guarantee that employees generally and non-union employees in particular will be able to translate their legal rights into enforceable claims.[43] Weiler points to the low success rates of reinstatement orders for wrongful dismissals in non-union settings in Quebec as an example of how the lack of power and resources undermines the individual employee's ability to enjoy his or her legal rights.[44] Management control, *i.e.*, the individual contract/labour market regime, is not viewed by Weiler as a recipe for exploitation, but it is criticized for its failure to protect and represent workers' interests adequately because of the limits of managerial empathy and altruism to their employees.[45] A third alternative, worker control, is discussed, but because there is no prospect of such a policy being implemented in United States in the foreseeable future, Weiler does not arrive at a final verdict on its merits.[46]

To this point, as Weiler himself recognizes, there is nothing particularly novel about his updating of the pluralist defence of union representation and collective bargaining.[47] Weiler's contribution, therefore, lies in his attempt to respond to the crisis in which the post-War industrial relations system finds itself, and it is here that the turn to pre-War paradigms is introduced. Collective bargaining may be the preferred instrument of regulation in theory, but its rapid decline in practice raises serious questions about its viability. Weiler's response is typically pluralist. In part, union representation has declined because of increased employer resistance and the increasingly cumbersome operation of the legal machinery used to enforce workers' organizational rights. Urgent reform is proposed to facilitate the establishment of unions and collective bargaining relationships, including better remedies for unfair labour practices, first contract arbitration, instant elections and job protection during a strike. He

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[42]*Ibid.* at 151-52.
[43]*Ibid.* at 152-61.
[44]*Ibid.* at 85-87.
[45]*Ibid.* at 161-68.
[46]*Ibid.* at 168-80.
[47]*Ibid.* at 186.

would expand the scope for secondary boycotts.[48] Many of these proposals are drawn from Canadian laws.[49] However, Weiler also asserts that part of the problem stems from the practice of collective bargaining which developed in the post-War era. Unions had become overly concerned with protection and had not addressed the issue of participation. As a result, they were defending work rules and other practices which inhibited the competitiveness of American industry and failed to address many of the real and pressing concerns of their members. As a solution, he endorses the model of enterprise unionism as a replacement for industrial unionism. Instead of centralized bargaining which established industry standards, local unions will negotiate agreements that are responsive to the special features of individual firms and individual plants within firms.[50]

Finally, although still attached to collective bargaining, Weiler sees the need to develop alternative mechanisms for governing the workplace. He endorses changing the law to lift the ban on employer-sponsored employee involvement programs, more commonly known as company unions.[51] In fact, Weiler would go further. He proposes mandatory establishment of Employee Participation Committees (E.P.C.s) in all workplaces above a minimum size. E.P.C.s would be composed of elected employee representatives. These bodies would be fora for discussing major policy issues and, perhaps, would play some role in administering statutory programs relating to health and safety, plant closings and equal employment. Weiler is somewhat vague as to whether these bodies merely would be consultative or would actually exercise decision-making power. The only example Weiler gives of a decision-making power which might be conferred on E.P.C.s is the power to waive general health and safety standards.[52] Moreover, he opposes third party arbitration as a mechanism for resolving conflicts between the E.P.C. and management.[53] Thus, we can assume that E.P.C.s would be essentially consultative bodies.

All this sounds remarkably similar to Mackenzie King's employee representation plan, except that it would be imposed by law rather than adopted voluntarily. As in King's plan, workers would still have the right to join unions, but

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[48]*Ibid.* at 241-73. Much of this draws from Weiler's earlier work. In particular, see P.C. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the N.L.R.A." (1983) 96 Harvard L. Rev. 1769 and P.C. Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation" (1984) 98 Harvard L. Rev. 351.

[49]For example, Weiler draws on Canadian sources for first contract arbitration (*Governing the Workplace*, *ibid.* at 250) and instant elections (*supra* at 255). However, he rejects some of the more progressive innovations, including Quebec's laws prohibiting replacement workers and automatic certification based on signed membership cards (*supra* at 255 & 265).

[50]*Ibid.* at 222-23.

