THE FIRST ANNUAL BENJAMIN AARON LECTURE ON THE ROLE OF PUBLIC POLICY IN THE EMPLOYMENT RELATIONSHIP

With a Commentary by
The Honorable Harry T. Edwards

Co-sponsored by the UCLA Institute of Industrial Relations and the Labor Law Section of the Los Angeles County Bar Association

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The UCLA Institute of Industrial Relations

The Institute of Industrial Relations was created in 1945 by an Act of the California legislature. Institutes were established on two of the University's campuses -- Berkeley and Los Angeles. The IIR's mission is to serve all persons and groups involved in industrial relations, whether they represent labor, management, government, or the public. The UCLA Institute seeks to meet the needs of Southern California -- one of the largest and still expanding industrial and commercial areas of the world.

Over the years, the Institute has achieved a nationwide, and in some areas a worldwide, reputation through its research, education, and community services programs. Research is carried out by faculty drawn from various University departments, and by Institute staff, on topics reflecting a broad range of interests and expertise; research findings are disseminated through publications, conferences, seminars, and special issue-oriented programs. Community services programs are carried out by specialized Centers within the Institute -- the Center for Labor Research and Education, the Center for Management Research and Education, and the Center for Human Resource Management. In 1986 the Human Resources Round Table (HAART) was established to join the expertise of IIR staff and associated faculty and senior human resource executives from major Southern California public and private organizations.

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The Benjamin Aaron Annual Lecture Series

The Benjamin Aaron Annual Lecture Series on the role of public policy in the employment relationship was initiated in October 1986 under the joint sponsorship of the UCLA Institute of Industrial Relations and the Labor Law Section of the Los Angeles County Bar. This series commemorates the career of Professor Emeritus Benjamin Aaron, long-time director of the Institute and eminent scholar on the faculty of the UCLA School of Law. Its purpose is to present the views of prominent scholars on public policy issues of the day that relate to employment concerns.

BENJAMIN AARON, Professor of Law, Emeritus, School of Law, UCLA. Affiliated with UCLA Institute of Industrial Relations since 1946 (Director, 1960-75) and with the UCLA School of Law since 1960 as Professor of Law. Chair, University of California State-Wide Academic Senate (1980-81). Chair, UCLA Academic Senate (1970-71). A.B., University of Michigan; LL.B., Harvard Law School. Service on National War Labor Board (1942-45) and National Wage Stabilization Board (1951-52). Extensive experience as arbitrator, mediator, and fact-finder in the private and public sectors (1942-present). Affiliations: American Arbitration Association (Distinguished Service Award, 1981); American Bar Association, Section of Labor Relations and Employment Law (Secretary, 1967); Industrial Relations Research Association (President, 1972); International Society for Labor Law and Social Legislation (President, 1985-88); National Academy of Arbitrators (President, 1962). Member: International Labor Organization (ILO) Committee of Experts; United Auto Workers Public Review Board. Author of numerous publications on domestic and comparative labor law and industrial relations.

HARRY T. EDWARDS, Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit (appointed 1980). Graduate of the School of Industrial and Labor Relations at Cornell University and of the University of Michigan Law School. Prior to his appointment to the D.C. Circuit was Professor of Law at the University of Michigan Law School (1970-75 and 1979-80) and also at Harvard Law School (1977-80). In addition, served as a member of the faculty of the Institute for Educational Management at Harvard University (1976-82). Presently lectures at Duke Law School and Georgetown Law School. Is a member of the Advisory Council of the School of Industrial and Labor Relations at Cornell University, of the Advisory Board of the Institute for Law and Economics at the University of Pennsylvania, and of the National Advisory Council of the Institute for Educational Policy Studies at Harvard University. Has served on the Board of Directors, American Arbitration Association; on the Board of Governors and as Vice President of the National Academy of Arbitrators. Is the author of numerous books and articles dealing with labor law, equal employment opportunity, labor arbitration, and higher education law, including *Collective Bargaining and Labor Arbitration*, 2nd edition (Michie/Bobbs-Merrill, 1979).

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THE ROLE OF PUBLIC POLICY IN THE EMPLOYMENT RELATIONSHIP

Benjamin Aaron

I. Introduction

Before getting into the substance of my presentation, I want to thank the Director and staff of the Institute of Industrial Relations for establishing this annual lectureship in my name and for inviting me to give the inaugural address. I have been intimately associated with the Institute since it was founded in 1946; it represents an important part of my life. Like the subject of industrial relations itself, the Institute has had a rather tumultuous history, full of ups and downs, and I regret to say that most of the time, including the present, its standing in the academic and professional community has been higher outside the University than within it. An indication of the Institute's outside reputation is the all-star cast that has participated yesterday and today in the celebration of its fortieth anniversary, an event in which we may all take considerable pride. Certainly, I am honored beyond measure to have this annual lectureship named for me and to give the first one, and I look forward to future years when abler and more distinguished scholars will succeed me.

Because this is the first lecture in the series, I shall discuss a few broad topics of timely concern that succeeding lecturers may wish to develop in greater depth. Given the considerable number of eligible topics, my choices are purely arbitrary, but I hope they will prove to be of some interest.

II. The Meaning of "Public Policy"

The title of my address, "The Role of Public Policy in the Employment Relationship," is also the theme of the entire series of annual lectures. It is

appropriate, therefore, to clarify what we mean by "public policy." Definitions of the term tend to stress identification of behavior that should be restrained. Thus, the second edition of Webster's International Dictionary defines public policy as "The policy recognized or established by the state in determining what acts are unlawful as being injurious to the public or contrary to the public good." For example, we say that it is contrary to public policy to discharge an employee solely because of his or her refusal to commit an illegal act. Public policy, however, also has another, equally important meaning; it is an expression of those values cherished by society, including not only existing laws and customs, but also those principles of justice and equity to which a society aspires even though it may not have fully attained them. For example, we subscribe to the principle, never yet realized, that every person willing and able to work should be provided with a job suitable to his or her talents.

In my remarks I intend to lay greater emphasis on the affirmative, as opposed to the negative, side of the meaning of public policy. Specifically, I shall stress the necessity of continuing to strive for those objectives in the employment relationship that are, or in my view should be recognized as desirable, even though they have not yet been achieved.

III. The Changing Role of Collective Bargaining

In the 1930s the federal government made collective bargaining the keystone of our national labor policy. The policy was embodied in section 7 of the National Labor Relations Act (Wagner Act) of 1935, which guaranteed to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." As the Supreme Court was to observe, many years later, the rights protected by section 7 "are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'"[1] The emphasis was on the rights of the group, as opposed to those of the individual, and on collective bargaining as a process; Congress was less concerned about the substantive outcome of such bargaining.

