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A Theory of Labor Legislation

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A Theory of Labor Legislation

ALAN HYDE*

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This essay has occupied me on and off for over a decade. Parts III, IV, and VI were presented at the 1982 Annual Meeting, Law and Society Association, Toronto, Canada, June 3-6, 1982 and, in a later version, at the Interdisciplinary Legal Studies Colloquium, University of Wisconsin School of Law, March 19, 1984. A much earlier version of Part VII was given as a Harris Lecture at Indiana University Law School, Bloomington, Indiana, April 9, 1986. A Rutgers Law School faculty colloquium in October 1988 saw Parts I and III-VII. If I had anticipated such a long gestation, I might have done a better job keeping track of the suggestions made to me; I hope that my many critics over the years will recognize the pains I have taken with their suggestions, even when I have misplaced the source.

Special thanks go to Karl Klare, who introduced into law schools the interpretive approach to law; who encouraged me in this project even after large-scale inquiry into the social processes of legal change had become unfashionable within the Conference on Critical Legal Studies; and whose encouragement did not flag even after I became critical of some of Karl's models of legitimation and attempted alternative approaches. No one picking a model, a foil, or a friend could have been luckier than I have been.

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THE theory of labor legislation which I propose suggests that sweeping legislative reforms of labor law are ritual events whose significance, and a high significance it is, are cultural and symbolic. Labor legislation is a highly public ceremony which enacts an idealized picture of a culture's industrial power relations. In advanced, Western economies, such legislation is most frequently a concession to a union movement or working class which is making trouble, by a government forced by political circumstances to make some gesture showing workers' inclusion in the nation's political life. Labor legislation is designed to restore order by creating—not simulating—a cognitive experience—typically, an experience of victory—for working people.

People who legislate anticipate that legislation will educate, permitting working people or employers to grasp cognitively a particular system of values or power relations. This function of ritual has been well-

studied by anthropologists and is in accord with what we know about cognitive elements in the formation of social values.

The theory thus potentially explains the timing of labor legislation, the social forces leading to its enactment, and some features of its content; namely, the propensity of labor legislation in particular to concern itself heavily with declarations of rights and other matters not amenable to easy enforcement. This Article does not prove the theory. The Article is limited to a survey of large-scale facts which could not, even in principle, demonstrate that mine is the best interpretation of the process of labor legislation. Such demonstration would require smaller-scale, anthropological research that has not been done. Nevertheless, the theory is offered in its present form in the hope of directing attention to the symbolic aspects of law, in enriching our models of the legislative process, and in enriching debate about the strategic possibilities for the international labor movement.

I. INTRODUCTION: A FEW WORDS ABOUT LAW AS SYMBOLIC POLITICS

Before developing the theory proper, a few words are necessary to explain the claim that law plays a "symbolic" role. Experience in oral presentation of this work has taught me that communication difficulties set in at this point. By so describing law's functions I do not mean in any way to suggest that these are unimportant, illusory, or to be contrasted with a "real world" of "real politics," altogether elsewhere.¹ I am neither attacking nor pitying workers who achieve "symbolic" gains. I do mean to ally myself with an explosion of interest in symbolic behavior which has swept the social sciences over the past two decades and whose well-nigh inevitable rush into the law schools this Article aims to facilitate.²

Although our law reviews concern themselves little with them, it is not difficult to find examples of intense battles for legislative or other

1. This is the usage in M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964), which sets up throughout a basic distinction between a "real" world of politics, in which organized insiders play for money and power, and a "mass culture" in which passive spectators are served symbolic theater for their delectation. The distinction is played out in slightly different terms in each chapter: while the elite uses "referential" symbols to assist their thinking in an economical fashion, the masses are befuddled by "condensation" symbols which evoke "emotions" and into which they pour their own anxieties, *Id.* at 6; and so on.

This Article is in part an attack on this distinction, not an appropriation of it.

2. The breach in the floodgates is unquestionably Robert Gordon's magnificent pair of articles, themselves a major theoretical contribution to the school: Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984) and Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017 (1981) [hereinafter Gordon articles].

legal change in which the participants seem to be playing for no behavioral gain whatever. A vivid recent example was the congressional legislation—but not a constitutional amendment—banning flag burning, in response to the Supreme Court decision protecting it as speech.³ No one supporting the Supreme Court's decision, or any version of the legislative response, could have supposed that either would have significant behavioral consequences, if the behavior in question is "burning the flag."

Another such battle without immediate behavioral consequences concerns a constitutional amendment to permit prayer in public schools. One surreal aspect of the debate is that prayer is already endemic in the public schools. The impact of the relevant Supreme Court cases has been studied as extensively as any other, and while there were school districts that complied with them, compliance was spotty and largely in response to local political factors.⁴ Certainly many school districts continue to begin each day with required prayer, as both the scholars, and the steady stream of lawsuits by the American Civil Liberties Union and other organizations, demonstrate.⁵

From the perspective of a behaviorist, for example a scholar in the law-and-economics movement, advocates of flag burning legislation, or advocates of school prayer such as Jerry Falwell or Pat Boone, are acting irrationally. Advocates of school prayer know that they will not succeed in a constitutional amendment requiring prayer in unwilling districts. If I am right, that through local political pressure Falwell and Boone can already effectuate almost as much prayer as even they want, why do they want a constitutional amendment?

Even if the behavioral consequences are negligible or unclear, I do not think advocates of a constitutional amendment on flag burning or school prayer are irrational. The questions involved may not, however, be behavioral at all, at least not in any simple sense involving aggregate flags burned or prayers prayed. Rather, the questions involve the statement and definition of cultural values, in which the law occupies a sym-

3. Flag Protection Act of 1989, 103 Stat. 777 (to be codified at 18 U.S.C. 700); *Texas v. Johnson*, 109 S.Ct. 2533 (1989).

4. K. DOLBEARE & P. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICES* (1971). The decisions are *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

5. *See, e.g.*, *Jaffree v. Board of School Comm'rs*, 554 F.Supp. 1104 (S.D. Ala. 1983), *aff'd in part, rev'd in part*, 705 F.2d 1526 (11th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); *Karen B. v. Treen*, 455 U.S. 913 (1982), *aff'g* 653 F.2d 897 (5th Cir. 1981); *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981). It certainly seems possible that there were school districts which had not conducted prayer at all before 1962 but which bent to political pressure to introduce such prayer following the salience of the Supreme Court decisions.

bolic role. From this perspective, the debates about these proposed amendments are dramatic moments in which our culture asks itself hard questions: who are we anyway? What kind of country do we have? What kind of public order? The debate also addresses some less normative questions. Who's in charge here?⁶

Another recent example of a campaign for legal change substantially motivated by similar questions of cultural definition was the campaign for and against the Equal Rights Amendment. Of course, when Congress first approved the Amendment, the Supreme Court had yet to find any sex discrimination unconstitutional. But as the long state ratification campaign dragged on, accompanied by a steady flow of sex discrimination litigation, it became harder and harder to say, purely as a technical legal matter, what the Amendment would have accomplished.⁷ Nevertheless, opponents of the Amendment did not rejoice at its apparent otiosity; just as proponents refrained from claiming that their goals were achieved. Instead, of course, the battle for a symbolic statement both of power relations and of cultural values intensified, at the same rate that less and less remained at stake in terms of legal doctrine. The inevitable *denouement* was that after the Amendment was finally defeated, the Supreme Court upheld draft registration limited to men: the first Supreme Court decision that might possibly have come out the other way under the Equal Rights Amendment.⁸ One imagines a strict behaviorist exclaiming that for the first time he understands what the debate was about: the ERA was a demand that women be forced to register for the draft. We would be justified in thinking that the behaviorist had missed the point.

This Article explores an alternative approach: that battles over law are, enough of the time to matter, battles over cultural definition. This is true not only for obviously "symbolic legislation" such as a school prayer

6. This question was suggested by Clifford Geertz's interpretation of Balinese treaties in the 19th Century in C. GEERTZ, *NEGARA: THE THEATRE STATE IN NINETEENTH-CENTURY BALI* 41-44 (1980). The "treaties seem to have been designed more to codify the pretexts upon which alliances could be broken than to establish the bases upon which they could be built." *Id.* at 43. Nevertheless, "One thing that the treaties did do was to define in public terms who the official players in this superordinate game were . . ." *Id.* at 42.

7. *Accord*, J. MANSBRIDGE, *WHY WE LOST THE ERA* 2 (1986).

8. *Rostker v. Goldberg*, 453 U.S. 57 (1981). These remarks are meant to be suggestive, not indisputable. For an argument that an ERA would matter in doctrinal terms, by facilitating attacks on facially neutral laws with discriminatory impact, see Segal, *Sexual Equality, The Equal Protection Clause, and the ERA*, 33 *BUFFALO L. REV.* 85 (1984). Perhaps an ERA would have this effect, though of course the Fourteenth Amendment does not, *Village of Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252 (1977).

amendment, but for something as grubby as labor legislation. The Article suggests that the timing of labor legislation is shaped by the needs of governing elites for symbolic definition of labor's place in society. A frequent but not exclusive occasion for this definition is an unexpected increase in the quantity or intensity of industrial unrest. The Article suggests that the content of labor legislation is shaped by the desire of legislators to have the legislation function effectively as such a symbolic statement. Finally, the specialized process of labor legislation counts as a "ritual" in anthropological terms.

Before developing the model, however, I would like to develop three relevant anthropological conceptions. Here are two not-randomly selected extracts from the work of two anthropologists who have given this Article its definitions of "symbolic action" and "ritual." This will introduce three aspects of my model of labor law: labor law is symbolic in the sense of being consciously concerned with supplying concepts and images through which industrial actors may grasp cognitively their system; it is ritualistic in the sense of being accompanied by various unusual devices to heighten its public salience and impact; it achieves its effect through metaphor.

The anthropologist Clifford Geertz is a sort of guru to the new interest in symbolic behavior in the social sciences, and his influence lies heavy on the pages that follow. As an introduction, let us examine his 1964 essay on ideology, which may justly be termed germinal.⁹ Geertz attempts to salvage for social scientists the concept of "ideology," long debased into a mere pejorative. Geertz's solution is to view "ideology," not as an essentially distorted or unsatisfactory way of thinking, but rather as "symbolic templates" which are simply essential to any sort of group life. "The function of ideology is to make an autonomous politics possible by providing the authoritative concepts that render it meaningful, the suasive images by means of which it can be sensibly grasped."¹⁰ Geertz suggests, quite plausibly, that the formal articulation of ideologies

9. Geertz, *Ideology as a Cultural System*, in IDEOLOGY AND DISCONTENT 47 (D. Apter ed. 1964), reprinted in C. GEERTZ, *THE INTERPRETATION OF CULTURES* 193 (1973). Page references here will be to the latter volume.

10. *Id.* at 218. This of course is the nub of my rejection of Murray Edelman's formulation in M. EDELMAN, *supra* note 1: Edelman does not explain how the "rational" "insiders" can engage in "real" politics, or even communicate with each other, without a store of culturally supplied symbols and concepts, which define the crucial political players and permit their demands to be expressed. This study deals with this latter phenomenon; it is limited to quintessential "insiders" such as trade union confederations or employer organizations, and asks through what symbols these insiders wage legal battles.

should most likely be encountered as received tradition and conventional behavior weaken: "It is in country unfamiliar emotionally or topographically that one needs poems and road-maps."¹¹ In this way I hope, in the study which follows, to identify some crisis situations in the industrial relations of advanced economies, "unfamiliar countries" where traditional behaviors seemed inadequate, in which legislation performed this "ideological" function of highlighting, publicizing, new concepts and images.¹²

Another influence on this essay has been the work on ritual by the anthropologist Stanely Jeyaraja Tambiah, who has carried forward a recent current of anthropological thought in decoupling "ritual" from ideas of religion, or the "primitive." Instead, ritual more universally "attempts to restructure and integrate the minds and emotions of the actors."¹³ In this study, I will identify certain repetitive patterns of governmental response to industrial crisis involving stereotyped uses of legal processes and institutions, which qualify as "rituals" in this sense.

Now what may be of interest to the restive reader of these definitions is that both Geertz and Tambiah, searching for a familiar example in their reader's culture to illustrate these exotic phenomena, select an example from the world of labor law. Those examples will illustrate a final feature of our preliminary model: that legislation of the sort described here works as a ritual because it incorporates the power of metaphor.

11. C. GEERTZ, *supra* note 9, at 218.

12. Geertz's essay has indeed been seminal in awakening social science interest, particularly among anthropologists and historians, in symbolic behavior, which has involved application of the work of Geertz's pantheon: "such philosophers as Peirce, Wittgenstein, Cassirer, Langer, Ryle, or Morris [and] such literary critics as Coleridge, Eliot, Burke, Empson, Blackmur, Brooks, or Auerbach . . ." *Id.* at 208. However, it has failed in at least one purpose, inasmuch as the word "ideology" is probably as much a pejorative today, a quarter of a century on, as it was when Geertz wrote. If his usage had prevailed, one could without hesitation describe law as "ideological" and not be understood as sneering. I do not believe one can, so I will try to avoid the word "ideology," which continues to mean so many things to so many people. In my experience, the word "symbolic" causes enough problems.

13. S. TAMBIAH, *CULTURE, THOUGHT, AND SOCIAL ACTION: AN ANTHROPOLOGICAL PERSPECTIVE* 53 (1985). On this view, ritual may be defined as "a culturally constructed system of symbolic communication. It is constituted of patterned and ordered sequences of words and acts, often expressed in multiple media, whose content and arrangement are characterized in varying degree by formality (conventionality), stereotyping (rigidity), condensation (fusion), and redundancy (repetition)." *Id.* at 128. I will return to this definition of ritual. Obviously, I use it because it is handy and suits my purpose. I make no pretense of canvassing all the things that anthropologists have meant by "ritual" or sorting out who is responsible for various steps along the road to decoupling "ritual" from the sacred and universalizing the concept. A brief introduction is D. KERTZER, *RITUAL, POLITICS, AND POWER* 8-14 (1988), and sources cited therein.

Geertz uses the slogan which American organized labor attempted unsuccessfully to mobilize against the Taft-Hartley Act:¹⁴ "slave labor law." Understanding what is going on in this slogan helps one understand how Geertz's conception of "ideology" differs from the conventional conception. Conventionally,¹⁵ this slogan is "ideological" inasmuch as it was "exaggerated" and "caricatured," in short, distorted. Geertz argues that as an understanding of how the slogan was supposed to work, this is inaccurate if not downright insulting.¹⁶

That it might in fact draw its power from its capacity to grasp, formulate, and communicate social realities that elude the tempered language of science, that it may mediate more complex meanings than its literal reading suggests, is not even considered. 'Slave labor act' may be, after all, not a label but a trope. More exactly, it appears to be a metaphor or at least an attempted metaphor.¹⁷

Like all metaphors, it is "wrong": "It asserts of one thing that it is something else."¹⁸ Like all metaphors, it "works" if the false identification can come to seem "true"—which did not happen with "slave labor law"—but does, I shall argue, with successful labor legislation, in which the idealized portrait of industrial power relations can, like any metaphor, come to seem "true."¹⁹

Tambiah uses a different figure of political rhetoric. Indeed, his figure is employer, not union rhetoric: "the employer is to his workers as a father is to his children." Nevertheless, if this works, in the sense of convincing workers, it works as a metaphor. And Tambiah assumes that his readers are sufficiently familiar with persuasion of this kind as to serve them as a metaphor for understanding Tambiah's interpretations of ritual; namely, that it is a persuasive process in which the properties of a desired and desirable vertical relation are "persuasively transferred" to another, undesirable condition.²⁰

As a scholar and teacher of labor law, I read these two passages at

14. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-97 (1982).

15. Geertz cites F. SUTTON, S. HARRIS, C. KAYSEN & J. TOBIN, *THE AMERICAN BUSINESS CREED* 4-5 (1956).

16. "It is rather hard to believe that either those who coined and disseminated the slogan themselves believed or expected anyone else to believe that the law would actually reduce (or was intended to reduce) the American worker to the status of a slave or that the segment of the public for whom the slogan had meaning perceived it in any such terms." C. GEERTZ, *supra* note 9, at 210.

17. *Id.*

18. *Id.*, quoting Percy, *Metaphor as Mistake*, 66 *THE SEWANEE REV.* 79, 81 (1958).

19. On law as metaphor, see generally Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 *U. PA. L. REV.* 1105 (1989).

20. S. TAMBIAH, *supra* note 13, at 71-73.

different times with ironic exhilaration. The irony lay in the fact that these two anthropologists could assume that any educated reader would grasp how these instances of labor relations rhetoric do or do not work in her own culture, and thereby be in a position to understand more distant cultures. The assumption is true only at a very superficial level. The sad fact is that we do not understand how legal rhetoric, or labor relations rhetoric "works," is grasped by people, influences consciousness, behavior, action.²¹ "We" do not understand this in our capacities as scholars of law; nor do the political scientists, psychologists, historians, sociologists, or anthropologists, or practical labor or management politicians understand this much better; though, as we shall see, all these individuals have much to contribute to our understanding. Our continued inability to understand this feature of law is indeed becoming scandalous.²²

The exhilaration came, however, in realizing that we can in principle begin to understand these things, for we have made these laws ourselves.²³ The essay which follows is not, and cannot be, a complete theory of legal rhetoric, or even just of labor legislation. It may not even count as a "breakthrough."²⁴ That will come when more in our profession become alive to the symbolic, the cultural, the rhetorical component in our daily activities.

However, the claims I make for the theory even in its present nas-

21. A sweeping and imaginative recreation of the formation of working people's "world views" or consciousness does not mention legal ideas at all. C. SABEL, *WORK AND POLITICS: THE DIVISION OF LABOR IN INDUSTRY* (1982) identifies different "world views" or career plans among Western industrial workers and attributes these to experiences with job organization, such as the division of labor and careers at work; experiences of conflict; relations to other work groups; national cultures; and other factors. This is surely correct. I do not and would not suggest that legal ideas or even struggles over legislation would contribute more than a bit to the formation of workers' consciousness. However, I believe that there are moments in history when such distinctively legal ideas and struggles become important, as the excerpts from Geertz and Tambiah show. I am emboldened in my exploration of these moments here because of the relative absence of any respectable theoretical work about them in legal thought—as well as by Sabel's observation that the economic structures he observes are, within the limits of competition, "fixed by political choices," *Id.* at 231; for the countries Sabel studied, "fixed political choices" may be equated with "law."

22. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 71 (1984), notes that the law-and-economics school has barely scratched the surface of the ways in which law can influence behavior, but observes sadly that he cannot say, though he wishes he could, that we were on the verge of some breakthrough in understanding here. See also Abel, *Redirecting Social Studies of Law*, 14 *LAW & SOC'Y REV.* 805, 824-29 (1980), a breathless research agenda from the heady days when it looked as if Critical Legal Studies might join hands with and reorient Law and Society; little progress has been made on it, needless to say.

23. This is simply an article of faith on my part, about which no one will feel better if I cite *The New Science of Giambattista Vico* (1725).

24. B. ACKERMAN, *supra* note 22.

cent state are not modest. I hope to sustain the thesis that an understanding of the symbolic dimension of labor law is critical to a solution of several issues in the positive sociology of labor legislation, issues of extraordinary difficulty both from a sociological and a practical political point of view; namely: under what circumstances will a given country enact labor legislation or fundamentally alter its existing statutes? What can be predicted about the features of labor legislation? So the reader should not suppose from these genteel opening pages that yet another exciting political struggle is about to be buried in a deep snow of social science concepts, falling, like Joyce's snow, on the living and the dead. If the theory of labor legislation is correct, this should have serious implications for the political strategy and practice of American labor.

But first let us describe the scope of the problem.

II. THE PROBLEM: WHY IS THERE NO NEW LABOR LEGISLATION IN THE UNITED STATES OF AMERICA?

Autobiographical introductions to research projects may be tedious. I believe one fact is helpful to understanding this project. I first became interested in the comparative processes of labor legislation in the fall of 1977, while teaching a seminar on comparative labor law. It was a good time to teach such a seminar. In the previous decade, nearly every country in Western Europe had made substantial changes in its system of labor law. The reforms bore little resemblance to each other; European systems of labor law were incredibly diverse prior to 1968 and remain so today. New ideas were in the air; European labor law seemed to be all about change. Meanwhile, on our side of the Atlantic, mild technical reforms of our labor legislation, of the most modest aspiration and limited potential effect, had been filibustered to death by a Democratic Senate under a Democratic Administration. This surely was a paradox to be explained. Attention to the sociological processes of change in labor legislation did not seem, in 1977, to require any unusual perspicacity.

In the decade during which I have worked on this study, the problem of explaining why there is no new labor legislation in the United States has neither been solved, nor has it gone away. It has, however, altered its form. In 1977 there did not exist, either on the right or the left, a critical literature on labor legislation articulating alternatives to the existing legislative structure. The conventions of law review writing at that time required that proposed reforms take the general form of the failed 1977 reforms: administrative tinkering within an accepted structure. The intellectual problem in 1977 was in explaining why the only sort of legis-

lative change thinkable within the system was nevertheless unrealizable in practice.

A decade later, the world is upside down. For as any reader of the law reviews knows, there is now widespread among unions, management, and intellectuals, strong dissatisfaction with the system of American labor law, and many articulate alternatives.²⁵ What still is lacking is any practical possibility that any such alternative will be enacted into positive legislation. Consequently, attention to the underlying sociology of labor legislation is if anything, more timely today than at any time in recent history. Otherwise, the burst of creative thinking about labor relations will come to precisely nothing. For every new approach which I have seen would require substantial legislative reform, and none puts forward any strategy for achieving reform, or advances our understanding of how legislative reform could be achieved. Without such a strategic component, this torrent of new ideas will crash onto the rock of political obduracy, becoming nothing but mist.

But doesn't this very multiplicity of ideas simply illustrate why no reforms have been enacted? Surely, if there were consensus around one plan, reform would quickly follow? Like M. Jourdain speaking prose, our objector has just uttered a positive theory of labor legislation: labor legislation results from a consensus among labor and management leaders. In this case, the theory is a bad one. Consensus of values is not the answer; it explains none of the three major American labor statutes. There was no consensus among labor and management leaders which led to the pas-

25. A sample of the quite sweeping reforms of American labor legislation recently proposed would include, in no particular order, the facilitation of cooperative representation structures advocated in C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* (1988); the facilitation of union involvement in levels of corporate decision advocated in Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988); the thorough democratization of work advanced in Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C. L. L. REV. 39 (1988), and Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988); Catholic labor theory, Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1988); and the deregulation of labor relations and concomitant return to common law mooted, with perhaps varying degrees of seriousness, in the interview with Lane Kirkland, *AFL-CIO Chief Calls Labor Laws a "Dead Letter"*, Wall St. J., Aug. 16, 1984, at 8, col. 2; R. FLANAGAN, *LABOR RELATIONS AND THE LITIGATION EXPLOSION* (1987); Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); and the various contributors to *LABOR LAW AND THE EMPLOYMENT MARKET: FOUNDATIONS AND APPLICATIONS* (R. Epstein & J. Paul eds. 1985). See also, *Oversight Hearings on the Subject "Has Labor Law Failed"*, *Joint Hearings Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor and the Manpower and Housing Subcommittee of the House Committee on Government Operations*, 98th Cong., 2d Sess. (1984).

sage of the National Labor Relations (Wagner) Act of 1935,²⁶ Labor-Management Relations (Taft-Hartley) Act of 1947,²⁷ or Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959.²⁸ Our theory of labor legislation then, must discover what actually leads to labor legislation.

There are essentially two ways in which we might do this: historical study or comparative study. The historical study would go back to the last truly foundational labor legislation in the United States: Landrum-Griffin? Wagner?—and analyze the circumstances of its enactment. Returning to the Wagner Act, in this and other senses, has been a popular activity over the last decade, and much has been learned. I will return to this literature later in the study.²⁹

The comparative study has not been undertaken in this context, and that I propose to do now. There are many comparisons which might be made for various purposes. In order to study the turn toward legislation, it is necessary to make comparison with a country or countries which have undertaken thoroughgoing revision of their labor statutes. The countries chosen for comparison should bear some economic and social similarity to our own.³⁰ The last such wave of activity is still the Western European reforms of the 1968-1976 period, and that is what Part III of this Article will summarize.³¹

I make no claims for comparative method as such except that it is certainly suggestive that so many Western European countries with advanced industrial economies enacted fundamental changes in labor legislation during a decade in which the United States failed to enact rather minor reforms.³² The dangers in facile comparison among countries are

26. 49 Stat. 499 (1935), codified as amended at 29 U.S.C. §§ 151-69 (1982).

27. 61 Stat. 135 (1947), codified as amended at 29 U.S.C. §§ 141-97 (1982).

28. 73 Stat. 519 (1959), codified at 29 U.S.C. §§ 401-531 (1982).

29. See *infra* note 181 and accompanying text.

30. The advanced Western European countries, plus Canada (which has not undertaken fundamental reform), are the obvious comparisons for this purpose. I shall be referring to these countries randomly as "advanced," "industrialized," and "capitalist," without thereby meaning to incorporate any particular theory of legal development, such as Weberian or Marxist. On terminology, see generally Andrew Martin, *The Politics of Economic Policy in the United States: A Tentative View from a Comparative Perspective* (Sage Professional Paper in Comparative Politics No. 01-440, 1973).