[51]*Ibid.* at 211-18.

[52]*Ibid.* at 287.

[53]*Ibid.* at 290.

the relation of the union to the E.P.C. is ambiguous. It seems industrial pluralism has gone a long way, only to turn back toward the point at which it started.

II. Why the Circle Should be Broken

One does not dispose of an argument merely by labelling it and exposing its roots, although invariably any such exercise contains an implicit critique of the argument under consideration.[54] I do not claim to be exceptional in this regard. Implicit in my attempt to demonstrate that King and Weiler share a common theoretical space and, therefore, produce remarkably similar plans for employee representation, is the claim that their theory and policy prescriptions are profoundly flawed. This section, therefore, will make that critique explicit.

One of the interesting features of Weiler's book is that it is addressed almost exclusively to criticisms from the right. That is, Weiler defends trade unions and collective bargaining from charges that they interfere with individual rights and impair efficiency. His defence, however, reveals the limits of the pluralists' analysis, for what becomes apparent is that trade unions are only to be tolerated when they do not unduly impair the operation of a competitive labour market. Weiler acknowledges that the goal of trade unions is to take wages out of competition, but he is satisfied that, at best, they operate as "permeable cartels."[55] It is, however, a serious problem when a union is able to organize an entire industry and impose coalition or pattern bargaining. This will have undesirable allocational and distributional consequences. Weiler, however, is confident that these arrangements will not be permanent and that economic forces will arise which will re-impose competition. Indeed, he cites recent rounds of concessionary bargaining in the airline and auto industries as positive developments.

This approach only makes sense if one imagines that labour and capital have common interests and that those interests are to be located on the terrain of a smoothly operating capitalist labour market. However, even the most conservative trade union leader has recognized that the power of trade unions as labour market organizations lies in their ability to take wages out of competition. Craft unionists recognized this principal and sought to achieve it by organizing all workers selling a particular skill in a local, regional or national labour market and by limiting entry into the market through restrictive apprenticeship

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[54]Weiler himself engages in this loaded exercise in his discussion of Canadian labour law under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11. See P.C. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117, where he labels opposing points of view as "Pure Market Libertarianism," (*supra* at 132) "Romantic Liberalism," (*supra* at 135) and "Radical Cynicism" (*supra* at 141). For his own approach, he reserves the seductive label "Pragmatic Pluralism" (*supra* at 151).

[55]*Governing the Workplace*, *supra*, note 4 at 124-32.

requirements. These organizational forms could not adequately respond to the conditions resulting from the mass influx of semi-skilled workers brought about by the transformation of the labour process, but the principle of taking wages out of competition remained the same. A new organization form, industrial unionism, was developed, but the economic power of these unions was directly related to their ability to (i) organize as many of the workers in a particular product line as possible, and (ii) to establish multi-industry, multi-employer or pattern bargaining. Trade unions that could not achieve this goal were unable to deliver the promise of higher living standards associated with collective bargaining.

The assault on pattern bargaining in the 1980s welcomed by Weiler has had a devastating impact on workers. Take the meatpacking industry as an example. As pattern bargaining broke down under pressure from employers, a high wage industry quickly became a low wage one. Moreover, workers did not just pay for this development through a lowering of standards of living; they also paid with their lives and health. In the absence of effective union resistance, employers responded to new competitive pressures by intensifying work in order to increase productivity. This resulted in a marked increase in the rate of accidents and injuries. Indeed, after a period of improvement, declining conditions in meatpacking have made it the most unsafe industry in the United States.[56] How can Weiler ignore these consequences of the destruction of trade union bargaining power in his assessment of pattern bargaining? Is it okay because it is efficient?

