

1988

Labor Law as the Century Turns: A Changing of the Guard

Clyde W. Summers

University of Pennsylvania Law School

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 Neb. L. Rev. (1988)

Available at: <https://digitalcommons.unl.edu/nlr/vol67/iss1/3>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Labor Law as the Century Turns: A Changing of the Guard

Labor legislation in this and other countries has, for the last one hundred-fifty years, taken many forms, but it has been rooted in a basic premise and expressed a common purpose. The premise is that individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment. When there is such economic inequality, the function of the law is to protect the weaker party.¹

This was the explicit premise of the earliest legislation requiring employees to be paid in cash instead of scrip redeemable only at company stores. The same premise and purpose was expressed in legislation adopted at the turn of the present century fixing maximum hours of work and minimum wages, prohibiting child labor, requiring health and safety protection, and mandating compensation for work injuries. The law would not leave workers to merciless market forces, but would come to their aid as the weaker party and shield them from the over-reaching economic strength of the employer.²

This same basic premise and central purpose motivates labor law today. Society cannot understand where it has been or where it may be going without awareness of that motivating force. The continuing question is how we shall protect employees from socially unacceptable

* Fordham Professor of Law, University of Pennsylvania; B.S. 1939, J.D. 1942, University of Illinois; LL.M. 1946, J.S.D. 1952, Columbia University.

1. See generally J. COMMONS & J. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* (4th rev. ed. 1936).

But in any modern industrial community, large numbers of unorganized workers are found, still bargaining individually, employed at low wages and apparently unable to make any effective efforts themselves to improve their condition. If they are to be helped toward an equality in bargaining power with the employer, the state must take the initiative.

Id. at 43.

2. In this opinion [*Holden v. Hardy*, 169 U.S. 366 (1898)] the court recognized, what has been dimly seen or implied from the beginning of labor legislation, that inequality of bargaining power is a justification under which the state may come to the protection of the weaker party to the bargain Inequality of bargaining power has long been a ground for legislative and judicial protection of the weaker party

J. COMMONS & J. ANDREWS, *supra* note 1, at 529.

treatment by market forces where they lack the bargaining power to protect themselves.

This question has two parts. First, who shall act as guard to protect their interests? Second, what interests are to be protected? The National Labor Relations Act of 1935 (also known as the Wagner Act)³ responded to both of those questions with a single answer—collective bargaining. The Act declared that national policy should encourage the practice and procedure of collective bargaining. The intolerable inequality of the individual labor market was to be remedied by creating a collective labor market.⁴

There was no assumption that collective bargaining would provide perfect parity, even if perfect parity could be defined. The assumption was that the collective labor market would give the worker enough increased bargaining power to produce socially acceptable results. Employees, acting through a representative of their own choosing, would be their own guardian, and the interests protected would be those negotiated in the collective agreement.

Collective bargaining was conceived to serve two additional political and social purposes. First, by establishing a collective labor market with more equal bargaining power, collective bargaining reduced the need for government regulation to protect employees from oppressive terms. Collective bargaining was seen as the alternative to legislation prescribing terms and conditions of employment.⁵ Second,

3. 29 U.S.C. §§ 151-166 (1982).

4. Long ago we stated the reasons for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer . . . that union was essential to give laborers opportunity to deal on an equality with their employer. . . . Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937) (citation omitted). See also Frey, *The National Labor Relations Act Should Not be Amended at the Present Session of Congress*, 33 ILL. L. REV. 658 (1939).

5. Senator Wagner argued that the National Labor Relations Act constituted "the only key to the problem of economic stability if we intend to rely upon democratic self-help by industry and labor, instead of courting the pitfalls of an arbitrary or totalitarian state." J. HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 195 (1968).

Stating it more fully, Senator Wagner declared:

Modern nations have selected one of two methods to bring order into industry. The first is to create a super-government. Under such plan, labor unions are abolished or become the creatures of the state. Trade associations become the cartels of the state. . . . That is what is called the authoritarian state. . . . The second method of coordinating industry is the democratic method. It is entirely different from the first. Instead of control from the top, it insists upon control from within. It places the primary responsibility where it belongs and asks industry and labor to solve their mutual problems through self-government. That is industrial

collective bargaining provided a measure of industrial democracy by giving employees a voice in decisions which influenced their lives. It extended democracy to the workplace, freeing employees from the unilateral dictates of management and the remote unresponsiveness of governmental agencies.⁶

I.

The basic assumption of the National Labor Relations Act was that the labor market would be regulated by collective bargaining, not by legislation. Workers would be protected by their union, not by government officials. Workers' rights would be guaranteed by the collective agreement, not by the law. Those rights would be defined and enforced through grievance procedures and arbitration, not through administrative agencies or courts.

This assumption dominated our thinking in labor law for nearly fifty years. For example, the declared purpose of the Taft-Hartley Act⁷ was to adjust the balance between union and management so as to produce more socially desirable results, and to make collective agreements enforceable in the federal courts. The purpose of the Landrum-Griffin Act⁸ was to protect democratic processes in unions so they would better serve their purpose of providing a measure of industrial democracy.

One of the inevitable, though unremarked, consequences of this reliance on collective bargaining was to preclude consideration of legislation protecting substantive rights. For nearly thirty years the only significant legislation was the Fair Labor Standard Act, passed in 1938, which was conceived largely to provide a floor to support collective bargaining.⁹

democracy, and upon its success depends the preservation of the American way of life.

L. SILVERBERG, *THE WAGNER ACT: AFTER TEN YEARS* 13 (1945).

6. Senator Wagner explained the philosophy of the Act in these terms:

The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.

M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965* 321 (1970) (quoting N.Y. Times, Apr. 13, 1937, at 20, col.1).

7. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 144-187 (1982).