During the period of the 1930s through the 1960s, this form of bargaining worked reasonably well, largely because the generally favorable economic environment,

characterized by an expanding economy, permitted both unions and employers to achieve their main objectives. Unions wanted to standardize wages within industries or regions - to take them out of competition - and to link wage increases to rises in the cost of living and to long-term productivity gains. Employers wanted to insure predictability of labor costs, to retain the unilateral right to make strategic business decisions, and to initiate various actions at the workplace. To maintain industrial stability and labor peace, they agreed to establish grievance and arbitration procedures in return for no-strike pledges by the unions. The latter could use those procedures to challenge alleged breaches of collective bargaining agreements by employers. And if unions had no voice in employers' strategic business decisions, they could at least bargain over the effects of such decisions on wages, hours, and working conditions.[2]

Although the majority of the labor force in the private and public sectors has always been nonunion, during the period of the 1930s to the 1960s collective bargaining dominated in most of the major industries of the private sector. The latter decade, however, witnessed the rise of what Professor Thomas Kochan has called "the nonunion alternative model."[3] This model, he tells us, was distinguished by four principal characteristics: first, payment of wages that were competitive in local labor markets, but lower than standard union rates in the industry; second, greater flexibility in the organization of work than was allowed under most collective bargaining agreements; third, greater emphasis upon individual and small-group participation in decision making; and fourth, a stronger role for human resource management professionals at strategic levels of decision making to implement the new system and to avoid unionization.

The rise of this nonunion model was made easier by a number of different developments. As early as 1947, Congress had passed the Labor Management Relations Act (Taft-Hartley Act), which, among other things, amended section 7 of the NLRA to provide that individual workers had the right to refrain from engaging in any collective bargaining activities. This changed the public policy of the United States from encouragement of collective bargaining to neutrality, and introduced a new concern for the rights of individuals in their relations with employers and with collectivities of employees.

An increasingly less favorable economic environment in the 1970s and 1980s provided a more hospitable climate for growth of the nonunion model, which gradually has become an openly anti-union model. In the 1970s, and especially during and since the severe recession of 1981-82, we have seen an increase in so-called "concession

bargaining," characterized by employers' insistence that unions give back many of the gains won over past years of collective bargaining. Competition from abroad has seriously impaired the economic survival of major firms in the automobile, steel, and many other industries. There has also been substantial decentralization of some bargaining structures (for example, in coal, steel, and trucking), and extensive deregulation of such industries as airlines and trucking. Finally, many crucial decisions by the National Labor Relations Board and the courts have gone against the unions; indeed, the Reagan administration is perceived by most unions as hostile and vindictive.

In this new economic and political environment, employers have adopted different strategies. Some have attempted to avoid dealing with unions altogether, either by seeking to prevent organization of their employees or by trying to abandon existing collective bargaining relationships. Others, a minority, have continued to deal with unions but have sought increasingly to introduce such innovations as greater worker participation in management, employee stock-ownership plans, and various other schemes to improve quality, increase efficiency, and lower costs. Many nonunion firms, while eschewing a brass-knuckles treatment of unions, have resorted to these latter devices primarily to forestall organization of their employees by unions.

IV. The State of the Unions

Before raising some of the questions about the future of collective bargaining in this country prompted by these recent events, I want to say a few words about American unions. Currently, their situation is perilous and their prospects are bleak. A steady decline in union membership in the private sector began in 1977. The most recent available figures from the Bureau of Labor Statistics[4] show that union membership had declined from a high of about 35 percent in the 1950s to 18.8 percent in 1984 and 18 percent in 1985, despite a growth in the labor force. Thus, in 1980 union members made up 23 percent of total civilian employment, whereas in 1984 they accounted for 17.3 million out of a total of 92.2 million employed, and in 1985 they amounted to only 17 million of a total of 94.5 million employed.

Despite the gradual shift in employment from the goods-producing sector to the services-producing sector, union membership in the latter declined from 10.6 percent in 1984 to 9.8 percent in 1985. In only one of the occupations surveyed by BLS - finance, insurance, and real estate - did the percentage of union membership increase from 1984 to 1985, and that was only from an anemic 2.7 to 2.9 percent. Among

government workers at the federal, state, and local levels, however, the proportion of unionized workers held steady at 35.8 percent between 1984 and 1985.

Although women are joining the labor force in increasing numbers, only 13.2 percent are union members, as compared with men, 22.1 percent of whom are union members. Another interesting statistic is that the proportion of whites reporting union membership was 17.3 percent, compared with 24.3 percent for blacks and 18.9 percent for Hispanics.

Unions have also been plagued with the problem of corruption. Relatively few suffer from it in a major way, but because of the notoriety of the massive corruption in the Teamsters Union, whose international presidents and various regional and local officers have repeatedly been indicted or convicted of serious crimes, and in a small number of other unions, the entire labor movement has been tarred with the same brush.

V. Questions for the Future

With this admittedly incomplete and superficial review of the present state of collective bargaining and of the unions in mind, we must ask ourselves whether the fundamental assumptions of the original NLRA concerning the nature of the employment relation are still valid; how much, if any, of the New Deal model of collective bargaining deserves to be preserved; and, in any case how much, if any, of that model can survive in today's economic and political environment? The common, if not the prevailing, view among academic experts was expressed recently by Professor John T. Dunlop, who has long been concerned with the growing intrusion of law into the conduct of industrial relations. "In 1935," Dunlop said, "we took the road dictated by the opportunity of the moment, perhaps inevitably so, but the road was the wrong one for the long term. . . ."[5] The legal framework of the 1990s, he argues, "must be built on the intent and dedication of labor and management concerned with the economic performance of this country."[6] Such a foundation, he concludes, must assume the necessity of a free labor movement and a free enterprise economy, performing "their legitimate adversarial roles."[7]

In a somewhat similar vein, Kochan questions the feasibility of returning to the principles and practices that lent stability to the New Deal system of collective bargaining. He argues that the "increased exposure to global and domestic competition, the changing nature of technology. . . , the increased priority firms must give to

flexibility in the use of human resources and to cooperation at the workplace . . . will all continue to induce changes in labor-management relations."[8] He looks for heightened efforts on the part of nonunion or lightly organized firms to avoid dealing with unions, but believes that highly unionized firms "will need to accept a *broader* union role at the strategic and the workplace levels in order to gain union rank and file commitment to the human resource management organizational principles needed to be competitive in today's world."[9]

Numerous, less well-informed observers, however, have adopted the simplistic view that the era of "confrontational" relationships between labor and management is dead, and have hailed the new age of cooperation between employers and unions. The expression of such vague sentiments is a recurring phenomenon of American life, but "cooperation" obviously means different things to different people, ranging from a genuine sharing of decision making at all levels to the gradual disappearance of unions and some form of spontaneous collaboration between employers and their employees, with the former making all the important decisions. Although it seems clear that more genuine cooperation and sharing of decision making on key issues between management and labor is necessary if our society and economy are to prosper, it is not yet evident that such cooperation is about to be achieved.