Enterprise unionism is the logical extension of the breakdown of effective industrial unionism. It is not surprising, therefore, that Weiler endorses this model. The major benefit of this "new unionism" is that it will get away from the excessively protectionist and rigidly regulatory approach of industrial unionism and bring in a more flexible and participatory regime. Agreements can be adjusted to suit the particular requirements of the firm, including more flexible compensation packages, while employers will be freer to make better use of its workforce. Moreover workers will have a greater influence on their own immediate surroundings, and ultimately on the enterprise.[57] Nowhere in this discussion does Weiler consider the impact of this brand of unionism on the power resources of workers. That is, Weiler ignores the relation between enterprise

[56]For American developments, see *An Injury to All*, *supra*, note 2 at 179-82 and W. Glaberson, "Misery on the Meatpacking Line" *The New York Times* (14 June 1987) Section 3, 1. Similar developments in Canada are discussed in J. Novek, A. Yassi & J. Spiegel, "Mechanization, The Labour Process, and Injury Risks in the Canadian Meat Packing Industry" (1990) 20 Int'l. J. of Health Services 281 and A. Forrest, "The Rise and Fall of National Bargaining in the Canadian Meat-Packing Industry" (1989) 44 Rel. Ind. 393.

[57]In addition to *Governing the Workplace*, *supra*, note 4 at 218-24, see *The New Unionism*.

unionism and the re-assertion of wage competition, not just between firms, but between plants of the same firm. In addition, he does not seriously consider objections to the introduction of the team concept or Quality of Working Life (Q.W.L.) and other such employee involvement programs that have been voiced by progressive trade unionists. These programs tend to, and often aim to, undermine worker solidarity, the major resource workers have, by getting them to accept management's competitive imperatives as the guiding principles of their behaviour. Moreover, while these programs appeal to the desire of workers to be treated as intelligent human beings who understand what they are doing and who can make a positive contribution if allowed to do so, they rarely deliver any real power to workers. Indeed, it is often at the point when workers express views which are not acceptable to management that such programs fall apart. Moreover, where there are no unions, these kinds of plans are consciously used by employers as avoidance techniques.[58] What makes Weiler think that the weak forms of unionism and employee representation that he endorses are likely to achieve the positive benefits for workers that he envisions?

Pluralists turn a blind eye to the ugly reality of power because they do not want to confront the possibility that the interests of labour and capital may not be reconcilable on the terrain of capitalist accumulation. Indeed, they go to great lengths to discount this possibility. Thus, for example, Weiler, drawing on the work of Piore and Sabel, amongst others,[59] seeks to paint an optimistic picture of the current trends in the American labour market and to suggest that efficiency concerns will support movements in the direction of more democratic work environments. According to this scenario, the conditions which supported mass production have eroded. In order to prosper it is necessary to move to a new model of production, "flexible specialization." This model, however, requires a better educated and highly skilled work force which will be most productive in a participatory and collegial, not an authoritarian and hierarchical, work environment. Therefore, it is anticipated that as more American workers have these kinds of jobs, employers will be motivated to transform the employment relationship. In effect, Weiler's model of transformation is rooted in a form of techno-economic determinism. Weiler recognizes that this is somewhat

[58]The critical literature is substantial and growing. For a sample, see *An Injury to All*, *supra*, note 2 at 187-91; G.J. Grenier, *Inhuman Relations – Quality Circles and Anti-Unionism in American Industry* (Philadelphia: Temple University Press, 1988) and M. Parker, *Inside the Circle: A Union Guide to Q.W.L.* (Boston: South End Press, 1985). In Canada, see D. Wells, *Soft Sell: "Quality of Working Life" Programs and the Productivity Race* (Ottawa: Canadian Centre for Policy Alternatives, 1986) and J. Rinehart, "Appropriating Workers' Knowledge: Quality Control Circles at a General Motors Plant" (1984) 13 Stud. in Pol. Econ. 75.