31. The last decade or so has been one of weakness for labor all around the industrial world, yet this fact has not (outside of Britain) led to repressive legislative reforms, or legislative reforms of any kind. This fact is not without significance. We will return to it *infra* note 193 and accompanying text.

32. The statement in text is a bit too modest. I will want to claim *infra* Part V that the dominant theories of legislation in American legal thought, namely the economic regulation theories of the public choice school, Weberian developmental theories, and cruder variants of legitimation theory, functionalist all, come a cropper in their inability to explain transnational variation in countries with

well-known and I give them less than full treatment here not because I am unmindful of them, but just because they are well-known.³³

Part IV of the Article will sum up the European changes studied and articulate a set of questions that the developments seem to raise. Part V will review theories of legislation generally, or labor legislation, cur-

similar economies. See Gordon Articles, *supra* note 2, for fuller treatment. So the comparative method, to my mind, leads directly to inquiry into interpretive modes of explanation which are less rigidly functionalist, perhaps not functionalist at all.

33. Two excellent and cautionary essays have guided my steps. See Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 BUFFALO L. REV. 210, 227-28 (1966) ("The value in studying solutions developed by other countries, however, is not that they can provide models which we can imitate, but rather that they can open our minds to fresh ways of looking at our problems and suggest new kinds of solutions which we can tailor to meet our special needs.").

A second is aimed at historians but applies as well to legal scholars. As the author is E.P. Thompson, the rhetoric is unsummarizable but well-worth reprinting:

Where the influence of the social sciences is undoubtedly most fruitful it is, at exactly the same point, most treacherous: in the comparative method. For it is precisely at the point where these 17th-century families become The Nuclear Family: where these 13th-century Russian peasants and those 19th-century Irish cottiers become The Peasantry: where these Chartist Plug Rioters and those Communards become Violence in Industrial Society: where, indeed, 18th-century Birmingham and a bazaar in 16th-century Persia and a village in 20th-century Ecuador become assimilated as Pre-Industrial Society—it is at this point that the integument of the historical discipline comes under extreme strain, and is in danger of being punctured to let in a gush of abstract typological air. The danger is worth taking; but each new concept so gained must be thrust back into the ensemble of meanings of a specific historical context once again, and many of the concepts—perhaps the majority—will crumble to mere dust of irrelevancy in the immersion. Perhaps the continual making and breaking of the integument is the best that we can do.

Thompson, *Anthropology and the Discipline of Historical Context*, 1 MIDLAND HIST. (No. 3) 41, 46 (Spring 1972).

I have failed this advice. I fully agree that Thompson has described the next step. I would hope that all the abstract air of this study will indeed be thrust into specific historical contexts by people qualified to do so, but I cannot take that step myself. I fully grant that whatever insights this study has are the inevitably somewhat superficial insights of one who has been reading a bit about a wide range of campaigns for labor legislation, including some in countries where I do not even read the local language. On the other hand, I do believe that comparative insights are worth making, if treated with caution, and if they survive the "next step"—do people more familiar than I with the specific areas studied, and others, find this approach enriches their research?

Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981), has stimulated my thinking and inspired greater rigor in my approach. I have not however found "cost-reduction" to be a helpful way of describing the behaviors that I have studied, for reasons to be explored *infra*, text accompanying notes 158-60, unless "cost" is defined so broadly as to lose the chaste rigor of the concept as applied by Clark.

Unfortunately, as is well-known, there are no sound methodological reasons not to apply such a broad notion of "cost," so the apparent chastity of Clark's approach edges closer to arbitrariness. See generally M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114-85 (1987); Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387 (1981); Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

rently in vogue, in order to show that none really explains legislation of the type studied. Part VI outlines my positive theory, which explains labor legislation chiefly in terms of well-timed increases in worker unrest. Part VII is a more speculative discussion of recent work in anthropological and cognitive theory which lends support to the positive theory, though the theory stands without it.

III. FIVE NATIONAL STUDIES OF RECENT CHANGE IN LABOR LAW

Let us then turn to brief accounts of the processes leading to the enactment in five Western European countries of some fundamental, foundational statutes regulating labor relations. This is a tall order and it would be idle to pretend that the accounts which follow are free of bias—or that any imaginable alternative accounts would be free of bias either. So let me explain the principles that went into the drafting of this section.

As I have mentioned, I first began reading about these countries with no ulterior purpose of any kind except to accumulate information about recent changes in labor law for preparation of a seminar in comparative labor law. What they now illustrate is simply the following: these are countries which enacted fundamental changes in labor law, the sort of change that is the theme of this study. This study is not an inquiry into a random sample of employment statutes; it is focussed specifically on the big ones: the statutes seen as laying fundamental groundwork for the entire conduct of labor relations.³⁴

Within the group of countries which adopted such legislation during the past twenty years, the five below have been chosen for two reasons. First, to illustrate the substantive diversity of European labor law before and after the 1970s. From a standpoint of substantive law, these five countries had little in common as to what even counted as labor law:

34. For a discussion of the distinction between studying "law creation": basic revisions, really new proposals, and more day-to-day law making, see Chambliss, *On Lawmaking*, 6 BRIT.J.L. & SOC. 149 (1979).

One cannot assume that the same social processes would govern the more quotidian work of statutory amendment, regulation writing and administrative interpretations. Ronnie Steinberg makes just this point in her excellent study of these low-level changes in American state wage and hour regulation, R. STEINBERG, *WAGES AND HOURS: LABOR AND REFORM IN TWENTIETH-CENTURY AMERICA* 63, 74 (1982) (cautioning against studying only initial statutory adoptions). This does not mean that the relevant social processes are entirely distinct, however. Indeed, Steinberg's meticulous study of regulatory changes ultimately is in accord with this study: response to crisis predicted more of the state-level increases in employment benefits than either of the more bureaucratic mechanisms; that is, there was no real tendency for levels of benefit either to converge among states over time or to simply proceed along predictable progressions from year-to-year. *Id.* at 140-155.

whether there was a large or small quantity of labor law³⁵ and what aspects of labor relations were subject to legal regulation. The 1970's reforms only underscore this diversity in substantive values—the better to play up the commonalities in social process. Second, adequate accounts in English exist for all five countries both for the substance of their legislation and the processes leading up to it.

In telling the stories which follow, I have certainly selected the facts which help make my case; that is, the political and industrial context of the legislative reforms. I have, moreover, omitted facts which would be crucial to establishing certain rival hypotheses. For example, someone who believed that labor legislation fundamentally reflects deep cultural traditions long predating industrial civilization will find little to work with in the following narratives, which largely start around 1945.³⁶

However, in presenting my narratives of the events leading up to the adoption of the most recent legislative reform, I have tried to stick as closely as possible to a kind of neutral, official account of the sort that almost any industrial relations scholar selected at random might produce, if she or he were asked to write a brief essay on the history of the most recent legislative change.³⁷ While it may seem utopian to aspire to

35. The idea of “quantifying” the amount of law comes from D. BLACK, *THE BEHAVIOR OF LAW* (1976). It is not used here (any more than in Black) in any sort of sense you could put numbers onto and use in a computer program. Rather, the intent is to convey a rough sense of countries which have “a lot” of labor law or which “frequently” employ distinctively legal forms and personnel in the regulation of industrial life.

In truth, the idea of formulating broad general propositions about legal change and testing them against evidence probably was also inspired in large measure by Black's book. The search was emboldened by the fact that Black's own theses were inadequate to the job. Black's book is an attempt to explain the “quantity” of law with reference to a range of factors largely having to do with class or status differences among relevant groups. Nothing in the book is very helpful as to the problem with which I was concerned: cross-cultural variations in the “quantity” of law employed to govern exactly the same class or status relationship, namely employer-employee in countries at a similar level of development. Black's book has since engendered a great amount of criticism which I will not, for the reasons stated, take up here.

36. I regard the cultural traditions hypothesis as fairly implausible—if labor law can't build on a modernist break with tradition, what could?—but, as we shall see, *infra* notes 162-68, it has its notable adherents. Western European labor law before 1945 has been ably summarized in the essays anthologized in *THE MAKING OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF NINE COUNTRIES UP TO 1945* (B. Hepple ed. 1986)(hereinafter *NINE COUNTRIES*), and, while I learned much from this volume, I learned little which directly aided understanding of the post-1968 reforms.

37. I am using “industrial relations” as a generic term, meaning people who study the organization of work and workers and conflicts around work issues. In some countries studied, the term itself is controversial, as an American import, or because it is thought to commit the user to a research program which studies something called “industrial relations systems,” see generally J. DUNLOP, *INDUSTRIAL RELATIONS SYSTEMS* (1958), in isolation from political or economic systems. Whether or not the latter course is compelled by Dunlop, which I doubt, it is not pursued here; indeed my

such neutrality, it does in fact correspond to a certain *genre* of writing up these histories; one which I have tried to follow. This explains the heavy reliance on such quasi-official sources as reports to the International Labour Office (ILO). I have tried to read as widely as I could into these events, but have not cited everything I have read, particularly if it was not in English or not generally available. I have tried, in short, to come up with fairly neutral accountings of the relationship between political background, industrial unrest, and legislative change. This framework is easy to follow because, for so many native observers of the events in question, it appears "naturally" as the normal way of telling the story.

My ultimate aim, to be candid, is to get the reader to experience the same sense of discovery I myself did. I would like you to be struck by the great diversity of human imagination which has gone into the making of labor law; the wide range of jobs given to legal institutions in various countries, the different solutions to common problems. And at the same time, I hope commonalities generally unnoticed by commentators will also emerge: labor law as the creature of particular kinds of governing coalitions faced with the demand to "do something" in the face of increased levels of unrest, and seizing certain standard techniques for coping.

A. *France*

France in the 1950s and 1960s had only a modest quantity of law regulating collective labor relations. Like all the countries studied, France had direct statutory regulation of certain issues which would be bargainable in the United States, such as mandatory vacations.³⁸ The unions themselves are divided into rival confederations, economically weak, and enroll the smallest percentage of the workforce in Western Europe.³⁹

project could be defined, by those who like "systems" talk, either as a study in the relationship of political-legal to industrial relations systems, or as a study of the political-legal system as it relates to workplaces. I regard this dispute as terminological, unhelpfully so.

38. On the historical identification of French Socialists with increased mandated paid vacation, see D. SINGER, *IS SOCIALISM DOOMED? THE MEANING OF MITTERAND* 107 (1988).

39. They are "unions of militants, in which the essential element of the organization is the initiative and devotion of men motivated by conviction and the need for action." Reynaud, *Industrial Relations Research in France 1960-75: A Review*, in *INDUSTRIAL RELATIONS IN INTERNATIONAL PERSPECTIVE: ESSAYS ON RESEARCH AND POLICY* 262 (P. Doeringer ed. 1981)(hereinafter IRIP), citing sources. General introductions to French unions are: *THE FRENCH WORKERS' MOVEMENT: ECONOMIC CRISIS AND POLITICAL CHANGE* (M. Kesselman ed. 1984); Sellier & Silvestre, *Unions' Policies in the Economic Crisis in France*, in *UNIONS IN CRISIS AND BEYOND: PERSPECTIVES FROM SIX COUNTRIES* 173-87 (R. Edwards, P. Garonna, & F. Tödting eds. 1986), and Ross, *The Perils of Politics: French Unions and the Crisis of the 1970's*, in *UNIONS, CHANGE AND CRISIS:*

The foundational statute for postwar French labor law was the Act of 11 February 1950. The law made the central legal institution of labor relations the "collective agreement." This, however, is quite different from what Americans mean by the term. Agreements under the 1950 Act were to cover an entire industry or occupation, and apply to all establishments and workers in the covered industry.⁴⁰ The Act also provided for plant agreements to "adapt" the industry agreements to particular situations in individual firms.⁴¹ Conflict was largely unregulated.⁴²

Under the 1950 Act, agreements remained in force until amended. As a consequence, little pressure was felt to alter agreements once reached, and collective bargaining was intermittent.⁴³ By 1960, 189 national industry agreements were in force and registered with the Ministry of Labor. Between 1960 and 1964 bargaining virtually ceased due to employer refusal. During this period, actual wages paid rose considerably above those stipulated in the agreements. Bargaining resumed somewhat in scattered industries from 1965 to 1968, but as to national agreements or social legislation, the period has been described as a "vacuum."⁴⁴ In general, French industrial relations in this period may certainly be char-

FRENCH AND ITALIAN UNION STRATEGY AND THE POLITICAL ECONOMY 1945-1980 15-93, (P. Lange, G. Ross, & M. Vannicelli eds. 1982) [hereinafter FIUSPE].

40. An earlier law, on 16 May 1946, had set up elected works councils (*comités d'entreprises*) along the lines of a government order the previous year. Works councils exist today in over 80 percent of firms with over forty-nine employees; they are favored by employers and regarded with suspicion by unions. Adam & Lucas, *Les institutions de représentation du personnel en France: bilan et perspectives*, DROIT SOCIAL, March 1979, at 79.

41. Loi du 11 février 1950 sur les Conventions Collectives, still in effect and described in Dubois, Durand & Erbès-Seguin, *The Contradictions of French Trade Unionism* [hereinafter Dubois], in 1 THE RESURGENCE OF CLASS CONFLICT IN WESTERN EUROPE SINCE 1968 74-76, 80-81 (C. Crouch & A. Pizzorno eds. 1978) [hereinafter RESURGENCE]. It does not impose any obligation of negotiation or agreement.

42. The right to strike was conceptualized as belonging to the individual worker; thus the union as an entity had no peace obligation. Giugni, *The Peace Obligation*, in INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 139 (B. Aaron & K. Wedderburn eds. 1972) [hereinafter INDUSTRIAL CONFLICT].

43. The presence of a collective agreement does not restrict resort to economic conflict, either in law or practice.

44. Dubois, *supra* note 41, at 58 n.4.

The emphasis in the text on bargaining is not meant to suggest that there is any necessary virtue in collective bargaining leading to a negotiated agreement, either American-style bargaining leading to a plant agreement or French-style, allegedly leading to an industry agreement. Significant elements in the French and Italian labor movements in particular have long rejected this concept on ideological grounds, viewing agreements with capital as class collaboration and insisting on a purely oppositional role for unions. *Id.* at 71-73 (France). In particular, I do not wish to be understood as allying myself with the dominant trend in industrial relations scholarship which still identifies American-style collective bargaining with maturity and high development: despite the beating that institution has taken at home! By emphasizing the low levels of bargaining in France, I mean only to

acterized as "comparatively under-institutionalized."⁴⁵

In May 1968 an extraordinary outburst of strikes and labor unrest, much of it of rank-and-file origin, came to involve between eight and ten million workers.⁴⁶ A dramatic meeting intended to revive the process of bargaining was held at the Ministry of Social Affairs in *rue de Grenelle*. The resulting "*Grenelle*" Statements or Protocol was announced by then-Prime Minister Pompidou with the agreement of the leaders of major employer groups; the leaders of the major union confederations did not sign the agreement, but nevertheless participated in the subsequent upsurge in bargaining and agreements concluded.⁴⁷

Bargaining extended to new sectors (such as certain public and nationalized enterprise) and new topics (such as hours, training, and profit sharing).⁴⁸ For example, between May 1968 and October 1969, the Ministry of Labor received seventy-one private-sector agreements on reduction of working hours—prior to May 1968 only three agreements had ever covered reduced hours. Strike activity remained high over three years, including some plant occupations and unilateral union reductions in working hours.⁴⁹

emphasize the dissonance between a legal system supposedly centered on that institution, and the institution's virtual nonexistence on the ground.

45. Ross, *supra* note 39, at 20.

46. There are a great many memoirs, manifestos, and the like from the famous 1968 strikes, but not a wide assortment of comprehensive academic treatments. The students seemed to get better press than the workers. In English, the best start is probably G. ROSS, *WORKERS AND COMMUNISTS IN FRANCE* (1982). In French, two synthetic pictures are Pierre Dubois, Renaud Dulong, Claude Durand, Sabine Erbès-Seguín, and Daniel Vidal, *Grèves revendicatives ou grèves politiques?: Acteurs, Pratiques, Sens du Mouvement de Mai* (1971) (on the causes of the strikes), and Jean-Daniel Reynaud et al, *Les événements de mai-juin 1968 et le système français des relations professionnelles* (1972).

For an imaginative reading of the symbols and iconography of the student revolt which took place at the same time, as well as brief accounts of efforts by French academics to interpret these same symbols, see Turkle, *Symbol and Festival in the French Student Uprising (May-June 1968)*, in *SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY* 68 (S. Moore & B. Myerhoff eds. 1975). The refusal of industrial relations experts on the scene to pay the same kind of attention to the symbolic aspects of struggle is what has made the instant Article more programmatic than synthetic.

47. The Grenelle statements and subsequent recognition of unions by employers were described at the time by the general secretary of the largest union confederation as "the most important legal victory for the trade-union movement since 1884." Quoted in A. TOURAINE, M. WIEVORKA, & F. DUBET, *THE WORKERS' MOVEMENT* 240 (1987).

48. Curiously, demands for changed working conditions or reduced hours decreased after 1968 as grounds for strikes. See Dubois, *supra* note 41, at 61-65. The events of 1968 succeeded in triggering bargaining over these demands, despite their lessened salience to the workers involved!

49. In hindsight, it appears that "France is one of the few countries in Europe where the annual average number of days lost by strikes from 1969 to 1972 is not much higher than from 1964 to 1967." Reynaud, *France: Elitist Society Inhibits Articulated Bargaining*, in *WORKER MILITANCY AND ITS CONSEQUENCES, 1965-75: NEW DIRECTIONS IN WESTERN INDUSTRIAL RELATIONS* 279

In addition, two national multi-industry agreements entered into between employers' associations and union confederations in February 1969 and July 1970 covered respectively, job security (including standardized procedures for layoffs involving notice to new plant works councils and compensation for laid-off employees) and vocational training (including the right to educational leaves of absence). Such multi-industry agreements were not mentioned in the 1950 Act, and their legal status was unclear.

A trio of statutes between 1968 and 1971 attempted collectively to order the chaos by institutionalizing industrial relations at (successively) the workplace, company, and multi-industry levels. The Act, Number 68-1179 of December 27, 1968, Respecting the Exercise of the Right of Association in Undertakings, recognized plant-level branches of unions (*sections syndicales d'entreprise*) for the first time. These branches were granted the right, on plant premises, to post notices, collect dues, and hold meetings. The Act also provided procedures for designating delegates to plant-level work commissions.⁵⁰

Company level agreements were recognized in the law of 30 June 1971, to adapt industry agreements to the situation in particular firms.⁵¹

(S. Barkin ed. 1975). As Reynaud points out, however, the strikes in the later period seized the public imagination due to the high incidence of building occupations and other illegal conduct and the low incidence of conventional economic pressure.

50. 1968 Legis. Ser. (ILO), 1968-Fr.2. While this legislation influenced the later Italian statute of 1970, discussed *infra* note 75, it had nowhere near the latter's impact: employer resistance to shopfloor unionism and low union priority on shopfloor struggles prevented any major increases in union shopfloor power. See Ross, *supra* note 39, at 29. As a general matter, all the French legislation in the wake of the Grenelle agreements imposes nothing on employers absent further enforcement regulations (*décrets d'application*), which take a long time to appear, or negotiated settlements. Dubois, *supra* note 41, at 75-76. This diffidence about enforcement is characteristic of labor legislation, particularly that described by my model; I will return to the significance of this point *infra* notes 198-200.

A major theme of all the French legislation to be mentioned was the institutionalization of the "representative" unions, that is, practically speaking, those affiliated with the national confederations. Only these attain rights under the legislation; it is essentially impossible to organize a new rank-and-file organization and have it achieve recognition as a union. See Sellier & Silvestre, *supra* note 39, at 174-75.

51. 1971 Legis. Ser. (ILO), 1971-Fr.3. The law was ineffective in encouraging company-level bargaining, which was barely known before the law and did not grow after it; by 1981 only 9.9 percent of firms had company-level agreements, while 76.9 percent were covered by industry-level agreements. Eyraud & Tchobanian, *The Auroux Reforms and Company Level Industrial Relations in France*, 23 BRIT. J. INDUS. REL. 241, 242 (1985) (Ministry of Labor survey). The article attributes the reluctance to bargain at the company level to the respective strategies of unions and employers. Unions fear the incorporation of company-level bargainers into management's point of view, resulting in weak "company unions" (as Americans would say); employers prefer a united front and fear interfirm competition.

Finally, Act Number 71-561 of 13 July 1971 gave multi-industry agreements the status of collective agreements under the 1950 Act. Failure to negotiate was made a punishable offense, and the legal scope of bargaining was broadened to include the frequency of wage reviews, the compensation of temporary and part-time workers, and equal pay for equal work by female and young employees.⁵²

The general post-1973 economic downturn in the industrialized world did not end creative thinking about labor relations in France, but it certainly led to legislation and government report in unusually timid form.⁵³ The Act of 27 December 1973 Respecting the Improvement of Working Conditions required consultation (but not agreement) with the works commission over working conditions.⁵⁴ Two years of negotiations on working conditions at the national level followed, culminating in an agreement of 17 March 1975 which the two largest union confederations did not sign. Continued discussions at the industry and firm levels were contemplated. Legislation in 1973 and 1975 dealt gingerly with individual discharges and group layoffs, respectively.⁵⁵

Since 1975, extended public discussion of worker participation in enterprise has crystallized around the *Sudreau* Report of that year, the Report of the Committee to Study Company Reform, created July 1974. This Report avoided recommendations of legally-imposed structures but contented itself with suggestions addressed to unions and management.⁵⁶

The legislative agenda shifted sharply with the election of a Socialist government under President Francois Mitterand in 1981. Despite the limited success of past legislative efforts to encourage bargaining or con-

52. 1971 Legis. Ser. (ILO), 1971-Fr.3. See generally Delamotte, *Recent Collective Bargaining Trends in France*, 103 INT. LAB. REV. 351 (1971). The law "was prepared after thorough consultation with both labor and management and was passed unanimously by parliament." Reynaud, *supra* note 39, at 259. The law did not lead to any increase in multi-industry agreements: "there were just as many instances of such negotiations from 1968 to 1971 as there were from 1971 to 1974." Dubois, *supra* note 40, at 84.

53. Union membership began decreasing around 1974 and has declined since. Sellier & Silvestre, *supra* note 39, at 178-87.

54. 1973 Legis. Ser. (ILO), 1973-Fr. 2. This was accomplished in part by lifting an earlier prohibition on variations in working hours and part-time work which had impeded the development of bargaining. The Act also created a National Agency for the Improvement of Working Conditions.

55. The 1973 law requires only that an employer state in writing the reasons for the discharge. The 1975 law on group layoffs is tougher; it requires consultation with the enterprise committee fifteen days to three months before layoffs (depending whether the layoff was cyclical or structural and how many are affected). Approval of the inspector of labor is also required, but in practice this was not difficult to obtain. See Sellier & Silvestre, *supra* note 39, at 194.

56. LA RÉFORME DE L'ENTREPRISE: RAPPORT DU COMITÉ PRÉSIDIÉ PAR PIERRE SUDREAU (1975) [hereinafter SUDREAU REPORT].

sultation at a particular level,⁵⁷ it was believed once again that legislation could help institutionalize negotiations which had not previously been seen by unions and employers as in their interest.

This legislation is known collectively as the “*Auroux Laws*” of 4 August, 28 October, 13 November and 23 December 1982. I will discuss the first three.⁵⁸

The first of these, the Law of 4 August 1982 on Workers’ Rights seeks to introduce a novel channel of expression at the workplace by guaranteeing workers the right of direct, unmediated, unrepresented collective expression on the content, organization, and conditions of work.⁵⁹ This right of unrepresented expression is supposed to coexist with the other versions of workplace expression favored earlier, namely representation by the works council and representation by the union’s branch.⁶⁰ Employers have been able to use this legislation more effectively than workers or unions: early agreements have isolated the “expression” groups from the representative bodies, specifying, for example, that management personnel will chair the “expression” meetings, or that the union need not be informed of management’s responses to questions, or that the union may not be invited to attend “expression meetings.” Some employers have gone further and incorporated the meetings into “quality circle” type programs.⁶¹

The established channels of representation were supposed to be strengthened by the companion Law of 28 October 1982 on Representative Institutions.⁶² The works committees are now entitled to additional information about mergers, shutdowns, and company finances. The union branches are given additional rights to communicate in plants and additional protection against retaliation. This enhanced institutional presence for unions at the workplace has not been reflected in any in-

57. See *supra* notes 50-52 and accompanying text.

58. The fourth, 1983 Legis. Ser. (ILO), 1983-Fr. 2E, deals with health, safety, and working conditions and falls outside this study.

59. 1983 Legis. Ser. (ILO), 1983-Fr. 2B.

60. The SUDREAU REPORT, *supra* note 56, had advocated direct expression by employees, and successive governments of the right and left had studied methods of institutionalizing this. Summers, *infra* note 79, at 389, attributes this concern to interest in “workplace democracy,” but one could also trace a particularly French distrust of representation and support for direct expression, back to Rousseau.