My own perception of the current situation is that many of those who would abandon "confrontationalism" for what they call cooperation are all too willing to throw out unionism along with traditional collective bargaining. In my view, we cannot have an effective system of industrial relations without unions, functioning as partners in the making of decisions affecting wages, hours, and working conditions, including employment security. I believe, with the late professor Sir Otto Kahn-Freund, that there is an inherent inequality of bargaining power between employers and their individual employees; that the major object of labor law is to be a countervailing force to counteract that inequality of bargaining power; and that the countervailing power of labor unions to that of management is much more effective than the law has ever been or can ever be. I also agree with him that it is "sheer utopia to postulate a common interest in the substance of labour relations," and that the "conflict between capital and labour is inherent in an industrial society and therefore in the labour relationship."[10]

This is a subject, however, that obviously needs to be explored in much greater depth in subsequent lectures in this series.

Given the present embattled state of the unions, it is relevant to inquire whether they can make a comeback, and if so, whether their traditional role will change. Will unions, for example, abandon some of their traditional organizing tactics and develop new ones? What sort of role will they play in national and local politics and in corporate affairs?

Not surprisingly, unions have tended to put the blame for their present plight on others. They have concentrated their attacks against the Reagan administration, the NLRB, and the courts, accusing all of them of being anti-union in their policies and decisions. Last year, however, the AFL-CIO produced a committee report, *The Changing Situation of Workers and Their Unions*,[11] which for the first time turned the federation's gaze at least partially inward. This report, based upon an independent survey, includes the candid admission that "non-union workers do not perceive unions as pursuing an institutional agenda drawn from the needs and desires of their members"; that 65 percent of such workers agree with the statement that "unions force members to go along with decisions they don't like"; that 63 percent believe that union leaders, as distinguished from union members, decide whether to strike; that 54 percent believe that "unions increase the risk that companies will go out of business"; that 57 percent believe that "unions stifle individual initiative"; and that 52 percent believe that unions fight change. Finally, the committee reported that among the population as a whole, 50 percent believe that most union leaders no longer represent the workers in their unions.[12]

On the basis of these and other findings, the committee made a series of recommendations, including the following:

> Experimental efforts to organize workers around particular issues, rather than around the principle of collective bargaining, are worth exploring; an organizer might be more effective in achieving the ultimate end of majority support for collective bargaining if the organization has first demonstrated the potential of concerted activity by achieving results on a particular issue of concern to the workers in the unit.[13]

Some efforts have already been made in this direction and more are sure to follow. It may well be that the labor movement has finally understood that the confession of ignorance or weakness is the beginning of wisdom.

I do not believe the union movement in this country is going to wither and blow away; indeed, there are already some signs of a beginning of a modest resurgence. It is apparent, however, that its survival will depend, in part, on new types of organizers and organizing techniques, a fact of which it is, fortunately, now aware. It also seems clear that the great majority of unions, which are not corrupt, are faced with the

difficult alternatives of dissociating themselves from the Teamsters or of joining government in applying pressure on that organization to clean its own house. At present, however, there is little evidence that either course is contemplated.

It seems to me, moreover, that the role of unions of the future will be substantially altered from what it is today. Major improvements in the conditions of employment are much more likely to originate, as they have increasingly in recent years, from federal and state legislation than from collective bargaining with private employers. The sweeping changes brought about by fair employment practices legislation, occupational health and safety laws, and statutes protecting employee retirement income security, for example, could not have been accomplished solely through collective bargaining. I look for that trend to continue. That means that American unions, like their Western European counterparts, will probably shift their principal efforts to achieving major objectives, especially enhanced employment security, through legislation, instead of through collective bargaining. Thus, the political role of unions will be emphasized more than formerly. Whether unions will be forced to continue to tie their political fortunes to those of the Democratic Party is not clear. The old Gompers philosophy of electing your friends and defeating your enemies still has substantial appeal, and the labor movement has friends and enemies in both political parties, or at least it finds some support and arouses some opposition on specific issues in both parties.

Widespread union participation in corporate affairs remains problematical. The idea of serving on management boards of directors, at least until recently, did not appeal to union leaders. Many of them felt ill-equipped for such a role; but of greater importance was their reluctance to participate in making decisions for which they might later be blamed by their members. It was easier to let management act first, and then to react by filing grievances or demanding changes in the collective bargaining agreement when the old one was about to expire. As a last resort, there was always the strike weapon.

The current climate of collective bargaining, however, to which I have already adverted, has caused some union leaders to rethink their positions on this matter. In an era of "givebacks" and virtually no major improvements in wages, hours, and working conditions, membership of one or more union representatives on corporate boards of directors has sometimes been one of the few gains a union could claim in a particular contract negotiation. But how real an advantage does that signify? Douglas Fraser, former president of the United Auto Workers, who was made a member of the

Chrysler board of directors, claimed that he was able to make a significant contribution to decisions affecting the welfare of Chrysler workers, and he probably did; but I think his case was the exception rather than the rule. Not only are some union leaders still wary of serving on corporate boards, but some management representatives also have their doubts about the utility of such an arrangement. In a recent interview with the *Wall Street Journal*, Frank Borman, former chairman and chief executive of Eastern Airlines, was asked about Eastern's experience with union representatives on its board. Here is a brief excerpt from that interview. Among other things, he said that "[t]he idea that the unions are somehow equipped to participate in major investment decisions is crazy. That's not their forte by either training, temperament or because of their vested interest," and that "[m]iddle management . . . were perhaps the least enthusiastic about the whole deal - because they had to deal with unions on a working level on a day-to-day basis," and also because they did not want to give up power.[14] That is, of course just one executive's point of view, but I suspect many others feel the same way. At any rate, as I indicated earlier, the era of the lion and the lamb lying down together is not yet at hand, unless, as Mark Twain suggested, the lamb is inside.

VI. Specific Problems of Immediate Urgency

In the limited time that remains I want merely to outline two problems of immediate urgency to which I think we must find some sort of solution on a federal or a state-by-state basis. The first concerns plant closures and removals; the second, wrongful employment terminations of individuals.

A. Plant Closures and Removals

According to the findings of the government's General Accounting Office, approximately 7,800 employers either shut down or experienced significant layoffs, disclocating slightly more than one million workers, during 1983 and 1984. Some 18 percent of these employers gave their workers at least three months' notice of the layoffs or shutdowns, but 42 percent gave their employees less than two weeks' notice, and 13 percent gave no notice at all.[15]

Only a few states have enacted laws dealing with plant closings and, so far, all efforts to secure federal legislation relating to the problem have failed. The most recent proposal to be rejected was H.R. 1616, the Labor-Management Notification and

Consultation Act of 1985; it would have required employers to give ninety days' notice to their employees and to the Federal Mediation and Conciliation Service (FMCS) of a planned shutdown or permanent layoff of fifty or more employees and to consult with employees on the issue. The FMCS would have been authorized to extend or reduce the ninety-day period and to determine whether the employer had complied with the consultation requirements. Predictably, the bill was vigorously opposed by business and industry. The director of labor law for the U.S. Chamber of Commerce testified that the bill "puts government where government should not be - in the board rooms of America usurping management's prerogatives to make economic decisions regarding the well-being of their companies,"[16] and a former general counsel of the NLRB, testifying for the National Association of Manufacturers, declared: "The bill's short sighted provisions put a premium on temporary job security at the expense of long-term economic viability, the latter being the only sure way to promote true economic stability and job security for workers."[17]

