AMERICAN AND EUROPEAN LABOR LAW: THE USE AND USEFULNESS OF FOREIGN EXPERIENCE

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THE Supreme Court's decision in *J.I. Case Co. v. NLRB*[1] provides a unique and telling example of the role of foreign labor law in shaping our own labor law. The central significance of that decision to the structure of our labor law and collective bargaining makes our starting there doubly relevant. The J.I. Case Company had, for a number of years, made uniform written one-year contracts of employment with individual employees each August 1st. These contracts were not the product of any unfair labor practice, nor were they made for the purpose of forestalling unionization or collective bargaining. The United Auto Workers won a representation election and was certified by the National Labor Relations Board as the exclusive bargaining representative of the production and maintenance union, but the company refused to deal with the union in any manner affecting rights and obligations under the existing individual contracts until they expired. The N.L.R.B. found that this amounted to a refusal to bargain collectively in violation of the National Labor Relations Act. When this case came before the Supreme Court, the narrow issue was whether the existence of individual contracts precluded the making of a collective agreement covering the same issues and thereby justified the employer in refusing to bargain collectively concerning those terms until the individual contracts expired. The Court, however, did not limit itself to this narrow and rather easy issue, but addressed itself broadly to the difficult question of the nature of the collective agreement and its relation to the individual contract of employment.[2]

In probing these problems, for which the statute made no express provision, the Court referred to legal theories developed in other countries, and drew upon Professor Lenhoff's outstanding article, *The Present Status of Collective Contracts in the American Legal System.*[3] In this article Professor Lenhoff brought to bear upon American cases and statutory provisions his intimate knowledge of legal theories developed by Austrian and German scholars.[4] He

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1. 321 U.S. 332 (1944).

2. The Court decided another case the same day which squarely presented one aspect of that problem—whether the existence of a collective agreement precluded an employer from making contracts with some individual employees whereby they agreed to accept wage rates below those in the collective agreement. Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944). The two cases were decided together, and the two opinions are a single piece. The principal discussion was in the *J.I. Case Co.* opinion, though citations were borrowed from the Board's brief in that case for use in the other.

3. 39 Mich. L. Rev. 1109 (1941). The Court cited Professor Lenhoff's article only in *Railroad Telegraphers, supra* note 2, at 346 n.7, but the same language appears in *J.I. Case Co.*, and other portions of the language and analysis are remarkably parallel to that of Professor Lenhoff's.

4. Professor Lenhoff explicitly referred to foreign labor law in only one footnote (at 1124 n.50), but his whole structure of analysis and his conclusions bear clear marks of the theories which he had developed as a teacher and leading scholar of labor law in Austria.

reshaped those theories to provide an imaginative and coherent analysis of the legal effects of the collective agreement on the collective parties—union and employer—and on the individuals subject to its terms. Thus informed by comparative law,[5] the Supreme Court wrote an opinion which has become a cornerstone of American labor law and collective bargaining.

I. Insularity and Uniqueness in American Labor Law

J.I. Case Co. v. NLRB is exceptional, for it is one of the few instances in which either the Court or Congress has looked to foreign experience for possible solutions to problems in labor law. We have struggled for years with troublesome problems such as protecting union members from employer hostility, requiring employers to give their employees a voice in decisions of the enterprise, defining the limits of economic force, and prescribing the enforceability of collective agreements. These same problems confront every industrial society which relies upon collective bargaining to help regulate the labor market and to provide a degree of democracy in industrial life. But our legislative records and judicial opinions are almost wholly barren of any inquiry into the solutions worked out in other countries. We have borrowed the word "boycott" from the English Captain Boycott,[6] but our law of boycotts bears no resemblance to English law.[7] Both the majority and dissenting opinions in *Vegelahn v. Guntner*[8] cited English precedents, but the conclusions were even more sharply conflicting than these precedents. The Commission on Industrial Relations of 1916 brought forth proposals[9] which were the forerunner of the Wagner Act,[10] but in doing so made only passing references to foreign experience.[11] The legislative history of the Wagner Act emphasized that the rights to organize and bargain collectively were recognized as fundamental in every democratic

5. The only other law review cited by the Court was Hoeniger, *The Individual Employment Contract Under the Wagner Act: I*, 10 Fordham L. Rev. 14 (1941). Professor Heinrich Hoeniger had been Professor of Law at the University of Freiberg and a leading scholar in labor law in Germany. See 10 Fordham L. Rev. 64 (1941).

6. See State v. Glidden, 55 Conn. 46, 76-77, 8 Atl. 890, 896-97 (1887).

7. *Compare* Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958), *with* Crofter Hand Woven Harris Tweed v. Veitch, [1942] A.C. 435 (Scot.).

8. 167 Mass. 92, 44 N.E. 1077 (1896).

9. S. Doc. No. 415, 64th Cong., 1st Sess. 5 (1916). For the basic proposals which are strikingly parallel to the National Labor Relations Act of 1935, see *id.* at 67-68.

10. National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 (1935).

11. In a subsidiary section of the Report it was recommended that all legal restrictions on economic action on both sides be removed, with the observation, "This has been most successfully accomplished by the British Trades Disputes Act, which is the result of 60 years of legal evolution, and in its present form seems to work as successfully as could possibly be expected." *Id.* at 81. However, in its basic recommendations fourteen pages earlier, the Report proposed legislation limiting the employer's economic force by prohibiting blacklists, yellow dog contracts and discriminatory discharges. *Id.* at 67-68.

The Report of John R. Commons and Florence J. Harriman, which dissented from the basic proposals, relied extensively on foreign experience. They urged following the British model and removing government intervention entirely from collective bargaining. They rejected any legal restriction on the employer's anti-union economic measures, or any legal requirement to recognize and bargain with the union, as well as any legal limits on strikes, boycotts and picketing. *Id.* at 214-15. See also *id.* at 177, 187, 189, 200, 203, 209 for reliance on foreign experience in other areas.

society,[12] but made no inquiry into how those rights were legally protected or the legal limits within which they were exercised in other democratic countries.[13] In 1938, President Roosevelt appointed a commission to study industrial relations in Great Britain and Sweden. After a summer tour of the two countries, the commission issued brief reports which sketched some of the main characteristics of the two systems.[14] But these reports quickly gathered dust and had no visible impact on our labor law, although they had suggestive solutions to a number of problems confronted by Congress in 1947, such as unionization of supervisors, industry-wide bargaining and enforcement of collective agreements. The Taft-Hartley Act[15] contained only one exception to the prevailing pattern—the union security provisions of Sections 8(a)(3) and 8(b)(2) were modeled after an arbitration decision of Judge Rand of the Supreme Court of Canada;[16] but the Landrum-Griffin Act[17] was made from a purely American mold.