8. Labor Management Reporting and Disclosure (Landrum-Griffin) Act, 29 U.S.C. §§ 153, 158-160, 164, 186-187, 401-402, 411-415, 431-440, 461-466, 481-483, 501-504, 521-531 (1982).

9. Although Wagner pressed for the Fair Labor Standards Act, he considered it "merely the foundation upon which can be built the mutual efforts of revived industry and a rehabilitated labor To expect the government to do more

Collective bargaining, where established, served its intended purposes. It provided a tolerable balance of bargaining power in most situations. Collective agreements not only established wage rates and benefits, but also defined rights of employees in the workplace and provided, through grievance procedures and arbitration, a system for adjudicating and enforcing those rights. Through their union, employees obtained a voice in many decisions affecting their working lives. To be sure, strikes sometimes disrupted production, but this was the price of market bargaining, free from government control.

The visible success of collective bargaining, its domination in major manufacturing and transportation industries, and the publicized drama of negotiations and strikes obscured the fact that the Wagner Act failed to achieve its purpose. Collective bargaining never became established except in segments of industry. The majority of employees were not covered by collective agreements but remained subject to the inequalities of individual bargaining. Instead of expanding, collective bargaining began shrinking in relation to total employment in the early 1950's. It now covers less than 25% of private employment and continues to shrink.¹⁰

Why collective bargaining has not been more widely extended is, for present purposes, unimportant. The significant fact is that collective bargaining does not regulate the labor market. Unions and collective agreements do not guard employees from the potential deprivations and oppressions of employer economic power. The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party.¹¹ The law, either through the courts or the legislatures, will become the guardian. Labor law is now in the midst of that changing of the guard. There is current recognition that if the majority of employees are to be protected, it must be by the law pre-

would run the risk of creating a 'despotic state.' " The major reliance must be left to private labor management relations "worked out on the basis of true equality of representation. That is why the cultivation of collective bargaining is not merely an abstract matter of freedom for the worker, Wagner insisted, but rather a concrete foundation for the general welfare." J. HUTHMACHER, *supra* note 5, at 203-04.

10. In 1946, union membership reached its peak strength with 35% of non-agricultural workers in unions. N. CHAMBERLAIN, D. CULLEN, & D. LEWIN, *THE LABOR SECTOR* 124 (3d ed. 1980). The number covered by collective agreements was somewhat larger. In 1978, with 22.3% of the labor force in unions and employee associations, collective agreements covered 29.7% of non-agricultural employees. By 1981, only 20.9% of the labor force were members of unions or employee associations. Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 *BUFFALO L. REV.* 9, 15 (1982). Present union membership has dropped to 17.5%. 1 *Lab. Rel. Rep.* (BNA) 124:140 (March 2, 1987).
11. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982).

scribing at least certain rights of employees and minimum terms and conditions of employment.

II.

The trend might be traced back to the Equal Pay Act of 1963¹² and Title VII of the Civil Rights Acts of 1964.¹³ Discrimination was recognized as an intolerable social evil which cried out for correction. Collective bargaining provided little promise of improvement, for even where collective bargaining was established, discriminatory practices persisted. Even where national unions had strong antidiscrimination policies, those policies were flaunted by local unions who built into their collective agreements perpetuations of employer discriminatory practices. The Equal Pay Act and Title VII of the Civil Rights Act were aimed in part at collective agreement evils rather than those existing because of the lack of collective agreements.

More responsive to the failure to establish collective bargaining was the Age Discrimination in Employment Act of 1967.¹⁴ Seniority provisions in collective agreements provided older workers significant protection against dismissal, and hiring halls in some industries provided some protection against age discrimination in hiring employees. The Age Discrimination in Employment Act helped those not covered by collective agreements. In practical operation, its major impact has been to protect those not reached by the collective bargaining system.

The clearest legislative break came in 1970 with the Occupational Safety and Health Act (OSHA).¹⁵ This legislation comprehensively regulated a major mandatory subject of bargaining, one which was central to bargaining in industries such as coal. OSHA was especially well suited for the flexible and particularized process of plant level regulation through collective bargaining and the grievance procedure. The legislation, most strongly urged by the unions themselves, was not aimed at strengthening the bargaining process but at protecting all employees, including those outside collective bargaining. The statute provided special roles for the "representative of employees" in reporting, inspecting, and enforcing, but this role was not limited to the majority union representative; it extended to minority and informally selected (if not self-appointed) "representatives." The driving force was the recognition that collective bargaining had failed to provide adequate protection of employee health and safety. The law and legal institutions had to become guardians.

Following OSHA, the Employment Retirement Income Security

12. 29 U.S.C. § 206 (1982).

13. 42 U.S.C. §§ 2000(e)-2000(e)17 (1982).

14. 29 U.S.C. §§ 621-634 (1982).

15. 29 U.S.C. §§ 651-678 (1982).

Act of 1974¹⁶ protected employees' pension rights, including rights which could have been protected through collective bargaining. But again, collective bargaining had not, and could not, provide the needed protection because most employee pension plans were not reached by collective bargaining.

All of these federal statutes included provisions protecting employees from retaliatory discrimination or discharge for reporting violations, instituting proceedings, testifying, or providing information concerning violations. Similar provisions have been included in other federal regulatory statutes such as the Clean Air Act,¹⁷ the Nuclear Regulatory Commission Act,¹⁸ the Hazardous Substances Release (Superfund) Act,¹⁹ the Safe Drinking Water Act,²⁰ and the Solid Waste Disposal Act.²¹ All of the conduct covered by these statutes was protected by "just cause" clauses in collective agreements where collective bargaining was established.

These statutes regulating employment relations were the first hidden signs of a break in our national policy of relying on collective bargaining to regulate the labor market. The unmistakable signal came with the sudden judicial fracturing of the employment at will doctrine.