The bill was first modified so as to delete the requirement that the employer consult with the affected employees or their representative and to disclose pertinent information concerning the layoff or plant closure, and was then defeated by the narrow margin of 208 votes to 203 in the House of Representatives. Even had it passed in its modified and greatly weakened version, however, it would have provided much less statutory protection than is available in virtually every country in Western Europe.[18]

The position of employers in these types of situations was immensely strengthened by a 1981 decision of the United States Supreme Court, in *First National Maintenance Corp. v. NLRB*,[19] in which the employer terminated a contract with a customer and discharged the employees who had been working under that contract. A majority of the Court, speaking through Justice Blackmun, held that although the employer had a duty to bargain in good faith with the union representing its employees over the effects of the decision, it had no duty to bargain over the decision itself. Starting with the premise that the employer has a "need for unencumbered decision-making,"[20] he had no trouble reaching the conclusion that "bargaining over management decisions that have a substantial impact on . . . continued . . . employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."[21] Conceding the union's "legitimate concern over job security," he declared that its practical purpose in participating in a decision whether to close a particular facility would be

"largely uniform: it will seek to delay or halt the closing."[22] And although the union would doubtless "be impelled . . . to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs," he thought it unlikely that requiring bargaining over the decision itself would "augment the flow of information and suggestions."[23]

Justice Blackmun went on to note that for management to meet business opportunities and exigencies there might be a great need for speed, flexibility and secrecy. Further, he observed that an employer might not have an alternative to closing, so that even good-faith bargaining could create additional loss for the employer. Finally, he concluded:

> [t]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of . . . "terms and conditions". . . . over which Congress has mandated bargaining.[24]

Thus, aided by the Supreme Court, American industry continues to oppose legislation that would place any limitation on the freedom of individual employers to shut down or move their plants for economic reasons, or to give or withhold advance notice of their decisions, as they see fit. Many businesses have, of course, acted in good faith to ease the impact of such decisions on their employees, once the decisions have been made, but it is questionable how useful those efforts, including severance or relocation pay, aid in finding a new job, and minimal job retraining, really are. Individually or collectively, they are inadequate to deal with the tragic byproducts of job losses and plant removals: income loss and underemployment, loss of family wealth, deterioration of physical and mental health, as well as the creation of ghost towns, community anomie, and related private and public ills.[25]

The problems created by plant shutdowns and removals cannot be solved or effectively ameliorated by the discretionary unilateral actions of employers. In the minority of instances in which unions are involved, at the time bargaining takes place, the union's position is one of great weakness relative to the employer, who has, figuratively, packed his bags and is now halfway out the door. Moreover, in the usual case, the union is able to obtain for the employees it represents little more than a bandaid to cover a gaping wound, and the community that is being abandoned gets no relief. Obviously, the NLRA is a useless instrument with which to deal with this problem. What is needed is a basic change in the attitude of business generally toward

government regulation of both the procedures to be followed in the case of plant closings or removals and the minimum employee protective provisions to be provided.

Faced with the immediate consequences of various kinds of material disasters, private citizens in this country, as well as the federal and state governments, are capable of prodigies of organization and cooperation to provide relief for the victims. Unhappily, no comparable efforts on a similar scale are forthcoming to relieve individuals and communities whose lives are seriously disrupted or destroyed by sudden plant closings or removals. Although in most instances such events can be predicted well ahead of time, the idea of advance planning by employers, employees, unions, and the government to forestall or ameliorate their effects remains an unpopular one. The root of this negative response appears to be the conviction that any social measures that impede the mobility of capital are necessarily bad. We need to study this problem further and to review and evaluate the methods devised to deal with it in other industrialized countries, as well as in our own.

B. Wrongful Employment Terminations of Individuals

In broad terms, the common-law doctrine of employment at will provides that all individual contracts of employment of nonspecific duration are deemed to be "at will," i.e., they may be terminated without notice by either party at any time. Practically speaking, this means that an employer may dismiss an at-will employee at any time for any reason or no reason.

Professor Jack Stieber estimates that about two million of the 60 million U.S. at-will employees are discharged each year without the right to a hearing before an outside impartial tribunal.[26] In recent years, the courts of about thirty states have modified the employment-at-will doctrine, the chief exceptions being discharges for refusal to violate a law or public policy,[27] or in violation of an implied employment contract,[28] or an implied covenant of good faith and fair dealing.[29]

In 1982, the International Labor Conference of the ILO adopted Convention No. 158, providing that employment of a worker shall not be terminated except for a valid reason. The United States government and employers' representatives joined those of our staunch allies - Iraq, Saudi Arabia, Lebanon, Brazil, and Chile - as the only delegates voting against the convention. Thus, the United States remains the only major industrial country in the world that offers no statutory protection to individual employees who are unjustly or arbitrarily discharged.

Paradoxically, in some states, notably California, which have rejected the doctrine of employment at will in the exceptional circumstances previously noted, the monetary

damages awarded to wrongfully discharged employees have in many instances been far in excess of reasonable indemnity for losses suffered. Moreover, the great majority of successful plaintiffs have been management employees; most plaintiffs' attorneys are not interested in the cases of rank-and-file workers, for whom possible monetary damages are likely to be much less.

Although a variety of bills have been proposed in a number of states, none has yet enacted a statute offering protection against discharge without just cause. I believe that legislation of this kind at the state level is both desirable and inevitable. The problem is to devise a statute that will be fair to all concerned. This is another topic that should be explored in greater detail in subsequent lectures in this series. Meanwhile, time permits me only to raise a few illustrative problems.

Consider, first, the question of coverage. Who should qualify as an "employee"? For example, should top executives be protected by the statute? Should there be an exemption for small employers? Should employees represented by unions be excluded?

Then there is the always troublesome question of the relation between the proposed statute and other state and federal laws. For example, should every dismissal covered by state workers' compensation laws, the NLRA, Title VII of the Civil Rights Act of 1964, or federal or state occupational health and safety acts be excluded from coverage by the proposed state statute against unjust discharge?

Equally difficult problems arise in respect of enforcement. Should enforcement powers be confined to the courts, an administrative agency, private parties, such as arbitrators, or some combination of them?

Finally, there is the matter of remedies. Should they be restricted to reinstatement with or without back pay? Should the decision maker have the power to deny reinstatement to a successful plaintiff? What kinds of damages, if any, should be allowed? Specifically, should a successful plaintiff be eligible to receive punitive damages or compensatory damages for "pain and suffering"?

There are, of course, many other problems I have not mentioned, but the ones to which I have adverted should be sufficient to illustrate the magnitude and complexity of the legislative drafting task.