The Supreme Court's one significant exception since *J.I. Case Co.* is *Brotherhood of Ry. Clerks v. Allen*,[18] in which the Court sought to develop some workable method of regulating the use of union dues for political purposes. Two years before in *International Association of Machinists v. Street*,[19] the Court—without overtly relying for guidance on any foreign experience[20]—held that a union could not, by means of a union shop clause, compel an individual to pay to the union that portion of his dues used to promote political causes with which he disagreed. The Court was then confronted with giving some practical content to this basic policy, and in the *Allen* case it modeled its solution on the British method of allowing individuals to "contract out" of political contributions; the burden was then on the union to show the amount of dues money so used and to refund that portion periodically to those thus objecting. The Court suggested that to avoid the practical difficulties created

12. See, *e.g.*, *Hearings on S. 1958 Before the Senate Committee on Education and Labor*, 74th Cong., 1st Sess. 35 (1935) (statement of Senator Wagner in presenting his bill in committee); Bernstein, The New Deal Collective Bargaining Policy 135, 147 (1950).

13. Buried in the 1934 Senate hearings was a substantial study by the International Labor Office relating to collective bargaining procedures in a number of countries. See Kuttig, *Problems of Conciliation and Arbitration: A Study in Comparative Law*, reprinted in *Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 73d Cong., 2d Sess. 312-25 (1934). This study was never discussed in the Hearings, nor is there any evidence it was read by anyone involved.

14. U.S. Dep't of Labor, Commission on Industrial Relations in Great Britain, *Report* (1938); U.S. Dep't of Labor, Commission on Industrial Relations in Sweden, *Report* (1938).

15. Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. § 141 (1947).

16. See 2 NLRB, Legislative History of the Labor Management Relations Act of 1947, at 1422 (1948) (statement by Senator Taft referring to Ford Motor Co. of Canada v. UAW, 1 Lab. Arb. 439 (1946)).

17. Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 29 U.S.C. § 401 (1959).

18. 373 U.S. 113 (1963).

19. 367 U.S. 740 (1961).

20. Mr. Justice Frankfurter, in his dissenting opinion, referred to the solutions evolved in Britain, Canada and Australia, and specifically referred to the British legislation regulating union political expenditures, saying, "Congress is, of course, free to enact legislation along lines adopted in Great Britain, whereby dissenting members may contract out of any levies to be used for political purposes." *Id.* at 817.

by court decrees the unions could set up separate political funds as in England and provide orderly procedures for "contracting out,"[21] and in an appendix to the opinion quoted the relevant sections of the English statute.[22]

Although *J.I. Case Co.* is exceptional in looking at foreign solutions, it is typical in arriving at a uniquely American solution. In spite of its allusions to foreign law, the Court's opinion solidified and extended legal rules which have made American labor law and collective bargaining fundamentally different from those of any other major industrial country.

Our uniqueness begins with Section 9(a) of the National Labor Relations Act which provides that "Representatives designated . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining. . . ."[23] The need for this rule was accepted as self-evident,[24] although in most Western European countries employers bargained simultaneously with competing unions and made agreements which legally bound only members of each union.[25] Section 9, read literally, only prohibited bargaining collectively with other "representatives," and did not prohibit bargaining directly with individual employees. Both the statutory language and Supreme Court dicta, prior to *J.I. Case Co.*, left room for the individual to make a contract of employment with better or poorer terms than those in the collective agreement[26]—a result which would have followed the accepted English rule.[27] The Court, however, in *J.I. Case Co.* rejected this result and followed Professor Lenhoff's analysis, built upon the Continental model, and held that an individual employment contract cannot be effective to waive any benefit to which the employee is entitled under the collective agreement. But the Court went beyond this analysis to declare that the individual could not bargain even for better terms than those in the collective agreement. "The practice and philosophy of collective bargaining," asserted the Court, "looks with suspicion on such individual advantages. . . . [A]dvantages

21. Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 123 n.8 (1963).

22. Trade Union Act, 1913, 2 & 3 Geo. 5, c. 30; reenacted by Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. 6, c. 52.

23. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1964).

24. See, *e.g.*, *Hearings on S. 1958*, *supra* note 12, at 81 (statement of Francis Biddle, Chairman of NLRB); *Id.* at 243 (statement of Professor Witte); Houde Eng'r Corp., 1 N.L.R.B. (o.s.) 35 (1934); Bernstein, *op. cit. supra* note 12, at 136-38.

25. Smith, Cases on Labor Law (Supp. 1954, at 73-79, 153-57). Professor Lenhoff states that under the French and German law the attempts by unions to reach beyond its members to all employees in the unit were considered acts of "terrorism." *A Century of American Unionism*, 22 B.U.L. Rev. 357, 371 (1942).

26. This argument was spelled out—and rejected—by Professor Lenhoff: *The Present Status of Collective Contracts in the American Legal System*, 39 Mich. L. Rev. 1109, 1140-42 (1941).