61. See Eyraud & Tchobanian, *supra* note 51, at 250-52. See also W. SMITH, CRISIS IN THE FRENCH LABOUR MOVEMENT: A GRASSROOTS’ PERSPECTIVE 215-19 (1987); A. BORZEIX, D. LINHART, & D. SEGRESTIN, SUR LES TRACES DU DROIT D’EXPRESSION (1985).

62. 1983 Legis. Ser. (ILO), 1983-Fr. 2C.

crease in membership, which continues to decline.⁶³

Company level bargaining was the subject of the Law of 13 November 1982 on collective bargaining, creating a duty to bargain (but not agree) yearly at the firm level, on wages, hours, and work organization. As we saw above, company-level bargaining has not been favored by French unions or employers and there is little reason to assume that the new legislation will alter matters.⁶⁴

B. Italy

Article 39 of the Italian Constitution of 1948 guarantees the right to form unions and employers' associations and the right to strike, but provides no enforcement mechanism in the event of interference with these "rights." Nor was any implementing legislation enacted until 1970, due in part to disagreements among the union confederations. Until 1970, Italy (with the United Kingdom) had the smallest quantity of positive labor law in Western Europe.⁶⁵ Workers were represented both by unions, which are split along religious and political lines and tend to view themselves as advancing a broad range of political concerns beyond working conditions,⁶⁶ and by plant-level elected internal commissions, which grew up without statutory authorization or regulation.⁶⁷ Strikes

63. Ross, *From One Left to Another: Le Social in Mitterand's France*, in THE MITTERAND EXPERIMENT: CONTINUITY AND CHANGE IN MODERN FRANCE (G. Ross, S. Hoffmann, & S. Malzacher eds. 1987). See also W. SMITH, *supra* note 61, at 218.

64. 1983 Legis. Ser. (ILO), 1983-Fr. 2D; Eyraud & Tchobanian, *supra* note 51, at 252-56. Modest increases in limited negotiation are depicted in Delamotte, *La loi et la négociation collective en France: Réflexion sur l'expérience 1981-1985*, 42 RELATIONS INDUSTRIELLES 92 (1987).

65. Legal scholarship concerned itself in the main with rules not created by the state, the so-called "ordinamento intersindacale" or rules created by the daily activities of unions and employers. See generally Giugni, *The Italian System of Industrial Relations*, in IRIP, *supra* note 39, at 332-34 (Giugni originated the concept of "ordinamento intersindacale"); Veneziani, *Labour Law Research in Italy*, in LABOUR LAW RESEARCH IN TWELVE COUNTRIES 169-70 (S. Edlund ed. 1986) [hereinafter TWELVE COUNTRIES].

66. Most of the literature in English about Italian unions is now between thirty and forty years old. A concise introduction with references is Lange & Vannicelli, *Strategy under Stress: The Italian Union Movement and the Italian Crisis in Developmental Perspective*, in FIUSPE, *supra* note 39, at 95-206.

Structures existed on paper in the 1950's to integrate unions into economic decisionmaking, but were virtually unused. Weitz, *Labor and Politics in a Divided Movement: The Italian Case*, 28 INDUS. & LAB. REL. REV. 226, 229-30 (1975).

67. In theory the *commissione interni*, under the 1953 national agreement between union and employer federations which created them, were supposed to handle grievances; in fact they engaged in bargaining on a range of issues, particularly piece-rates. See Contini, *Politics, Law and Shop Floor Bargaining in Postwar Italy*, in SHOP FLOOR BARGAINING AND THE STATE: HISTORICAL AND COMPARATIVE PERSPECTIVES 200 (S. Tolliday & J. Zeitlin eds. 1985); Sciarra, *The Rise of the Italian Shop Steward*, 6 INDUS. L.J. 35, 36-37 (1977). However, they were rather ineffectual bodies of work-

in the private sector were unregulated, apart from occasional ministerial mediation of labor disputes, on an entirely ad hoc basis, without any statutory authorization or regulation.⁶⁸ Unions operated mainly nationally or province-wide, but were not present in any meaningful sense at the plant level.⁶⁹

The years 1968 to 1970 saw an upsurge in industrial unrest.⁷⁰ Most of this was at the shop floor and headed by popular representatives or stewards.⁷¹ It was an era of high strike rates including participation by public servants and white-collar workers, new forms of worker organization, new forms of conflict (brief strikes, rolling strikes, go-slows, plant occupation), and new demands (equal increases for all, upgrading of positions). The unions had neither created nor anticipated this activity, but lost little time in successfully incorporating it into their organizations, and basing new plant-level operations on the stewards and new works councils.⁷²

place representation since they were unable to link up with other such bodies, while their internal factions, corresponding to the union confederations, were able to link up with other bodies. W. GALENSON, *TRADE UNION DEMOCRACY IN WESTERN EUROPE* 7 (1962).

68. B. VENEZIANI, *LA MEDIAZIONE DEI PUBBLICI POTERI NEI CONFLITTI COLLETTIVI DI LAVORO* (1972).

69. T. TREU, *SINDACATO E RAPPRESENTANZE AZIENDALI: MODELLI ED ESPERIENZE DI UN SINDACATO INDUSTRIALE, FLM-CISL 1954-1970* (1971).

70. This peaked in the so-called "hot autumn" of 1969, and declined slowly through the 1970's. Like the French "events of May 1968," these have engendered an enormous literature of memoirs and manifestoes but lack a good English-language introduction. See generally C. SABEL, *supra* note 21, at 145-67; S. TARROW, *DEMOCRACY AND DISORDER: PROTEST AND POLITICS IN ITALY 1965-1975* (1989); Regalia, Regini & Reyneri, *Labour Conflicts and Industrial Relations in Italy* [hereinafter Regalia], in 1 *RESURGENCE supra* note 41, at 101-58; Brandini, *Italy: Creating a New Industrial Relations System From the Bottom*, in *WORKER MILITANCY AND ITS CONSEQUENCES, 1965-75: NEW DIRECTIONS IN WESTERN INDUSTRIAL RELATIONS* 82-117 (S. Barkin ed. 1975). Standard Italian references are D. GRISONI & H. PORTELLI, *LE LOTTE OPERAIE IN ITALIA DAL 1960 AL 1976* at 45-160 (1977); *LOTTE OPERAIE E SINDACATO IN ITALIA, 1968-1972* (A. Pizzorno ed. 1974)(6 vols.); G. GIUGNI, *IL SINDACATO TRA CONTRATTI E RIFORME, 1969-1973* (1973).

71. These *delegati operai*, which (when later institutionalized) replaced the old internal commissions, see *supra* note 67, were truly a new generation in industrial relations: their average age was between thirty and thirty-five and only thirty percent belonged to any political party. Giugni, *Recent Trends in Collective Bargaining in Italy*, 104 *INT'L. LAB. REV.* 307, 324 n.1 (1971). See generally R. AGLIETA, G. BIANCHI & P. BRANDINI, *I DELEGATI OPERAI: RICERCA SU NUOVE FORME DI RAPPRESENTANZA OPERAIA* (1970) [hereinafter R. AGLIETA].

72. See Regalia, *supra* note 70, at 141-46; R. AGLIETA, *supra* note 71; T. TREU, *supra* note 69. In the heady days of 1969-71, there was much discussion about the novelty of the *delegati*—who were (and are) elected directly by work groups, without prior nomination, may be recalled by the group, and need not join the union—and their links, if any, with the historic theories of Antonio Gramsci on workers' control. "Now, after a lapse of some years, it is generally accepted that the system of shop-floor delegates in Italy is simply a variation of the trade union organization and not a new form of worker participation (a view held by the unions themselves)." Giugni, in *IRIP, supra* note 39, at 346.

This new importance of workplace industrial relations was reflected in the comprehensive revision of Italian labor law in 1970.⁷³ The *Statuto dei Lavoratori*, Act Number 300 of 20 May 1970, guaranteed unions and employees sweeping rights at the plant level.⁷⁴ Unions were given the right to meetings on premises, up to ten hours a year of which could be on working time, the right to veto transfers of union leaders, paid time off for union leaders, and the right to collect dues and communicate in the plant. Employees were given protection against unjust dismissal; freedom from audio-visual surveillance or required medical examinations; the right to expression of views without retaliation; the right to tell their side of the story before imposition of discipline. Most significantly, lower courts were given jurisdiction over violations of the statute, touching off a wave of such litigation, in practice, tried before the youngest (and frequently most radical) magistrates.⁷⁵ Italian scholars remain quite divided

73. The history of reform proposals in the 1968-70 period is traced in Calavita, *Worker Safety, Law, and Social Change: The Italian Case*, 20 LAW & SOC. REV. 189, 203-206 (1986). Pre-1968 versions had gone nowhere. Following legislative elections in 1968, the three leftmost parties introduced workers' rights bills. In 1969, a Senate Commission was charged with reporting to the Ministry of Labor on the need for any legislation and the possibility of receiving input from employers and unions. The ruling Christian Democrats introduced their proposal in June 1969, explicitly designed to protect unions and "normalize" industrial relations. This was followed closely by the proposal of the complete governing coalition and the report of the Senate Commission, both close to the Christian Democrats' proposal (for example, all lacked health and safety legislation). Following the "hot autumn" of 1969, the Communists successfully grafted some of their proposals onto the government's bill (including health and safety features), and the legislation was broadened again in the Senate in December 1969 to create a role for unofficial worker delegates.

74. 1970 Legis. Ser. (ILO), 1970—It.2. The main goal of the statute has been described as the strengthening of union organization at the workplace level in order to withstand threats from employers and spontaneous workers' groupings. Giugni, *supra* note 71, at 318. For example, only unions associated with national confederations or signatory to national agreements may participate in the *consigli di fabbrica* or works councils which the statute creates. Sciarra, *supra* note 67, at 40.

The intellectual origins of the statute have been traced to two quite different currents in Italian labor, corresponding to the two leading union confederations: a Marxist or left-wing strain which had long wanted, as the slogan had it, "the Constitution in the factory," (i.e. bring freedom to the "private" sector), *see, e.g.,* Cazzola, *La CGIL e il diritto sindacale*, Quaderni di Rassegna Sindacale, No. 46 (1972); and an American-influenced strain which wanted a legal framework to protect and institutionalize the union as an entity at the plant level, patterned after the Wagner Act. Contini, *supra* note 67, at 204. American influence on CISL, the union confederation allied (formerly closer than today) with the Christian Democratic party, has been direct and strong; many CISL staff were trained at a school in Florence with close ties to American labor. *See* Lange & Vannicelli, *supra* note 66, at 114-15.

Employers however must have realized that the historic weakness of Italian unions, their exclusion from power, and the low level of wages, created a possibility of radical change which the institutionalization of unions might cabin. M. SALVATI, *ALLE ORIGINI DELL'INFLAZIONE ITALIANA* 65 (1979), quoted in Lange & Vannicelli, *supra* note 66, at 127-28.

75. Unjust dismissal had in theory been impermissible under a 1960 statute, but that lacked a reinstatement remedy which the 1970 legislation provided. Workers are allowed to choose an arbi-

over the impact of this dramatic increase in legal regulation on individual employees.⁷⁶

The next level of union strategy in the early 1970s involved a working alliance of the union confederations and an attempt to deal directly with the government, outside their traditional party allies, on a variety of social and developmental concerns. This strategy never succeeded; union power was weakened sharply in the general economic downturn following the 1973-1974 oil crisis, and has never really recovered.⁷⁷ There have been no significant legislative initiatives to concern us.

C. *German Federal Republic*

In contrast to Italy, postwar West Germany presents a high quantity of labor law. Meticulous legal regulations have consistently covered worker representation at the plant level (through the works council), at the level of corporate management (through the institution of worker directors), and bargaining and conflict, typically at a regional industry level, between unions and management. A trio of significant postwar stat-

trator but, apparently in the early years, preferred to choose judges. Organisation for Economic Cooperation and Development, Manpower and Social Affairs Directorate. Recent Trends in Collective Bargaining. Final Report of the International Management Seminar, Castelfusano 21st-24th Sept. 1971 at 24.

76. F. Rossiti and Tiziano Treu, *L'applicazione dello Statuto dei Lavoratori*, *Sociologia del Diritto*, no. 2 (1974) (reporting disagreement among Italian observers).

Certainly the intent of the statute was to consolidate and institutionalize the union advances of the hot autumn, and if that period had any long-lasting effects, which some doubt, it may be through the statute. Contini, *supra* note 67, at 210. S. TARROW, *supra* note 70, at 313-14, claims that the statute heightened a trend already under way to pursue grievances through legal means as opposed to direct action (citing judicial records).

It is interesting however that not one of the workers in a collection of interviews with Italian workers (conducted in 1979) mentions the statute, despite extensive recollections of the hot autumn period. J. BARKAN, *VISIONS OF EMANCIPATION: THE ITALIAN WORKERS' MOVEMENT SINCE 1945* (1984). A similar divergence between workers' accounts of their situation and union leaders' is apparently revealed by a major Italian survey. D. DE MASI & G. FEVOLA, *I LAVORATORI NELL'INDUSTRIA ITALIANA* (1974), discussed in Giugni, in *IRIP*, *supra* note 39, at 350 n.107. A recent (17 October 1983) construction of the statute by the Court of Cassation greatly diminishes the number of enterprises to which it applies, but this occurred long after the interviews mentioned.

In M. PIORE & C. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 228 (1984), the authors attribute the survival of their darlings, Italian artisan firms, in part to their exemption from the Statuto dei Lavoratori, and thus in a weird way provide backhand evidence for the statute's efficacy.

Calavita, *supra* note 73, at 212-18, discusses the modest but real impact of the statute's provisions on health and safety.

77. Lange & Vannicelli, *supra* note 66, at 131-180; J. BARKAN, *supra* note 76, at 160 (1980 defeat at FIAT); Garonna & Pisani, *Italian Unions in Transition: The Crisis of Political Unionism*, in *UNIONS IN CRISIS AND BEYOND* 147-57 (R. Edwards, P. Garonna, & F. Tödtling eds. 1986); Contini, *supra* note 67, at 211-15.

utes provides the legal framework.⁷⁸

The Works Constitution Act of 1952 makes the fundamental unit of workplace representation, the works council, elected by all employees.⁷⁹ While the 1952 legislation applied in theory to each enterprise with more than five employees, only some 6 percent of enterprises ever established a works council under the 1952 Act. These were, however, the largest enterprises, employing two-thirds or so of German workers.⁸⁰ Unions are given no formal role to play in this system, although in practice they run candidates for the works council, some 80 percent of whose members are union members.⁸¹ The 1952 legislation, in theory, limited the power of the works council to the form, principles, time and place of wage payment, job descriptions, working time and overtime, bonuses and premiums above the basic wage rates, fringe benefits, and disciplinary rules. The legislation expressly restricts the council's function in economic decisions, such as curtailment of production or the closing of an enterprise, to the receipt of information. The employer retains the right of "technical and commercial management." Nor may the council bargain over basic wage rates, which are to result from employer-union bargaining. Finally, the council is constrained by a general duty of "trustful cooperation" and forbidden any resort to economic action.

Union-employer bargaining, in theory an entirely separate system, was governed by the Collective Agreements Act of 1949, which made collective agreements enforceable without governmental action.⁸² Agreements are entered into between unions and employer associations, and

78. See generally Reichel, *Recent Trends in Collective Bargaining in the Federal Republic of Germany*, 104 INT'L LAB. REV. 469 (1971).

79. This legislation was adopted against the votes of the Social Democrats and over the opposition of the union confederation. Müller-Jentsch & Sperling, *Economic Development, Labour Conflicts and the Industrial Relations System in West Germany*, in 1 RESURGENCE, *supra* note 41, at 288. The history of German works councils and their tension with unions is traced in Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 373-75 (1980).

80. Ramm, *Co-determination and the German Works Constitution Act of 1972*, 3 INDUS. L. J. 20 (1974).

81. See *id.*; Müller-Jentsch & Sperling, *supra* note 79, at 282 n.13. However, at least in the service industries, only forty percent of works council members reported good relations with unions. Summers, *supra* note 79, at 373 n.11 (1980)(citing studies). In turn, works councils help organize unions, collect dues, recruit members; and union members with works council experience dominate the unions organizationally in various ways. Müller-Jentsch & Sperling, *supra* note 79, at 282. See also W. STREECK, *INDUSTRIAL RELATIONS IN WEST GERMANY: A CASE STUDY OF THE CAR INDUSTRY* (1984).

82. The Minister of Labor may "extend" agreements to cover all establishments in a given industry and region. Müller-Jentsch & Sperling, *supra* note 79, at 304 n.10; Bergmann & Müller-Jentsch, *The Federal Republic of Germany: Cooperative Unionism and Dual Bargaining System Chal-*

cover general base wages, job evaluation systems, bonuses, premiums, and other terms of employment. Agreements typically cover an entire *Land*, or several *Länder*, and an industry as heterogeneous as "metals" (which includes shipbuilding, automobile manufacturing, the optical industry, precision machinery, and musical instrument manufacture). By a 1967 decision of the Federal Labor Court, they must also apply equally to union members and non-members.

This so-called dual industrial relations system of workplace representation by works councils, and regional wage negotiation by unions, has legislative roots as far back as 1920. While the Collective Agreements Act does not prohibit unions from bargaining at a subregional or enterprise level, unions have made few such attempts, and most employers resist the practice.⁸³

The Collective Agreements Act, as interpreted by the Federal Labor Court, also regulates the weapons of economic conflict. Here again legal regulation is high. Conduct in labor disputes must accord with *Sozialadaquanz* or "social appropriateness," a vague criterion further amplified by the Federal Labor Court as "the moral social order of the Society as it developed historically." As applied, this has resulted in comparatively severe legal restrictions on use of the strike. The strike may not be employed during the term of a contract or pending negotiations; a union was once fined for conducting a strike vote under such circumstances.⁸⁴ Strikes must be approved by a vote of 75 percent of the membership; strikes by smaller groups or without authorization by the union are illegal.⁸⁵ The strike is a measure of last resort, and the union must be prepared to present evidence on the exhaustion of alternative contractual mechanisms, which frequently include mediation or arbitration. Finally, the *ultima ratio* of the strike must also be "socially appropriate," and this has been used to forbid strikes with political or other objectives beyond

lenced, in *WORKER MILITANCY AND ITS CONSEQUENCES, 1965-75: NEW DIRECTIONS IN WESTERN INDUSTRIAL RELATIONS* 253 (S. Barkin ed. 1975).

83. Zoll, *Centralisation and Decentralisation as Tendencies of Union Organisational and Bargaining Policy: A Comparison of Union Structures at Shop-Floor Level in Italy and in the Federal Republic of Germany*, in *2 THE RESURGENCE OF CLASS CONFLICT IN WESTERN EUROPE SINCE 1968* at 127 (C. Crouch & A. Pizzorno eds. 1978). Unions' organizational interests in the plant are represented by elected shop stewards who are expected to communicate union policies to members and organize support for the union during bargaining. In practice, the stewards work closely with the works council. See Muller-Jentsch & Sperling, *supra* note 79, at 282-83.

84. See Bergmann & Müller-Jentsch, *supra* note 82, at 255; see also Schmidt, *Industrial Action*, in *INDUSTRIAL CONFLICT*, *supra* note 42, at 41.

85. Schmidt, *supra* note 85, at 41.

improvement of working conditions.⁸⁶

The third institution of worker representation is the well-known scheme of Co-determination or *Mitbestimmung*; that is, worker participation on corporate supervisory boards.⁸⁷ Unlike the two other institutions, this is a postwar innovation; like them, it is extensively regulated legally. This co-determination originated in the immediate postwar needs of the Allied Administration to resume industrial activity without excessive reliance on those too closely associated with the Nazi Period. There are, however, sharp differences of opinion on the forces which kept co-determination from expiring with the Occupation.⁸⁸ In any event, the Co-determination Act of May 21, 1951, which applied only to the coal, iron and steel industries, provided that half the seats on the supervisory board (roughly equivalent to the board of directors) be held by employee representatives, and that the worker representatives appoint the labor director to the smaller management board.⁸⁹ The Works Constitution Act of 1952, one year later, extended a weaker version of worker representation, involving one-third of board seats, to industries other than coal, iron and steel.⁹⁰ One effect of this discrepancy was a wave of mergers in coal, iron and steel, which put more companies under this later Act. Between 1952 and 1968, the number of companies subject to the stricter co-

86. Hartmann & Conrad, *Industrial Relations in West Germany*, in IRIP, *supra* note 39, at 225-26, citing Schacht & Unterseher, *Das Tarifverhandlungssystem der Bundesrepublik, in Verteilungskampf und Stabilitätspolitik* (W. Meisner & L. Unterseher eds. 1972); Bergmann & Müller-Jentsch, *supra* note 83, at 254-56.

87. Numerous descriptive accounts are available in English, including Hartmann, *Codetermination Today and Tomorrow*, 13 BRIT. J. INDUS. REL. 54 (1975); Hartmann, *Codetermination in West Germany*, 9 INDUS. REL. 137 (1970); Roberts, *The Works Constitution Acts and Industrial Relations in West Germany: Implications for the United Kingdom*, 11 BRIT. J. INDUS. REL. 338 (1973); Szakats, *Workers' Participation in Management: The German Experience*, 16 J. INDUS. REL. 29 (1974). Leminsky, *Worker Participation: The German Experience*, in LABOR RELATIONS IN ADVANCED INDUSTRIAL SOCIETIES: ISSUES AND PROBLEMS 141 (B. Martin & E. Kassalow eds. 1980), traces codetermination back to 1922 legislation permitting works councils to appoint one or two members of supervisory boards. Most observers however attribute the current institution to postwar needs.

88. Hartmann & Conrad, *supra* note 86, at 141, claims that the unions and Social Democratic Party showed little enthusiasm for the co-determination system, which was supported most strongly by the Catholic wing of the labor movement, while Bergmann & Müller-Jentsch, *supra* note 82, and Leminsky, *supra* note 87, claim that only a threatened mass strike in May 1951 prevented repeal of the program. Another version is that, while outside Germany codetermination is seen as an experiment in participation, inside Germany it is considered by unions and management alike as a conscious attempt to expand the power of the union hierarchy. See Kirkwood & Mewes, *The Limits of Trade Union Power in the Capitalist Order: The Case of West German Labour's Quest for Co-Determination*, 14 BRIT. J. IND. REL. 295, 296 (1976).

89. 1951 Legis. Ser. (ILO), 1951—Ger.F.R.2.

90. Betriebsverfassungsgesetz, Law of Oct. 11, 1952, 1952 Legis. Ser. (ILO), 1952—Ger.F.R. 6.

determination dropped by over one-third. Union dissatisfaction, and the entry of the Social Democrats into a "grand coalition" in 1966, led to the appointment the following year of a commission under Kurt Biedenkopf to study co-determination.

Another effect of the entry of the Social Democrats into the national government was the adoption of more Keynesian economic policies which included voluntary wage restraint by the unions in return for promises of later "symmetry" with profits. This "symmetry" was not obtained by 1969. In that year, a Social Democratic election victory replaced the "grand coalition" with one dominated by Social Democrats.

In September of that year there were spontaneous strikes, particularly in metal and building trades, an unprecedented event in postwar German labor relations, which had been virtually free of strikes of any kind for over ten years, let alone unofficial strikes.⁹¹ Observers surveyed tended to regard these strikes as "local and apolitical," largely a protest against national union wage restraint, wage inequalities, and high profits,⁹² although they were doubtless also influenced by similar activity elsewhere in Western Europe. This wave ended the period of voluntary cooperation with government wage planning, and a round of bargained contracts, which did not particularly satisfy the rank-and-file.⁹³ Another wave of strikes, mainly spontaneous, took place in 1973. Demands were principally for cost-of-living adjustments, but also involved some protests over intensification of work.⁹⁴

In the midst of this increase in unrest, the Biedenkopf Commission reported to Parliament.⁹⁵ The Report was favorable to co-determination as then practiced, finding it accepted by management and labor, and not an impediment to managerial efforts at increased efficiency. It did not recommend any further expansion of the practice; however, Parliament went beyond the report and adopted two bills expanding the authority of institutions of worker representation.

91. Müller-Jentsch & Sperling, *supra* note 79, at 262 (Figure 7.1).

92. P. SWENSON, *FAIR SHARES: UNIONS, PAY, AND POLITICS IN SWEDEN AND WEST GERMANY 73* (1989); see also Bergmann, *Neues Lohnbewusstsein und Septemberstreiks*, in *GEWERKSCHAFTEN UND KLASSENKAMPF 1972* (O. Jacobi et al eds. 1972); M. SCHUMANN et al, *AM BEISPIEL DER SEPTEMBERSTREIKS—ANFANG DER REKONSTRUKTIONSPERIODE DER ARBEITERKLASSE?* (1971), both summarized in Hartmann & Conrad, in *IRIP*, *supra* note 39, at 227; and Müller-Jentsch & Sperling, *supra* note 79, at 261-69.

93. The pre-1968 style of negotiating collective agreements involved no participation of union members and relatively automatic wage increases. Müller-Jentsch & Sperling, *supra* note 79, at 265.