Some small cracks in the employment at will doctrine opened in the mid-1970's. *Monge v. Beebe Rubber Co.*²² upheld a contract action by a woman who was discharged for refusing to date her foreman. The New Hampshire Supreme Court held that "termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation . . . constitutes a breach of the employment contract."²³

In *Frampton v. Central Indiana Gas Co.*,²⁴ the Supreme Court of Indiana upheld a tort action by an employee who was discharged for filing a workmen's compensation claim. The court endorsed the employment at will doctrine, but declared: "[W]hen an employee is discharged solely for exercising a statutorily conferred right, an exception to the general rule must be recognized."²⁵

In *Nees v. Hocks*,²⁶ the Oregon Supreme Court upheld a tort suit by a secretary based on an alleged wrongful discharge. The plaintiff was

16. 29 U.S.C. §§ 1001-1461 (1982).

17. 42 U.S.C. § 7622(a) (1982).

18. 42 U.S.C. § 5851(a) (1982).

19. 42 U.S.C. § 9610(a) (1982).

20. 42 U.S.C. § 300(j)-9(i) (1982).

21. 42 U.S.C. § 6971(a) (1982).

22. 114 N.H. 130, 316 A.2d 549 (1974).

23. *Id.* at 133, 316 A.2d at 551.

24. 260 Ind. 249, 297 N.E.2d 425 (1973).

25. *Id.* at 253, 297 N.E.2d at 428.

26. 272 Or. 210, 536 P.2d 512 (1975).

discharged because she did not try to get herself excused from serving on a jury. The discharge, said the court, contravened values "high on the scale of American institutions and citizen obligations" and constituted a legal wrong.²⁷

Finally, in *Agis v. Howard Johnson Co.*,²⁸ the Supreme Judicial Court of Massachusetts upheld the complaint of a discharged waitress for intentional infliction of emotional distress and a separate complaint by her husband for loss of consortium. The employer announced that stealing was going on but that he did not know who was responsible. Until he discovered the responsible person, the employer threatened to discharge the waitresses in alphabetical order. The plaintiff was first on the list and was subsequently fired. The court held that the lower court's dismissal was in error because there were sufficient facts in the complaint to support a jury question as to whether the discharge was "extreme and outrageous [and] utterly intolerable in a civilized community"²⁹ as proscribed by Section 46 of the Restatement (Second) of Torts.

Within five years, courts in other states had opened gaping holes in the employment at will doctrine. The public policy exception was enlarged by the Illinois Supreme Court to protect from discharge a managerial employee who supplied police with information that another employee might be violating the criminal code and agreed to gather further evidence.³⁰ The Connecticut Supreme Court protected a quality control employee from discharge who reported to his employer the use of substandard materials and incorrect labelling.³¹ The covenant of good faith and fair dealing was used by the California Court of Appeals to give an employee an action in both tort and contract when he was discharged after eighteen years of service without good cause and without notice and hearing as provided in the company's regulations.³² The contract of employment was given added substance by the Michigan Supreme Court which incorporated into the contract the provisions in employee handbooks and personnel policy manuals that stated grounds for discharge and described procedures for handling grievances and terminations.³³

Although not all courts have recognized exceptions or limitations to the employment at will doctrine, courts in thirty-two states have adopted public policy exceptions, eleven states have applied the covenant of good faith and fair dealing, and twenty-nine states have used

27. *Id.* at 219, 536 P.2d at 516.

28. 371 Mass. 140, 355 N.E.2d 315 (1976).

29. *Id.* at 145, 355 N.E.2d at 319.

30. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

31. *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980).

32. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

33. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

employee handbooks to find contractual limitations on terminations.³⁴ A total of thirty-nine states now employ one or more theories to qualify the employment at will doctrine.³⁵

These court decisions have been paralleled by a wide variety of state statutes protecting whistleblowers, prohibiting retaliatory discharges, and protecting the exercise of various personal, legal, or political rights.³⁶ Within the last year, Montana has enacted the first state statute providing general protection against "wrongful discharge."³⁷ This statute was designed to prohibit retaliation for the employee's refusal to violate public policy, for reporting a violation of public policy, and for violations of express provisions of the employer's written personnel policy. Broad dismissal statutes have also been adopted in Puerto Rico³⁸ and the Virgin Islands.³⁹

In addition, states have passed a variety of statutes protecting a wide range of employee rights other than the right not to be unjustly discharged. Various statutes prohibit employers from requiring polygraph tests, limit drug testing, impose confidentiality on employee records, require that employees be given access to their personnel file and the right to have errors corrected, require posted notices of job hazards and toxic substances, require smoke free work areas, and require employees be given notice of plant closings.⁴⁰ A Maine statute requires that the employer not only give 60 days notice of a plant closing, but also requires that it pay severance pay to the employees dismissed.⁴¹

III.

An overview of this process of judicial and legislative regulation suggests three general characteristics. First, equivalent protection of employees could be, and often is, encompassed in collective agreements. Provisions requiring just cause for discipline or discharge are included as a matter of course in most agreements, and those provisions give employees much more comprehensive and effective protection than court decisions or legislation. Other judicial and statutory protections cover the scope of mandatory subjects of bargaining and frequently appear in collective agreements or are found by arbitrators

34. 9A Lab. Rel. Rep. (BNA) 505: 51-2 (Jan. 1988).