27. This follows from the basic English rule that the collective agreement is not legally binding and is only a "treaty" between the union and the employer. As such, it merely establishes a custom which determines the terms of employment in the absence of some agreement to the contrary. See Lenhoff, *General Report on Content, Legal Effects, Application and Execution of Collective Agreements*, in Second (Geneva) International Congress of Labor Law (1957).

to individuals can be as disruptive to industrial peace as disadvantages."[28] This confident assertion, however, was contradicted by the law and experience of other democratic countries, where almost without exception collective agreements fixed *minimum* but not *maximum* terms and conditions of employment, and the freedom of the individual to bargain for just such "advantages" was taken for granted.[29]

The statutory rule of exclusive representation, supplemented by the judicially declared rule that the collective agreement prescribes maximum as well as minimum terms has far-reaching consequences for our law and institutions of collective bargaining—consequences too manifold and remote to be traced here. Obviously, it shapes the legal and working relations between competing unions, between the employer and the majority union, and between the union and the individual. Less obviously, it defines the social function of collective bargaining and the role of the union in regulating the labor market. When the collective agreement fixes only minimum terms—as it does in European countries—it serves as a flexible form of minimum wage legislation. Centralized bargaining through employer associations and extension of the agreement by government decree to the entire industry emphasizes this social function of collective bargaining.[30] Actual wages and working conditions are largely determined by bargaining with individuals and groups at the shop level, and in this bargaining the union often plays little or no role. The collective agreement rates, particularly in periods of full employment, are often twenty to fifty per cent below the actual rates, with various employers in the same industry paying quite disparate rates.[31] The union thus has little control over actual wages and working conditions. Under Section 9(a) and *J.I. Case Co.*, the collective agreement serves to regulate the actual terms and conditions of employment, and in that regulatory process the majority union plays a preemptive role.

The uniqueness of American labor law does not end with Section 9(a), for there are other important though less fundamental and marked differences between our statutory structure and that of most other countries. Two broad differences reflect our special reliance, at least at the legal level, on collective bargaining to regulate the labor market. First, the statutory protection given the process of unionization and collective bargaining by the Wagner Act is probably without parallel in any other country. Many countries, like France

28. 321 U.S. 332, 338.

29. See generally Labor Law Group Trust, Labor Relations and the Law 333-37 (Mathews ed. 1953). The most noted exception was the Dutch law.

30. See Lenhoff, *Some Basic Features of American and European Labor Law: A Comparison*, 26 Notre Dame Law. 389, 417-20 (1951); Kahn-Freund, *Labor Law and Social Security* in 2 American Enterprise in the European Common Market 297, 398-400 (Stein ed. 1960).

31. Roberts, Trade Unions in a Free Society 4-5 (1959); Ross, *Prosperity and Labor Relations in Western Europe: France and Italy*, 16 Ind. & Lab. Rel. Rev. 63, 69 (1963); Ross, *Prosperity and Labor Relations in Europe: The Case of Western Germany*, 76 Q.J. Econ. 331, 341-43 (1962).

and Germany, prohibit dismissal because of union membership, but give little protection against less gross forms of discrimination and no protection against many forms of "interference and restraint" proscribed by Section 8(a)(1).[32] Sweden is one of the few other countries which imposes a statutory obligation to bargain in good faith, but it provides no direct sanction and does not define the subject matter of bargaining.[33] Second, statutory regulation of substantive terms and conditions of employment is significantly less in the United States than in many other countries. In most Western European countries such matters as the length of the work week, the number of paid holidays and the amount of paid vacation is prescribed by law; and rules requiring notice of termination and protection against arbitrary dismissal are found in statutes rather than in collective agreements.[34] Thus, in comparison with other systems, our labor law places heavy emphasis on protecting the process of collective bargaining and then relies on that process to regulate the terms and conditions of employment.[35]

II. Sources of Insularity and Uniqueness

Recognition that we have failed to look to foreign experience in constructing our labor law and that the system we have built is fundamentally different from that of other countries raises the difficult question of why this is so. Why have we struggled for years with seemingly intractable problems which must be confronted by every democratic industrialized society and have ignored the solutions proposed and tried in other countries? Why have the solutions which we have adopted to parallel problems been so different in such fundamental respects?

Several reasons for this are immediately apparent—perhaps too apparent. Each has obvious substance and persuasive appeal, especially when we look only at the bits and pieces of evidence which confirm it. But closer and more comprehensive examination can quickly disturb the comfort given by these easy answers, for, upon such an examination, each reason proves itself to be at best a partial explanation of the insularity and uniqueness of our labor law.

First, our failure to look at foreign experience is in part a product of our provincial attitudes. This is more than our narrow self-assurance that others have nothing worthwhile to teach us about how to solve our problems, though we have ample of that defect. Our general lack of facility in foreign languages—itself a product of our provinciality—creates a barrier to our learning about

32. European Coal and Steel Community, La stabilite de l'emploi dans le droit des pays membres de la C.E.C.A. 42 (1958).

33. Labor Law Group Trust, *op. cit. supra* note 29, at 272-74; Schmidt, The Law of Labour Relations in Sweden 145-47 (1962).

34. Kahn-Freund, *supra* note 30, at 363-64; Labor Law Group Trust, *op. cit. supra* note 29, at 66-68.

35. This basic difference was emphasized and documented in Lenhoff, *Some Basic Features of American and European Labor Law: A Comparison*, 26 Notre Dame Law. 389 (1951).

labor law in other countries. The language barrier, however, is not now an adequate excuse for our ignorance—it was scarcely ever an excuse for our refusal to look to English experience.[36] Thirteen years ago Professor Lenhoff contributed to one of the leading labor law casebooks a series of comprehensive and illuminating comparative comments directly relating foreign labor law to American rules and problems,[37] and shortly thereafter another leading casebook added a supplement with an equally valuable comparative labor law discussion.[38] The leading Swedish text on labor law, an unusually insightful and readable work, has been translated and published in this country;[39] a scholarly colloquium on the law of collective bargaining and industrial conflict in eight European countries has been published in England;[40] and proceedings of international congresses have valuable comparative studies on various problems.[41] These are in addition to the growing number of studies by Americans of foreign labor law and collective bargaining systems. For a student who can read any one of the four languages of the European Community, there is available a series of volumes comprehensively describing and comparing labor law in the six countries.[42]

Our provinciality goes beyond our lack of language. We too easily assume that other systems are enough like our own that we can quickly understand their similarities and differences. The Commission appointed by President Roosevelt in 1938 issued reports on two countries as diverse as England and Sweden after three months of interviews and document gathering. As a result, the commission failed to focus on the less obvious but more critical characteristics of the two systems; it emphasized their common feature of acceptance of collective bargaining while brushing over their contrasts in legal structure and institutional arrangements; and it gave a superficial, if not inaccurate, analysis

36. With the passage of the Trade Disputes Act of 1906, English law began to develop in the opposite direction from that taken by American law. The English began to move toward legal abstention in union-employer relations, weapons of economic conflict were legalized, and the union was freed from liability for tort. See Flanders & Clegg, *The System of Industrial Relations in Great Britain* 104-27 (1954). At the same time we moved toward increasing legal intervention, holding unions subject to the anti-trust laws, restricting picketing and secondary boycotts, holding unions liable in damages, and finally adopting the massive intervention of the Wagner Act and the Taft-Hartley Act.