VII. Conclusion

The solution of these and other employment relations problems is of the utmost importance to our society. In that effort, law can play a significant, but not the most

vital, role. What is needed now, perhaps more than ever before, is a willingness by all parties to the employment relation, including government, to seek to reach some broad consensus on the goals of our society for the 1990s and beyond. Such a consensus will not be achieved spontaneously throughout the country. It is more likely to occur, if at all, incrementally, industry by industry. Competition and conflict will certainly remain, but with consensus as to objectives, it is possible, I believe, to sublimate and channel conflict into productive and cooperative effort. That, at any rate, should be the goal of our public policy.

Notes

1. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62 (1975).

2. *See* Kochan, The Future of Collective Bargaining and its Implications for Labor Arbitration, a paper presented to the 1986 Annual Meeting of the National Academy of Arbitrators, Philadelphia, 5 June 1986 (mimeo.).

3. *Id.* 7.

4. *See* BNA DAILY LAB. REP. No. 29: B-1 (12 Feb. 1986).

5. *The Legal Framework of Industrial Relations in the United States*, reprinted in BNA DAILY LAB. REP. No. 194: E-1, E-5 (7 Oct. 1986).

6. *Ibid.*

7. Labor Management Group, *Statement of Purpose*, 4 March 1981, quoted *ibid.*

8. *Supra* note 2, at 15.

9. *Id.* 15-16.

10. LABOUR AND THE LAW 16, 17 (2d ed. 1977).

11. A REPORT BY THE AFL-CIO COMMITTEE ON THE EVOLUTION OF WORK, February 1985.

12. *Id.* 13.

13. *Id.* 28.

14. *Frank Borman on Deregulation, Unions, Managing - and Borman*, WALL STREET JOURNAL, Sec. 2, p. 33, 11 June 1986.

15. *See* BNA DAILY LAB. REP. No. 84: A-12 (1 May 1985).

16. *See* BNA DAILY LAB. REP. No. 95: A-10 (16 May 1985).

17. *Ibid.*

18. *See* Aaron, *Plant Closings: American and Comparative Perspectives*, 59 CHI-KENT L. REV., 941, 952-60 (1984).

19. 452 U.S. 666 (1981).

20. *Id.* at 679.

21. *Ibid.*

22. *Id.* at 681.

23. *Ibid.*

24. *Id.* at 686.

25. *See* B. BLUESTONE & B. HARRISON, CAPITAL AND COMMUNITIES: THE CAUSES AND CONSEQUENCES OF PRIVATE DISINVESTMENT 62-83 (1980).

26. *Recent Developments in Employment-At-Will*, 35 LABOR L.J. 557, 538 (1985).

27. *E.g.*, Tameny v. ARCO, 27 Cal. 3d 167, 610 P. 2d 1330 (1980).

28. Pugh v. See's Candies, 116 Cal. App. 3d 317 (1981).

29. *E.g.*, Cleary v. American Airlines, 111 Cal. App. 3d 443 (1980).

AGONIZING OVER THE SIMPLE REALITIES OF LABOR RELATIONS IN THE UNITED STATES

Harry T. Edwards

Preface

Not too long ago, I heard a young labor law professor say, with quite firm conviction, that unions were irrelevant and that collective bargaining could no longer be considered to be a legitimate process of dispute resolution. I was mostly amused to hear what purported to be "words of wisdom" from someone fresh out of law school, with no practical experience under his belt. Although I found it somewhat distressing that a person holding such an unyielding viewpoint could have been hired to teach labor law, I did not think much of the incident - at least, not until I read the advance copy of Professor Aaron's paper for this conference.

Professor Aaron has challenged us to respond to a perceived crisis in the union movement in the United States and to consider the legitimacy of the current renewal of interest in individual employee rights. His concerns in these areas are shared by a great many scholars and practitioners in the fields of labor law and collective bargaining. For example, at a recent workshop on labor and employment law, sponsored by the Association of American Law Schools, I heard a number of professors argue that we should greatly deemphasize law school teaching focused on the National Labor Relations Act because the percentage of unionized labor in the private sector has sunk to less than 20 percent. I also heard a number of these same professors contend that collective bargaining has become substantially less relevant in our society because federal and state governments have increasingly begun to regulate the substantive terms of employer-employee relations.

In reflecting on Professor Aaron's paper, it occurred to me that the remarks that I had heard from the arrogant young professor - rejecting unions as irrelevant and

collective bargaining as outmoded - may have been statements that accurately reflect a growing sentiment within the profession. Indeed, this is one of the principal points being made by Professor Aaron in his paper.

In identifying and analyzing the current trend of thinking regarding collective bargaining in the United States, Professor Aaron has been faithful to his academic mission in presenting a scholarly, and mostly dispassionate, critique of current developments. Professor Aaron's paper is wonderfully insightful in steering a straight course through the competing theories over the legitimacy and relevancy of unions and collective bargaining. My tack will be somewhat different. I am inclined to believe that certain aspects of the current trend of thinking to which Professor Aaron has alluded are based on false assumptions; that these sentiments are oblivious to certain important realities; and that they are short-sighted insofar as they purport to project the future of collective bargaining in the United States. Therefore, I will follow a less straight course than Professor Aaron in presenting a viewpoint that is somewhat at odds with the current trend of thinking that he has identified.

I. Introduction

Professor Aaron has told us that, recently, "many crucial decisions by the NLRB and the courts have gone against the unions [and that] the Reagan administration is perceived by most unions as hostile and vindictive." He has also pointed out that "an increasingly less favorable economic environment in the 1970s and 1980s" has eroded union membership and diminished unions' status at the bargaining table. Given these legal, political and economic considerations - which no one seriously doubts - it has become fashionable in recent years for scholars and practitioners to explore alternatives to the traditional collective bargaining model. Some suggest that the next decade will mark the advent of a "nonunion model," under which unions no longer play a substantial role in industrial relations. Others suggest that unions will continue to survive, but that their role will be significantly altered; that is, rather than seeking improvements in the workplace through the traditional means of collective bargaining, unions will be required to focus on the political arena and function more as lobbying groups. This I will call the "legislative model."

In reading over Professor Aaron's paper, I could not help but feel that he is torn over whether current political and economic developments do indeed signal the demise of the traditional "collective bargaining model." On the one hand, he sees the

prospects for unions as "bleak," and the legislative process as their greatest hope for achieving significant improvements in working conditions. On the other hand, he recognizes that we cannot have an effective system of industrial relations without unions, that there is an inherent inequality of bargaining power between employers and their individual employees, and that the best way for individual employees to gain significant improvements in their conditions of employment is through collective action.

Professor Aaron's ambivalence is understandable. While I share his sentiments on the need for unions and collective bargaining, there is no denying that the present impediments to union growth and meaningful collective bargaining are great: a somewhat stagnant economy, particularly in the traditionally unionized "smokestack" industries; an administration openly hostile to some of the principal goals of organized labor; an NLRB whose opinions provide no solace for organized labor; and a persistent unwillingness on the part of Congress to ease the plight of unions through legislative enactments. In my view, however, we must be careful not to let this present confluence of trends deceive us into embracing an unworkable alternative model of labor relations. I say this because it is my belief that the economic and social systems of this country are incapable of supporting either the nonunion model or the legislative model of employment relations to the exclusion of meaningful collective bargaining.