35. *Id.*

36. See W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION, RIGHTS AND REMEDIES app. A (1985).

37. Wrongful Discharge From Employment Act, 1987 Mont. Laws ch. 641 (now codified at MONT. CODE ANN. § 39-2-901 (1987)).

38. P.R. LAWS ANN. tit. 29, § 185a (1985).

39. V.I. CODE ANN. tit. 24, § 65 (1970).

40. Lab. Rel. Rep. (BNA) 124: 67-81 (Feb. 2, 1987).

41. ME. REV. STAT. ANN. tit. 26, § 625-B (1987).

to be implied in the agreement. Although the decision to close a plant may not be a mandatory subject, the parties are free to bargain about it. Collective agreements may include provisions requiring employers to give advance notice of closings, and severance pay is clearly a mandatory subject. Collective bargaining, where it is established and accepted, can provide almost all of the employee protection now provided by court decisions and legislation. Labor counted on collective bargaining to provide this protection, but the protection has been incomplete. Society is now looking to the courts and legislatures to protect employees not covered by collective bargaining. Labor law is in the midst of a changing of the guard.

The second characteristic of the judicial and legislative changes is that the interests protected are primarily non-economic interests in fairness, personal dignity, privacy, and physical integrity. Protection against unjust discharge focuses more on substantive and procedural fairness and personal dignity than on the economic value of the job. Cases enforcing the handbook as a contract or invoking the covenant of good faith and fair dealing look to the expectations of the employee, adherence to stated rules and procedures, and fundamental fairness. In tort cases, the damages for mental suffering and punitive damages are frequently much more than the lost wages. Limitations on polygraph and drug testing and the requirement of confidentiality of records recognize the rights of privacy; protection of whistleblowers recognizes the value of personal integrity; and requiring notice of hazards and toxic chemicals recognizes the employees' interest in physical integrity. The Supreme Court's reading of OSHA as " 'placing the benefit' of worker health above all other considerations"⁴² to the extent feasible and rejecting an economic cost-benefit analysis is both symbolic and significant.

The third characteristic is that the courts and legislatures have built on an underlying assumption, more nascent than fully developed, that the employee has a valuable interest in his or her job which ought not be arbitrarily taken away. This assumption is implicit in the breakdown of the employment at will doctrine, for it is the courts' sense of that valuable interest which spurs them to develop legal theories which will provide protection. This assumption is explicit in the Montana statute prohibiting discharge without good cause,⁴³ and in the advocacy of such legislation in other states. It is also implicit in the plant closing statutes such as the Maine statute,⁴⁴ which requires payment of severance pay to employees who lose their jobs. The United States is witnessing an evolving legal recognition of the employee's property right in his or her job, an interest which is of crucial

42. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981).

43. MONT. CODE ANN. § 39-2-901 (1987).

44. ME. REV. STAT. ANN. tit. 26, § 625-B (Supp. 1987).

personal and economic importance to the individual. As such, it is entitled to broad legal protection.

IV.

What does this decreasing reliance on collective bargaining and increasing reliance on the law to regulate the labor market bode for the future? My crystal ball is clouded, so I am uncertain whether I am seeing inside the ball or only my own reflection. However, I would like to suggest the directions in which labor law will move as the century turns.

First, the prospects are for continued proliferation of judicial and legislative regulation of the labor market. The deeper economic, social, and political forces which have brought labor law to where it is now will not reverse. The unequal bargaining position of most individual workers will continue or become more acute as the number of low wage workers in the service trades increases, robots in industry dilute or obsolesce skills, and computers transform white collar workers into mechanical appendages in bureaucratic organizations. There will be an increased need to protect employees from their helplessness in individual bargaining. One might hope that there would be a political and social recommitment to collective bargaining with a realization by employers that joint self-regulation is preferable to legal regulation, but all signs point in the opposite direction. Even if there is a rebirth of collective bargaining, society will not return to delusive reliance on it as the sole guardian.

The felt need to protect employees' rights in the workplace will spur courts to extend legal theories and develop new remedies. Judicial decisions in one state will continue to break paths for decisions in other states as the employment at will cases have shown. Legislative initiatives in one state will encourage similar legislation in other states, as plant closing laws have demonstrated. The Montana statute on unjust dismissal⁴⁵ will almost certainly be followed by parallel statutes in other states, just as the Michigan whistleblower statute⁴⁶ seeded statutes in Connecticut,⁴⁷ Maine,⁴⁸ and a number of other states⁴⁹. In the same way, legislation concerning polygraph and drug testing, access to personnel files, and notice of job hazards will proliferate.

Passage of these statutes will generate demand for protecting other employee rights. We should be able to read the handwriting on the

45. MONT. CODE ANN. § 39-2-901 (1987).

46. MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1981).

47. CONN. GEN. STAT. ANN. § 31-51m(a) (West 1987).

48. ME. REV. STAT. ANN. tit. 26, §§ 831-840 (Cum. Supp. 1987).

49. 9A Lab. Rel. Rep. (BNA) 505:21 (May 1987).

wall, not only in legislation already enacted in the states, but in proposals now being pressed at both the state and federal level—protection of the employment rights of AIDS carriers, limitations on exposure to video screens, restrictions on computer surveillance of employees, and requirements for pregnancy and parental leaves.

Second, labor law in the future will likely continue to focus on personal rights of employees rather than on economic terms of wages and benefits. The political and social pressures which have pushed forward the recent court decisions and legislation reflect deeply felt values and needs, and there are no compelling arguments why those values should not be realized and those needs fulfilled.

General arguments against big government and legal regulation have limited persuasiveness when personal rights are being protected. Most employees do not look upon laws preserving their privacy, upholding their personal dignity, shielding their personal safety, and insuring them fairness of treatment and security in their jobs as encroachments on their freedoms. Workers are more likely to view such laws as a caring government getting employers off their backs.