[59]See M.J. Piore & C.F. Sabel, *The Second Industrial Divide - Possibilities for Prosperity* (New York: Basic Books, 1984) and the other works cited in *Governing the Workplace*, *supra*, note 4 at 198 n. 20.

romantic,[60] but does not wish to call seriously into question the foundation of his views.[61]

A closer examination of trends in the American labour market, however, should have alerted Weiler to the fact that his model of transformation is seriously flawed. Numerous commentators have observed a trend in the United States towards a split-level economy in which the distribution of incomes is increasingly polarized.[62] Although there is growth in both the high and low wage sectors of the economy, it is the low wage sector which is growing more rapidly. There will be good jobs of the sort described by Weiler for a minority of American workers, but for most the scenario is far more bleak. Increased flexibility in this context will not hark back to the model of the autonomous and skilled craft worker on whom the employer depended to solve production problems. Rather, flexibility is likely to mean low wages, few skills, part-time work and almost no job or employment security. The workers who have these bad jobs are also disproportionately women, visible minorities, young or unorganized. Employers are unlikely to be interested in creating the new and improved employment relationship Weiler is so enthusiastic about for this vast body of workers. Furthermore, these workers are not going to have the economic power to force those changes on their employers. While it might be nice if American capitalists responded to the challenges of the new global competition by switching to high value-added industries employing skilled workers, the more common reaction, as Bennett and Bluestone suggest, has been to "[reverse] the slide of profits by becoming lean and mean with regard to [their] work force."[63]

Only by facing up to the reality of systemic conflict and the salience of unequal power relations between classes and their intersection with race and gender, can we understand the roots of the crisis of American industrial relations and devise strategies that will improve, not exacerbate the problem. The power

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[60]*Governing the Workplace*, *ibid.* at 201-202.

[61]For a critical perspective on the effect of the new technology on employment and social policy, see R. Mahon, "From Fordism to ?: New Technology, Labour Markets and Unions" (1987) 8 Econ. & Ind. Democracy 5. For a general critique of pluralism's technological determinism, see R. Haddon, "Forward" in C. Kerr *et al.*, *Industrialism and Industrial Man* (Middlesex: Penguin, 1973) 1.

[62]*Prisoners of the American Dream*, *supra*, note 2 at 216-20; H. Bennett & B. Bluestone, *The Great U-Turn* (New York: Basic Books, 1988).

On the disparate impact of these changes on men and women, see: B. Helvacioglu, "The State in the Reagan Era: Capital, Labour and More?" in *Regulating Labour*, *supra*, note 7 at 158-61. On Canada, see M. Gunderson, L. Muszynski and J. Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990) and internationally, see G. Standing, "Global Feminization Through Flexible Labor" (1989) 17 World Development 1077.

[63]On employers' strategies generally see *The Great U-Turn*, *ibid.* at 125. On these developments in Canada, see D. Drache & H. Glasbeek, "The New Fordism in Canada: Capital's Offensive, Labour's Opportunity" (1989) 27 Osgoode Hall L.J. 517.

resource model of industrial conflict developed by Korpi and others provide a corrective to the pluralists' myopia.[64] Central to this approach is the notion that differences in power resources between classes play a crucial role in shaping social institutions and in determining the manner and extent in which conflict becomes manifest. The major power resources available to the capitalist class are those based on their ownership of, and control over, capital while the major power resource of workers is based on their solidarity and organizational capacity both as an economic agent in the labour market and as an effective political force in the public political sphere. The conditions under which these resources can be mobilized further depend on structural factors, including the position of the national economy in the world system, the ideological climate, and the actions of agents, including the historical legacy of previous strategic choices.[65]

From this perspective, the decline of collective bargaining cannot be explained by pointing to increased employer opposition. "Employer resistance ... is not an explanation; it is a given."[66] Rather, the more interesting question is why American workers were less able to withstand the employer onslaught on the post-War system than any other group of workers in the western capitalist countries. As Goldfield demonstrates, the answer is not to be found in changes in the economic structure or the social composition of the work force.[67] Rather, the answer is to be found in the weaknesses of the American version of the post-War accord between labour and capital.

We can only summarize briefly those defects, but they all relate to the failure of the American labour movement to develop its power resources in a way which would allow it to defend itself when employers no longer found it worthwhile to play to the collective bargaining game.[68] Much of that failure can be explained in relation to the almost total triumph of business unionism in the post-War period. A number of inter-related features characterized this development. Pure and simple unionism was indeed a business. The trade union became the wholesaler of labour power, not a social and political organization challeng-

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[64]W. Korpi, *The Working Class in Welfare Capitalism – Work, Unions and Politics in Sweden* (London: Routledge & Kegan Paul, 1980) c. 2; W. Korpi & M. Shalev, "Strikes, Power and Politics in the Western Nations, 1900-1976" (1980) 1 Pol. Power & Soc. Theory 301.