II. The Nonunion Model

There are many advocates of the "nonunion model." For example, in a book entitled *What's Wrong With Our Labor Unions!*, the author suggests that the labor movement in this country has reached its "moment of final challenge."[1] He goes on to argue that the American economy is faced with "foreign competition far more acute than any it ever has had to face before," and that organized labor and its leadership must finally come "face to face with their responsibilities to the rest of society and into line with the long-term interests of the nation's economy."[2] Another commentator, in a report entitled *The Decline of the Labor Movement,* is equally pessimistic about the prospects for organized labor, citing the contraction in union membership, the inability of unions to adopt fresh organizing techniques, the "sullied" image of unions, the combative tactics of employers, and the hostility of the National Labor Relations Board.[3] Similar sentiments have been expressed by a noted labor relations counsel from a major U.S. corporation, speaking at a seminar entitled "Crisis in Bargaining," during which he observed that "we are currently witnessing a

phenomenon in labor relations in this country . . . which . . . in the long run, [may] spell the end of collective bargaining."[4] Finally, *Harper's* magazine has published an article proclaiming, in its title, that the "Last Days of the Labor Movement" are upon us.[5]

All of these gloomy forecasts appear to mirror the current trend of thinking that has been identified by Professor Aaron in his paper. However, what is noteworthy about the publications that I have just cited is that none of them reflect current assessments of collective bargaining in the United States. The first book from which I quoted - *What's Wrong With Our Labor Unions!* - was published over twenty years ago. The report to which I alluded, entitled *The Decline of the Labor Movement*, was published over twenty-five years ago. The seminar on the "Crisis in Bargaining" was held in 1968. And the *Harper's* magazine article, entitled *The Last Days of the Labor Movement*, was published in 1978. There are many other gloomy forecasts that I could cite, especially from commentators on the labor movement during the pre-Depression period of the 1920s. The simple point is that the commentaries of the 1980s are not the first - nor will they be the last - in our history claiming the impending demise of the labor movement. Periodically, an economic or political crisis emerges that appears to sound the death knell for collective bargaining in this country. However, history has shown that predictions of "the last days of the labor movement" tend to be grossly exaggerated, either pursuant to the wishful thinking of those who oppose the labor movement or the short-sightedness of those who have forgotten the resolve of human nature.

As I have already suggested, the decline in union membership in the 1980s is easily explained. On the economic front, conditions have been highly unfavorable, particularly in the heavily unionized industries. On the political front, unions face an administration that is unsympathetic to union goals. And on the legal front, the NLRB has issued a long line of decisions that appear to many commentators to be hostile to union interests. With all these developments converging, it is hardly surprising that unions have been suffering through some trying times.

It is one thing, however, to say that unions face a period of adjustment, or even retrenchment. It is quite another to profess that unions are a thing of the past. To argue the latter, it seems to me, one must be prepared to assert that there has been a fundamental change in the nature of the employer-employee relationship, and that individual workers now believe they can go it alone against the admittedly superior

power of their employers. As far as I can tell, no proponent of the nonunion model has suggested that such changes have occurred.

As Professor Aaron rightly observes, there remains an inherent inequality of bargaining power between employers and their individual employees. Therefore, unless employers as a group suddenly turn benevolent to an extent not heretofore witnessed in the United States, it follows that individual workers will be unable to fulfill many of their perceived employment needs. According to numerous studies of worker behavior, it is this inability to satisfy basic human needs - both economic and psychological - that induces workers to join unions.[6]

There is, therefore, a very *human* element to the union-nonunion equation; an element often overlooked when we focus on short term shifts in the economic and political winds. Simply stated, there is an inherent conflict between employers and employees, with each group striving to obtain its share of limited resources. In the course of that struggle, at least *some* workers inevitably will be driven to unions, through which they can combine their individual power and bargain with their employer on somewhat equal terms. Interestingly, when this country was suffering through unprecedented stagflation in the 1970s, no one supposed that capitalism was dead. I would contend that unionism is no less fundamental to our system than capitalism, and that unions will likewise weather the current storm.

My conviction that unionism will survive its latest "crisis" is buoyed by the level of union membership in the public sector. As Professor Aaron observes, recent figures demonstrate that the proportion of unionized government workers has remained steady at 35 percent. In view of the proportion of government workers who hold traditionally difficult-to-organize white-collar and technical jobs, the hostility of the present administration towards union activity, and the greatly restricted system of collective bargaining in the federal sector, it is quite extraordinary that union organization in the public sector has remained so high. If public sector unionism can survive in these unfavorable conditions, the prognosis for private sector unions cannot be considered all bad.

The percentage of union membership in the private sector is likely to remain relatively low. But I doubt that the membership figure will ever get so low that unions are no longer a concern to unorganized employers, or that collective bargaining agreements no longer serve to guide the development of substantive terms of employment. By saying all this, I do not mean to imply that the traditional collective bargaining model is not in need of reform, or that unions do not need to improve their

image and their organizing techniques. These are quite separate issues. My central point is that the nonunion model is not one likely to swallow collective bargaining in this country. Unions are an integral part of the industrial relations system in almost every industrialized nation in the world. I would submit that this cannot be viewed as mere coincidence.

III. The Legislative Model

Because the present environment in the United States is less than ideally conducive to meaningful collective bargaining, many have suggested that improvements in conditions of employment will have to come through federal and state legislation. Whether or not it is a good idea to seek substantive legislation to improve the working conditions of American employees, history has proven that proponents of this approach are very hard pressed to achieve their goals. And there is nothing to suggest that the course of history will be altered any time soon.

First and foremost, legislators in this country traditionally have been reluctant to afford workers substantive rights through statutory enactment. Indeed, as Derek Bok explains in his seminal article, *Reflections on the Distinctive Character of American Labor Laws*,[7] this traditional aversion to substantive employment legislation is one of the primary features that distinguishes our system of labor relations from those of other industrialized countries.

Along these lines, I find it hard to take seriously the argument advanced by some commentators that unions are irrelevant because individual workers now receive adequate protection from expanding social legislation. In my view, it is fallacious to suggest that collective bargaining is being displaced by federal and state regulations of the substantive terms of employment. In his paper, Professor Aaron points to the laws covering employment discrimination, OSHA and ERISA as examples of the legislative model. What is noteworthy, however, is that these are the only laws that are ever cited by proponents of the legislative model - there are no other examples! I would contend that, as has been true throughout our history, there is no pervasive scheme of social legislation protecting workers in the United States. I would agree that the laws on discrimination, safety and pensions have, to some degree, "regulated" the employment relationship. But these laws have in no manner reduced the substantive terms of collective agreements. Indeed, there are some who would contend that ERISA does nothing more than ensure the enforcement of certain very limited pension rights,[8]

and that OHSA is less significant than many union contracts in its provisions for job safety.