94. P. SWENSON, *supra* note 92, at 78-83; Müller-Jentsch & Sperling, *supra* note 79, at 263-69.

95. *MITBESTIMMUNG IM UNTERNEHMEN* (1970). See also K. BIEDENKOPF, *MITBESTIMMUNG: BEITRÄGE ZUR ORDNUNGSPOLITISCHEN DISKUSSION* (1972).

The Works Constitution Act of 1972 amended the 1952 Act to increase the rights of the works council to influence on piecework and bonus rates, quality of work, safety, layoffs, transfers, dismissal, and protection of minority groups.⁹⁶ A previous maximum size limit of thirty-five was deleted to permit smaller ratios of representation in very large establishments. Foreign workers were made eligible for the works council.⁹⁷ The "cooperation" obligation was not diminished, and management retained the right to economic decisions and to managerial decisions which do not increase employee workload.⁹⁸ In case of work reductions or closing, the works council is limited to demands for compensation for affected employees.⁹⁹

The Co-determination Act of 1976 was adopted unanimously by the *Bundestag*. It extended worker "parity" on the supervisory board to all companies with over 2,000 employees. The "parity" is somewhat illusory since one employee representative must represent middle and upper management, who are not expected to side routinely with workers; moreover, the chairman, who can break ties, may be elected in the event of deadlock on the whole supervisory board, by the shareholder representatives alone.¹⁰⁰ A challenge by employers to the constitutionality of the law was rejected by the Federal Constitutional Court in 1979.¹⁰¹

96. 1972 Legis. Ser. (ILO), 1972—Ger.F.R. 1. See generally Ramm, *supra* note 80. "There is a general consensus, however, that these concessions are difficult to make use of because they are closely hedged, and fairly limited to begin with." Hartmann & Conrad, in IRIP, *supra* note 39, at 237.

97. As of 1975 they comprised 2.9 percent of the membership, a far cry from the 16 percent of the German work force which is foreign. Müller-Jentsch & Sperling, *supra* note 79, at 288.

98. In practice, however, works councils do negotiate wages and terms of employment when they are able to increase these over national minima. See Ramm, *supra* note 80, at 24.

99. "That the works councils inadequately fulfil their legally stipulated purpose as a form of workforce representation was expressed by the wildcat strikes of Autumn 1969, and still more clearly during the many unofficial work-place strikes in 1973." Müller-Jentsch & Sperling, *supra* note 79, at 290.

100. 1976 Legis. Ser. (ILO), 1976—Ger.F.R. 1. The effect of these limitations is difficult to determine: in coal and steel, where true parity has long existed, outright showdowns between worker and other representatives are rare but not unknown. One study found twenty in a four-year period, W. TEGTMEIER, WIRKUNGEN DER MITBESTIMMUNG DER ARBEITNEHMER (1973), summarized in Hartmann and Conrad, in IRIP, *supra* note 39, at 236. This somewhat jaundiced account maintains that supervisory boards are in practice preempted by "collusion" between top management and works councils.

101. Bundesverfassungsgericht, Ruling of March 1, 1979, 1BvR 532/77, 533/77, 419/78 and 1 bVI 21/78. A wry account of the decision, and the role of legal scholarship in it, is Heilmann, *Labour Law Research in the Federal Republic of Germany: Current Status and Future Trends*, in TWELVE COUNTRIES, *supra* note 65, at 116.

D. *The Netherlands*

The Netherlands represents in some respects the highest quantity of labor law in the postwar period, for it maintained from 1945 until 1963 an effective wage control system under which wage levels were subject to legal determination.¹⁰² The trend in the Netherlands in the 1960s was toward diminution of the quantity of labor law; more recently, labor law has increased. The two most distinctive features of Dutch labor law are probably the continued practice of direct governmental limitations on wage increases, and the rapid trajectory from a system of exceptional harmony and consensus, close to corporatism, to one of unusual hostility and discord.

The wage control system is sufficiently idiosyncratic to be worth a bit of attention. It had its origin in immediate postwar problems and perceptions shared equally in France, Italy, Germany, and many countries not studied: a desire by unions and management to reindustrialize and reestablish a position in world markets. In the Netherlands, however, this was accompanied by a belief, shared by unions and management, that high wages would be incompatible with this goal, what has been described as an obsession with national vulnerability,¹⁰³ and habits of deference to governmental action, particularly when taken by economic and technical experts. These beliefs and habits are frequently traced in the literature to long before the postwar period.¹⁰⁴

The legal embodiment of these forces was the October 1945 Extraordinary Decree on Labor Relations (*Butengewoon Besluit Arbeidsverhoudingen*, or BBA) which, though intended as an emergency control, provided the basis of Dutch labor law for nearly twenty years.¹⁰⁵ The BBA had three parts. First, discharges, layoffs, or voluntary quits were unlawful without permission from government employment agencies for good cause shown. This was initially intended to prevent an influx of rural workers into the cities at a time when economic recovery

102. The highest quantity only "in some respects" since the Netherlands to this day lacks separate statutory treatment of employment contracts, which continue to be covered by three 1907 sections of the Civil Code, and also lacks any distinct labor court. Van den Heuvel, *Labour Law Research in the Netherlands*, in *TWELVE COUNTRIES*, *supra* note 65, at 122-23.

103. J. WINDMULLER, *LABOR RELATIONS IN THE NETHERLANDS* (1969).

104. See generally Peper, *The Netherlands: From an Ordered Harmonic to a Bargaining Relationship*, in *WORKER MILITANCY AND ITS CONSEQUENCES, 1965-75: NEW DIRECTIONS IN WESTERN INDUSTRIAL RELATIONS* 118-121 (S. Barkin ed. 1975).

105. Staatsblad F.214; 1945 Legis. Ser. (ILO), 1945—Neth.1. A small portion of the decree still remains in effect, dealing with an aspect of unjust dismissals. Van den Heuvel, *supra* note 102, at 124.

was thought to depend in part on agriculture. However, it soon became a staple of Dutch employment relations. Second, the workweek was standardized at forty-eight hours. Third, a national system of wage control was instituted. All collective agreements, at national or plant level, required approval from the misnamed College of State Mediators (*College van Rijksbemiddelars*) which could approve, reject, or modify the agreement, or extend it to cover otherwise uncovered workers, based on policies announced in advance. The policies were to be developed in consultation with two bodies: the Foundation of Labor (*Stichting van de Arbeid*), a bipartite council of union federations and employers' associations set up around the same time, and (following 1950) the Social Economic Council (*Social Economische Raad*), which included government representatives along with employer and union representatives. Payment of wages at other than approved rates was made a criminal offense. In the early years of the system, prosecutions were frequent and employers occasionally fined or imprisoned.¹⁰⁶

The national consultative role of the unions was further institutionalized in the Organization of Industry Act of 1950, which set up bipartite boards with delegated authority to provide rules in entire industries. This included authority to turn collective agreements into a species of statutory regulation. Strikes in protest of a decision of the regulatory boards—in practice, nearly all strikes—were ruled illegal by the courts.¹⁰⁷ Some forty of these boards were in operation by the late 1960s.

With unions thus expected to function almost entirely at the national level, new institutions of plant level representation were created in the Works Council Act of 1950. It seems generally accepted that these were indeed new bodies which owed little to prewar institutions of employee representation. The work councils were to be purely advisory bodies, chaired by the employer, who was to bear their expenses.

This system was quite effective throughout the 1950s. Union and employer leadership were represented in the government and shared similar views on the importance of cooperation and economic reconstruction. Apparently, wage levels were usually set in the Foundation of Labor and then ratified by the College of State Mediators; this permitted the government to take responsibility for wage levels and the Foundation

106. Pen, *The Strange Adventure of Dutch Wage Policy*, 1 BRIT. J. INDUS. REL. 318, 319 (1963). See generally J. WINDMULLER, *supra* note 103.

107. Akkermans & Grootings, *From Corporatism to Polarisation: Elements of the Development of Dutch Industrial Relations*, in 1 RESURGENCE, *supra* note 41, at 164 (citing legal studies).

to appear neutral.¹⁰⁸ The effect was that Dutch wages by 1959 ran some 25 percent below levels in Belgium, West Germany, or France.¹⁰⁹ Additionally, wages were highly uniform, linked mainly to measures of productivity in the economy as a whole and only secondarily to the industry concerned.¹¹⁰

It is "easier to understand why the system broke down than why it worked so well during the whole period from 1945 to 1963."¹¹¹ By 1959, government control of the economy had been progressively loosened until wages were the only matter under control. In that year, a movement arose away from the uniform wage system and toward greater relationship between wages and industry or even firm productivity. This system apparently foundered amid problems of defining and measuring productivity and worker resistance to what appeared to be wage discrimination based on factors they could not control. Finally, "off-the-books" wages were increasing and prosecution diminishing.

In August 1963, some of the larger employers in the Amsterdam metal working industry announced that they would no longer follow Foundation guidelines. Unions soon demanded large increases, and wild-cat strikes broke out. In 1964 wages increased 16 percent, while an astonishing productivity increase prevented any increased unemployment.¹¹²

The transfer at the time of the approval function of collective agreements, from the governmental College of State Mediators to the bipartite Foundation, turned out to be more than cosmetic. The foundation accepted every collective agreement submitted to it, and thus initiated free collective bargaining, despite futile governmental attempts to get the Foundation to observe guidelines. In 1966, approval of agreements was once again transferred, this time back to the College.¹¹³

In this new era of wage determination through bargaining, the Socialist metalworkers' union decided around 1962 or 1964 to try to establish plant-level operations which had no statutory sanction. These were to include stewards to reflect rank-and-file wishes which the union might request. An increasing number of plants have been organized in this

108. Pen, *supra* note 106, at 320.

109. *Id.* at 329.

110. For example, a single agreement for building workers covered 250,000. Company agreements did not in fact differ from national agreements in form or scope of issues. See Albeda, *Recent Trends in Collective Bargaining in the Netherlands*, 103 INT'L LAB. REV. 247, 249-50 (1971).

111. *Id.* at 254.

112. *Id.* at 255-56.

113. J. WINDMULLER, *supra* note 103, at 321-27.

manner in the 1960s and 1970s.¹¹⁴

In 1969, the government, attempting to create a new structure of wage control, submitted a proposed new Wages Determination Act which would have authorized the Minister of Social Affairs to invalidate contracts in whole or in part. The bill was adopted over strenuous union opposition in February 1970. It further abolished the College of State Mediators and granted the government power to impose a general wage freeze. The enactment of such legislation over union opposition was seen as a decisive break with the tattered postwar cooperative consensus, and the two largest union confederations (Socialist and Catholic) withdrew from the Foundation of Labor.¹¹⁵

Meanwhile a wave of unofficial strikes, which had begun in 1969, grew steadily. In September 1970, a shipworkers' strike in Rotterdam harbor over higher wages paid temporary workers ended with a flat 400 guilder payment per worker; this touched off a wave of unauthorized strikes elsewhere to achieve the same payment. Many of those strikes were without union authorization and continued after ostensible union settlements with employers.¹¹⁶ Rejection of proposed contracts was a new element in Dutch labor relations and illustrates the gap between union leaders and the rank-and-file. The 400 guilder increase became universal—the first general uniform wage increase since 1959.¹¹⁷

In October 1970, the government announced that it would not invoke the provision of the Wages Act of 1970 giving it the power to nullify particular bargained results. The union confederations returned to the Foundation of Labor. No consensus was reached, however, and a general wage freeze for six months was announced by the government unilaterally in the Wage Moderation Decree in December 1970. On December 15, the two largest union confederations called a one-hour strike which was the most widespread industrial and political action in the postwar Netherlands.¹¹⁸

On January 28, 1971 a new Works Council Act was enacted repealing the 1950 Act and creating certain areas of mandatory consultation (incentive rates and other payments not covered by collective agree-

114. Akkermans & Grootings, *supra* note 107, at 167-68.

115. 1970 Legis. Ser. (ILO), 1970—Neth. 1. *See generally* Akkermans & Grootings, *supra* note 107, at 170.

116. Strike statistics are reviewed in Akkermans & Grootings, *supra* note 107, at 174-75. The levels were not high in a world-comparative sense but were certainly high by Dutch standards. They began declining in 1974 and were by 1975 again among the lowest in the world.

117. Albeda, *supra* note 110, at 257; Peper, *supra* note 104, at 133-34.

118. Akkermans & Grootings, *supra* note 107, at 170; Peper, *supra* note 104, at 133.

ments) and others of mandatory co-determination (work rules, welfare institutions, health and safety). The employee members of the council are now permitted to meet separately from the employer to develop a common position.¹¹⁹ In the same year, a new corporations law permitted the works council to nominate members for the supervisory board, which will be required of companies with more than one hundred employees.

In April 1971, parliamentary elections resulted in a new, somewhat less conservative government which sought to improve relations with the unions by nullifying the wage moderation decree retroactive to January 1971, and by announcing its refusal to use the Wage Law of 1970 to review individual agreements. This appeared to be a return to free collective bargaining and a great union victory.

National wage negotiations resumed, but levels of unrest remained exceptionally high, by now, under strict union control. The largest union strikes involved the building industry in May 1971, and the metal industry in 1972 and 1973.¹²⁰

The government fell apart over internal disputes on wage policy, and new elections in November 1972 brought the Labor Party back into the government for the first time in some years. The unions proposed a "social contract" in which wage restraint would be met by governmental expansion of services and some employer concessions on union organizational rights. This proposal was not accepted. Rather, the government prepared and adopted in December 1973, a new Enabling Act restoring government control over wage settlements. Meanwhile, strikes declined in the face of the oil crisis of autumn 1973 and larger economic deterioration, and 1973 and 1974 agreements, bargained with government involvement under the provisions of the 1973 Enabling Act, produced meager wage increases.¹²¹

Dutch labor law has largely been stable since 1973 with no implementation of the bargaining review provisions of the Wage Act of 1970, nor any legislation on economic conflict or strikes, despite lengthy study of the latter. In 1979, the Works Council Act of 1971 was amended to require the council's consent to changes in shop floor complaint procedures, training, recruitment, dismissal, and promotion policy. The council's right to be consulted (but not veto) now extends to shutdowns, mergers, takeovers, subcontracts, joint ventures and the like. The union

119. 1971 Legis. Ser. (ILO), 1971—Neth.1.

120. Peper, *supra* note 104, at 134-38.

121. Peper, *supra* note 104, sees 1973 as a turning point in the decline of union power, attributed to reduced tendency to strike, increased unemployment, and certain internal division in the unions.

also gets information on investments and long term plans. The employer no longer chairs the council.¹²²

E. Sweden

Sweden, like Italy, and unlike the Netherlands, has seen dramatic increase in the quantity of labor law in the 1970s. A strongly-held ethos of state nonintervention with labor relations has given way to significant regulation of the bargaining process.¹²³

For the forty years prior to 1976, Swedish politics were dominated by the Social Democratic Party. This continuity is unique among countries studied and has significantly affected Swedish labor law. Before the mid-1930's, Sweden had the highest levels of industrial conflict among Western European nations, and frequent state intervention into labor disputes.¹²⁴ Over the following forty years, Sweden developed functioning collective bargaining and a near absence of any disputes or state intervention into daily labor relations.¹²⁵ While activist in the areas of fiscal policy and welfare benefits, the Social Democrats were slow to regulate labor relations. In turn, unions were able to achieve increases in benefits through legislation that in other countries would probably have become the subjects of collective bargaining. Industrial conflict declined sharply in the 1930s and remained low until the late 1960s.

The embodiment of these understandings was the 1938 Basic Agreement (or *Saltsjobaden* Agreement, after its place of origin) between the largest union confederation and employers' association. Each group accepted the other and recognized procedures for the handling of grievances and negotiations. The unions acceded to the enforceability of collective agreements and the channeling of "rights" disputes, over their

122. 1979 Legis. Ser. (ILO), 1979—Neth.1.

A new health and safety statute was enacted in 1981, replacing a 1934 statute. See Van den Heuvel, *supra* note 102, at 125.

123. F. SCHMIDT, *THE LAW OF LABOUR RELATIONS IN SWEDEN* (1962). An outstandingly detailed study of Swedish labor and Swedish society is W. KORPI, *THE WORKING CLASS IN WELFARE CAPITALISM: WORK, UNIONS, AND POLITICS IN SWEDEN* (1978).

124. For strike figures, see E. SHORTER & C. TILLY, *STRIKES IN FRANCE, 1830-1968*, at 333 (1974); W. KORPI, *supra* note 123, at 94-100. For an account of pre-1930's legal intervention, see Edlund, *Movements in Swedish Labour Law and Labour Law Research*, in *TWELVE COUNTRIES*, *supra* note 65, at 46-48; F. SCHMIDT, *supra* note 123.

125. A useful historical sketch of legal developments is Edlund, *supra* note 124, at 46-55. See also Korpi, *Sweden: Conflict, Power and Politics in Industrial Relations*, in *IRIP*, *supra* note 39, at 185. The decline in strikes from the early to late 1930s is probably internationally unique. See W. KORPI, *supra* note 123, at 393 n.22.

interpretation, to a Labor Court.¹²⁶ Strikes and lockouts were forbidden during the contractual term. The negotiation of contracts was to be accomplished by the parties themselves.¹²⁷ The unions also acceded to the employers' right to hire and dismiss labor at will¹²⁸ and to direct and distribute the work, rights included in all pre-1977 collective agreements by order of the employers' federation to its members.

In subsequent years, the Labor Court won the acceptance of each side.¹²⁹ Managerial prerogatives were given a broad interpretation, and the employer was given the right of first interpretation of contracts, leaving it open to the union to be the plaintiff in the Labor Court. On the other hand, unions were mollified by the court's willingness to extend contractual benefits to smaller employers not members of the negotiating association. However, use of the Labor Court was never heavy and declined throughout this period.¹³⁰

In 1969, Sweden began a seven-year period of sharply increased industrial conflict. The strikes were mainly unorganized and principally concerned wage issues. While the proportion of strikers was not great by international standards, it was three and four times what Sweden had been accustomed to.¹³¹ The strike activity peaked in 1969-1970 and 1974-1975.

The Social Democratic party received one of its greatest electoral victories in 1968, only to see its margins decline in the early 1970s. This led to a rethinking of party strategy and a willingness on the part of

126. The Labor Court had been established earlier, in 1928, but the unions had formerly opposed it.

127. National negotiations permitted the unions to pursue a "solidaristic" wage policy in the postwar period of attempting to equalize wages across job titles, gender, geography. R. MEIDNER, *CO-ORDINATION AND SOLIDARITY: AN APPROACH TO WAGES POLICY* (1974).

128. This concession had been made earlier, in the December Compromise of 1906.

129. See Edlund's account of the lack of notice given his somewhat critical dissertation on the Court when it first appeared in the 1960s, Edlund, *supra* note 124, at 58-59.

130. By 1970 the Labor Court decided only thirty or forty cases per year. *Id.* at 49.

131. Two unofficial strikes particularly clarified the issues. The first involved dockworkers in Gothenburg seeking the reinstatement of two workers discharged for refusing, in violation of the contract, mandatory overtime. The second involved northern miners seeking restoration of their former pay differentials. The egalitarian bargaining policies of the union confederation (LO) had reduced this differential by 20 percent over the previous decade. This strike lasted 57 days and succeeded. Both strikes demonstrated the weakness of the LO in relations with the rank-and-file, in not understanding local grievances, and then in being unable to end the strikes. In the miners' strike, a union-management agreement was rejected by the strike committee, and the strike ended only when management negotiated directly with a joint group of union officers and the strike committee. P. SWENSON, *supra* note 92, at 84; Tersmeden, *Swedish Unofficial Strikes*, in *LA CRISE DES RELATIONS INDUSTRIELLES EN EUROPE: DIVERSITÉ ET UNITÉ, LES RÉPONSES POSSIBLES* (G. Spitaels ed. 1972); Korpi, *Unofficial Strikes in Sweden*, 19 *BRIT. J. INDUS. REL.* 66 (1981).

unions and party to press for parliamentary legislation to meet the demands of the rank and file.

Several significant statutes were enacted during this period, three of which will be mentioned here.¹³² In 1972, all companies with over one hundred employees were required to have two members of the board of directors elected by employees.¹³³ The union confederation, previously cool to this idea, supported it in 1972 as part of a larger plan to increase worker participation at all levels. In 1973, employees were protected against unjust dismissal, contrary to the famous requirement of the constitution of the employers' association.

The question of industrial democracy came in for somewhat greater study. A parliamentary commission reporting January 1975 revealed a split between the Social Democratic party representatives, who joined the employers and more conservative parties in advocating elected works councils on the German model, and the union representatives, who advocated an increased workplace role for the unions. In March 1976, the government introduced a bill along the unions' lines which was enacted in June 1976 and went into effect January 1, 1977.¹³⁴

The new Joint Regulation in Working Life Act of 1976¹³⁵ represents a fundamental reversal of understanding in the 1938 Basic Agreement, and an equally fundamental rethinking of the place of law in Swedish industrial relations. The employer's right to "manage and distribute the work" is no longer exclusive; joint negotiation is made the normal mode of enterprise decision-making. In the case of disputes, the union's interpretation prevails until contrary agreement by the parties or decision by the Labor Court. Nor may collective agreements stabilize matters; new negotiation or agreement may be demanded at any time, and on any topic. Finally, as to all these union powers, it is the local branch, not the national entity, that is empowered.¹³⁶

132. Others include increased protection for wages (1970); an equal opportunities act (1979); the work environment act (1977). This output may fairly be characterized as a "legislative explosion," Edlund, *supra* note 124, at 50, and not merely in comparison to the preceding half century without legislation.

133. 1972 Legis. Ser. (ILO), 1972—Swe.1.

134. Korpi, *Sweden: Conflict, Power and Politics in Industrial Relations*, in IRIP, *supra* note 39, at 207-208.

135. Lag om Medbestämmande i arbetslivet, den 10 juni 1976. Translations are in F. SCHMIDT, *LAW AND INDUSTRIAL RELATIONS IN SWEDEN* 234-46 (1977); 1 *LAW AND THE WEAKER PARTY: AN ANGLO-SWEDISH COMPARATIVE STUDY* 151 (A. Neal ed. 1981); and 1976 Legis. Ser. (ILO), 1976—Swe.1.

136. F. SCHMIDT, *supra* note 123; Bouvin, *New Swedish Legislation on Democracy at the Workplace*, 115 INT'L. LAB. REV. 131 (1977); Neal, *Swedish Industrial Relations: Act on the Joint Regula-*

This and contemporaneous legislation were insufficient to stem electoral defections from the Social Democrats, and in 1976 a conservative coalition took office for six years. A nationwide lockout in May 1980, perhaps the largest industrial conflict ever to take place in a Western nation (in terms of proportion of the workforce involved), brought the country to a standstill but did not result in new legislation.¹³⁷ The Joint Regulation Act has been implemented, in part through national agreements in 1982 and 1987, and a flood of new cases in the Labor Court will define it further over time.¹³⁸

There have been no changes in the foundational labor statutes since the Social Democrats' return to power in 1982. Two new legislative initiatives in the labor law are: a long-standing proposal¹³⁹ for investment of corporate profits into stock ownership funds run by unions in trust for employees, enacted in "a heavily watered-down version" in 1983,¹⁴⁰ and a Youth Law guaranteeing everyone between the ages of 18 and 20 a job for four hours a day, typically in the public sector.¹⁴¹

tion of Working Life 1976, 5 INDUS. L. J. 237 (1976); Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175 (1984). On the whole, the Labor Court has interpreted union rights expansively. For example, the employer must undertake mandatory negotiations before appointing senior executives. Decision of the Labor Court, October 1979, summarized in 1980 I.L.O. SOC. & LAB. BULL. 171 (June 1980). See generally Summers, *supra*, at 199.

Unions are also granted certain rights in the plant to carry on business under the Companion Shop Stewards Act (1974).

137. W. KORPI, *THE DEMOCRATIC CLASS STRUGGLE* 159 (1983). It concluded with separate agreements of varying duration, widely regarded as signifying the end of solidaristic wage policies. Svensson, *Class Struggle in a Welfare State in Crisis: From Radicalism to Neoliberalism in Sweden*, in UNIONS IN CRISIS AND BEYOND: PERSPECTIVES FROM SIX COUNTRIES 290-91 (R. Edwards et al eds. 1986).

138. Research on the effects of the law is summarized in Svensson, *supra* note 137, at 296-97. He reports little use of the law to change work organization; attempts to use the law to forestall closings and mergers, for which purpose it has proved not well-suited, since the rights it grants are at the shopfloor level and do not easily penetrate very high into corporate structures; employers becoming more reconciled to the law; positive effects for employees in terms of better access to information, stronger union presence in smaller firms. See also Peterson, *Swedish Collective Bargaining—A Changing Scene*, 25 BRIT. J. INDUS. REL. 31 (1987); Fahlbeck, *The Swedish Act on the Joint Regulation of Working Life*, in 1 LAW AND THE WEAKER PARTY: AN ANGLO-SWEDISH COMPARATIVE STUDY 145, 168-71 (A. Neal ed. 1981).