[65]See C. Lipsig-Mumme, "Canadian and American Unions Respond to the Economic Crisis" (1989) 31 J. of Ind. Rel. 229 and D. Kettler, J. Struthers & C. Huxley, "Unionization and Labour Regimes in Canada and the United States: Considerations for Comparative Research" (1990) 25 Labour/Le Travailleur 161.

[66]*An Injury to All*, *supra*, note 2 at 125.

[67]*The Decline of Organized Labor*, *supra*, note 1 at 115-52.

[68]For much fuller treatments, see *An Injury to All*, *supra*, note 2; *Prisoners of the American Dream*, *supra*, note 2; *The Decline of Organized Labor in the United States*, *supra*, note 1; Lipsig-Mumme, *supra*, note 65; and, H.J. Glasbeek, "Labour Relations Policy and Law as Mechanisms of Adjustment" (1987) 25 Osgoode Hall L.J. 179.

ing the current order.[69] On the shop floor, it conceded managerial rights over production. Instead of workers having positive control rights, they substituted a complex web of job descriptions, work rules and job ladders governed by seniority. Enforcement of this system of rules was through grievance procedures which removed disputes from the shop floor, where workers enjoyed an advantage because of their power to disrupt production, into more bureaucratized and legalized channels, leaving managerial authority intact and workers guilty until proven innocent.[70] There was a failure to devote sufficient resources to organizing outside core sectors of trade union strength, especially among women and visible minorities. And, on the political front, organized labour chose to act as a pressure group within the Democratic Party rather than to build an independent labour or social-democratic party. These decisions led to trade unions being increasingly isolated from, and insufficiently interested in, the masses of workers outside their ranks. As a result, trade unions failed to develop any political strength. Not a single victory in respect of any major piece of labour legislation was won between 1935 and now. A number of serious defeats, however, were inflicted on labour. These defeats have made it more difficult for unions to organize new workers when they attempt to do so. As well, instead of building a strong welfare state which would provide decent benefits to all citizens, labour used whatever strength they had to construct a "private welfare state" for their own members.

Cummulatively, these developments left the union movement in a weak position when an employer offensive was mounted. Its weakness as a labour market organization left trade unions overly dependent on legal supports. But as Moody notes,

> the law has always been impotent when employers chose to ignore it ... [l]ike most laws governing labor relations, the N.L.R.A. works for labor only when labor "enforces" it through its own efforts.[71]

As well, as a political force, organized labour lacks clout. As one commentator noted:

> [w]e are in the presence of more than the failure of the law here: this is also the failure of the union movement's ability to influence the state.[72]

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[69]F.R. Annunziato, "Gramsci's Theory of Trade Unionism" (1988) 1 Rethinking Marxism 142.

[70]N. Lichtenstein, *Labor's War at Home: The C.I.O. in World War II* (Cambridge: Cambridge University Press, 1982) at 179-80, cited in *An Injury to All*, *supra*, note 2 at 32.

[71]*An Injury to All*, *ibid.* at 124. Also, see M.J. Mosand, "U.S. and Canadian Labour: Convergence at Whose Expense?" (1991) 43 Monthly Rev. 15 at 18-20; T. Geoghegan, *Which Side Are You On: Trying to be for Labor When It's Flat on It's Back* (New York: Essar, Straus & Giroux, 1991).

[72]Lipsig-Mumme, *supra*, note 65 at 242.

This is manifested in both the anti-labour policies being adopted by the N.L.R.A.'s administrators and the dim prospects for pro-labour legislative reform, even of the mild kind recommended by Weiler.