37. Labor Law Group Trust, Labor Relations and the Law (Mathews ed. 1953). Nearly 100 pages of comments were interspersed through the book, giving not only a general picture of foreign law but also specific foreign solutions to various problems in American law.

38. Smith, Cases on Labor Law (2d ed. 1954). The comment was written by Professor Kahn-Freund, of the London School of Economics, and formerly a member of the German Labor Court.

39. Schmidt, The Law of Labour Relations in Sweden (1962).

40. Kahn-Freund, Labor Relations and the Law (1965).

41. See, *e.g.*, Fifth (Lyon) International Congress on Labor Law and Social Security (1963); Third (Brussels) International Congress on Labor Law (1958).

42. The series is entitled Droit du Travail, and is published by the European Coal and Steel Community. The studies published thus far are: I, Les sources du droit du travail; II, La stabilité de l'emploi; III, La representation des travailleurs sur la plan de l'enterprise; V, Grève et lockout; IX, La protection des travailleurs en cas de perte de l'emploi. An excellent survey of the labor law of the six countries written particularly for Americans is Kahn-Freund, *supra* note 30.

of the successes and failures of each system and the factors which had contributed to each. The impact of the Commission's reports was commensurate with their comprehension. Such Cook's tours continue under scholarly and other auspices, and though they may contribute odd lots to our store of information and offer grab bags of insights, they can help us little in understanding the legal rules and institutions which others have used to meet the problems we must face.

Second, our failure to look at foreign experience is in part a result of our political process. Our labor law statutes are not the product of rational evolution but political eruption. Congress does not regularly study specific problems and make limited revisions, but waits until political pressures have accumulated and then makes massive changes—at twelve year intervals came the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act, with no significant changes in between. Unions and employers can each marshal powerful political forces to veto any legislative action until cumulative demands for multiple changes override resistance. When these demands lead to change, Congress, in the cross-fire of open clash between major social forces, must devise answers to the whole range of specific problems which have accumulated. There is neither time nor temper for the careful inquiry and detached reflection necessary to search for solutions in foreign experience. The search is rather for a political compromise which will placate the maximum number of demands.

In 1947 there was a dominant, though unfocused, demand that agreements be legally enforceable. One side insisted that strikes and lockouts during the contract term be barred by statute; the other side insisted that the parties should be free to define their legal obligations by collective bargaining. The political resolution was to give ambiguous expression to the first demand in Section 8(d) and to the second demand in Section 301.[43] The politically explosive issue of whether an injunction should be available to enforce the contract was dampened by leaving Section 301 silent and allowing the NLRB to seek injunctions for violations of Section 8(d).[44] The unions' long and bitter memory of the money judgment enforced against individual members in the *Danbury Hatter's Case*,[45] thirty years before, led to inclusion in Section 301(b) of a clause freeing union members from such liability.[46] Congress' preoccupation with other problems such as union security, employer free speech, secondary boycotts, national emergency strikes, and union political contributions permitted no time to study "peace obligations" and their methods of enforcement in

43. See Note, *Labor Arbitration, the NLRB, and Taft-Hartley Section 8(d): Problems of Jurisdictional Conflict*, 69 Yale L.J. 309 (1959).

44. The ambiguity of congressional action is demonstrated in the opposing Court opinions in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962). See also Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. Rev. 292, 331-43 (1963).

45. Loewe v. Lawlor, 235 U.S. 522 (1915); see also Loewe v. Lawlor, 208 U.S. 274 (1908). For the history of this bitter litigation which lasted 14 years, see Witte, The Government in Labor Disputes 131 (1931).

46. See Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962).

other countries. Superficial inquiry at that stage would not have clarified the problem and would have diverted efforts from the immediate need for patching together a political compromise and quieting inherited fears.

There is less reason for the courts' failure to examine foreign experience, for they are able to focus on single problems largely free from political pressures. *Brotherhood of Ry. Clerks v. Allen*[47] suggests the special potential of the courts in fashioning solutions drawn from foreign experience. However, the myth that the courts only follow the intent of Congress inhibits most judges from examining solutions worked out in other countries, even when Congress had no intent or when that intent was not to solve but to avoid the problem. Thus, the Court in the *Lockout Cases*[48] condemned the NLRB for "unauthorized assumption . . . of major policy decisions properly made by Congress,"[49] and then fabricated a Congressional intent to support its own policy decision. The Court could have gained greater insight into the problem and made a more responsible decision if it had examined the alternative solutions from other countries; but that would require an open admission that the Court was making the policy decision which Congress had refused to make.

Third, some of our labor law has not developed parallel to that in other countries because uniqueness tends to beget uniqueness. The basic rule of exclusive representation, as articulated in *J.I. Case Co.*, gave birth nine months later to the union's duty of fair representation in *Steele v. Louisville & N.R.R.*[50] More far reaching, the special legal status and protection given unions by the National Labor Relations Act provided one of the central arguments for legally requiring unions to observe certain democratic procedures and helped produce Landrum-Griffin. In the words of the Senate Committee on Labor, "The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent."[51] The legal obligations placed on unions by this statute have no equivalent in any European country, and this further accents the uniqueness of our labor law.

It would be a mistake, however, to assume that there is a necessary one-to-one relationship between the uniqueness of Section 9(a) and the uniqueness of these obligations imposed on unions. For example, Belgian law designates by name the three unions authorized to represent workers in negotiating national industry agreements through *commissions paritaires*, and those agreements may be made binding by royal decree on the whole industry.[52] But Belgium has developed no law protecting the rights of union members or insuring demo-

47. 373 U.S. 113 (1963).
48. American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965).
49. NLRB v. Brown, *supra* note 48, at 292.
50. 323 U.S. 192 (1944).
51. Committee on Labor and Public Welfare, *Report*, S. Rep. No. 187, 86th Cong., 1st Sess. 20 (1959).
52. Blanpain, La convention collective de travail 37-42, 96-106 (1964).

cratic processes within unions. Neither union members nor the government in Belgium knows how the sizeable assets of the unions are expended or invested,[53] yet there has been no suggestion that the legal status given unions by the government requires financial reporting or regulation of their internal processes. Swedish unions in the Confederation of Labor, though lacking such formal legal status, exercise in fact the power of exclusive representatives and their agreements effectively regulate terms and conditions of employment for members and non-members alike.[54] But this power of the unions has not generated the logic that unions have a correlative responsibility to be democratic. Indeed the constitution of the confederation prohibits member unions from submitting proposed contracts to binding ratification vote and requires that the officers retain full power to make agreements;[55] chairmen of national unions are not periodically reelected but serve until retirement or removal for cause;[56] and local unions often encompass such a large geographical area that membership participation is obstructed.[57] Yet there has been no demand by any party for legislation requiring union democracy.