139. R. MEIDNER, *EMPLOYEE INVESTMENT FUNDS: AN APPROACH TO CAPITAL FORMATION* (1978) (Swedish version published 1975).

140. Edlund, *supra* note 124, at 54.

141. About 40,000 young people have received such a job under the law. Svensson, *supra* note 137, at 287.

IV. SOME QUESTIONS: TIMING, SUBSTANCE, AND EFFICACY OF LABOR LEGISLATION

The changes in European labor law discussed above may be thought to raise three particularly difficult questions for sociological students of labor law: problems of the timing, diversity, and effect of changes in labor law. Moreover, such questions are not merely academic: workers, union leaders, and managers would all presumably be interested in a theory which predicted the timing, substance, and efficacy of labor legislation. Is labor legislation something worth trying to obtain? How much can be obtained? And if worth obtaining, how to obtain it?

The timing of the recent wave of changes would appear in one sense to be the easiest thing to understand about them. Certainly the changes must have been a response, in most or all of the cases, to a sharp increase in labor unrest and recorded strikes; in some cases (the Netherlands, the German Federal Republic, and Sweden) the first such unrest in substantial quantity since the Second World War. To point this out is indeed to have said something, however, since there is no general linkage described in the industrial relations literature between labor unrest and legal regulation.¹⁴²

Moreover, noting the common origin of these legal changes in responses to strikes only deepens the mystery of their diverse content. For the content of the legislation was diverse: union rights, union regulation, works councils, wage regulation, regulation of bargaining, corporate

142. See however the interesting paper, limited to the U.S. case, by Donald Lee Berry, *Political Militancy and the Formation of Working Class Legislation* (unpublished paper delivered at the Law and Society Association, annual meeting, Amherst, Mass., June 12-14, 1981), attempting to demonstrate that: "Legislation favorable to the working class is enacted as a result of working class militancy, independent of fluctuations in economic conditions." *Id.* at 2. See also Ramsay, *Cycles of Control: Worker Participation in Sociological and Historical Perspective*, 11 Soc. 481 (1977), treating grants by employers in the United Kingdom of power-sharing or participation as concessions to worker pressure.

The insight may "come naturally" if one has been thinking and reading about Western European labor. Recall however that it did not "come naturally" in the discussion, *supra* notes 26-29, of why there is no labor legislation in the United States. The "natural" explanations involved lack of consensus among labor professionals, not diminished levels of striking. (Try out on your friends the question of why there has been no U.S. reform of labor legislation and see how many of their responses refer to levels of labor unrest).

A possible explanation for this phenomenon would be that models which predict legislation in Western European polities do not work in the United States, where different dynamics obtain. I do not believe this, and will address the applicability of the model to the United States *infra* Part VI. Briefly, the United States appears to be willing to tolerate unusually high levels of unrest without adopting legislative palliatives. On the other hand, it is absolutely unheard-of in the United States for significant pro-worker legislation to be adopted in the absence of significant labor unrest.

boards, privacy rights for employees. Yet, amazingly, none of the legal changes overtly addressed the problem of strike control. And most of the legislation—not all—could be characterized as a concession to workers or their organizations.

Finally there is the problem of the effects, if any, of the legislation studied. An American unionist studying the rich variety of reforms might conclude that campaigns for legislation were well worth it. While I will argue that this is the case, one's enthusiasm must be tempered after one has studied the literature on the impact of the post-1968 reforms.

A constant theme of industrial relations literature was the limited effect of the post-1968 changes. Study after study reported little lasting impact of the changes.¹⁴³ While to some extent this conclusion followed from the adoption of what might be criticized as a "command" theory of law paying insufficient regard to the difficulties of studying the "effect" of law on a "semi-autonomous field" such as labor relations,¹⁴⁴ even more sensitive and sophisticated studies reported little impact of the legal change. This led, in time, to a widespread sentiment among industrial relations scholars that borrowing legal institutions was generally a mistake, rarely effective.¹⁴⁵ Yet the conclusion seems odd, for there seems little reason that labor regulation, on the whole more recent and less ingrained than most other legal institutions, should be so culture-bound and resistant to change.¹⁴⁶ So many of the background factors to labor law are the same among advanced economies: all have unions and employers, a regulatory state, public and private sectors, laws and judges, large factories, small workshops. Many work processes are identical and the major employers are often identical too: slightly varying subsets of the small set of prominent multinational corporations.¹⁴⁷

143. *Supra* notes 46-51, 57-60 (France); 71 (Italy); 91-96 (Germany); 134-136 (Sweden).

144. Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987); Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973); Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981); Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986).

145. This position is particularly associated with Sir Otto Kahn-Freund. *See infra* notes 162-68.

146. This now seems generally recognized. "The generalization that 'borrowing (with adaptation) has been the usual way of legal development is at least as true for labour law as it is for other branches of law." Hepple, *Introduction to NINE COUNTRIES*, *supra* note 36, (quoting A. WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 7 (1974)).

147. This fact has gone ignored by American unions in their various struggles. It is one thing to argue (as they often do) that employers ought to submit to a particular new way of doing things, and another to argue (as American unions rarely do) that employers ought to submit because they have successfully operated plants in another country, making the very same product, under the proposed reform.

In short, as Max Weber wrote:

What we are concerned with here is the fact that, once everything is said and done. . . , modern capitalism prospers equally and manifests essentially identical economic traits under legal systems containing rules and institutions which considerably differ from each other at least from the juridical point of view. . . . Indeed, we may say that the legal systems under which modern capitalism has been prospering differ profoundly from each other even in their ultimate principles of formal structure.¹⁴⁸

The fact of national diversity in substantive law is an embarrassing fact for theories of law which emphasize economic factors. This includes most theories of legislation popular in American legal thought.

V. THEORIES OF LEGISLATION

Oh well, we
 Were meant to rest at this point so that the laundry
 Of our thinking will be spread out on bushes and not
 Come to tempt us too much with the long shadows of causality
 Striking deep into its expansionist mass to let the bare
 Branches form a tentative yet definitive icing or hair net
 over its
 Accidented terrain. That's how determinism does it:
 Jack fell down and broke his crown,
 And Jill came tumbling after.¹⁴⁹

It is not surprising that there is no generally-accepted general theory of legislation. The idea strikes me as preposterous. There will always be too many variables, political, economic, and social. The most the present study tries to put forward is a suggestive theory of a very small sample of labor legislation.¹⁵⁰

What is perhaps surprising is that, despite the hubris involved in doing so, general theories of legislation have been put forward and some,

148. 2 M. WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 890 (G. Roth & C. Wittich eds. 1978) (this translation originally published in M. WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 315-16 (M. Rheinstein ed. 1954)).

149. Ashbery, *Polite Distortions*, in *APRIL GALLEONS* 62 (1987).

150. The only general theory of labor legislation with which I am familiar is Cohen, *An Analytical Framework for Labor Relations Law*, 14 *INDUS. & LAB. REL. REV.* 350 (1961), which argues that labor law reflects the interests of the politically powerful, and that changes in labor law follow the occurrence both of a shift in political power and a shift in "prevailing ideology of property rights." This does not capture the post-1968 changes, which of course postdate the article, which were typically changes to favor the comparatively powerless. Of course, it is possible that the theory is always true, definitionally, for if "power" were defined as the ability to achieve legislative change—not a bad definition—then any legislative change would, analytically, reflect a power shift. But then we should really have learned nothing.

while not achieving general acceptance, have acquired a certain influence in legal academia over the past few decades. I will review briefly some of these theories here, namely, (1) Weberian or neo-Weberian models of legislation as functional adaptations to systemic needs generated by appropriate levels of economic development; (2) public choice models of legislation as payoffs to interest groups; (3) cultural models which see labor legislation as responding only to ingrained traditions (and hence resistant to transplantation).

The current intellectual style in legal academia apparently requires me to reduce all rival theories to rubbish, but I shall not pursue that path. There is much to be learned from our current models of legislation. It is also true that none of them fully catches the essence of labor legislation, so the field remains open for a fresh approach.

A. *Weberian Theories of Legal Development*

I don't think that there is anyone who would deny that labor law or legislation responds in fundamental ways to underlying forms of economic organization, which set powerful limits on the possible range of legal variation. For present purposes, however, it is important to see that the range of legal variation set by economic organization is still quite incredibly large—vastly larger than professors of labor law admitted until recently. The aspects of labor law which vary from capitalist country to capitalist country don't seem trivial, as the variations in labor law discussed above should illustrate—they seem like the sorts of things which ought to have major impact on the lives of working people, among others. People who believe generally that law is limited by economic structures—that is, nearly all of us—need a theory accounting for the parts of law that don't seem to be. An interesting discovery of the Critical Legal Studies movement is that these people—we—simply don't have any such theory.¹⁵¹

I argue here that the solution to the problem must lie in improving our understanding of the cultural, symbolic significance of legal communication. Our understanding (as a profession) of these processes is quite primitive, and in the end, this Article may be more of a programmatic call for further research than any real contribution to understanding law's symbolic roles. However, before following me down that road, the reader is entitled to learn how national variations in law are explained by

151. See Gordon articles, *supra* note 2 *passim*.

other scholars who hold to more deterministic theories involving economic factors which vary little among countries.

There are basically only two possible explanatory moves here:

(1) ignore national variation in legal systems. Flatly illegitimate, yet frequently done.¹⁵²

(2) Maintain the theory by holding that laws or legal systems do converge, if examined from some "higher" level, typically functional. National variation thus exists but is substantially irrelevant. For example, variation among institutions of worker representation, such as elected works councils, informal delegates and labor unions may be explained away, as I just did, by treating these as equivalent functionally; namely, the function of "representing workers" or "integrating the working class."

The second move is Max Weber's. Let's see how the master does it. Weber was aware, to put it mildly, of national variations in the legal systems of countries at similar stages of development. He invoked those differences to refute the argument that law might be derived, in any important or meaningful sense, from a popular "sense of justice."¹⁵³ So why don't national differences embarrass a general cross-cultural theory of legal development? Weber grasped the nettle at the broadest level. The overarching systemic need was for stability and predictability. So, for example, if English law could not achieve this through a German norm of logically formal rationality—and the common law system, Weber felt, precluded a very high level of logically formal rationality—it would have to achieve predictability through alternative means. Weber mentioned two: the central organization of the English legal profession (through the courts in London) and the fact that the livelihood of all of them rested on being retained by capitalists.¹⁵⁴

This sort of explanatory strategy is often encountered. For example, it works neatly with the post-1968 European legislation. The story would go that systemic needs for stabilization and integration of the working class are met in different ways in different cultures. And of course there are powerful critiques of this whole way of thinking which deny that

152. See discussion of the law and economics movement, *infra* Part V.B., a monument to ethnocentrism.

153. 2 M. WEBER, *supra* note 148, at 883.

154. *Id.* at 889-92. I am reading Weber as consistent in his functionalism. See Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 LAW & SOC'Y REV. 487 (1987). An alternative reading is that Weber is simply in deep internal conflict on this and other matters. See, e.g., A. KRONMAN, MAX WEBER (1983); Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society*, 20 LAW & SOC'Y REV. 573 (1986).

legal systems exist as discrete entities, or that they have needs, or that law as we know it could ever be functional in the way the theory seems to require.¹⁵⁵

I have allied myself with the latter group in the past, but do not want to hoe that row today.¹⁵⁶ Let me just raise a much narrower prob-

155. See Griffiths, *supra* note 144; R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Gordon articles, *supra* note 2.

156. Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379. That article criticized a variant of the Weberian explanatory move. Under the variant, societies, or sometimes legal systems, develop a need for something called "legitimation," which various legal phenomena, sometimes doctrines, sometimes institutions, sometimes rhetoric, can "fill." In the article I traced the explanatory strategy back to Weber (and not, as often thought, Marx), showing that it carries no radical political implications of any kind. Indeed, it breathes the air of a whole way of thinking about law which radicals often (and rightly) reject: that there are legal systems, and that law is typically functional in terms of the needs of those systems. (Robert Gordon, who has demolished the Weberian apparatus of law responding to "social needs," continues to cling, for reasons I find baffling, to the Weberian term, though perhaps not the Weberian concept, of "legitimation." See Gordon articles, *supra* note 2). I also reviewed the fantastic variation in the usage of "legitimation" and suggested that for that reason alone the concept contributed to misunderstanding and should be abandoned.

That Article has come in for extensive friendly and unfriendly criticism, see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 262-68 (1987); Friedrichs, *The Concept of Legitimation and the Legal Order: A Response to Hyde's Critique*, 3 JUST. Q. 33 (1986); McEwen & Maiman, *In Search of Legitimacy: Toward An Empirical Analysis*, 8 LAW & POL'Y 257 (1986); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 92 n.85 (1984); Lempert, *From the Editor*, 18 LAW & SOC'Y REV. 5 (1984); and has in turn been defended by Stick, Book Review, 88 COLUM. L. REV. 407, 417-430 (1988).

I have always believed, and said in the earlier Article, that some behavior is probably shaped by ideology. See *infra* note 230 and accompanying text, on the indispensibility of affective or ideological appeals for union organization to exist at all. Kelman and Gordon devote some effort to asserting this. For example, Kelman has recently had sport with law-and-economics types who admit no theory of human motivation except for narrow dollars-and-cents rationality, Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 206-23 (1988). Of course, such a flattened theory of motivation is just about as silly as a theory of motivation that admits only affective appeals. Kelman has yet to take on more sophisticated theories that model behavior as rational but define rationality to include moral and affective appeals. See, e.g., J. ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER (1989) and Elster's many other studies of rationality; J. COHEN & J. ROGERS, ON DEMOCRACY 51-72 (1983). Nor has Kelman identified a single empirical study in which a tendency to conform one's behavior to law outweighed significant material incentives to disobey.

The real issue is not the concept of "ideology", but the distinctive role, if any, of legal institutions and personnel in the construction of social ideology.

I also believe, and said, that legal discourse may contribute to the formation of ideologies, world-views, consciousness, and thus alter behavior, too, even where unaccompanied by direct sanctions. I also believe however, and tried to show in the earlier article, that legal theorists characteristically overstate this effect, often grotesquely; that cases of law's independent effects are generally impossible to isolate; that at most law might occasionally contribute effects where it is consonant with other systems of cultural communication; but that we know little about specific audiences as to whom law might have this effect or specific legal communications which might; and, finally, that we shall never find out about these things so long as we are beguiled by a supposed "legitimation" effect which is

lem with the general functionalist explanatory strategy. As applied to the problem before us: a positive theory of labor legislation—it seems to land straight in the following insoluble dilemma: why don't the system's needs (being met by law) lead ineluctably to legal convergence? To say that England and Germany could attain predictability through alternative means is not to explain why they would want to, if the underlying need were real and each free to adopt the other's system. But just this situation exists respecting labor legislation. Unlike people in the United States, Western Europeans know each others' labor laws, study them, do not hesitate to borrow from each other. If some underlying function is being performed by all this labor legislation, why doesn't a "race to the top" result in convergence on the system which "works best"? And if different systems work differently on the ground, fill different local "needs," if you like, then maybe the explanatory power of our economic variables is not what we thought it was. Which seems to me to call out, as I have said, for better understanding of the symbolic, the cultural power of law. Pending such understanding, of which this essay is only a very tentative first step, it seems premature to opine about how and for whom "law" might be "functional."¹⁵⁷

B. *Law-and-Economics: Legislation as Interest Group Payoffs*

The foregoing skepticism about legal systems and legal functionalism applies particularly to the law-and-economics school, the ultimate belief around these days in legal systems, legal needs, and functional law.

general to all law and all audiences, a thesis which, so far as I can determine, lacks any empirical support whatever and surely has received none from any of my critics. For surely the evidence is overwhelming, as I said in the earlier article, that most people know nothing about law, have a poor opinion of legal personnel, and alter neither their behavior nor their beliefs on learning more about law.

The instant Article is an attempt at just such a narrower inquiry: into particular extraordinary circumstances (high social unrest, collapse of old norms) under which in particular social subgroups (industrial relations actors) it just might be plausible to find a symbolic effect in legal communication, in part because of particular cognitive changes which someone seeks to bring about in a targeted audience, using particular devices used to heighten the new law's salience. If there is anything at all to the theory of law's symbolic impact, which I of course believe, it must, in my view, be anchored, in the way I am doing here, to particular circumstances, audiences, kinds of legal communication. Moreover, it should be expressed in a conceptual vocabulary free of such problematic assumptions as those which animate the usual "legitimation" discourse; namely that legal systems exist, that law is functional, and that law importantly influences behavior such as the propensity to revolt.

Now if such particular instances of symbolic impact can be documented, I have no objection to calling them "legitimation," although because of the unhappy history of that word I personally shall continue to avoid it.

157. Stick, *supra* note 156, at 420-24.

As it happens, however, these people have a precise theory of the legislative process which exempts it from any charge of functionalism to the public good, for it is always the public which loses in the legislative process, and some private group which gains—or reduces costs, if you like.¹⁵⁸ This derives from political theorists of public choice or economists of regulation and in general assumes that legislation will pay off interest groups, meeting only their demand for reduced competition, limiting entry, subsidy, or fixed prices.¹⁵⁹

Now this also does not quite make it as a general theory of the entire legislative process, and Jerry Mashaw has done a good job of showing vast areas of legislative output (deregulation, environmental regulation) and voter behavior which the theory does not predict at all.¹⁶⁰ As applied, however, to the narrow problem with which we deal, the public choice model contributes some interesting insights and questions. For I certainly want to argue that the transformative labor reforms with which we deal were indeed payoffs to insurgent working classes, though the word “payoff” is not the one I would normally use. Moreover, the payoffs were not necessarily guided by notions of efficiency or the public good.

What the public choice theory cannot explain is the convulsive nature of these changes and the limited dollars-and-cents impact they have.

158. “The contemporary ethos of the legislative process is thus that it is fundamentally an arena for pressing private claims. Both those who press the claims and those who assess them generally understand their roles in such terms.” Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073, 1119.

159. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) is the *locus classicus*. Explorations from the legal side, dealing with how to interpret such unsavory statutes, include Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-18, 42-58 (1984); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). A variant is the six-stage model of statutory evolution toward “political cost-externalization” set out in Elliott, Ackerman, & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313 (1985); this fails to account for statutory change which is sporadic and not evolutionary. Interpreting or predicting labor legislation requires more a theory of statutory convulsion than a theory of evolution, but if the physicists can have both, I don’t see why we can’t too. An outstanding critique is Kelman, *supra* note 156.

160. J. Mashaw, *Positive Theory and Public Law* (Rosenthal Lectures, Northwestern University Law School, Feb. 3-5, 1986). Mashaw also discusses the unfortunate effects on judicial discourse of facile adoption of this view of statutes, and sketches out alternative ways of treating statutes as “meaningful,” other than as interest group payoffs. A small portion of these lectures has been published as Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT. L. REV. 123 (1989).

Consider the pattern observed above under which labor reforms languish legislatively for years, are resurrected in the face of increased unrest and slammed through, to high symbolic, but possibly little economic impact. This sort of legislation is not typical and seems to call for a model different from the quotidian subsidies purportedly explained by the public choice people. In short, they too need a theory of legal symbolism, as others have observed, and that is what I mean to sketch here.¹⁶¹

C. *Labor Law and Cultural Tradition*

In a decade of sweeping labor legislation in Western Europe, nothing was more sweeping than the United Kingdom's Industrial Relations Act of 1971.¹⁶² Nor was any failure more spectacular. The three years of the Act's duration saw widespread noncompliance and resistance. Ultimately the legislation collapsed. It was substantially repealed in 1974.¹⁶³

One of the many lessons that might be drawn from the story was drawn by Sir Otto Kahn-Freund: that transplanted labor legislation was in general doomed to failure. The 1971 Act failed not merely in the substantive values it advanced, not merely in the circumstances of its adoption; it failed—inevitably—because it borrowed from other (largely United States) sources and ignored distinctive British political traditions, specifically, what Kahn-Freund had earlier identified as “collective *laissez-faire*,” that is, the progressive and gradual elimination of regulation.¹⁶⁴

Perhaps after the abject failure of the 1971 legislation, such a bracing warning was called for. Yet, when we lift our eyes from that experience, it is far from clear that labor legislation in particular is really so difficult to transplant.¹⁶⁵ In truth, it is the rare European labor legislation

161. B. ACKERMAN, *supra* note 22.

162. 1971 Legis. Ser. (ILO), 1971—U.K.1.

163. B. WEEKES, M. MELLISH, L. DICKENS, & J. LLOYD, *INDUSTRIAL RELATIONS AND THE LIMITS OF LAW: THE INDUSTRIAL EFFECTS OF THE INDUSTRIAL RELATIONS ACT, 1971* (1975); A. THOMSON & S. ENGLEMAN, *THE INDUSTRIAL RELATIONS ACT: A REVIEW AND ANALYSIS* (1975).

164. Kahn-Freund's most thorough development of the anti-transplantation thesis are Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1, 20-27 (1974), reprinted in O. KAHN-FREUND, *SELECTED WRITINGS* (1978), and the general treatment of legislation in O. KAHN-FREUND, *LABOUR AND THE LAW* 24-47 (2d ed. 1977). The first appearance of the concept of “collective *laissez-faire*” is found in Kahn-Freund, *Labour Law*, in *LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY* 215, 224 (M. Ginsberg ed. 1959), reprinted in O. KAHN-FREUND, *SELECTED WRITINGS* (1978).

165. Critiques of Kahn-Freund's pessimism about transplanting include Watson, *Legal Transplants and Law Reform*, 92 *L. Q. REV.* 79 (1976), and Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 *NW. U. L. REV.* 198 (1977).

which does not draw heavily on the experience of other countries, as the stories above help show.¹⁶⁶

Kahn-Freund had very little use for labor legislation in general.¹⁶⁷ He was most identified as a describer and justifier of autonomous collective bargaining. And if one's images of labor legislation are dominated by Nazi laws on the one hand and the Industrial Relations Act of 1971 on the other, autonomous bargaining would look good indeed. Kahn-Freund's defense of British practice, during the decades of heavy criticism, gave rise to a great quantity of useful scholarship within the voluntaristic assumptions of the period.¹⁶⁸

Disquiet with the assumptions of voluntarism does not necessarily lead one to embrace legislation. Still, as my purpose is very different from Kahn-Freund's, my reservations about his warnings decline. The struggles for legislation may be as heroic as the struggles to bargain, all the more so when that struggle is really over cultural symbolic definition. Looking at legislation in this light, clash between the political traditions of the "borrower" and "donor" cultures may not defeat the efficacy of legislation. It may rather be the occasion for its success—in cultural definition.

The theory that follows aims to be consistent with Kahn-Freund's skepticism about whether labor legislation may be transplanted. It does this by locating the common features of labor legislation, not in its substance, which claim could not be maintained, but in the processes of its adoption. While the processes of labor legislation are comparable, its substance diverges. There are, in short, significant cultural factors shaping labor legislation in each national culture, and the theory aims to validate these, and put them in their proper place—which is symbolic.

VI. A POSITIVE THEORY OF LABOR LEGISLATION

Labor law in contemporary advanced economies, I would suggest, is frequently, perhaps typically, a vehicle for concessions to disruptive worker movements by threatened elites. Thus, I agree with the implicit view of the industrial relations school that labor law is rarely the weapon

166. United States law reform is a different story, of course, rarely drawing on foreign experience. See generally Stein, *supra* note 165, at 209-16. For the labor law story, see Summers, *supra* note 33; Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1458-63 (1971).

167. See O. KAHN-FREUND, *LABOUR AND THE LAW* 46 (2d ed. 1977) (1978).

168. This scholarship continues after Kahn-Freund's death; see, e.g., *LABOUR LAW AND INDUSTRIAL RELATIONS: BUILDING ON KAHN-FREUND* (K. Wedderburn, R. Lewis, & J. Clark eds. 1983).

of choice of a strong employer or capitalist class against a weak working class. Rather, working classes which create enough actual or perceived potential disruption so as to create demands for elite concessions will frequently find that those concessions will come through the legal system.

Thus, labor law arises not at random moments, but at particular historical times of actual or potential disruption. While at these times some concession to worker groups is indicated, the precise content of the concessions is shaped by: (1) what, in any given culture, will count as a concession to workers; and (2) what, among possible concessions, will most commend itself to governing elites as a way of eliminating the present threat with minimum harm to long-range elite interests. The content of the concession is thus shaped by national traditions of discourse about justice and particular national power configurations, and thus over time the accreted systems of labor will bear little resemblance to each other. Finally, the anticipated effects of labor law change are generally quite short-term and it is thus hardly surprising that although the institution of labor law is universal, its impact is so often undiscernible and so little of it appears functional.

I put forward this view with considerable trepidation. It is not a general theory of labor law and leaves much unexplained. Nor does it really disprove any other explicit or latent sociology of labor law. I hope, however, that the concept of law as symbolic communication among classes, a vehicle for concessions to insurgent groups, may strike a chord with other students of legal change in advanced societies and perhaps redirect study of that process away from certain common models which I believe are excessively functionalist, ideological, or determinist.