Arguments that such laws will hamper American industry in competing in the world market will carry little weight in the future, for most of these legal protections impose no substantial economic costs on the employer. Recognition of the employee's privacy costs the employer no more than foregoing inquiry into matters having little impact on productive efficiency. Notice of hazardous substances in the workplace imposes only minor administrative burdens unless employers are endangering the health of their employees. Pregnancy and parental leaves cause some dislocations, but seldom beyond the capacity of capable management. These leaves cause substantially fewer dislocations than temporary layoffs, which are accepted as commonplace.

Limitation of the employment at will doctrine requires only fairness; it does not require keeping unproductive employees. Indeed, fairness and job security may improve employee morale, and with it, increase productivity. At the very least, requiring fair procedures and good cause may prevent hasty, ill-considered, and unnecessary loss of potentially valuable employees in whose training the employer has a substantial investment. The employers' nearly universal acceptance of such employee rights in collective bargaining suggests that fairness in discipline is not overly costly to employers. Even requiring employers to give notice of plant closings and severance pay places little burden on the employers' ability to compete in the world market. The willingness of some states to pass such legislation expresses the view that the costs are not substantial enough to place businesses in those states at a competitive disadvantage.

Required notice of plant closing imposes no burden on employers beyond a minimum of advance planning and increased pressure by

employees and the community to justify the decision. Severance pay imposes a limited burden because it is a one-time payment and is assessed only against those minority of employers who close their plants. Neither the requirement of notice nor severance pay puts American employers at a competitive disadvantage with employers in Western Europe or Japan, for those countries have long had such legislation. The protection most costly to employers is safety and health regulations, but the high value society places on physical integrity will continue to outweigh concern for increased costs attributable to safety and health. These legal protections are quite unlike proposals to require employers to provide medical insurance, day care centers, or other economic benefits which add substantially to labor costs. At the state level, legislators will be reluctant to place such burdens on their state's businesses and put them at a competitive disadvantage with businesses in other states.

Third, the proliferation of legal protection of employee rights will greatly increase the complexity of labor law through the turn of the century. The employment at will cases provide an introductory warning. Courts, without any contribution from the legislatures, have created complex legal theories in both contract and tort as well as hybrid theories such as "good faith and fair dealing," "public policy," and "abusive discharge." In addition, the discharged employee may sue for defamation, fraudulent representation, intentional infliction of emotional distress, and restraint of competition.⁵⁰ Ten years ago the law of employment at will could be adequately summarized in five pages; now it generates five hundred page textbooks and scores of law review articles. Employment at will law is now the centerpiece of weekend continuing legal education conferences and feeds a looseleaf service of some 200 pages a month. Legislation concerning this and other employee rights will make this complex judge-made framework seem simple and coherent, for legislation will almost certainly be a combination of federal, state, and even local regulations. Each statute will have not only its own unique body of substantive rules, but also its own administrative procedures and remedies. Present legislation gives no reason to hope that there will be any consistent pattern or systematic coordination. Labor law will increasingly change from a troublesome thicket to an impenetrable jungle.

The most difficult problem of the near future will be reconciling overlapping protections. The problem, in its simplest form, is illustrated by the Montana Wrongful Discharge Act.⁵¹ The Montana statute attempts to pre-empt "common law remedies" by stating that "except as provided [in the statute] no claim for discharge may arise

50. See W. HOLLOWAY & M. LEECH, *supra* note 36, at ch. 7; see generally H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* (2d ed. 1987).

51. MONT. CODE ANN. § 39-2-901 (1987).

from tort or express or implied contract.”⁵² This leaves unclear whether actions may be brought for defamation or intentional infliction of emotional distress. Other statutory causes of action at the federal, state, and even local level remain untouched. Instead of having one primary guardian in collective bargaining, we now have multiple legal guardians with potentially multiple causes of action. A commonplace example, again involving wrongful discharge, suggests the possibilities.

A fifty-five year old woman is discharged after writing a letter to the local newspaper disclosing that her employer is using toxic chemicals which she claims endangers the work area. She has potential recourse in least four forums: (1) the grievance procedure and arbitration for unjust discharge under the collective agreement, if there is one; (2) the EEOC for sex discrimination under the Civil Rights Act, and for age discrimination under ADEA; (3) the Secretary of Labor for retaliatory discharge under OSHA; and (4) the state court for discharge violating the public policy protecting freedom of speech. Suit on the EEOC charges will be in the federal district court, with the sex discrimination claim tried by the judge and the age discrimination claim tried by the jury. In both, the plaintiff may obtain reinstatement, damages, and lawyers’ fees; but in the age discrimination claim the plaintiff may receive double recovery with liquidated damages. The state court will not order reinstatement or lawyers’ fees, but may allow damages for mental suffering and add punitive damages.

If the rights and remedies are considered cumulative, the course of the plaintiff’s lawyer is clear—proceed in any or all forums so as to take advantage of the multiple chances of winning and the option of taking the most favorable aspect of each result. Arbitration or administrative proceedings may achieve reinstatement and back pay; suit in federal court will pay the legal costs; and suit in the state court may add compensation for mental suffering and punitive damages. The course of the employer’s lawyer is equally clear—defend in each proceeding until all are exhausted and then send the employer the bill. One can scarcely imagine an arrangement better designed to hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery. The bitter irony is that if any of the employees were injured by the toxic chemical, they would not have a remedy except a workmen’s compensation claim which would pay only half of their economic loss.

The most difficult problems arise in determining whether the remedies are exclusive, and major attention thus far has focused on the overlap of collective agreement remedies and legal protection. When the legal rights arise under federal statutes, the answers seem rela-

52. *Id.* at § 39-2-913.

tively clear. In *Alexander v. Gardner-Denver Co.*,⁵³ the United States Supreme Court held that remedies under grievance arbitration and Title VII of the Civil Rights Act were cumulative. An employee had separable rights under both the collective agreement and Title VII which could be enforced separately. The fact that the employee's contract claim was denied in arbitration did not foreclose the vindication of his statutory right in federal court.