The fourth obvious reason our labor law is unique is that the social institutions which surround it and through which it must function are unique. Labor law must be shaped to fit the structure of the unions involved, the degree and form of employer organization, the attitudes of unions and employers to each other, the practices of collective bargaining and a multitude of other social, economic and political factors. National differences in these factors lead to national differences in labor law, and awareness of these differences causes reluctance to rely on others' experience. The validity of this is so obvious as not to need statement—except as a preliminary to emphasizing limits on its validity.

The employer unfair labor practices proscribed by Section 8 of the Wagner Act were a legal response to virulent methods commonly used by American employers to prevent unionization and collective bargaining. French employers also have a notorious hostility to unions; many engage in anti-union discrimination, support employer-dominated unions, and refuse to recognize nationally affiliated unions at the shop level.[58] But there is no French equivalent to Section 8, and this is the case even though there is an articulate national policy favoring collective bargaining and relying on it as an important instrument for

53. See, *e.g.*, Confederation des Syndicats Chretiens, *Rapport d'activité:* XXI Congress 31-44 (1960). This biennial report shows the amount spent for strike benefits and for various social benefits, but there is no report, even in gross amounts, of income, expenses, or assets.

54. Summers, *Collective Power and Individual Rights in the Collective Agreement: A Comparison of Swedish and American Law*, 72 Yale L.J. 421 (1963).

55. Stadgar för Landsorganisationen i Sverige § 11, para. 2. See Sölvén, Landsorganisationens Nya Stadgar 30-32 (1952).

56. Sölvén, *op. cit. supra* note 55, at 105.

57. For example, the retail clerks union in 1960 consolidated 260 locals into 40 "great locals," for all Sweden. Many of these cover areas with a radius of 30 to 50 miles. [1963] *Handels Nyht.* No. 3.

58. Ehrmann, Organized Business in France 9, 37, 42 (1957); Lorwin, The French Labor Movement 273-76 (1954); Sturmthal, Contemporary Collective Bargaining 166 (1957).

regulating the labor market. The nearest European equivalent to Section 8 is in Sweden[59] where employer acceptance of collective bargaining and the unionization of industry had, for thirty years, been greater than in any other country.[60] The rule of exclusive representation would create special, if not insoluble, problems where the labor movement is divided along political or religious lines. This can explain why such a rule has not developed in countries such as France, Italy, Belgium or Holland;[61] but it can not explain why our law in this respect differs from that of England and Sweden where the union movement has not been thus split,[62] or from that of Western Germany where post-war efforts succeeded in building a unified labor movement.[63] The Landrum-Griffin Act was a product of corrupt and undemocratic practices in some American unions. Certain forms of corruption publicized by the McClellan Committee seem to be uniquely American phenomena—at least they seem to be unknown in Western Europe. But simple misappropriation of union funds is a universal problem, though it may be less often discovered or publicly revealed in other countries. More important, even prior to the passage of Landrum-Griffin, the vitality of the democratic process within unions, the opportunity of members to participate in union decisions, and recognition of the right to fair procedures were probably as great, if not greater, in the United States than in any other country. Certainly, the great bulk of unions in this country had far more internal democracy than unions in a number of countries which have never even discussed the need for such legislation.[64]

Such differences in social institutions undoubtedly have played a significant role in giving our labor law its unique character, but these examples are enough to make us wary of simple answers. Differences are easy to rationalize when comparisons are limited to two systems, but when comparisons cover several systems, simple hypotheses are quickly disproven. Explanations may then be sought in a combination of several differences in social institutions. Though such hypotheses are probably nearer the truth, they may be more satisfying only because they appear more sophisticated and more difficult to disprove. As

59. Schmidt, *op. cit. supra* note 39, at ch. VI.

60. Thirty years earlier the Swedish Employers Confederation, in a "basic" agreement with the Confederation of Unions, had explicitly recognized the right of employees to join unions and to bargain collectively. When the statute was adopted in 1956, nearly 90% of all blue collar workers were organized. The statute was aimed almost exclusively at employers who were resisting the unionization of their white collar workers. See Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States*, 112 Pa. L. Rev. 647, 653-54 (1964).

61. See Galenson, Trade Union Democracy in Western Europe (1961) for a brief description of the trade union movements in these countries.

62. *Id.* at ch. III.

63. Sturmthal, *op. cit. supra* note 58, at ch. V.

64. See Fifth (Lyon) International Congress on Labor Law and Social Security: *General Report on the Internal Relations Between Unions and Their Members* 43-77 (1963) and the supporting national reports in the same volume. The *General Report* and three national reports are reprinted in 18 Rutgers L. Rev. 236-407 (1964).

the factors to be considered increase, the hypotheses become impossible to test, for we cannot know enough about the social institutions in other countries to evaluate their impact. We are left with little more than a bald assertion that the uniqueness of our labor law is caused by the unique combination of our institutions. There remains room for healthy doubt that this adequately or meaningfully explains our uniqueness.

Furthermore, explaining labor law as the product of social institutions and attitudes oversimplifies the linkage of cause and effect. For example, the fact that American unions historically were not split along political lines made the legal rule of exclusive representation feasible in 1935; but the adoption of the rule is partly responsible for unions not being so split today. The principle of majority rule grew out of bargaining between a union and a single employer; but the legal definition of the appropriate unit for determining the majority has retarded the growth of employer association bargaining. The Court's dictum in *J.I. Case Co.* that the collective agreement establishes maximum terms was not compelled by social forces and might be viewed as an historical accident; but the legal principle has so shaped our institutions and attitudes as to be nearly indispensable now. Our union and employer organizations, our collective bargaining structures, and the character of our collective agreements are different from those of other countries in part at least because our labor law is different.