This perspective can also better inform discussions of worker participation.[73] The establishment of participatory schemes and their effective operation are closely related to the balance of power between labour and capital which, in turn, is a function of their respective mobilization of economic, political and ideological resources. It is no surprise that those Western European and Scandinavian countries with the most developed worker participation schemes have strong social democratic parties and trade union movements. Yet, even in these more favourable conditions, employer resistance to worker participation in higher level managerial decision-making is quite substantial and progress has been quite slow.[74] Weiler's refusal to take power seriously leaves him without a convincing explanation of how legislation requiring employee representation will be enacted in the United States and how it will ever be implemented effectively.

Conclusion

Mackenzie King's employee representation plan was used to rob American and Canadian trade unions of their strength. It was partially succesful. Trade unions recovered in the late 1930s and 40s, but their leadership accepted the liberal-pluralist industrial relations framework after World War II. The effect was to disarm the American labour movement. It surrendered its economic, political and ideological resources in exchange for improved terms and conditions of employment during a period of unprecedented economic growth and prosperity. When the conditions which supported that deal unravelled, labour was too weak to defend itself effectively. Weiler sees the need to counteract some of the effects of this employer offensive by giving unions better protection against unfair labour practices, making certification easier, protecting the jobs of striking workers and relieving some of the restrictions on the use of secondary boycotts. But his proposals regarding enterprise unionism and employee representation, if followed, would further diminish the few resources labour has left, making it even less likely that legislation supportive of trade unions would be enacted.

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[73]M. Poole, *Towards a New Industrial Democracy – Workers' Participation in Industry* (London: Routledge & Kegan Paul, 1986) and E. Tucker, "Constructing the Conditions of Worker Participation in Occupational Health and Safety Regulation: Lessons from Sweden" Stud. in Pol. Econ. (forthcoming).

[74]For an account of Swedish capital's resistance, see G. Olsen, "Labour Mobilization and the Strength of Capital: The Rise and Stall of Economic Democracy in Sweden" (1991) 34 Stud. in Pol. Econ. 109.

Weiler replays the themes of *Industry and Humanity* in a new key, because he, like King before him, is unwilling or unable to imagine that the interests of labour and capital are not reconcilable with the infusion of a little more humanity into the employment relationship. History has shown that, if we depend on labour market conditions to support humanitarian employment practices, they will appear fleetingly and then only for a small portion of the workforce. American-style collective bargaining improved conditions for some workers for a time, but has not proved that it can bring about a lot more sustainable humanity either. American industrial unions were never the countervailing power pluralists portrayed them to be, and an even more fragmented variant, enterprise unionism is likely to exacerbate, not improve the situation. Legally mandated humanity, implemented through statutory employee representation schemes which confer no power on workers, is an even less likely prospect.

The American union movement has dug itself, and has been dug into, a deep hole. It needs to change its course, but not in the direction suggested by Weiler. The alternative is the model of social unionism, a model whose roots in the history of American labour Weiler ignores and whose prospects he dismisses. For example, in his compressed history of the stages of American unionism, Weiler relegates the social union model of the Knights of Labor to a footnote.[75] Similarly, the only difference between A.F.L. and C.I.O. unions in the 1930s and '40s which Weiler discusses is their form (craft versus industrial). He ignores the equally important differences in their social and political outlooks during that period.[76] When Weiler considers the case for workers' control as an alternative instrument for workplace governance, he never bothers to refute the arguments in its favour because "there is simply no prospect on the horizon for any policy of true worker control."[77] Yet there are some signs that groups of American workers are experimenting with new forms of struggle and organization which build solidarity between isolated bargaining units, between separate unions and with community groups.[78] As Weiler recognizes, trade unionism must once again be an "activity of employees, not an entity external to them,"[79] but the focus of that activity must be building solidarity, not enhancing employer profits.

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[75]*Governing the Workplace, supra*, note 4 at 194.

[76]*Ibid.* at 196-97.

[77]*Ibid.* at 180.

[78]*E.g.* see D. Moberg, "Hard Times for Labor" (1989) Dissent 323; *An Injury to All, supra*, note 2; S. Lynd, "The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburgh, 1977-1987" (1987) 74 J. Am. Hist. 926; and, an exchange between Moody and Lynd in (1990) 184 New Left Rev. 76.

[79]*Governing the Workplace, supra*, note 4 at 301.