This same principle was followed in *Barrentine v. Arkansas-Best Freight System, Inc.*,⁵⁴ in which the Supreme Court held that an employee, whose claim for overtime under the collective agreement was denied in arbitration, was not barred from suing under the Wage-Hour Law. "[T]he employee's claim", said the court, "is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."⁵⁵

This principle was echoed once again in *Atchison, Topeka and Sante Fe Ry. v. Buell*,⁵⁶ in which the Supreme Court held that a railroad employee who suffered emotional distress and mental breakdown because of a foreman's harassment and intimidation could sue for damages under the Federal Employers' Liability Act, even though he could have prosecuted a grievance to arbitration to correct the situation.

When there is an overlap between collective bargaining remedies and state contract or tort remedies, the lines are unclear. Some light was shed by the Supreme Court in *Allis-Chalmers, Inc. v. Lueck*⁵⁷ which barred state tort action for a bad faith refusal to pay an insurance claim under a collectively bargained disability plan. An implied obligation of good faith, said the Court, was tightly bound with questions of contract interpretation because "nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract."⁵⁸ Tort actions would diminish the central role of arbitration in interpreting the contract because the same dispute that could be decided by the arbitrator would be decided by the state court. This decision would seem to cast a cloud over suits for wrongful discharge, particularly those based on contract and covenant of good faith and fair dealing theories where there is a collective agreement with a just cause discharge and arbitration clause.

But the lines have again become blurred. In *Caterpillar, Inc. v. Williams*,⁵⁹ the Supreme Court held that a state law complaint for

53. 415 U.S. 36 (1974).

54. 450 U.S. 728 (1981).

55. *Id.* at 737.

56. 107 S. Ct. 1410 (1987).

57. 105 S. Ct. 1904 (1985).

58. *Id.* at 1915.

59. 107 S. Ct. 2425 (1987).

breach of an individual contract of employment was not pre-empted by the collective agreement. The promise of permanent employment had been made when the employee was a supervisor outside the bargaining unit and was not a right "created by the collective bargaining agreement" or "substantially dependent on analysis of a collective bargaining agreement."⁶⁰ The Court went on to state that "[a] plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied on is *not* a collective bargaining agreement."⁶¹

The availability of dual remedies was further suggested in *Metropolitan Life Insurance v. Massachusetts*⁶² in which the Court declared: "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non-union members."⁶³

It is no surprise that the courts of appeal are in conflict on the unjust discharge cases. Some, like the Seventh Circuit, have disregarded *Caterpillar* and *Metropolitan Life* by holding that all state court remedies are pre-empted by the collective agreement, even when the discharge violates state public policy and punitive damages would be available in the state court.⁶⁴ Other courts have reached the same result by reasoning that exceptions to the employment at will doctrine were developed to protect employees who had no other protection.⁶⁵ The availability of arbitration removes the reasons for the exception, and courts should not provide a remedy.

On the other side, some courts have followed the Ninth Circuit and held that state court remedies are not wholly pre-empted by collective agreements.⁶⁶ The state court is not precluded from protecting its own interests and enforcing its own public policy by providing a tort remedy and punitive damages for those discharged in violation of the state's public policy.⁶⁷ This question of the relation between collective

60. *Id.* at 2431.

61. *Id.* at 2431-32 (emphasis in original).

62. 105 S. Ct. 2380 (1985).

63. *Id.* at 2398.

64. *Lingle v. Norge Division of Magic Chef*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 226; *see also Johnson v. Hussman Corp.*, 805 F.2d 795 (8th Cir. 1986).

65. *Phillips v. Babcock & Wilcox*, 503 A.2d 36 (Pa. Super. 1986).

66. *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984); *see also Herring v. Prince Macaroni, Inc.*, 799 F.2d 120 (3d Cir. 1986); *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); *cf. Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984).

67. *See generally Wheeler & Browne, Federal Preemption of State Wrongful Discharge Actions*, 8 IND. REL. L.J. 1 (1986); *Herman, Wrongful Discharge Actions after Lueck and Metropolitan Life Insurance*, 9 IND. REL. L.J. 596 (1987).

bargaining remedies and state tort remedies is now before the Supreme Court,⁶⁸ but a decision in that case can at most provide a ray of illumination on this small corner of overlapping remedies.

The overlap between grievance arbitration and federal or state remedies is of limited practical importance because less than a fourth of all employees are covered by collective agreements. More difficult are the overlaps between federal or state statutory remedies and common law remedies. Returning to the not so hypothetical fifty-five year old whistleblower, the Illinois Supreme Court has held that the availability of an administrative remedy for age discrimination precluded a common law tort action,⁶⁹ and a California court has held that availability of a statutory remedy for retaliatory discharge under the state workmen's compensation statute precluded a common law tort action.⁷⁰ Beyond these issues are other questions such as whether federal administrative remedies for retaliatory discharge available under OSHA preclude both state administrative and common law remedies. Uncertainties as to whether the availability of one remedy precludes another are matched by unraised questions of election of remedies such as whether winning in one forum will bar seeking additional relief in another forum. Will our discharged woman, having won liquidated damages and lawyers' fees in her federal age discrimination action, be allowed to pursue her state common law actions for mental suffering and punitive damages?

These questions merely graze the surface of the complex problems which will be raised by the proliferation of employment rights and remedies. A signal flag of the future can be seen in the fact that during the last term of the Supreme Court, eight overlap or pre-emption cases involving individual rights were decided. Two of those involving the overlap of grievance arbitration and federal statutory or state common law remedies have already been discussed.⁷¹ The other six, set out below, provide a glimpse of the problems to come.