All four of the factors discussed above have undoubtedly contributed to the insularity and uniqueness of our labor law. Combined together they may provide an adequate explanation of why we have not followed the patterns evolved in other countries. That, however, is not the important point. What is important is that none of these reasons, singly or combined, present an insuperable obstacle to our learning from the experience of other countries how to better meet the difficult problems with which we are confronted. Our provinciality is a matter of choice; whenever we want to study seriously the labor law and collective bargaining systems of other countries, the materials and opportunities are available. The ways of Congress are indeed difficult to change and we can not expect Congressmen to become experts in foreign labor law—we must be happy if they understand our own. But comparative studies made by other institutions, public or private, focusing on emerging problems could give Congress added understanding, fresh ideas, and a wider range of choice when it must find solutions to multiple problems. And the courts have at least limited flexibility, particularly in the difficult problem areas, to take guidance from foreign experience if they are adequately educated by lawyers and scholars. Finally, the uniqueness of our present labor law and social institutions does not compel us to perpetuate that uniqueness, at least that special form which we now possess. We have an area of choice and capacity for change; indeed, we can within limits design our labor law to reshape our institutions of collective bargaining.

III. The Usefulness of Foreign Experience

We now come to the most critical question—what, if any, contribution can the study of labor law in other countries make in working out our own problems? Assuming that we break out of our provinciality and gain a better understanding of other systems, will the law and experiences of other countries be of any practical value in helping us reshape our legal rules?

Only the brashly bold or half blind can urge that simply because another legal rule or system of rules has worked well in another country, we should borrow it to solve our problems. Transplanted to another setting, the legal rules may die or cause disruption. Taft-Hartley has been transplanted to Japan[65] but has not taken root;[66] Norris-LaGuardia was transplanted to the Philippines but instead of freeing unions from judicial restraint, it provided the basis for the creation of the labor injunction which had been previously unknown.[67] Hopefully, we would not be so irresponsible to ourselves. Sometimes we may reasonably believe that the social institutions and attitudes within which the legal rules function are sufficiently similar to justify borrowing; but more often the interactions are too complex and subtle to enable us to make any responsible judgment. The study of labor law in other countries, however, can be of practical value in a number of less direct ways. Only three need be mentioned here. The first value in studying comparative labor law is that it can help free us from the paralysis of unquestioned assumptions. Premises which are often repeated become self-evident, and that which is customary becomes accepted as inherent. Studying other systems helps remind us that collective bargaining can work with quite different premises. The proposition that collective agreements should be binding on employer and union alike, and that legal remedies should be available, is accepted by many in this country as being as unquestionable as a Euclidean theorem. But when we learn that in England the collective agreement is legally binding on neither party;[68] that in Belgium the employer is bound but there is no legal remedy against the union;[69] that in Germany the union is bound but it has no effective remedy against the employer;[70] that in France the employer has no legal remedy against the worker;[71] and that in Sweden there are legal remedies against the union, the employer and the individual worker[72]—when we learn this, we are compelled to recognize that our self-evident assumptions are self-generated. The fact that each country considers its result logically compelled by the nature of the col-

65. Labor Union Law, Law No. 174, June 1, 1949 (English translation), 8 Eibun-Horei-Sha Law Bulletin Series.
66. See generally Levine, Industrial Relations in Post War Japan (1958).
67. See Laurel, The Labor Injunction as an Instrument of Policy in Philippine Labor Relations, 1960 (unpublished thesis, Yale Law School Library).
68. Kahn-Freund, *op. cit. supra* note 40, at 25-26.
69. Blanpain, *op. cit. supra* note 52, at 52-59.
70. Kahn-Freund, *op. cit. supra* note 40, at 87-88.
71. Despax, Les Conventions Collectives de Travail 275-76 (1966).
72. Schmidt, *op. cit. supra* note 39, at 47, 213.

lective agreement underlines for us the freedom we have to choose our premises.

Again, courts, arbitrators and scholars in this country have, at times, been quick to assert that individuals have no independently enforceable rights under the collective agreement.[73] The contract is between the union and the employer; the individual has only those rights created by the union; and the union can therefore make a binding settlement of his claim.[74] To allow the individual to sue in his own right would "create a condition of disorder and instability disastrous to labor as well as industry."[75] Such logic loses its compulsion when we learn that in England and Germany the union has no enforceable rights and only the individual can sue;[76] that in France the union can sue to enforce individual claims only if the employee fails to do so;[77] that in Holland and Switzerland the union can sue, but this does not affect the individual's right to sue;[78] and that in Sweden the individual can sue if the union refuses to do so.[79] Indeed, in almost every other country the right of the individual to sue is considered so self-evident and fundamental that any rule allowing the union to settle an individual's claim without his consent is unthinkable.

The value in learning that others follow different premises to different conclusions is not to prove that ours are wrong, but to compel us to confront the question whether ours are right. New and better solutions to our old and difficult problems are more likely to be found by a healthy scepticism of what has been taken for granted than by spinning new logic from worn premises. At the very least, we are encouraged to think the unthinkable and to consider the possibility of that which has been assumed impossible.

The second value in examining other labor law systems is that it may give us fresh insight into the social function of our legal rules. The illegality of certain forms of economic force is commonly explained in moral terms. The secondary boycott is illegal because it attacks innocent third parties and is a conscription of neutrals; the lockout is said to be illegal because it punishes employees for making demands,[80] or said to be legal as a good faith effort to serve legitimate business interests;[81] and the employer's right to hire permanent replacement is upheld as a right to protect and continue his business.[82] But Sweden has never questioned the legality of the secondary boycott or the lock-

73. See Taschenberger v. Celanese Corp., 34 L.R.R.M. 2305 (Md. Cir. Ct. 1954); Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 Stan. L. Rev. 235 (1961); Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956).

74. See, *e.g.*, Cortez v. Ford Motor Co., 349 Mich. 108, 84 N.W.2d 523 (1937); Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959).