I recognize that the equal employment laws have had an enormous impact on all sectors of employment. However, I do not view the laws against discrimination as displacing collective bargaining. Title VII and other such laws merely set forth certain standards that provide minimum protections in the context of any employment relationship. Beyond the minimum, however, there is extraordinary room for the development of substantive terms of employment.

Professor Aaron's own discussion of plant closing legislation should be sufficient to expose the deficiencies of the so-called legislative model. When plant closing legislation was first introduced in the House, it contained *very modest* provisions for notice and consultation. This modest bill was later watered down significantly by deletion of the consultation provision. *Even as modified*, however, the bill could not pass a House of Representatives that was controlled by the Democrats. This, I submit, tells us a great deal about the present likelihood of workers achieving significant substantive rights through legislation.

The fate of plant closing legislation should also serve to warn unions that any attempted reliance on their supposed political muscle is misguided. Both labor and business pushed hard to advance their respective positions on the proposed legislation, and business emerged the clear victor. As Freeman and Medoff explain in their book, *What Do Unions Do?*, this result should not surprise us. Much the same result pertained in 1977 when organized labor placed all its "muscle" behind the mild Labor Law Reform Act, only to fail once again in the face of stiff management opposition.[9]

This is not to say that there should be no pursuit of legislative reform. The important point is that, unless we change to a parliamentary system of government, the legislative model is not the answer to the current woes of organized labor. If unions desire to achieve significant reforms for their members, they are more likely to find success in the context of collective bargaining. In their book, Freeman and Medoff convincingly demonstrate that collective bargaining, not politics, usually has been the principal means through which workers have obtained *significant* improvements in their wages and working conditions,[10] and that the pervasive effects of collective bargaining have been felt both in the union and nonunion sectors of the economy.[11]

Present day adjustments to administration policies, international competition and sluggishness in the economy - reflected by plant closings, "concession bargaining" and declining union membership - in no way diminish the findings of Freeman and Medoff.

Unions are not immune to the realities of the societies in which they exist, so they will rise and fall with the tides of the economy and politics.[12] Yet, as Freeman and Medoff demonstrate, the positive effects of collective bargaining have persisted over the long term, despite periodic downturns in the economic or political environment.[13]

I should also note that I share Professor Aaron's distrust of those who hail a so-called new era of union-management "cooperation," as if to distinguish "cooperation" from "collective bargaining." "Cooperation," I fear, is often a euphemism for "capitulation." Workers and employers certainly should engage in cooperative ventures and non-adversarial problem solving, where appropriate, but not at the expense of traditional collective bargaining.

IV. The Appropriate Role for Public Policy

Interestingly, while some have suggested that law must play a greater role in industrial relations in the years to come, others have clamored for a *reduction* in legal intervention. This latter view has been expressed most forcefully by Professor John Dunlop, who, as Professor Aaron noted, "has long been concerned with the growing intrusion of law into the conduct of industrial relations." In a recent speech, Professor Dunlop reiterated his view that the NLRA model is the wrong one for the long term, and that the goal of public policy should be to encourage labor and management to resolve their own differences, free from legal constraints.[14] Professor Dunlop argues that "the legal framework for the 1990s must be built on the intent and dedication of labor and management concerned with the economic performance of this country."[15]

In reflecting on Professor Dunlop's most recent remarks, I have been able to discern several themes. He seems to be saying that labor and management can resolve most if not all of their problems through collective bargaining, that the parties must conduct this bargaining with the economic performance of the country in mind, and that law should stay out of the way.

To the extent that Professor Dunlop is saying that collective bargaining holds the greatest promise for substantive improvements in employment conditions, I tend to agree. To the extent that he is saying that the parties must take note of the prevailing political and economic environment as they structure their bargaining goals, I also agree. I disagree, however, with Professor Dunlop's suggestion that virtually all issues are proper subjects for collective bargaining. There are certain legal principles,

for example, freedom from employment discrimination, that are inviolate. These principles simply may not be bargained away by private parties.

Not only does Professor Dunlop argue in favor of bargaining over most subjects, he appears to me to come close to saying that we no longer need an NLRA. I find this to be a very troublesome suggestion. I recognize that the NLRB is often justly accused of "political" decision making, with the case law under the NLRA changing with each new administration. I have always found this to be an unseemly process of adjudication, infected as it is by the ever-changing ideological leanings of the members of the NLRB; but a desire for *repose* in the law does not militate in favor of *abandonment* of all law. At a minimum, the NLRA has provided a useful framework for collective bargaining, defining the appropriate subjects for negotiation and proscribing certain unfair practices by the parties. In my view, there is no doubt that this framework is better than a regime of lawlessness in which individual employees would be subject to employer retaliation and neutral employers would be subject to the coercive effects of secondary boycotts, and the like. In other words, in my view, there is a role for law to play in labor-management relations.

V. "Employment-at-Will" and Protection Against Unjust Dismissal

In considering the role of law and public policy in labor relations, it seems fitting to conclude with a few observations about recent developments affecting our common law tradition of "employment-at-will." Under the employment-at-will doctrine, an employee works at the sufferance of his employer and may be fired solely at the will of management. This rule has been substantially eroded in situations involving collective bargaining agreements that protect employees against discharge except for "just cause," civil service rules protecting the "tenure" of certain government employees, and various statutory enactments, such as Title VII and the NLRA, that prohibit prescribed forms of employment discrimination. Nevertheless, it is still clear that the vast majority of workers in the United States have no protection against "unjust dismissals" that are unrelated to statutorily proscribed discrimination.

Professor Aaron contends - and I concur - that individual workers should be protected against unjust dismissals. As my former colleague, Professor Theodore St. Antoine has written, "there is nothing to be said in favor of an employer's right to treat its employees unfairly or arbitrarily."[16] The reasonableness of this proposition

seems self-evident, but, at least until very recently, employment-at-will has been a predominant doctrine in employment law in this country.

During the last few years, almost simultaneously with the push for a "nonunion model" of labor relations, we have seen an emerging law of unjust dismissal. Proponents like Ben Aaron and Ted St. Antoine view these protections against unjust dismissal as salutary without regard to the current state of the union movement in the United States; however, there are many others who have suggested that the emergence of unjust dismissal law highlights the irrelevance of unions and collective bargaining. It is this latter argument that I find both astonishing and disturbing. I believe that any law prohibiting unjust dismissals must be seen to supplement, not supplant, collective bargaining. To the extent that alleged proponents of unjust dismissal law argue otherwise, their motives may be viewed as suspect.

In the first place, it must be recognized that "modifications of the employment-at-will doctrine have been relatively minor."[17] Judicially recognized exceptions to the doctrine have been few. Equally as important, according to Professor Jack Stieber, the exceptions have been invoked "almost exclusively by executive, managerial, and higher level employees, who constitute only a small minority of all employees."[18] This is hardly surprising, because lower paid complaints in unjust dismissal cases will not find it easy to secure legal representation. This same phenomenon is seen in connection with Title VII litigation where potential plaintiffs find it extremely difficult to hire lawyers, unless their case involves a substantial class action.