In *Perry v. Thomas*,⁷² a California statute provided that actions for unpaid wages could be brought in court without regard to any arbitration provision in the employment contract. The Supreme Court held that this statute was pre-empted by the Federal Arbitration Act and required the employee to arbitrate in accordance with a standard form provision in his employment application. In *Pilot Life Insurance v. Dedeaux*,⁷³ and *Metropolitan Life Insurance Co. v. Taylor*,⁷⁴ individ-

68. *Lingle v. Norge Division of Magic Chef*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 226 (1987).

69. *Mein v. Masonite Corp.*, 109 Ill. 2d 1, 485 N.E.2d 312 (1985).

70. *Portillo v. G.T. Price Prod., Inc.*, 131 Cal. App. 3d 185, 182 Cal. Rptr. 291 (1982).

71. *Atchison, Topeka and Santa Fe Ry. v. Buell*, 107 S. Ct. 1410 (1987); *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425 (1987).

72. 107 S. Ct. 2520 (1987).

73. 107 S. Ct. 1549 (1987).

ual employees claimed their disability benefits had been wrongfully terminated by their employers' insurance companies. They sued the insurance companies in state court for tortious breach of contract, breach of fiduciary duties, and fraud in the inducement. The Court held that these state contract and tort actions were barred by the broad pre-emption provisions of the Employee Retirement Income Security Act (ERISA).

However, in *Fort Halifax Packing Co. v. Coyne*,⁷⁵ the Supreme Court held that the broad pre-emption provisions of ERISA did not reach the Maine plant closing statute which required advance notice of closing and payment of severance pay to employees who were dismissed. ERISA barred only state regulation of employee benefit "plans," and the statute did not require the employer to establish or maintain a "plan," but only make a one-time lump sum payment. Nor was the statute pre-empted under the National Labor Relations Act, "since its establishment of a minimum labor standard does not impermissibly intrude upon the collective bargaining process."⁷⁶

Two state statutes that point in quite opposite directions have been upheld as not conflicting with federal prohibitions against discrimination on the basis of pregnancy or other related conditions. *California Federal Savings and Loan Association v. Guerra*⁷⁷ upheld a state statute requiring employers to grant pregnancy leaves and to reinstate those returning from leave. California was free to provide pregnant employees *more* protection than provided by the federal statute, and employers were not required by the state statute to give preference to pregnant women, for employers could give equal benefits to other disabled workers.

In contrast, the Missouri Unemployment Compensation Act, which classified women who left work due to pregnancy as quitting voluntarily and disqualified them from receiving unemployment benefits, was upheld in *Wimberly v. Labor and Industrial Relations Commission*.⁷⁸ The federal provision only prohibited singling out pregnant women for unfavorable treatment, and Missouri disqualified all workers, male or female, who left work "voluntarily and without good cause attributable to [her] work or to [her] employer."⁷⁹

My purpose here is not to analyze and rationalize these most recent decisions on pre-emption. Indeed, they are probably impossible to rationalize in any systematic fashion, for the Court seems to be feeling its way case by case. My point here is that these cases are a prelude to

74. 107 S. Ct. 1542 (1987).

75. 107 S. Ct. 2211 (1987).

76. *Id.* at 2223.

77. 107 S. Ct. 683 (1987).

78. 107 S. Ct. 821 (1987).

79. *Id.* at 823.

the complex problems of overlap and pre-emption with which labor law will have to struggle for at least the rest of the century. The earlier pre-emption cases⁸⁰ already seem a game of checkers when compared to the blindfolded chess we are now playing; the game of the future will be even more challenging.

V.

These are all predictions — my view of the direction labor law will take as we change from relying on collective bargaining to relying on the law to protect employees from their weakness in individual bargaining. Facing this future, what will be the needs of labor law in the coming decades? What changes ought to be considered that will make labor law more serviceable for workers and employers and enable it to serve the larger political and social purposes which have motivated labor law for one hundred and fifty years?

Three needs appear obvious. First, the problems associated with overlapping rights and remedies and of multiple forums must be reduced. To have a single discharge litigated in four or more forums is intolerable for the employer, the worker, and the legal system — for everyone except lawyers. One possible course of action would be to federalize all labor law and create a system of labor courts as a unified forum. This, however, would depreciate the value of our federal system for it would block the states from having local variations, experimenting, or breaking new ground. A single specialized court might cramp or distort the evolving law. Labor law cannot live or grow in isolation; it must reflect general social and political values such as privacy, personal freedom, human dignity, and procedural fairness which permeate other areas of the law. This is particularly true of the individual rights in employment which the law must increasingly protect.

I can propose no neat solution. Indeed, I fear that because of the wide variety of rights to be protected and our hesitant legal recognition of them, the solution must be piecemeal and will inevitably be incomplete. However, we should be able to arrive at a rough consensus as to what the appropriate remedies and measure of damages should be so that they will not vary with the form of the action or the chosen forum. Further, we should be able to reduce multiple litigation by requiring that all of the rights growing out of the same transaction be adjudicated in the same forum and that the judgment be collateral estoppel on those rights. Some exceptions might be neces-

80. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979); *Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

sary where certain rights, such as those under Title VII of the Civil Rights Act, would be effectively protected only in a special forum.

There are other ways of reducing overlap and complexity, including systematic efforts to draft statutory provisions that more clearly define the relative priority of substantive rules and procedures. Few statutes provide useful guidance on pre-emption problems, and when they do, the pre-emption provisions are often inserted as an afterthought without any careful analysis or exploration of their potential impact on the wide variety of concrete cases.