75. Bianculli v. Brooklyn Union Gas Co., 14 Misc. 2d 297, 299, 115 N.Y.S.2d 715, 718 (Sup. Ct. 1952).

76. Kahn-Freund, *op. cit. supra* note 40, at 25-26, 87-88.

77. Despax, *op. cit. supra* note 71, at 341-46.

78. Kahn-Freund, *op. cit. supra* note 40, at 113-14, 121-22.

79. Summers, *supra* note 54.

80. American Ship Building Co. (Local 374, International Bhd. of Boilermakers), 142 N.L.R.B. 1362 (1963).

81. American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965).

82. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

out—even the sympathetic lockout—and sympathetic economic action on both sides is accepted as wholly proper.[83] In France and Italy a lockout would be considered illegal[84] and the permanent replacement of strikers the violation of a fundamental right.[85] Such differences can scarcely be explained by differences in moral standards—the reputed warmth of the Latin blood or the popular image of Swedish morals notwithstanding. We are compelled by the apparent incongruity of the differences to seek meaning elsewhere, and in that seeking we may come to the hypothesis that these legal rules speak to economic strength, not moral virtue. Balance of economic power between unions and employers in Sweden requires free use of sympathetic action, particularly by employers who would otherwise be helpless before strong centralized unions.[86] But the lockout in France and Italy would be devastating to the poorly organized and financially weak French and Italian unions who must rely largely on recurrent short term stoppages to wear an employer down.[87] Replacement of strikers would likewise tip the balance against the unions. This hypothesis then requires us to reexamine our own legal rules to discover whether they have any social justification other than a crude balancing of economic power. Once we view our legal rules from this perspective we can make a more meaningful inquiry into whether they are properly shaped to perform this social function.

Similarly, we may clarify our perspective of organizational picketing, a phenomenon which is nearly unknown in other countries, and is unknown for good reason. Other countries provide legal procedures for "extension" of collective agreements—that is, to require all unorganized employers in an industry to comply with the minimum standards established in the industry agreement between the dominant employers association and the unions.[88] Union standards in the organized sector are thereby protected from being undercut by competition based on substandard wages and other conditions in the unorganized sector.[89] Organizational picketing in this country, particularly when cast as "area standards" picketing,[90] seeks to achieve, by marshalling economic pressure, the same protection of union standards which in other countries is achieved by government decree. This helps us focus more clearly on the question of whether we want to protect union wages and other working conditions from competition

83. Schmidt, *op. cit. supra* note 39, at 162-75.

84. Kanowitz, *The Strike and Lockout Under French Labor Law*, 9 St. Louis U.L.J. 211, 234-36 (1964); European Coal and Steel Community, Grève et lockout 237-42 (France), 314-20 (Italy) (1961).

85. Kanowitz, *supra* note 84, at 233; European Coal and Steel Community, *op. cit. supra* note 84, at 223 (France), 297 (Italy).

86. 10 Statens Offentlig Utredningar 143, 185 (Swed. 1934). Hallendorf, Svenska Arbetsgivareforeningen (1927).

87. European Coal and Steel Community, *op. cit. supra* note 84.

88. Labor Law Group Trust, Labor Relations and the Law 281-87 (Mathews ed. 1953); Kahn-Freund, *Labor Law and Social Security* in 2 American Enterprise in the European Common Market 297, 398-400 (Stein ed. 1960).

89. Lenhoff, *Some Basic Features of American and European Labor Law: A Comparison*, 26 Notre Dame Law. 389, 419-20 (1951).

90. See Houston Bldg. and Constr. Trades Council (Claude Everett Constr. Co.), 136 N.L.R.B. 321 (1962).

with non-union wages and conditions, or whether we want to permit or protect non-union competition as a check on union economic power. We see the problem of organizational picketing as more than a problem of balancing the interests of the employer, the union and the individual; we see it as a problem of defining and structuring the role of competition in the labor market. We recognize that it has less to do with union solicitation for membership and free speech than with the size of appropriate units and the anti-trust laws. This clarification of the problem does not make the answer easy, nor does it urge adoption of the foreign solution. But it does help remind us that the solution might take a totally different form than regulating union patrols and their placards.

The third value of looking to the experience of other countries is that it may suggest solutions to some specific problems. We are now fumbling with adapting collective bargaining to public employment, a long-ignored problem now demanding answers because of the rapid growth of public employee unions and the increasing acceptance of collective bargaining within government.[91] Other countries have had years of experience from which we might profitably learn, and they have developed legal rules and structures which might be adapted to our needs.[92] Flat prohibitions against all strikes by public employees have been rejected by most other countries as impractical and unresponsive to the expanding scope of public employment. Instead, distinctions are drawn between those categories of employees which can strike and those which cannot.[93] The experience of others can assure us that legal recognition of the right of some public employees to strike will not undermine the authority of government. Indeed, it can create greater respect for law than revealing the government's irresolution and impotence in barring such strikes. Although other countries have developed no consensus as to just where the line should be drawn, their rules remind us of the obvious, that there are differences between strikes of street sweepers, secretaries, school teachers, and policemen. More important, the very lack of consensus as to the location of the line emphasizes that an arbitrary line is better than no line at all.

In creating structures for collective bargaining in public employment, we have unthinkingly sought to build upon the rule of exclusive representation,[94]

91. For a discussion of the rapid development and difficult problems in this area, see generally Industrial Relations Research Association, *Collective Bargaining in the Public Service* in Proceedings of the Annual Spring Meeting, 1966; Am. Bar Ass'n, Section of Labor Relations Law, 1963 Proceedings 126-62; *id.* 1964 Proceedings 355-84; *id.* 1965 Proceedings 321-43.

92. For discussion of status of public employees, their right to bargain collectively, and right to strike in various countries, see Sixth (Stockholm) Congress on Labor Law and Social Security, *General Report: Theme II B* (mimeo. 1966), and the supporting national reports (printed for use at the Congress). See also Labor Law Group Trust, *op. cit. supra* note 88, at 108-11. Kahn-Freund in Smith, Cases on Labor Laws 129 (2d ed. 1954).