A. *Scope of the Theory*

The theory applies only to societies not governed by the working class, but in which working people and their organizations exert political power only in coalition with elements of elite groups. This has two implications for the scope of the theory. First, the theory applies in some measure to every known political system with organized workers' movements, including, most particularly, self-designated Communist countries like Poland or the Soviet Union. In fact, Poland in the early 1980s is a particularly vivid recent example of a threatened elite attempting, as an initial matter, to restore legitimacy through legal concessions

to a workers' movement.¹⁶⁹ Second, the theory applies with varying amounts of force, and applies best only to a middle range of societies—a broad middle range to be sure—in which laboring or working groups are powerful or troublesome enough to raise some threat to governing elites (this excludes rather a great many less developed countries), but not so strong as to rule absolutely (this excludes no present political system).

Since the theory applies with varying degrees of force, it is not a general theory of labor law. A complete typology of labor law in advanced countries would include at least two varieties of labor law not described by this model: the simple enactment by a working-class or union-dominated party of its program, and "repressive" legislation not designed as a concession of any kind, symbolic or otherwise. The first of these types is found occasionally outside the United States; the latter describes some American and European legislation. Neither is as common as the labor legislation described by the model, but both deserve a few words here.

1. *A Counter Example: Pro-Worker Reforms by a Pro-Worker Party.* Start with a pure type of legislation reflecting the working class program. If workers actually governed the country alone, they could in theory simply legislate their program into being. As this is purely a theoretical construct, there is no reason to discuss whether such a society is possible;¹⁷⁰ or whether such a working class would exercise power through state legal structures or rather through other means, the state somehow withering away; or whether in a real worker-run state elements of some other social class such as bourgeois remnants or an insurgent lumpen proletariat might extract analogous legal concessions.

If the pure type of workers' control legislation is theoretical, some real world variants are encountered. The French labor law reforms of the

169. I mean only to be suggestive, here as throughout the essay. The proof of my approach must lie for any country in localized research on whether legal change felt to people as I am suggesting it might have felt. It is not easy to design such research, rendering all these remarks provocative speculation as opposed to social science.

Materials in English on the early 1980's legal reforms adopted as a concession to the Solidarity movement include Brand, *Solidarity's Proposals for Reforming Poland's Economy*, 105 MONTHLY LAB. REV. 43 (May 1982); Wolff, *Poland's Trade Union Statute: An Impermissible Violation of Human Rights Laws*, 10 BROOKLYN J. INT'L L. 25 (1984).

Neither my theory nor any other would have predicted the subsequent repression of Solidarity, followed by its acquisition of power in 1989.

170. See R. MICHELS, *POLITICAL PARTIES* (1958) (originally published in 1915). For a critique as applied to the governance of trade unions, see Martin, *The Effects of Recent Changes in Industrial Conflict on the Internal Politics of Trade Unions*, in 2 RESURGENCE, *supra* note 41, at 101.

Mitterand period¹⁷¹ represent just this acquisition of power and subsequent legislative reform, and owe little to industrial conflict or any of the dynamic I describe here.

One may divide countries into rough groups in terms of length of political power exercised by working-class oriented parties, as Walter Korpi has done in order to explain industrial conflict, but which, I would suggest, helps predict labor legislation as well. Korpi argues that those advanced countries which have seen a secular decline in industrial conflict in the postwar period (such as Sweden, Austria, and Norway) have been countries where a working-class party has governed fairly continuously since the war, in which case: "It . . . becomes possible for the labour movement to influence distributive processes also by political means."¹⁷² Industrial conflict has remained high or increased in countries with workingclass parties that have been excluded from power, or unions excluded from governing parties, or both. In these countries, it has not "paid" unions to change their "conflict strategies," so strike activity remains high.

To the extent a working class or movement attains an effective legislative power and uses it to implement its goals, one would expect (says Korpi) a decline in industrial conflict and (I would say) a corresponding decline in the frequency of the sort of labor law described by my model.

171. See *supra* notes 58-64 and accompanying text.

172. W. KORPI, *THE DEMOCRATIC CLASS STRUGGLE 168-83* (1983). The quoted passage is at 170.

Korpi's is only one of several recent attempts to construct a theory to explain when unions resort to industrial action and when political action. These theories would predict when unions would seek legislative change, though not necessarily when they would get it. Other examples include Pizzorno, *Political Exchange and Collective Identity in Industrial Conflict*, in 2 *RESURGENCE*, *supra* note 41, at 277 (a cyclical theory relating action in "political markets" and "economic markets" to cyclical presence or absence of equilibrium in each); Offe & Wiesenthal, *Two Logics of Collective Action*, originally published in *POLITICAL POWER AND SOCIAL THEORY* 67 (M. Zeitlin ed. 1980), and now in Chapter 7 of C. OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* 170, 217 (1985) (relating turn toward political action to internal organizational development of unions); E. SHORTER & C. TILLY, *supra* note 124, at 343 ("The main arguments of this book portray the strike as an element of working-class political action," rejecting rival descriptive hypotheses); G. ADAM & J. REYNAUD, *CONFLITS DU TRAVAIL ET CHANGEMENT SOCIAL* (1978).

I took the strategic choice between industrial and political action by unions as the starting point for a critique of American legal treatment of the latter in Hyde, *Economic Labor Law vs. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 *TEX. L. REV.* 1 (1981). Other recent treatments of the legal status of union political activity include Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 *VA. L. REV.* 685 (1985); Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 *TEX. L. REV.* 1071 (1987). A call for a more politicized, European style labor movement is Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 *CATH. U. L. REV.* 1 (1988).

This does not mean that there would necessarily be a decline in the total overall volume of labor law. Indeed, one would expect the working class legislative majority to enact its program through positive law.

The transition from labor law as conflict control, to labor law as the product of a politically potent working class, if it exists at all, must be an extremely gradual one. Sweden is far from a pure case, since an arguable working class majority of forty years did not enact labor law of any kind until faced with strikes.¹⁷³ Nevertheless, I repeat that my model describes not a general theory of labor law, but a particularly common kind of labor law in contemporary industrial societies in which organized workers are powerful enough to resist, but not powerful enough to govern without combination with other groups.

2. *A Second Counter Example: Repressive Law.* A pure type of repressive law may well reflect the desires of the ruling elite, unmediated by any need to placate or appease workers' organizations. In such societies labor law may not be symbolic communication at all, but may be frankly repressive.¹⁷⁴ This is not a theoretical construct but an historical stage. There appears good reason to think that every advanced economy passed through such a stage of labor regulation, when workers were poorly organized and labor law was strictly repressive.¹⁷⁵

Even in advanced societies, one occasionally encounters repressive labor law enacted by conservative majorities. For the past quarter century, the list is pretty much exhausted by the British Industrial Relations Act of 1971;¹⁷⁶ the group of British statutes enacted in the 1980s to curb union powers and immunities,¹⁷⁷ and the Dutch Wages Determination Act of 1970.¹⁷⁸ Such legislation certainly aims to alter behavior of unions; it also fits the model described in this Article of attempting to project an idealized portrait of the nation's labor relations— here the

173. See *supra* notes 124-30 and accompanying text.

174. Schwartz, *A Learning Theory of Law*, 41 S. CAL. L.REV. 548 (1968) distinguishes between educative and repressive law. Surely repressive law is profoundly educational too, in its bleak way. The distinction must only be relative.

175. Sorge, *The Evolution of Industrial Democracy in the Countries of the European Community*, 14 BRIT. J. INDUS. REL. 274 (1976) (an ambitious attempt to link twentieth century styles of union strategy to nineteenth century styles of state repression); Jacobs, *Collective Self-Regulation*, in NINE COUNTRIES, *supra* note 36, at 193.

176. 1971 Legis. Ser. (ILO), 1971-U.K.1.

177. These seem to lack comprehensive academic treatment at the moment. A brief narrative summary is Towers, *Running the Gauntlet: British Trade Unions under Thatcher, 1979-1988*, 42 INDUS. & LAB. REL. REV. 163, 167-71 (1989).

178. 1970 Legis. Ser. (ILO), 1970-Neth. 1.

weakness of unions—so as to reorient working people cognitively. It is not easy to sort out these two aims in the case of a sample of three, particularly since the Dutch statute never went into effect¹⁷⁹ and the earlier British statute was a regulatory failure.¹⁸⁰

From this limited sample, we can draw the following tentative conclusions. First, anti-union legislation is simply not very common any more in advanced societies. Second, this fact remains true even during times of comparative union political weakness and conservative governments. Third, it follows that governments responsive to employers must have more effective means than legislation to advance their behavioral and ideological agendas. The Reagan administration in the United States illustrates this well. Labor's weakness was symbolized by the government's action as an employer (in firing striking air traffic controllers) and in much rhetoric; neither agenda required new legislation. This paucity of new legislation to reflect what was quite a salient ideological agenda is simply another illustration of the general thesis of the weak "legitimatory" power of law; if it worked better, employers and the governments responsive to them would use it more.

B. *Elements of the Theory*

In this Part of the Article I sketch out the elements of the positive theory of labor legislation. In Part VI, I illustrate it with application to the countries studied.

1. *Timing of Labor Law.* The model predicts that an increase in the quantity of labor law is likely when:

- (1) a perceived upsurge in worker discontent or unrest leads to,
- (2) a perception on the part of the governing elite that some concession is desirable in order to restore worker loyalty to the regime, restore order, or simply "cool down" the situation.

This explains the convulsive quality of increases in labor law and, particularly, the extraordinary fact that Western European countries uniformly responded to the 1968-1970 wave of unrest with legislative and other legal changes. It does little more than restate at a very general level a truism that law is frequently a response to perceived social disorder or deviance, which, at that level of generality, I take to be fairly unobjec-

179. See *supra* note 117 and accompanying text.

180. See *supra* note 163 and accompanying text.

tionable. However, there are several problems with giving operational content to the theory which should be noted.

First, it predicts the timing of labor law only in a very gross way. There have been several attempts to relate the rapid legislative and judicial changes in American labor law in the period from 1933 to 1937 to levels of industrial conflict during that period.¹⁸¹ These attempts have been inconclusive, and I have serious doubts whether the operation is valuable within that range of precision. Once perceived worker unrest helps set the legislative process into motion, many other factors influence its timing and it seems highly reductionist to suppose that month-by-month levels of unrest would alone, or even importantly, determine the timing of the law-making process. Legislation could still be said to respond to unrest, particularly if some significant unrest in the near future appeared likely throughout the period, as was true in 1935.

Second, an increase in labor law should follow a perception of increased worker discontent or unrest by the governing elite. At times such unrest is obvious. Unfortunately, however, the perception of labor unrest is a mysterious process which is imperfectly correlated with the actual presence of labor unrest. On the one hand, it is characteristic of British writing on industrial relations to bemoan a supposed British obsession

181. Most accounts of the successful passage of the National Labor Relations (Wagner) Act, 49 Stat. 499 (1935), (codified as amended at 29 U.S.C. §§ 151-169 (1982)), link it to the dramatic strike activity of 1934, without any sense that this proposition is controversial. The strike activity included sit-downs in Toledo, a general strike in San Francisco, and a national strike in textiles. See generally J. HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 161-71, 190-98 (1968) (quoting Wagner: his bill as responsive "to the serious industrial disturbances of last summer, when blood ran freely in the streets and martial law was in the offing," *id.* at 192); P. IRONS, THE NEW DEAL LAWYERS 204-215 (1982) (general account of internal debates in Roosevelt administration; nearly every internal memorandum on the Wagner bill refers to labor unrest); Vittoz, *The Economic Foundations of Industrial Politics in the United States and the Emerging Structural Theory of the State in Capitalist Society: The Case of New Deal Labor Policy*, 27 AMERIKASTUDIEN/AMERICAN STUDIES 365, 381-86 (1982). The point is argued particularly strongly in Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression*, 38 INT'L ORG. 39, 86-88 (1984); and F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 107-47 (1977).

This account has been criticized in a series of articles by Theda Skocpol and her students. Skocpol, *Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 POL. & SOC'Y 155, 182-99 (1980); Finegold & Skocpol, *State, Party, and Industry: From Business Recovery to the Wagner Act in America's New Deal*, in STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY 159 (C. Bright & S. Harding eds. 1984); Massad, *Disruption, Organization, and Reform: A Critique of Poor People's Movements*, 27 DISSSENT 81 (1980). Their basic point is that the actual short-term response to the 1934 strikes was not Wagner's bill, which failed adoption in that year, but the tepid Public Resolution 44, and that the adoption of Wagner's legislation in the following year cannot be attributed to industrial unrest, which had tailed off between 1934 and 1935.

with labor unrest during a period when such activity in Britain was unremarkable either in an historical or international comparative perspective.¹⁸² On the other, a recent survey of industrial relations scholarship in the United States pointed out a sharp decline in interest in the causes or control of strikes from the 1940s through the 1950s, a period during which the incidence of strikes had not declined at all.¹⁸³ This has the unfortunate consequence of making what was already a very loose theory on the timing of increases in labor law even flabbier. For one thing, it is not easy to quantify "perceived worker unrest" or to obtain any reliable index of it.

Moreover, relating labor law to "perceived" unrest leaves open the possibility that in any country (say Britain, if the British scholars are right) there may be near constant perception of labor unrest; hence labor law reform might happen along at any time. For research purposes, then, one should associate increases in labor law with reported increases in labor unrest, mindful that the relationship is considerably this side of direct.

2. *Content of Labor Law: What Makes for a Concession?* Understanding labor law as typically a symbolic concession does not of course permit precise prediction of its doctrinal content. Indeed, as argued above, it is partly intended as an explanation of national diversity in systems of labor law.

However, several puzzling substantive elements of labor law become easier to understand. First, if the function of labor law is to serve as a public concession, one would expect to find enormous variation in its contents, which is close to arbitrary so long as it will be perceived as a concession. Second, what counts as a concession will vary from country to country and from struggle to struggle, according to the set of unfulfilled worker demands at any particular time, which in turn might be defined mainly by intra-national "coercive comparisons."¹⁸⁴ In other words, variations which would be inexplicable if labor law resulted from

182. K. WALSH, *STRIKES IN EUROPE AND THE UNITED STATES: MEASUREMENT AND INCIDENCE* (1983) attempts to debunk the myth of British strike-proneness.

183. Strauss & Feuille, *Industrial Relations Research in the United States*, in IRIP, *supra* note 39, at 81. The willingness of United States governments to tolerate quite high levels of industrial unrest without legislative concessions to workers may be internationally unique. See *infra* notes 194-96 and accompanying text.

184. Standard theories of union wage bargaining emphasize members' comparison of themselves with other employees. See, e.g., W. ATHERTON, *THEORY OF UNION BARGAINING GOALS* (1973); H. LEVINSON, *DETERMINING FORCES IN COLLECTIVE WAGE BARGAINING* (1966). For an account of the historical forces which limited these horizons within national boundaries (and a plea, which I

the adoption by wise professionals of the "best" institutional arrangements for economic regulations become understandable. It is unlikely that there are "best" importable institutions for the pacification of unruly workers, since what counts as pacification will generally be situation-specific and probably nationally-specific.

It is true, as we have seen, that reforms in contemporary labor law are very frequently precluded by exhaustive study by distinguished governmental commissions of international alternatives for reform. This is hardly surprising. If labor law is to work at all—that is, if it is to restore order and morale when workers regard it as a victory for them—it must be highly public. Distinguished study commission, dramatic meetings of high officials of government, employer and union groups, announcement of proposals by cabinet ministers are the raw symbolic stuff of public concession.

3. *Content of Labor Law: What Limits Concessions?* Although most contemporary labor law should be seen as a concession to workers, one should not lose sight of the fact that it is elites who are doing the conceding. Following Korpi, one would predict that the model we have identified, of convulsive changes in labor law resulting from conflict, would be most typical of countries where organizations truly representative of the working class have been represented weakly or not at all in postwar national governing coalitions, and conflict thus high.¹⁸⁵ This means that elites will retain substantial control over the shape of labor law, constrained only by the need to offer a concession.

One would therefore predict that elites would, to the extent possible, offer concessions which combine the maximum symbolic pacificatory value with the minimum inroads on employer control. One cannot bear down too hard on this to predict particular doctrinal changes resulting from particular struggle. Sometimes only a real concession of managerial autonomy will restore order. Sometimes elites may guess wrong, and concede more than they have to. Nonetheless, with sufficient study, one can identify an apparent hierarchy of preferred concessions which will be made, when appropriate to a given set of workers' demands, and a set of concessions which will never be made. For example, the entire set of post-1968 labor law reforms involved no concession to labor of any con-

join, for more international horizons), see C. VOGLER, *THE NATION STATE: THE NEGLECTED DIMENSION OF CLASS* (1985).

185. See W. KORPI, *supra* note 173.

trol over profits, financial structure, pricing, or control of the production process.

Instead, one can identify four broad classes of concessions which are made fairly readily by contemporary employer elites faced with worker insurgency. One is attractive mainly for its precisely symbolic value: placing worker representatives on the company supervisory board.¹⁸⁶ One has high symbolic value but in practical terms inconveniences management relatively little: protection against unjust dismissal.¹⁸⁷

Finally, two classes of concessions illustrates the principle that, where possible, threatened elites will tend to make a concession to some institution other than the immediate source of trouble, so as to build up a rival which might exert some control over the situation. Thus, when pressure is being placed on management by spontaneous or unorganized workers, concessions will be made to the union in order to build it up as a restraint on employee action, or simply to institutionalize the conflict.¹⁸⁸ Conversely, when the source of pressure is seen to be unions themselves, the concession is likely to come either to employees directly, or to an elected works council, in order to create rivalry in plant-level industrial relations between the union and works council.¹⁸⁹ Union pressure is likeliest to result in a concession to the union only when there are no other plausible institutions of worker representation.

4. *Effects of Labor Law.* If labor law is typically designed, insofar as political pressures permit, as the smallest feasible symbolic concession, one would anticipate limited direct behavioral effects apart from the short-range goal of conflict suppression.

In a particular case, of course, pacification might require relatively far-reaching concessions which actually alter managerial or worker behavior. However, the symbolism of an employer concession would probably be nearly as effective if enforcement structures or sanctions are left murky than it would be if details of enforcement or sanctions were spelled out or even stringent. Thus, one would expect labor law to be concerned more with "rights" of workers and similar broad principles than with finer points of providing effective sanctions for employer viola-

186. See *supra* notes 99 (Germany), 119 (Netherlands), 133 (Sweden) and accompanying text.

187. Estreicher, *Unjust Dismissal Laws in Other Countries: Some Cautionary Notes*, 10 *EMPL. REL. L. J.* 286 (1984), reprinted in 33 *AM. J. COMP. L.* 310 (1985), discusses the modest form in which most Western European countries adopted unjust dismissal protection.

188. "Guerilla warfare is not susceptible of effective regulation." R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* 226 (1959).

189. OECD survey showing managers prefer presence of both union and works council.

tions of those rights. Consequently, little labor law would contain the sort of enormous sanctions one would expect to be necessary to alter the ingrained behavior of organized groups.

It is vastly more difficult to determine the long-range ideological impact of legal change generally or change in labor law. The model is agnostic on this point. On the one hand, it predicts that the overriding goal in most labor law is short-term pacification, the need for which is the chief shaper of doctrinal details. Certainly then, there is little room for planned long-term ideological impact. On the other hand, one cannot rule out the possibility that repeated legal enunciation of rights or other pro-worker concessions might "legitimate" a particular regime or order by inducing attitudinal changes which would lead to increased citizen loyalty, law-abiding behavior, and the like.¹⁹⁰ Moreover, again over the long run, styles and forms of state regulation of labor are bound to have an impact on union strategy and organization.¹⁹¹

C. *Applying the Model*

To sum up, I have suggested that a common pattern or model for contemporary changes in labor law discloses the following elements:

1. A governing coalition or elite in which direct working-class influence is relatively small.
2. An upsurge in perceived or actual worker unrest.
3. A legal change which is highly public and ceremonial.
4. Consisting of doctrinal changes which grant some subset of salient worker demands.
5. In a form which is considerably more assertive about the "rights" granted or similar principles than it is about sanctions or enforcement structures; the most common concessions concern grants of visibility to

190. Certainly many students of legal change profess to have found such a process of "legitimation." I have argued in Hyde, *supra* note 156, that such a relationship is most unlikely, in light of repeated empirical investigations which reveal both little impact of diffuse attitude on political behavior such as law-conforming behavior, and little impact of legal doctrines or changes on general or specific political beliefs. Certainly, the topic of the long-term ideological and behavioral impact of changes in labor law is wide open for study.

191. See Sorge, *supra* note 175; Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989) (attributing weakening interest in political activity by nineteenth century American unions to the difficulty in getting legislative victories enforced in court); Lothian, *The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared*, 7 CARDOZO L. REV. 1001 (1986) (attributing different levels of political militancy in Brazilian and American unions in part to different regulatory regimes); Wallace, Rubin, & Smith, *American Labor Law: Its Impact on Working-Class Militancy, 1901-1980*, 12 Soc. Sci. HIST. 1 (1988) (purportedly showing strong impact of NLRA, LMRA, and LMRDA on levels of strikes arranged by causes, though not on aggregate level: NLRA encouraged organizational strikes; LMRA and LMRDA discouraged wage strikes).

worker representatives on the plant level or on corporate boards, or protection of workers against unfair dismissal.

6. Which may increase the apparent authority or visibility of an institution of worker representation other than the source of the trouble: unions in the case of spontaneous trouble; works councils in the case of union trouble.

7. Quite conjectural long-term behavior or ideological effects of the legal change.

These elements are present, most quite strongly, in European labor law changes of the 1970s. The fit is sufficiently good so as to suggest that further empirical study along lines suggested by the model might well be fruitful.

1. *Poor Working Class Representation in Government.* Labor law as symbolic concession would normally be found in that middle range of countries where labor is sufficiently strong to be able to disquiet governing elites, yet not so central to those elites as to govern effectively. In such countries, one would expect labor law change to follow conflict or unrest.

Korpi's recent study of labor conflict divides the industrialized countries into three groups:¹⁹²

1. Working class parties came to power after World War II and held it, perhaps as part of a larger coalition, continuously thereafter (Sweden, Austria, Norway). These countries saw a sharp decrease in industrial conflict, as labor pressed formerly industrial demands through the political process where it was strong.

2. Working class parties were in and out of power in the postwar period (United Kingdom, Denmark, Belgium). Such countries saw maintenance of prewar levels of conflict.

3. Working class parties either did not exist or were effectively excluded from national power (United States, Canada, Italy, France, Ireland, Finland, Australia).

The Netherlands and the German Federal Republic are deviant cases for Korpi since they experienced generally low levels of industrial conflict despite weak governmental participation by worker representatives.

The model of labor law I have identified would apply primarily to category three countries (including the Netherlands and the German Federal Republic). That is, one would expect to find labor law as symbolic concession in countries with weak worker representation in govern-

192. W. KORPI, *supra* note 172.

ment and at times of high economic conflict. The generally low levels of conflict in the Netherlands and the German Federal Republic are not a problem for this model of labor law, which is more concerned with acute than chronic conflict, so long as the rare outbreaks of acute conflict are followed by legal change, which appears to obtain.

Among the countries in Korpi's categories one and two, only the United Kingdom and Sweden undertook major overhauls of their systems of labor law during the period in question.

In 1971, Conservative reforms in Britain were certainly not primarily in the nature of concessions or symbolic communication, although they did occur at a time of working class exclusion from power, and were introduced with great ceremony after the report of a prominent study commission, and did attempt to institutionalize union authority at the plant level, which was in part a response to perceived worker unrest. The 1971 Act in Britain also contained, however, major repressive components much more typical of countries where labor is not only excluded from power but sufficiently toothless so as to permit labor law to function more as repression than concession. In this sense, the 1971 British Act was plainly a "mistake." The British workers were emphatically not in the unorganized state which would permit effective legal repression. The massive union and worker noncompliance with, and obstruction of, the 1971 legislation led to its repeal; the entire reform episode is thought to have had next to no impact. Upon reattaining power in 1974, Labour repealed nearly all of the 1971 legislation, except only some of the elements of "concession," such as Britain's first statutory protection of workers against unfair dismissal. It is not outlandish to treat the 1971 legislation in Britain as a total miscarriage, and the 1974 reforms as a restoration of "normal" process under which labor law consists of concessions to workers.

This leaves two deviant cases. The less deviant is Sweden, where protracted postwar domination of national politics by the Social Democrats did not prevent a reversion to the standard model of labor law when economic conflict did break out. This may mean only that despite successive Social Democratic governments, worker demands were inadequately politically articulated, and there existed a set of unmet demands to spark brief conflict and the "traditional" response of concessions. I have indicated earlier my belief that Korpi's description of a worker-controlled state, in which political administration effectively replaces economic conflict, describes more of an ideal type than any observable polity.

The spectacularly deviant case is the United States of America. The

United States is doubly deviant. First, the Taft-Hartley Act of 1947 may be seen, in light of the British experience between 1971 and 1974, as the last effective labor legislation in an advanced industrial economy which is wholly repressive of union power and contains no element of concessions to workers.¹⁹³

Second, the United States is the one country in Korpi's third category, which despite experiencing rates of industrial conflict throughout the postwar period which (until 1980) annually topped global lists, did not obviously resort to legal concessions to pacify unrest.¹⁹⁴ It is possible to view much postwar American legislative activity in employment law as the extension of benefits directly to workers, such as guarantees of participation in union affairs, civil rights legislation, and regulation of occupational safety and health and private pensions. It is even possible to view these and related statutory reforms as a major restructuring of the effective American system of labor law away from collective bargaining, and toward governmental setting of terms and conditions of employment.¹⁹⁵ Nevertheless, industrial conflict over union financial corruption or oligarchy, job discrimination, safety and health, or retirement income, while not entirely lacking has never been of great enough importance to explain the resort to statutory reform, particularly when unaccompanied by any broader-scale concessions to employees.