Second, more study and thought needs to be given to designing remedies that will be effective, in practical terms, in making substantive employment rights real.⁸¹ The individual's weakness in bargaining with the employer is matched with the individual's weakness in litigating against the employer. Most workers do not have the price of admission to the legal system. They cannot afford a lawyer, and most claims are too small to produce a viable contingent fee. Awarding the winning plaintiffs their legal costs helps, but it discourages lawyers from taking cases which are doubtful or which may require developing new theories or legal rules. Double damages, such as those awarded in wage-hour suits, encourage the worker only minimally, because the claims are small and do little to deter employers from systematically underpaying their workers. Even in the unlikely event that an employer is successfully sued for half its violations, it still pays to violate the statute. Use of administrative agencies to enforce employee rights removes the burden of litigation from the worker, but our experience with administrative agencies, as presently designed and empowered, has found them wanting. Few neutral observers would characterize the NLRB, EEOC, OSHA, or the Department of Labor as effective guardians of employee rights.

Employment at will cases teach an additional lesson. Suits on implied contract theories are useful only for upper income employees because contract damages will not support a lawsuit. Tort theories, however, present a different picture. Damages for emotional distress and punitive damages may provide awards which encourage aggressive lawyers to accept such cases on a contingent fee and discourage employers from discharging employees without cause. In California, the average jury verdict in wrongful discharge cases has been more than \$250,000, with some verdicts for more than \$1,000,000.⁸² These awards, however, conceal two matters of concern. First, most wrongfully discharged workers are unsuccessful in litigation, so the law becomes a

81. See generally Kornblau, *Common Law Remedies for Wrongfully Discharged Employees* 9 IND. REL. L.J. 596 (1987).

82. Quackenbush, *1985 Jury Verdicts, Wrongful Termination Cases (California)*, 6 THE EMPLOYEE ADVOCATE 61 (Winter 1987); see also Palefsky, *Wrongful Termination Litigation: "Dagwood" and "Goliath"*, 62 MICH. B.J. 776 (1983).

lottery with a few big winners and many losers. Second, big awards attract public attention and generate a reaction against limitations on the employment at will doctrine and feed campaigns to reduce rather than increase employee rights. Reflection might lead to the conclusion that it would be preferable to have substantive rules which broaden the protection for more employees, with recoveries only for economic losses. However, it is also important to design practical procedures and remedies for the employees which will effectively deter violations by the employer.

Again, I am not prepared to present a solution; indeed, there may be no fully satisfactory solution. However, the designing of remedies which are more effective and appropriate is one of the most important jobs to be done before the turn of the century. This job, like that of reducing the problems of overlap, will require labor lawyers, academics, and judges to develop a new focus and different skills. The job is not one of description, but design. It is not one of reading statutes and interpreting them, but of writing them. It is not one of analyzing cases and predicting results, but of constructing procedures and prescribing rules which will reach the desired results.

Third, none of the present or proposed legislation on individual employment rights serves the political and social value of collective bargaining. Collective bargaining provides a measure of industrial democracy by giving workers a voice in the decisions affecting their working life. Employees' voice in legislation is so remote and weak it provides little sense of participation, and court decisions are completely beyond their control. As we substitute reliance on legal regulation for reliance on collective bargaining, the task will severely test our ingenuity and willingness to break out of old molds in finding answers to how we can construct a system of worker participation where there is no collective bargaining.

It is no answer that employers recognize the need and value of worker participation to increase productivity, improve quality, and reduce turnover. The fact is that the overwhelming majority of employers do not recognize the value of worker participation. Those who do are so rare as to be newsworthy. Many personnel programs which purport to provide workers a voice do not require management to listen to what it does not want to hear, much less act on it. Often, the matters on which employees can speak are limited to matters of small consequence. Few employers are prepared to share substantial prerogative with their employees.

It is important to point out that other countries have solved this problem by providing by statute for the establishment in each workplace of a works council or employee committee, elected by the employees, to act as their representative. In Germany, for example, the works council is given by statute codetermination rights on a wide

range of matters, including hiring and transfer of employees, job classification and work assignments, work schedules and overtime, implementation of job training, and plans for adjusting the work force and severance pay in cases of large scale layoffs and plant closings. In France, Italy, Belgium, and the Netherlands, elected employee representative committees perform many of these same functions. In Scandinavia, these functions are performed by the local unions; no statutory committees are needed because employees are 80-90% organized.

The very mention of employee plant committees revives for unions the specter of company unions, and employers immediately reject any suggestion of sharing management prerogatives. However, where there is no collective bargaining, the employees should have some other avenue for making their voice heard. One of the premises of the Wagner Act was that industrial democracy was an essential part of political democracy and that the law should provide for democracy in the workplace just as the constitution provides for it in government. This premise is still valid, and we should search for ways to fulfill it. If we shed our preconceptions, we can design a structure that will meet this need.

CONCLUSION

I want to make crystal clear that I still believe the goals of the Wagner Act are sound. Collective bargaining, with its grievance procedure and arbitration, is the best instrument for protecting individual employee rights, achieving industrial democracy, and minimizing governmental intervention. Collective bargaining, where it is established and accepted, has demonstrated that it can, and for most purposes has, fulfilled those purposes.

We were not wrong to look to collective bargaining as the best guardian of most individual employee rights. We are now beginning to acknowledge the unwelcome fact that for most employees, collective bargaining does not exist, and they have no guardian. This has motivated the judicial attacks on the employment at will doctrine and legislative initiatives to protect individual employees. There is now a changing of the guard for those who are not protected by collective bargaining. The prospect is that this process will continue through the turn of the century. Society will increasingly rely on legal regulation of employment relations. This will not be a precise systematic process, but rather a patchwork of laws, regulations, and decisions at federal, state, and local levels. The challenge will be to design those laws so as to bring some coherence to the process, provide appropriate and effective remedies, and ultimately develop structures of employee representation for those not represented through collective bargaining.