In the legislative sphere, to my knowledge there have been no enactments prohibiting unjust dismissals. Though bills were introduced in Michigan in 1982 and California in 1984, neither so much as came up for a vote.[19] These legislative failures to modify the employment-at-will doctrine provide further evidence of the traditional reluctance of legislators to interfere in a substantive way with employment relations.

Even if unjust dismissal law were to prosper, however, it could not possibly serve to replace collective bargaining. The substantive reach of collective bargaining is so much greater than "unjust dismissal" - it is like comparing a cannon and a slingshot. Just as the presence of civil service legislation did not diminish the growth of collective bargaining in the public sector, the development of unjust dismissal law should not adversely affect unions in the private sector. Indeed, if unjust dismissal law *does* enjoy some real success in litigation against employers, say, something akin to malpractice suits against doctors, we may find many employers gaining a new or renewed respect for the repose of a collective bargaining relationship.

Conclusion

I have tried to focus here on some simple realities of labor relations in the United States. History teaches us that there always will be significant numbers of workers in this country who will perceive a need to join unions, and that collective bargaining holds out the greatest promise for significant improvements in the workplace. At this point in our history, when unions and collective bargaining face what appear to be insuperable obstacles, it is only natural for commentators to agonize over whether these simple realities have lost their validity. As I demonstrated earlier, however, this is not the first time that commentators have announced the demise of unions and collective bargaining. The lesson we should glean from the present "crisis" in unionism - and from the numerous "crises" of the past - is that unions are particularly vulnerable to short term changes in economic and political conditions. When economic downturns combine with pro-business shifts in the political mood, unions invariably will suffer. As in the past, however, it would be a mistake to confuse treatable illness with terminal cancer. the challenge in the 1990s is to smooth out the fits and starts in labor-management relations, not to devise some sort of alternative model that ignores the simple realities of labor relations in the United States.

Postscript

There is no way that I can truly express my gratitude for the opportunity to participate in this conference. Ben and Eleanor Aaron have been special friends for many years, so I relished the chance to spend some time with them at UCLA. In these past twenty years, much of my professional life has been devoted to studying, teaching and writing about labor law and collective bargaining, and arbitrating labor disputes. In my work, I have had four "heros" whom I have sought to emulate: Jean McKelvy, Archibald Cox, Russell Smith and Ben Aaron. For Ben's part, his contributions to labor law and collective bargaining have been quite extraordinary: he has been a brilliant teacher, a prolific and insightful scholar, a highly sought-after advisor to policy makers in both state and federal governments, a leader of the National Academy of Arbitrators, a wise contributor to major works and conferences on comparative labor law, and a highly respected mentor to scores of labor law teachers, industrial relations professionals and budding arbitrators. When you consider the breadth, depth and

insightfulness of Ben's work, you easily understand that he has had a profound impact on the fields of labor law and collective bargaining. Best of all, despite his lofty achievements, Ben always has been a man of great grace, dignity, warmth and wit, and a friend with whom so many of us have shared cherished moments. It truly has been an honor for me to share this time with Ben during the first "Ben Aaron Lecture on the Role of Public Policy in the Employment Relationship." UCLA has done itself proud to honor such a distinguished colleague with this named lectureship.

Notes

1. MAURICE R. FRANKS, WHAT'S WRONG WITH OUR LABOR UNIONS! 16-17 (1963).

2. *Id.* at 16.

3. SOLOMON BARKIN, THE DECLINE OF THE LABOR MOVEMENT: A REPORT TO THE CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS (1961).

4. Hilbert, *Coordinated Bargaining - A Management View*, in CRISIS IN BARGAINING? (Niagara University Press, 1969).

5. *The Last Days of the Labor Movement*, HARPER'S, December 8, 1978, at 22.

6. *See, e.g.*, Hammer & Berman, *The Role of Noneconomic Factors in Faculty Union Voting*, 66 J. APP. PSYCHOLOGY 415 (August 1981); Schriesheim, *Job Satisfaction, Attitudes Towards Unions, and Voting in a Union Representation Election*, 63 J. APP. PSYCHOLOGY 548 (October 1978); Hamner & Smith, *Work Attitudes as Predictors of Unionization Activity*, 63 J. APP. PSYCHOLOGY 415 (August 1978); Bakke, *Why Workers Join Unions*, 22 PERSONNEL 1 (July 1945).

7. 84 HARV.L. REV. 1394, 1418-25 (1971).

8. The limited reach of ERISA is amply demonstrated by a recent case in the D.C. Circuit, *Stewart v. National Shopmen Pension Fund*, 795 F. 2d 1079 (D.C. Cir. 1986), in which the court refused to overturn a decision of a pension fund trustee that dramatically reduced the vested pension rights of the petitioners.

9. R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 191-206 (1984).

10. *Id.* at 5, 20-22, 61, 191-206; *see also* Bok, *supra* note 7, at 1419, 1425. Freeman and Medoff acknowledge that unions have enjoyed some political success in promoting "social" legislation such as the Civil Rights Act, the Voting Rights Act, and OSHA. They find, however, that unions have been notably unsuccessful in securing important legislation directly affecting wages, hours and working conditions.

11. *Id.* at 150-161.

12. *Id.* at 244 ("Historically, unions have rarely grown at a moderate pace. Instead, they have advanced in fits and starts - in sudden spurts, generally during improving conditions following significant recessions, and during the two world wars. . . . The spurts have also gone hand in hand with governmental policies favorable to unionization.").

13. *See also* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1822-27 (1983); Freeman & Medoff, *The Impact of Collective Bargaining: Illusion or Reality?*, in U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT 47 (J. Stieber, R. McKersie & D. Mills eds. 1981); LEWIS, UNIONISM AND RELATIVE WAGES IN THE UNITED STATES (1963).

14. *See* Dunlop, "The Legal Framework of Industrial Relations in the United States," *reprinted in* BNA DAILY LAB. REP. No. 194: E-1 (Oct. 7, 1985).

15. *Id.* at E-5.

16. St. Antoine, *The Revision of Employment-at-Will Enters a New Phase,* 36 LAB. L.J. 563, 566 (1985).

17. Rodgers & Stieber, *Employee Discharge in the 20th Century: A Review of the Literature,* 108 MONTHLY LAB. REV. 35, 35 (1985); *see also* Stieber, *Recent Developments in Employment-at-Will,* 36 LAB. L.J. 557 (1985); Stieber, *Employment-at-Will: An Issue for the 1980s*, 36 INDUS. REL. RES. A. PROC. 1-13 (1984).

18. Stieber, *Employment-at-Will: An Issue for the 1980s, supra* note 17, at 7.

19. *See* Rodgers & Stieber, *Employee Discharge in the 20th Century: A Review of the Literature, supra* note 17, at 35.

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