The absence of legislation to build a rival representative model is explainable. Since the United States lacks works councils or other institutions of workplace representation apart from unions it has been difficult to use legislation to build up works councils or other assertedly cooperative forms of worker representation.¹⁹⁶

193. I am assuming that the historical jury is still out on the long-term effect of some of the Thatcher government's legislation of the 1980s limiting union legal immunities. See, e.g., Klarman, *The Judge Versus the Unions: The Development of British Labor Law, 1867-1913*, 75 VA. L. REV. 1487, 1596-1601 (1989). Almost any current issue of the British Journal of Industrial Relations for the ongoing debate over whether Britain has a "new industrial relations." Union power has certainly been weakened through legal and other means, but it is far from clear that the legislation will have the longevity of Taft-Hartley. If this survives it will have demonstrated a new lease on life for repressive labor legislation.

194. On longterm trends in, and explanations for, American strikes, see generally P. EDWARDS, *STRIKES IN THE UNITED STATES 1881-1974* (1981). Strikes peaked in 1980 and, with the exception of 1986, have declined each year since. Measures of Strikes and Lockouts, 127 Lab. Rel. Rep. (BNA) 313 (March 7, 1988)(BLS report).

195. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988); Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. NAT. ACAD. ARB. 97 (1976).

196. See however, in this context, National Productivity and Quality of Working Life Act, 89 Stat. 733 (1975) (codified at 15 U.S.C. 2401 et seq. (1982)), and Labor Management Cooperation Act, 92 Stat. 2020 (1978), (codified at 29 U.S.C. 175a (1982)); both expressing vague support for

Nevertheless, the conjunction of high conflict and low legal reform is unique. The principle application of the model to the United States (apart from the passage of the Wagner Act of 1935, as well as the earlier Clayton Act, both of which the model would predict) may be to focus attention on the really difficult question: why does the United States, over its history, tolerate such high levels of industrial unrest? And why, in a country where political concessions and indeed problems of any kind are said to assume legal form so readily, have these high levels of industrial conflict not resulted in legal concessions?

2. *Increased Worker Unrest.* This is, as indicated, a relatively weak predictive variable which is meant to indicate primarily that it is comparatively unusual to undertake major labor law reform in the absence of increased unrest. Moreover, in each of the countries studied, labor law reform did follow (sometimes by a few years) major increases in labor unrest, and conversely, it is unusual for sharp increases in unrest not to be followed by legal reform. More precise attempts to relate the month-by-month timing of steps in labor law reform to levels of industrial unrest seem to me to ask more than any single factor can produce.¹⁹⁷

The timing of the particular legal reforms studied is, however, more than suggestive. French law, which had been stable since 1950, was overhauled in December 1968 along the lines of a statement issued by the government in May 1968 which ended strikes involving between eight and ten million workers. The French strike wave spread to Italy, which experienced heavy wildcat strike activity in spring 1969, followed by more organized strikes in several large northern firms and announced union plans for major strikes in the autumn, when several important national agreements were due to expire. The government announced legislative reforms in June 1969, which among other things implemented provisions of the postwar Italian Constitution which provided for union freedom but which had not been implemented since 1947. The Netherlands Works Council Act of 28 January 1971, repealing the Organization of Industry Act of 1950, which had been the organic statute of labor regulation, followed rare strike activity in that country; specifically, a major strike at Rotterdam shipbuilding yards in September 1970 and smaller strikes which followed. Sweden experienced, in 1970 to 1976, a

cooperative programs such as "quality of work life" programs, but largely leaving the question of their reconciliation with earlier collective bargaining legislation to the judiciary.

197. See *supra* note 181 and accompanying text.

fivefold and then tenfold annual increase in the number of work stoppages, and a tripling of the number of workers involved over the 1955 to 1969 period; the Joint Regulation in Working Life Act of 1976, a thoroughgoing revision of 1920's and 1930's era legislation followed. The major German reforms of 1972 and 1976 also followed a sharp upsurge in strike, particularly wildcat strike activity.

This does no more than clarify one particularly common pattern of labor law timing. Not every strike upsurge induces reform, nor is every legal change provoked by strikes. Nevertheless, the pattern identified is more than suggestive. It might reorient industrial relations research away from the question of "Why strikes?"—since strikes so often turn out to be functional—and towards such questions as "Why strikes without concessions? Why concessions without strikes?"

3. *Public and Ceremonial Nature of the Legal Reform.* While some sorts of legal change might be expected to slip through the legislature unnoticed—a tax break benefiting a few, or some increases in prosecutorial authority—law which is symbolic concession would not. This creates a problem, however, since most legal change is not particularly salient, especially to working class populations. Thus, labor law change is associated with several relatively unusual devices to increase its visibility.

France provides a spectacular example in that the nucleus of subsequent legislative reform was originally announced in a dramatic meeting in May 1968 at the Ministry of Social Affairs, at a time when between eight and ten million French workers were on strike. The meetings involved the leaders of the major union confederations and employer groups, and the compromise—known as the "*Grenelle*" statement or protocol, after the Ministry's location in *rue de Grenelle*—was announced by then Prime Minister Pompidou.

Another method of providing high visibility to legal reforms is the appointment of a distinguished study commission of experts, whose reports become a center of political discussion. There may be many laudable motives in the creation of such a commission, but there can be little doubt that it does increase the public salience and symbolic value of the resulting legal changes. It is not used for routine administration, but then labor law is not routine administration. For example, German reforms in the 1970s were shaped by the governmental study of Co-determination headed by Kurt Biedenkopf. Union calls in Sweden in the 1960s for greater authority for worker representatives led to the creation in 1971 of

a distinguished study commission, whose January 1975 majority and minority reports (*Demokratisk pa arbetsplatsen: Forslag till ny lagstiftning om forhandling sratt och kollektivavtad*) were a subject of much public comment until the proposal of legislation (along the lines of the minority proposal) in March 1976. At about the same time, February 7, 1975, the French received the so-called *Sudreau* Report, the Report of the Committee to Study Company Reform, created the previous summer, which included a number of proposals for increased worker participation and profit sharing. British industrial relations discussion has likewise revolved to a great degree around the Donovan Commission Report of 1969 and the Bullock Commission Report of 1974, both of which proposed sweeping concessions to unions. As it happened, changes in government prevented either set of concessions from being carried out. If either set had materialized, its salience could only have been increased by the attention given the work of the study commissions.

4. *Content of Labor Law Changes—Rights Without Remedies.* In the pattern of labor identified, reform represents a concession to workers, selected for maximum symbolic value, and therefore likelier to be larger on ideology than features which would change much industrial behavior.

A classic example is the reform of corporation law to permit or require some of the supervisory directors to be nominated or appointed by worker representatives. This institution has been much studied; the invariant result is that worker directors are found to function as a helpful channel providing corporate information to workers. They do nothing to improve enterprise participation by workers; nor do they change the behavior of the board itself or turn it into a body likelier to consider worker concerns or make decisions favorable to workers.¹⁹⁸ Yet worker directors have been the subject of recent legislative reform in the Netherlands (1971), Sweden (1975), and the German Federal Republic (1976); they would be required under a much-studied proposed corporation law for the European Community,¹⁹⁹ and have been under study elsewhere.

198. F. EMERY & E. THORSRUD, *FORM AND CONTENT IN INDUSTRIAL DEMOCRACY* (1969); P. BRANNEN, E. BATSTONE, D. FATCHETT, & P. WHITE, *THE WORKER DIRECTORS: A SOCIOLOGY OF PARTICIPATION* (1976). United States experiences of employee directors have been mixed. A prominent success is Pan Am Corp., where unions successfully teamed with other board members to force a change in management. *Pan Am, in a Union Deal, Ousts 2 Top Executives*, N. Y. Times, Jan. 22, 1988, at A1. A prominent failure has been Eastern Air Lines, in which union board seats did not translate into power against an intransigent management, which ultimately sold the airline to an even less transigent owner. *Eastern's Embattled Unions*, N. Y. Times, Dec. 10, 1986, at D1.

199. European Community Bill on Worker Participation, 113 Lab. Rel. Rep. (BNA) 368 (Aug. 29, 1983).

Another theme of much 1970's legislative reform was the institutionalization of workplace conflict and the allocation of broad workplace powers either to unions, an elected works council, or both. The legislation carried resonant names²⁰⁰ and announced quasi-constitutional rights. Yet enforcement mechanisms were typically only lightly sketched out, and sanctions for noncompliance light. As we have seen, few statutes seem to have resulted in much short-term observable change. I fully agree that the effects of this legislation were doubtless complex, possibly ideological or normative, and hard to sort out. I would suggest that labor law research might in the future be rather more devoted to these effects, hard as they are to read, and rather less to the endless finding of little behavioral impact.

VII. TOWARDS A THEORY OF LAW AS CULTURAL SYMBOL

In the preceding Part, I presented a positive theory of labor legislation with significant implications for the timing, content, and effect of contemporary labor legislation. Moreover, I have done so without employing any of the following explanatory concepts: legitimation, ideology, alienation, false consciousness. At this point, I might usefully stop; positivists among my readers, if any, will surely want to stop here.

However, to leave matters at this point would leave the theory subject to serious misinterpretation. And so I would like to press on, more briefly this time, to sketch out a little more about what kind of a theory I have presented.

Earlier presentations of the theory revealed at least two serious weaknesses. First, the theory was too brittle causally. It predicts labor legislation where none has occurred: the United States, with its high rate of strikes in the 1970s. It fails to predict labor legislation, or predicts the wrong type, as in France and the United Kingdom. What can we learn from a theory so easily falsified?

Secondly, the workers seem so irrational in this theory. That is, they seem to settle for very little.

It seems to me likely that the answer to both these problems is the same: that the social changes described must be understood as containing an important symbolic dimension. And that this symbolic dimension, while not fully understood, helps capture both the way in which the theory is and is not a causal theory, and also why legislation "works," in the

200. Italy: Workers' Statute. Germany: Works Constitution Act. Sweden: Joint Regulation of Working Life Act.

sense of being something worth settling for. To understand how this is so requires an excursion into an alternative strain in the social sciences, sometimes called "interpretive" or "hermeneutic" social science.²⁰¹ Unfortunately, this is a minority strain among historians and anthropologists and is essentially unknown among legal scholars.²⁰²

So in Part VII, section A, I will set out some elements of interpretive social science. In section B, I will give an interpretive account of the passage of labor legislation. In section C, I will offer some criticism of this approach. My goal is, if you like, a revised theory of "legitimation," though I prefer to think of this as simply a more plausible account of the symbolic dimension of law than any we now have; one which does not fly in the face of evidence but is consistent with what anthropologists, sociologists, historians, and cognitive psychologists believe they know about law and industrial relations.

201. That interpretive approaches are only alternative approaches, and do not supplant other ways of knowing, is cogently argued in Rorty, *Method, Social Science and Social Hope*, in CONSEQUENCES OF PRAGMATISM 191, 197 (1982), with which I emphatically agree:

The idea that explanation and understanding are opposed ways of doing social science is as misguided as the notion that microscopic and macroscopic descriptions of organisms are opposed ways of doing biology. There are lots of things you want to do with bacteria and cows for which it is very useful to have biochemical descriptions of them; there are lots of things you want to do with them for which such descriptions would be merely a nuisance. Similarly, there are lots of things you want to do with human beings for which descriptions of them in nonevaluative, "inhuman" terms are very useful; there are others (e.g., thinking of them as your fellow-citizens) in which such descriptions are not. "Explanation" is merely the sort of understanding one looks for when one wants to predict and control. It does not contrast with something else called "understanding" as the abstract contrasts with the concrete, or the artificial with the natural, or the "repressive" with the "liberating." To say that something is better "understood" in one vocabulary than another is always an ellipsis for the claim that a description in the preferred vocabulary is more useful for a certain purpose.

202. A serious weakness of my earlier article on legitimation, Hyde, *supra* note 156, was insensitivity to this competing model of social science. In particular, not every author I criticized was making a positivist claim that could be falsified by the sort of survey data I used. That doesn't mean that these authors escape criticism as "interpretations"—the interpretations may be flawed. I was not, however, sensitive to the kind of claims being made, or the kind of evidence that would count for or against them.

The interpretive approach is found among members of the Conference on Critical Legal Studies but is almost universally misunderstood when employed; see Karl Klare's inquiry into certain forms of legal consciousness in Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978), misunderstood by Matthew Finkin in Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984), as if he were making conventional legal arguments such as one would make to a court. See Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 748-52 *passim* (1985) for a discussion of method. My outline of the elements of interpretive social science stems, perhaps out of excessive caution, from a desire not to be similarly misunderstood.

A. *Elements of Interpretive Social Science*

There are imperialists among interpretive scholars as there are in any movement,²⁰³ but I wish to start only with some modest claims.²⁰⁴ A large part of the vocabulary employed in Part VI was "action concepts" such as striking, demanding, conceding, publicizing, legislating. Application of these concepts requires more than the observation of physical data. It also requires an interpretation on the part of the observer in that she must interpret both the internal intentions, plans, desires of workers, employers, government officials, and the social conventions and assumptions taken for granted as they act. This necessarily involves interpretation since these actions can be carried out using a variety of physical behaviors, and conversely, the same physical behavior (e.g. throwing a rock) may or may not count as "striking," depending on background circumstances and the intentions of the thrower.

Now it seems to me fairly obvious that almost anything a scholar of law might want to write about, including law itself, is similarly graspable only through acts of cultural interpretation involving the decoding of cultural systems of symbols.²⁰⁵ "[I]t is impossible to have social relations without symbolic acts."²⁰⁶

203. See the witty discussion in D. HOLLINGER, *IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS 187-88* (1985).

204. Here I follow B. FAY, *SOCIAL THEORY AND POLITICAL PRACTICE 70-91* (1975).

205. "Living in a society that extends well beyond our direct observation, we can relate to the larger political entity only through abstract symbolic means. We are, indeed, ruled by power holders whom we never encounter except in highly symbolic presentations." D. KERTZER, *supra* note 13, at 8.

206. M. DOUGLAS, *PURITY AND DANGER 62* (1966). Or as Cynthia Heimel, the "Problem Lady," told a plaintive reader who asked: "When will long hair be okay again? When will society start judging individuals on the basis of who they are, not what they look like?":

Don't be ridiculous! Society will never start judging individuals by who they are. How can society tell? All society can do is look at your shoes, note that you're wearing purple hi-tops, and figure you're a kinda fun, kinda goofy guy, maybe a little artistic. Society does not have the time, the inclination, or the wherewithal to delve, to plunge to the depths of your persona. Society can only make snap judgments by the visual clues you exude. How much can you expect from society, anyway? Society is not your mother.

Village Voice, July 15, 1986, at 38.

While I do not expect these assertions of the universality of symbols to be controversial (*but see* M. EDELMAN, *supra* note 1), it should be noted that this assumption distinguishes my account from a classical Marxist one. The basic epistemological assumption of Marx was that people could have direct, unmediated knowledge of supposedly material aspects of the mode of production. 1 K. MARX, *CAPITAL 163-77* (B. Fowkes trans. 1976) ("nothing mysterious" about building a table, which becomes a "mystery" as a commodity; other modes of production more transparent). *See generally* G. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENSE 326-44* (1978). Unfortunately there is no historical support for this proposition, as Antonio Gramsci may have been the first to point out in *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 5-14* (Q. Hoare

An implication of this is that a theory such as that in Part VI must necessarily be at most quasi-causal, not causal at all, to adopt the terminology of von Wright.²⁰⁷ Strikes or unstable governing coalitions (or strikes and unstable governing coalitions) do not cause labor legislation. At most, they create the conditions under which labor legislation might be brought about.²⁰⁸ So understanding the processes which lead to labor legislation necessarily involves an interpretation: some sort of interpretation of the situation is bound up in the terminology used to describe the intentions and actions of people. It is best if the interpretation be made as explicit as possible, rather than simply lie latent and unexamined in the descriptive vocabulary used.

It follows that a complete account of the processes of change in labor law must be a sort of ethnographic narrative—"thick description," in Geertz's phrase²⁰⁹—capturing, as much as possible, the background assumptions, intentions, shared and not shared social meanings, which inform the actions of those in the process. Moreover, this description must employ the "juicy," evaluative terms in which subjects can recognize themselves and in which policy can be formulated; the "sterile jargon of 'quantified' social sciences" will neither capture the human experience nor assist intelligent reflection on it.²¹⁰ Fortunately, it is not necessary to invent this genre; there is now a sizable literature of work by ethnographers, and more recently historians of political and legal processes, which can guide our methodological groping.²¹¹ The sort of investigation I have in mind involves: (1) thorough description of the relevant public life;²¹² (2) interviews with small samples of cultural participants, to learn

& G. Smith eds. 1971) (inevitability of intellectual mediation between individual and economy). See also *id.* at 404-07 (historicity of Marxist approaches).

207. G. HENRIK VON WRIGHT, *EXPLANATION AND UNDERSTANDING*, 83-164 (1971).

208. "[I]n these sorts of conditionship relations, consciousness functions as a mediator between the determining antecedent factors and the subsequent action; in other words, men act in terms of their interpretations of, and intentions towards, their external conditions, rather than by being governed directly by them, and therefore these conditions must be understood not as causes but as warranting conditions which make a particular action or belief more 'reasonable', 'justified', or 'appropriate', given the desires, beliefs, and expectations of the actors." B. FAY, *supra* note 204, at 84-85.

209. C. GEERTZ, *supra* note 9, at 3-30.

210. Rorty, *supra* note 201, at 196.

211. I will be citing some of the best of these studies in the pages ahead, but I should mention Thompson, *Patrician Society, Plebian Culture*, 7 J. SOC. HIST. 382 (1974), as in many ways, the model for my understanding of the relationship between state theater and class struggles. I first read this essay years after the early drafts of this Article and was immediately struck that I had discovered the source of so many ideas which were "in the air" when I first began thinking about the problem.

212. "[C]osmological conceptions are not merely—or even importantly—to be understood in

their accounts of what is going on, and (3) self-examination as to the influences of one's own culture. The present Article represents only a fragment of the first, along with the third, of these.

Two objections immediately occur. First, what, if any limits govern the interpretive process? If I want to see in the process of labor legislation the progressive unfolding of reason, while you see endless class struggle over the control of the means of production, and she sees the struggle of consciousness to overcome the self/other dichotomy, does anything constrain our choice of interpretation? Or is it necessarily the case with interpretive social science that anything goes?

I regard this as a telling objection to a great deal of what goes on in the name of interpretive social science.²¹³ However, I do not believe it is an insurmountable objection to the entire school. The interpretation must always be "one which reveals to people what it is that they and others are doing when they act and speak as they do."²¹⁴ It must, in other words, increase "the possibility of communication between those who come into contact with the accounts of such a science and those whom it studies."²¹⁵ Thus,

for an interpretive social science, only that which is validated as conceivable or likely by the object of study as a possibly true account of what he is doing can be counted as true, which means to say that only when both the observer and the actor ultimately come to talk about the actions and beliefs of the actor in the same way is it possible to claim that a correct account has been given.²¹⁶

terms of the subjects' stated 'beliefs' . . . but are most richly embedded in myths, rituals, *legal codes*, constitutional charters, and other collective representations." S. TAMBIAH, *supra* note 13, at 129 (emphasis supplied).

213. See Gilbert, *The Medici Megapolis* (Book Review), 28 N.Y. REV. BOOKS 62-66 (Jan. 21, 1982).

214. B. FAY, *supra* note 204, at 79.

215. *Id.* at 80.

216. *Id.* at 82. A historian cannot exactly check her interpretations out with those she studies, but can impose analogous limitations on her work. See Thompson, *supra* note 33. A defense of a similar stance of a "dialogical" conception of historical inquiry, sensitive to its plurality of voices, is D. LACAPRA, *HISTORY AND CRITICISM* (1985).

The use of dialog as a limit on interpretation is not merely a methodological nicety to avoid self-indulgent interpretation. It is absolutely necessary if the researcher is not merely an interpretive social scientist but a critical social scientist as well. For critical social science, a status I would claim for this Article, must not merely expose oppressive features of a society but must do so in such a way as to stimulate the audience to transform it. See generally B. FAY, *CRITICAL SOCIAL SCIENCE: LIBERATION AND ITS LIMITS* 85-140 (1987), with which I am happy to ally myself on matters methodological and strategic.

A defect of so much work employing models of legitimation is an excessive self-confidence on the part of the researcher that the communication of historically subordinate people or classes represents "consent" or "submission" rather than complex mediations, even rebellion. For what must be the

Now I have not followed this methodological stricture here. I have presented and will present what I am pleased to consider an interpretation of labor legislation which I have not shared in a tavern with a French or Swedish worker. I readily confess that this is a serious weakness of this study, and that such validating dialogue must be the necessary next step. It is simply autobiographically the case that I arrived at this interpretation through comparative study, and that the interpretation seems helpful enough to me to offer it to the world at this point. In drafting it, I have constantly confronted Fay's dicta, and tried to produce only an interpretation which might be acceptable as true to the object of study. But if I or another investigator discover that this interpretation is not acceptable to the actors, that finishes it as an interpretation, as far as I am concerned.²¹⁷

A second and related objection is one of professional competence. Legal scholars are rarely trained ethnographers or historians. What leads us to think that we have any insight whatever into the complex web of social interactions which ripple out and around from legal phenomena?

My response is that legal scholars may be an especially good source of interpretations of legal phenomena. This requires an understanding of the sort of activity which has come to be the subject of interpretive social science.

Interpretive social science holds its greatest advantage over the more quantifiable kinds when it comes to dealing with unspoken matters of cultural consensus.²¹⁸ These sorts of regularities often elude survey re-

theoretical maximum of this distasteful interpretation, see M. BURAWOY, *THE POLITICS OF PRODUCTION: FACTORY REGIMES UNDER CAPITALISM AND SOCIALISM* (1985), and M. BURAWOY, *MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM* (1979), in which nearly everything is so interpreted. For a general critique, see the powerful parable of the Grandfather and the Elevator in Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 *LAW & INEQUALITY* 103, 104-13 (1987).

217. An interpretation can of course be one which never occurred to the actor. Freud's and Marx's are classic examples. "Weberians do not suggest that social actions are what individual actors say they are! A social action is what the community takes it to be; only thus is it effective in creating a social world." Harré, *Accounting for Social Reality* (Book Review), *The Times* (London) Lit. Supp. 399 (Apr. 11, 1986). But I do insist that a plausible interpretation must be one of which the actor might, ultimately, rationally become convinced.

218. A recurrent experience of ethnographers is that they are dealing with shared, individual phenomena, that culture represents a consensus on a wide variety of meanings among members of an interacting community approximating that of the consensus on language among members of a speech-community. . . .

. . . .

. . . [E]very human community functions with a group consensus about the meanings of the symbols used in the communications that constitute their social life, however variable their behavior and attitudes in other respects, because such a consensus is as

search, but are often of the greatest interest for interpretive accounts. Moreover, if the consensus is real, a large number of informants is not necessary; in-depth interviews with a small number of informants—including the researcher herself, as to her own culture—may reveal all that is necessary as to the cultural meaning of various symbols.²¹⁹ In such a search then—for basic cultural consensus—the best researcher or ethnographer may be the sensitive member of the local culture.²²⁰

necessary for encoding and decoding messages in social communication in general as agreement about speech rules is to encoding and decoding in the linguistic mode.

LeVine, *Properties of Culture: An Ethnographic View*, in *CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION* 67, 68-69 (R. Shweder & R. LeVine eds. 1984).

LeVine illustrates the point with reference to his own field work on witchcraft among the Gusii of Kenya. "I discovered that Gusii accounts of personal experience with witches were in fact highly predictable in the social situations of their occurrence, the images of witches and victims, the narrative sequences of action, the emotional reactions attributed to self and others, and the outcomes of attempts to combat witchcraft. These were the most intense emotional experiences reported by my friends and neighbors about themselves and their immediate families, yet the form and contents of their reports were standardized, apparently following a conventional scripts with a single set of symbols and meanings." *Id.* at 71.

I have no doubt that similar conventional scripts, though somewhat less standardized, attend the descriptions by working people of the experience of labor conflict. For unintentional confirmation, see R. FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* (1988), a detailed ethnographic study of a contemporary wildcat strike, organizing campaign, and economic strike ending in the decertification of the union. Fantasia's informants, like LeVine's, maintained both that these were intense emotional experiences which had completely altered their lives, and yet their descriptions have a similar "standardized" quality which reveals much about the "scripts" governing contemporary industrial relations.