93. European Coal and Steel Community, *op. cit. supra* note 84, at 38-40.

94. The President's Exec. Order No. 10988, 27 Fed. Reg. 551 (1962) provides for three levels of union recognition in the federal service. "Informal" recognition, which is simply an extension of the right of any individual or group to be heard by its government, can be given to any organization which has members in the federal service. "Formal" recognition is given to any organization which has a membership of at least 10% of the employees in the

even though the reasons for the rule in private employment have little application and the impact of the rule is to curtail the right of individuals or minority organizations to present their views to relevant governmental officials. By examining the experience of other countries, we are not only disabused of the assumption that viable collective bargaining, particularly in public employment, requires an exclusive representative; but we can also see the wide variety of structures available ordering multiple representation.

One of our large, though comfortably forgotten, problems is the protection of unorganized workers. Minimum wage and maximum hours laws provide a trap-riddled floor which does not even require a high enough wage for a full time worker to keep above the poverty level. Many workers have payless holidays, no paid vacations and no sick-leaves. Without a union they have no protector against abrupt and brutal dismissal, and no orderly procedure through which they can protest against arbitrary treatment. Though we proceed from the premise that these protections are to be achieved through collective bargaining, the harsh fact is that less than one-fourth of the employed work force is covered by collective agreements.[95] Though we might wish for constantly increased coverage, the tide is in fact running the other way, with a constantly decreasing portion of the work force governed by collective agreements.[96] Studying the labor law of other countries, particularly those of Western Europe, shames us with the realization that others have not thus abandoned the unorganized and have developed legal rules and structures to protect those outside the reach of collective agreements. In industries where the majority of employers are organized, the device of extension is available to make union standards applicable to the minority of employers who remain unorganized.[97] All employees are guaranteed by law paid holidays and paid vacations of three or four weeks a

unit, so long as no union has a majority. "Exclusive" recognition is given to the majority union and it can negotiate on behalf of all the employees in the unit. Am. Bar Ass'n, 1963 Proceedings, *supra* note 91, at 127-28. In practice, the "exclusive" recognition has had to be something less than exclusive because of long established competing unions, especially in the Post Office. *Id.* at 140.

Several states have adopted statutes providing for collective bargaining by public employees. All have embraced the exclusive representation rule. The same is true of the New York City Board of Education, and most other school boards and municipal bodies which have established collective bargaining machinery. Am. Bar Ass'n, 1963 Proceedings, *supra* note 91, at 143-44, 153; 1964 Proceedings, *supra* note 91, at 374, 382; 1965 Proceedings, *supra* note 91, at 332-36.

95. Statistics on the exact number of workers covered by collective agreements are not available. However, the exact number is generally estimated to be slightly larger than the number of union members. In 1964, there were 17,900,000 union members, which is 21.9% of the total labor force, and 28.9% of the workers in non-agricultural employment. U.S. Dep't of Labor, *Trends and Changes in Union Membership*, 89 Monthly Labor Rev. 510 (1966).

96. In 1956, the union membership was 28.8% of the total work force, and 33.4% of non-agricultural employment. *Ibid.* The decrease in eight years was thus approximately 4%. From 1958 to 1962 the coverage of factory workers by collective agreements declined from 67% to 62%, or a decline in the most heavily organized sector of the economy of 5%. Strasser, *Factory Workers Under Bargaining Agreements*, 88 Monthly Labor Rev. 164 (1965). See generally Barkin, The Decline of the Labor Movement and What Can Be Done About It (1961).

97. See notes 30 and 88 *supra*.

year.[98] Substantial notice of lay off or termination is required by law and unjust discharge is prohibited.[99] Statutorily created work councils elected by the employees at the shop level provide representation and a procedure through which employees can file grievances,[100] and labor courts are open to any individual employee who claims that any of his rights created by law, by collective agreement, or by individual employment contract have been violated by the employer.[101] With these examples before us we might be moved to at least reconsider whether we ought not supplement our truncated collective bargaining system with similar statutory standards and procedures. Foreign experience makes plain that collective bargaining need not be the only instrument in a democratic society for protecting employees and requiring recognition of individual dignity in industrial life. It further suggests how legal measures may be conjoined with free collective bargaining to bring some of the same values to those employees beyond the reach of collective agreements.

CONCLUSION

Work in comparative law is constantly in danger of becoming little more than the collecting of legal rules as souvenirs for scholarly display and intellectual one-upmanship. Elaborate and finely drawn comparisons may have little more meaning and less excuse than the travelling schoolgirl's collection of foreign dolls in native dress. This danger is greatest when the emphasis is on comparing legal rules rather than on comparing how the law solves common social problems. Beyond the rootless question of how the law of another country compares with ours is the practical question of what we can learn from foreign experience which will enable us to better understand and deal with our own problems.

The insignificant role which foreign labor law has played in shaping our law, our failure to look abroad, and our development of a unique legal and institutional framework for collective bargaining raises troublesome questions as to the usefulness of comparative studies in this area of the law. The factors which have led to our insularity and uniqueness do not foreclose us from learning from foreign experience. However, these factors do make plain the difficulty of making meaningful comparisons and the dangers in finding simple explanations of similarities and differences. We are thereby warned against superficial studies and hasty conclusions drawn from foreign experience. Direct borrowing, either wholesale or piecemeal, is rarely possible and the fact that a legal rule worked well elsewhere is no guarantee it will work well here. The value in

98. European Coal and Steel Community, *Evenments Sociaux dans la Communanté*, Note d'information, No. 2 (1963).

99. See generally I.L.O., Dismissal Procedures in Five Countries (1959); Kahn-Freund, *supra* note 88, at 428-42; European Coal and Steel Community, La stabilité de l'emploi dans le droit des pays members de la C.E.C.A. (1958).

100. Sturmthal, Workers Councils (1964); Kahn-Freund, *supra* note 88, at 402-17; Labor Law Group Trust, *op. cit. supra* note 88, at 72-84.

101. See Kahn-Freund, *supra* note 88, at 417-22.

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. Looking at foreign law may teach us nothing we could not otherwise know: we begin to question assumptions which detached reflection would have told us were creatures of habit and not of reason; we gain a new perspective of particular legal rules and the problems involved, but the perspective is new only because traditional teachings have blinded us to the obvious; and the different solutions may be nothing more than we, with a little ingenuity, should have long ago invented.

In short, studying foreign experience gives us more ideas than answers. It is a crutch needed only by those of lame imagination and is a reassurance needed only by those fearful to propose that which they have not seen tried. But it is just that kind of imagination and willingness to explore new paths which we seem to need in confronting old and persistent problems in labor law.