219. The point is powerfully illustrated in Pollner, *Mundane Reasoning*, 4 *PHIL. SOC. SCI.* 35 (1974), an inquiry into those aspects of observation which assume unanimity among all similarly-situated observers. Pollner observed municipal traffic courts, and especially ways in which defendants explained [away?] what the officer saw and what the defendant denies. The norms governing the occasion powerfully reinforce the assumption that anyone "not blind or crazy" "sees" the same thing, so that someone who "sees" something different, and cannot be accused of blindness or craziness, must be positioned in a place where he could not have seen well, or confused two incidents, or the like. "Each explanation preserves the world as an objective and shared order of events by showing how unanimity would have been forthcoming had it not been for the absence, failure, or violation of one of the presupposed but previously unformulated conditions necessary for unanimity." *Id.* at 52. An interesting interpretation of this research as revealing fundamental conditions for the existence of communication communities is I. J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 13-15 (1984).

220. Compare the new school of "postmodernist" anthropology, denying any privileged status to the ethnographer's point of view; enjoying a multiplicity of narratives; and suggesting that the chief value of ethnography is in challenging and disturbing assumptions of the ethnographer's own culture. J. CLIFFORD & G. MARCUS, *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (1986); G. MARCUS & M. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* (1986). The latter book contains an approving reference to some of the interpretive ethnographies of the legal system produced by the Critical Legal Studies Movement as a model for the sort of interpretation envisioned. G. MARCUS & M. FISCHER *supra*, at 154.

This starting point may or may not make a place for a "native," nontrained, ethnographer. But it does not seem to make a place at all for a legal ethnographer. For I have argued, and the point now seems to me beyond argument, that legal communications (statutes and judgments), institutions, and personnel do not play a significant, salient, or interesting role in shaping ordinary, everyday "mundane reasoning" in our culture.²²¹ Or at least, they do so only when heavily reinforced by other

221. Hyde, *supra* note 156. One of my critics, for example, has put forward the example of the cultural understanding of the employer's "right" to tell the employee what to do," suggesting that this rests on "the core concepts of liberal property and contract law: The employer 'owns' the business and so she or he can dictate the terms of access to her or his resources; the employee (impliedly) 'agreed' to submit to the employer's direction." Gordon, *Current Debate/Critical Legal Studies: A Response*, 3 *TIKKUN* (No. 5) 89, 90 (Sep./Oct. 1988). This sounds like a plausible sort of dialog, but it is very far from demonstrating the cultural importance of legal concepts or institutions. Ideas as general as these correspond not only to legal ideas, but also to fundamental ideas of liberal political philosophy, American political culture, favorite parables of American Protestantism at various times in its history. The employer's speech has been molded and reinforced by so many cultural stimuli that it is difficult to imagine that legal institutions or personnel have played much of a role. Indeed, the ideas are "legal" concepts only under a somewhat imperialistic definition of "legal concepts;" they are so generally accepted in our society that they concern lawyers little in their day-to-day work. They function much more as the kinds of cultural consensus which the anthropologists cited above are interested in.

Gordon, I suppose, would accept much of this, and the differences between us largely stem from the different purposes we have. *C.f.* Rorty, *supra* note 201. He wants legal education and discourse to be alive to these unexamined assumptions, and so do I. He wants legal discourse to take on these assumptions, not artificially limit itself to "professional" problems in contract and property law, and so do I. He wants law students to be alive to the cultural and symbolic aspects of their work, and so, of course, do I; it is a major theme of this essay. For all these concepts, the "imperialistic" conception of law is helpful.

Gordon and I part company—though really not by much—when I am working on the problem of this Article, which has occupied me so long: the nature and effects of social movements which result in changes in labor legislation. Understanding those effects is a very tricky process. A model of legitimation, which carries with it such assumptions as the high salience of legal institutions or some inherent tendency in the population to conform to legal norms, is simply no help at all in grasping the dynamics. There is absolutely nothing in the literature on the Western European reforms of the 1970s which suggests the slightest "legitimation" effect of these reforms; few workers can even be persuaded to discuss them.

Of course one can go to court proceedings and observe the cultural understandings manifested, see Pollner, *supra* note 219; *see also* E. SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 296-307 (1985) (interpretation of the narratives and assumptions employed in products liability trials). But this does not mean that these understandings were created by, or distinctive to, legal institutions. The assumption of the world as objective and shared, identified by Pollner, surely transcends the context of traffic court where he chose to observe it.

Closer to the model of legitimation are the assumptions about the moral responsibilities of creators of objects, identified by Scarry as dramatized in products liability trials. People probably do not walk around the street with any sort of notion of "the moral responsibility of creators of objects" and normally are called on to clarify their attitudes on this question only in the context of jury trials. So the distinctively legal modes of presentation so brilliantly analyzed by Scarry (repetition of narrative, counterfactuals) probably are highly significant in shaping jurors' thought processes and behavior. In

sorts of cultural communication, and only in the same way that diffuse cultural communication does reinforce consensus.

Where legal communication does become important, I believe I have shown, is in "crisis" conditions when old consensus has broken down and other cultural forces cannot generate a new basis for social interaction.²²² In these circumstances, the ethnographer sensitive to legal communication has a story to tell, not because that story is privileged or the master story, but because it is a story, and no other story is privileged in the sense of representing some social consensus. In fact, this seems to me to be perhaps the greatest social science contribution which legally-trained academics can make: not to be second-rate followers of another discipline, but first-rate interpreters and observers of their own.

B. *An Interpretation of Labor Legislation*

Let us begin with the values of Western working classes. It has become conventional to speak of a "dual consciousness" combining elements of acceptance and rejection, in odd mixture. It is quite misleading to speak simply of their acceptance of a "dominant ideology" of managerial capitalism or their subordinate position within it.

[W]orkers will often agree with dominant elements, especially when these are couched as abstract principles or refer to general situations, which is normally the case in interview surveys using standardised questionnaires, but will then accept deviant values when they themselves are directly involved or when these are expressed in concrete terms which correspond to everyday reality.²²³

other words, if you like, here legal systems do "legitimate" certain ways of thinking and behaving, if I do say so myself (Scarry doesn't use the word).

The problem here is in determining whether the attitudes and behaviors so "legitimated" would ever manifest themselves outside the trial context. For example, do jurors exposed to these narratives think or behave differently the next time they buy something at the hardware store that doesn't work? Do they argue differently in discussions among friends about what to do about defective products, or reform of the tort system? Does any mechanism exist for diffusing the experience of tort-case jurors out into the larger culture? Scarry is not particularly interested in these questions, but she provides no reason to think that the answer to any of them is "yes."

222. There may well be other circumstances when legal communication becomes an effective shaper of cultural symbolic understanding: other circumstances, other populations. Surely there are such circumstances. But these must be identified retail, not wholesale. Given the low salience of legal institutions, the low popular opinion (in our culture) of legal personnel, and the low rates of behavioral compliance with law unaccompanied by sanctions, it would have to be unusual circumstances in which law could play this role, and the law would have to be accompanied by unusual devices to heighten its salience.

223. N. ABERCROMBIE, S. HILL, & B. TURNER, *THE DOMINANT IDEOLOGY THESIS* 141 (1980)(reviewing literature). See also Mann, *The Social Cohesion of Liberal Democracy*, 35 AM. SOC.

Blue-collar informants do not hesitate to reject substantial elements of the ideology of private property and distinguish sharply between what they expect and what they consider just.²²⁴

This "dual consciousness" has, it turns out, a substantial cognitive component. These blue-collar workers are indeed willing to reject substantial elements of dominant ideology—they are much more liberal—and do not characteristically blame themselves for their subordinate position. But when they specify visions of justice which they do not expect to achieve, these visions "did not depart radically from current industrial pay norms."²²⁵

Cognitive research has found that, even when asked to imagine an idealized world, people generally do not stray far from what they already know. If this explanation is correct, then it may be possible to enlarge visions of justice through participation in small experiments that demonstrate alternative ways of distributing economic outcomes. In this context, small scale innovations (such as communes, employee ownership plans, and charitable drives) seem less quixotic in their often short-lived isolation. Perhaps people must live through an alternative before they can envision it on a larger scale.²²⁶

Under the right circumstances, labor legislation can do on a large scale what "small scale innovations" can only do partially: get industrial actors to live through alternative forms of work organization and thereby overcome cognitive and imaginative barriers to participation. But before seeing how this is done, it would be wrong to leave the impression that only managers or political elites have any stake in this process. For the unions' organizational need for labor legislation is even more pressing, and chronic.

If union appeals to organize were limited to the economically ra-

REV. 423 (1970)(little "value consensus" between workers and dominant classes in United States or United Kingdom, and what there is characteristically overstated in literature).

224. Martin, *When Expectations and Justice Do Not Coincide: Blue-Collar Visions of a Just World*, in JUSTICE IN SOCIAL RELATIONS 317 (H. Bierhoff, R. Cohen, & J. Greenberg eds. 1986) [hereinafter JUSTICE]. Cognitive psychologists believe that experimenters can "authorize" inequality to which subjects consent even though they do not think it fair or just. See M. Zelditch, W. Harris, G. Thomas, & H. Walker, *Decisions, Nondecisions, and Metadecisions* (Technical Report No. 78)(Stanford Laboratory for Social Research)(1981), discussed in Cohen, *Power and Justice in Inter-group Relations*, in JUSTICE, *supra*, at 65.

For a recent case study in the development of working class rejection of ideas of private property, see Lynd, *The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburgh*, 1977-87, 74 J. AM. HIST. 926 (1987).

225. Martin, *supra* note 224, at 330.

226. *Id.* at 331-33.

tional, no one would ever join a union in preference to free-riding.²²⁷ But workers do join unions and are not irrational to do so.²²⁸ The "logic of collective action" however is simply not captured by simple appeals to economic benefit.²²⁹ Rather, for the union to exist as an organization, it too must provide a steady stream of motivating symbols and images of a particular type: enough better than the status quo so as to motivate action; but not so utopian as to lose that motivational quality.²³⁰ And since union abilities to communicate with potential members are limited, legislation or other state communication may serve the union's organizational purposes.²³¹

Under the right circumstances, then, labor legislation which is moderately more attractive than the status quo and rich in motivating symbolism can serve both the motivational needs of employers and the organizational needs of unions. But how can this be true if (as I argued) workers in industrial countries do not share many beliefs with employers and if (as I argued) legal institutions are rarely effective in altering

227. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

228. R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* (1984).

229. Offe & Wiesensthal, *Two Logics of Collective Action*, in C. OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* 170, 183-84 (1985):

[W]orkers' organizations in capitalist systems always find themselves forced to rely upon non-utilitarian forms of collective action, which are based on the redefinition of collective identities, even if the organization does not have any intention of serving anything but the members' individual utilitarian interests, for example, higher wages. No union can function for a day in the absence of some rudimentary notions held by the members that being a member is of value in itself, that the individual organization costs must not be calculated in a utilitarian manner but have to be legitimately required to practise solidarity and discipline, and other norms of a non-utilitarian kind. The logic of collective action of the relatively powerless differs from that of the relatively powerful in that the former implies a paradox that is absent from the latter—the paradox that interests can only be met to the extent they are partly redefined.

230. A careful study is Klandermans, *Mobilization and Participation: Social-Psychological Expansions of Resource Mobilization Theory*, 49 *AM. SOC. REV.* 583 (1984), documenting through repeated interviews the increasing commitment of Dutch union members to a particular course of action. Group solidarity and perceived external threat built action where the sort of incentives which Mancur Olson is interested in were absent.

For a trenchant analysis of "*il sindacato dell'immagine*": a union which creates symbolic images through which it maintains support, see B. MANGHI, *DECLINARE CRESCENDO* 23-46 (1977). For a discussion of the impossibility of formal modeling of union bargaining behavior without substantial reliance on the motivating power of social norms, see J. ELSTER, *supra* note 156. For a detailed comparative study of unions' invocation of norms of equality and the like to motivate members, see P. SWENSON, *supra* note 92.

231. The most famous example in U.S. labor history is the "The President wants you to join the union" campaign of the United Mine Workers in 1933, where "President" was thought to mean Roosevelt. I. BERNSTEIN, *TURBULENT YEARS* 41 (1969).

belief?²³²

The short answer is that legislation is used, somewhat abnormally, to create a "ritual" or "social drama." These concepts have been developed in the anthropological literature precisely to capture the phenomenon of people acting together and thereby creating a functioning community without any necessary convergence of belief.

The classic theory is Durkheim's, in which shared rituals particularly in occupational groups, and especially in "advanced" cultures in which "mechanical" solidarity on the basis of shared values was no longer available, could nevertheless build a different kind of "organic" solidarity.²³³ People acting together in a ritual can create a community which would fall apart if people had to confront their diverse interpreta-

232. I have not been able to recast this study into the extraordinarily powerful vocabulary of Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989) [hereinafter *Transcendental Nonsense*]. Perhaps the labor statutes discussed here could be analyzed as parts of idealized cognitive models as Winter uses the term, *id.* at 1152. At some points, Winter seems to use the vocabulary of cognitive psychology to suggest that certain undesirable legal norms remain in force because of their deep psychological resonance with ingrained social narratives, e.g., Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1458 (1988) (the obfuscatory power of metaphor). In this usage, it is not easy to figure out how one would engage in unmediated, undistorted communication, or how Winter, a well-socialized member of our culture, has been able to transcend its cognitive "distortions."

Later articles make clear that Winter does not use the language of cognitive psychology to suggest that legal ways of thinking are static. He is expressly interested in self-conscious attempts to change dominant cognitive models through legal argument. See *Transcendental Nonsense*, *supra*, at 1224-37; Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) [hereinafter *Cognitive Dimension*]. Winter has provided us with a rich taxonomy of legal metaphors. Presumably this will be helpful in constructing theories of the relationship between these distinctively legal metaphors and broader social discourse. The latter task remains, however, as Winter recognizes, see, e.g., *Cognitive Dimension*, *supra*, at 2254 n.99.

233. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (Simpson trans. 1933) (originally published in 1893); E. DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Swain trans. 1915). "The genius of Durkheim's theory of ritual is that it articulates a psychologically grounded theory of individual needs with a sociologically grounded theory of social requirements." D. KERTZER, *supra* note 13, at 63.

Durkheim of course wrote about law, but not as ritual or as any independent shaper of solidarity. Rather law, specifically the ratio of "repressive" to "restitutionary" (facilitative) law, is used as an index of the level of solidarity attained by society. In so doing, he and his followers "slighted the importance of conflict: between moral principles, between laws, and . . . between legal and moral rules." Vogt, *Obligation and Right: The Durkheimians and the Sociology of Law*, in *THE SOCIOLOGICAL DOMAIN: THE DURKHEIMIANS AND THE FOUNDING OF FRENCH SOCIOLOGY* 184 (P. Besnard ed. 1983), as quoted in *Introduction, DURKHEIM AND THE LAW* 6 (S. Lukes & A. Scull eds. 1983). In this Article I follow Durkheim in his account of how ritual can create a sort of solidarity despite differences in values; as applied to industrial relations it is clear, I hope, that the solidarity created is at best temporary, negotiated, revisable. See *infra* note 241.

tions of the ritual.²³⁴

Can legal institutions or processes be rituals in this sense? No doubt the processes are not well understood, and further attention to them will refine these tentative suggestions. Under the right circumstances, by which I mean to include some social crisis in the sense of the waning power of traditional patterns, and some added elements of social drama to heighten what would otherwise be the low salience and effect of law, they can.²³⁵

Consider a recent study of the *Lit de Justice*, the ceremonial appearance of the king in early modern France.²³⁶ The ceremonies articulated, in symbolic form, fundamental principles of French constitutional jurisprudence: separation of powers, the king as spouse of the kingdom unable to alienate its dowry, principles of dynastic succession—"decades

234. Fernandez, *Symbolic Consensus in a Fang Reformatory Cult*, 67 AM. ANTHROPOLOGIST 902, 923 (1965), is a particularly well-worked-out example.

There is a misleading tendency to think of a person's 'beliefs' as if they were so many equivalent objects residing in his or her mind, and so well-formed, salient, harmonious, and meaningful opinions are assigned to individuals whose thoughts on the subject are ill-defined, logically incompatible, or of no necessary importance to them. The strength of political organizations comes less from any homogeneity of their members' beliefs than from the continuing expressions of allegiance through ritual. Thus, ritual can promote social solidarity without implying that people share the same values, or even the same interpretation of the ritual.

D. KERTZER, *supra* note 13, at 68.

235. The concept of "social drama" comes from V. TURNER, *DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY* 35-44 (1974). The concept definitely includes legal institutions, *id.* at 37, and is most suggestive in this context. Social dramas "are units of aharmonic or disharmonic process, arising in conflict situations. Typically, they have four main phases of public action, accessible to observation":

1. Breach of regular, norm-governed relations.
2. Crisis. Will the breach be sealed off or widen "until it becomes coextensive with some dominant cleavage in the widest set of social relations to which the conflicting or antagonistic parties belong?" *Id.* at 38. "This second stage, crisis, is always one of those turning points or moments of danger or suspense, when a true state of affairs is revealed, when it is least easy to don masks or pretend that there is nothing rotten in the village." *Id.* at 39.
3. Redressive action by the leaders of society. "It is in the redressive phase that both pragmatic techniques and symbolic action reach their fullest expression." *Id.* at 41.
4. The final phase "consists either of the reintegration of the disturbed social group or of the social recognition and legitimization of irreparable schism between the contesting parties. . . ." *Id.* at 41.

Labor legislation is presumably the furthest thing from Turner's mind, but isn't the fit remarkable? Turner's pattern of social drama applies to nearly every recent example of the adoption of labor legislation which I can find.

236. Hanley, *Legend, Ritual, and Discourse in the Lit de Justice Assembly: French Constitutional Ideology, 1527-1641*, in *RITES OF POWER: SYMBOLISM, RITUAL, AND POLITICS SINCE THE MIDDLE AGES* 65 (S. Wilentz ed. 1985). The whole volume is full of suggestive parallels for the student of contemporary law.

before such precepts were discussed in the writings of theorists.”²³⁷

This all suggests—it hardly demonstrates—the following model of labor legislation, seen as “social drama”:

1. Labor legislation responds to social crisis, including both:
 - a. Increased unrest and conflict, and
 - b. general sense that established patterns of interaction are inadequate to provide a basis for continuing life.
2. Labor legislation is substantially framed by social leaders who feel compelled to respond to crisis.
3. Labor legislation is a symbolic picture of a slightly idealized vision of the society’s labor relations. The “position” of working people in the society is reaffirmed as central, just as surely as the *Lit de Justice* depicted the “position” of the King or Parliament.
4. Labor legislation is welcomed by the formal organizations representing working people, typically unions, as the appropriate culmination of the unrest. Images of the organizational “place” of unions, the “rights” of workers, the “concessions” by employers can serve the union’s organizational needs in building solidarity and mobilizing action.
5. THE ULTIMATE IMPACT OF SUCH SYMBOLIC ACTION IS NEVER DETERMINATE; IT REMAINS TO BE WORKED OUT IN EACH CASE. Unrest may be quieted, or it may accelerate. Workers may accept temporary integration into “normal” political or administrative life, or may reject it. Labor legislation is not “symbolic” as opposed to “behavioral,” or because unions cannot get anything better.²³⁸ Labor legislation is symbolic because it cannot help being symbolic. Nobody would know where to go to work in the morning or how to behave once they got there without a store of cultural symbols describing how this works, and while many cultural forces converge to produce this symbolic message, on rare occasions, law does too.

C. *Objections to the Interpretive Model of Labor Legislation*

It will be objected that this account is necessarily a conservative one which overplays cultural continuity and cohesion and downplays fluidity and change. This criticism includes several distinct charges, some of

237. *Id.* at 74.

238. Of course in individual cases an observer could conclude that a union settled for a weak symbolic change when it might have achieved a more significant structural or economic change. But the determination can’t be made in general. Moreover, in my opinion, the long-run impact of symbolic legislation is so poorly understood as to diminish any confidence in one’s ability to make comparisons of this kind.

which are truer than others.²³⁹

It is certainly true as a matter of the internal history of this article that it was born in frustration at the tenacity of social institutions to resist change—in my case, the political blockages which seemed in 1977 to render impossible even modest labor legislation. And, as happens so often in the historiography of the world, frustration gives rise to cultural explanations. Problems seem intractable, politics seems blocked, progress seems thwarted; things are worse than we feared; surely some deep cultural explanation is needed.²⁴⁰ True, but so what? The issue is understanding the processes of change in labor law, not what led the researcher to study them, and if “cultural” factors figure in the best story we can tell, then so much the worse for our preconceptions.

A more telling charge of conservatism would assert some link between my use of Durkheim’s concept of ritual and Durkheim’s own heavy emphasis on system-maintenance and integration. This is a somewhat necessitarian argument for the link is not inevitable, and is successfully avoided by many contemporary anthropologists who study ritual. For the interpretation above is about nothing but change: the change in patterns of strikes and quiescence; the shifting demands of workers; the negotiation of symbols; the search for the new symbolic representation of power. We construct our symbols incrementally, building on what we know; but we do the constructing.²⁴¹

239. For example, who among us could confidently assert that his or her theory escapes the charge of necessitarianism, as made against much of the world’s thought in R. UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* (1987)? I certainly have tried to treat society as artifact not natural, have focussed on moments of context smashing not forming routines, but does any or all of this meet Professor Unger’s daunting requirements? B. FAY, *supra* note 216, is considerably more lucid on the subject of critical social science, and vastly less paralyzing.

240. These themes are explored in G. HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE 369-70* (1984)(with respect to “cultural” explanations of poverty). The rediscovery of English cultural resistance to labor law, *see supra* notes 164-68, similarly followed the disillusion of the failed 1971 reform, a disillusion felt even by those who detested the particular values that legislation endeavored to enact. Much of the recent American historical work on “working class culture” reflects similar political disillusion.

241. In trying to bury the naive notion that politics is simply the outcome of different interest groups competing for material resources, I want to avoid the opposite fallacy, that of portraying people as zombies imprisoned in a symbolically created universe they are powerless to change. The fact that symbols and rites are crucial to politics does not mean that people simply view the world in the way their culture and its guiding myths dictate. What is crucial, though, is the fact that power must be expressed through symbolic guises.

D. KERTZER, *supra* note 13, at 174.

Arnold van Gennep “insisted that in all ritualized movement there was at least a moment when those being moved in accordance with a cultural script were liberated from normative demands,

Finally, a more philosophic criticism asserts that an interpretation cannot ever be a criticism because it at most describes the status quo.²⁴² There are weighty ontological issues here, well-known to devotees of the literature of hermeneutic philosophy, which I shall pass over. The goal of the interpretation which I have advanced here surpasses criticism, approaches activism. For the truth of this interpretation will be if the activist comes to understand and then pursue the fight for control of cultural symbols; if the legal scholar comes to understand and then pursue the complex symbolic ramifications of our most ordinary daily law-making activity. As I said above, the validity of a critical interpretation lies in its acceptability to the object of interpretation. At this point, you, the reader, must decide the validity of my interpretation of the practice of legal scholarship, if not legislation. In this sense, the truth of the theory of labor legislation is not for me to know.

CONCLUSION

While scholars employ no generally-recognized general theory of labor law, most ordinary scholarship operates from an implicit theory under which labor law changes result from altered ideological consensus among union, management, and government leaders, who implement legislative change in order to bring about desired changes in management and union behavior. This implicit model of labor law in turn orients research towards these (generally illusory) changes in behavior.

Recently this model has been challenged, particularly within the Conference on Critical Legal Studies, by models which see labor law as a legitimating ideology. While full of insights, including attention to ideas, these models seem inconsistent with much of what we know about the relationship between law and behavior.

This Article has presented a model of labor legislation which is true to observable reality and predicts the timing, doctrinal content, and impact of labor law changes. The model raises more questions than it an-

when they were, indeed, betwixt and between successive lodgments in jural political systems. In this gap between ordered worlds almost anything may happen." V. TURNER, *supra* note 235, at 13. Participants in some of the strikes described *supra* Part III use similar vocabulary to describe the feeling that "anything was possible". See Zolberg, *Moments of Madness*, 2 POL. & SOC'Y 183 (1972).

242. The criticism is found in, *inter alia*, Lukes, *On the Social Determination of Truth*, in *MODES OF THOUGHT: ESSAYS ON THINKING IN WESTERN AND NON-WESTERN SOCIETIES* 230 (R. Horton & R. Finnegan eds. 1973), and B. FAY, *SOCIAL THEORY AND POLITICAL PRACTICE* 90-91 (1975), and is disputed, largely through adduced counterexamples, in M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 28-66 (1987). I read Fay as later abandoning this criticism in B. FAY, *CRITICAL SOCIAL SCIENCE: LIBERATION AND ITS LIMITS* (1987).

swers, but some of the questions have the virtue of being unorthodox. It appears that, under the right circumstances, working class pressure can be effective in achieving legislation. Proper subjects for research remain the symbolic impact of such legislation; cultural differences in the legislative process in labor law; the function of the rhetoric of rights in labor legislation; actual interpretations of labor law by working people; and explanations for the apparent deviance of the United States from some aspects of the model of labor legislation.

Yet while legal scholars study these questions, working people will continue to try to achieve justice through law. They want to know whether they can achieve anything through such struggles. While ultimately they, not we, must answer that question, we can, at least, begin to ask it.