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# What the Experiences of the Recent Past Tell Us About the Labor and Employment Law Issues of the Future (Roundtable Discussion)

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## **Roundtable Discussion: What the Experiences of the Recent Past Tell Us About the Labor and Employment Law Issues of the Future**

The following is an edited transcript of the Symposium's closing Roundtable discussion. The participants in this discussion were  
Professor Catherine Barnard, Trinity College, Cambridge University;  
Willard Carr, Gibson, Dunn & Crutcher, Los Angeles;  
Professor Kenneth G. Dau-Schmidt, Indiana University School of  
Law—Bloomington; and  
Professor Alvin Goldman, University of Kentucky College of Law (Moderator).

ALVIN GOLDMAN: Good afternoon, my name is Alvin Goldman of University of Kentucky College of Law and I'm delighted to be here for this occasion. Ken Dau-Schmidt has made some excellent contributions to the field of labor and employment law in the work that he has done to date, and there is no doubt in the minds of any of us here that he will continue to do so. Thus, I am most pleased to join all of you on this very special occasion of Ken's appointment to the Carr Professorship in Labor and Employment Law.

My job as moderator is to introduce folks, which has been made particularly easy because, at one point or another, everyone here has already been introduced. For those who were not here yesterday, the one person sitting here who has not been introduced today is Willard Carr. Willard and his wife Margaret are the generous sponsors of the chair that Ken Dau-Schmidt now holds. Briefly, Willard is a distinguished graduate of the law school, where he served as the Article and Book Review Editor of the *Indiana Law Journal*. After graduating in 1950, he went on to have a remarkable career with the Los Angeles law firm of Gibson, Dunn & Crutcher.

With that introduction, I will now get into the meat of our final session. I think that since this is sort of a wrap-up session, the way we should proceed is to ask each of the panelists if they want to take five or ten minutes to give us their thoughts reflecting upon what's transpired in the last day and a half. Then, I will pose a few questions to try to stimulate some discussion drawn from various parts of the program. I hope to get some responses not only from panelists, but also from the audience. Willard.

WILLARD CARR: I am going to take a bit of a different approach here, and I hope I won't be criticized for doing so. I am not going to comment specifically about the papers that have been presented. I think they have already been very ably commented upon and I'm sure Ken and the two other panelists will have additional comments. What I want to do, though, is just reflect a little bit on the experience of the recent past.

I'm a little bit more positive than some of our speakers are about what we've achieved and what we've accomplished. I feel good about where we are with industrial relations in this country and therefore feel good about the future.

The last few days here I see our ranks have diminished and there are fewer of us here in attendance at the symposium now, but this is the hard core, so this is obviously who we want here. We have been stimulated, we have been provoked, and

we have been challenged through a series of presentations, papers, and comments concerning employment relations in the new millennium. Ken certainly is the one who is responsible for the success of the symposium and the very intellectual and challenging content of it.

How many of the predictions that have been made at this conference will come to pass is anybody's guess. Obviously, we can only tell about the future after we have experienced it. Anytime a group of academics and practitioners get together, identical predictions obviously do not emerge. In fact, I think there have been a number of areas of conflict. And we've looked at many different areas, some of which I'm sure at the end of the day will all be pulled together, probably by Ken, as to how they really relate to each other and how they all fit within the scope of the conference. Obviously, I think one of the big emerging points here at the conference is that the revolution in communication and technology will impact employment relations as we face an ever smaller and more independent world. However, as Kierkegaard observed, "life has to be lived forward but can only be understood backwards."

Therefore, in my concluding remarks before we get into the Roundtable discussion, I'd like to talk about labor and employment law from one working lawyer's perspective, what I see as sort of where we are.

One of the themes that is sort of a paradox to me, and which is why we are here today, is the subtle way the employment relationship is so centrally linked to so many important human aspirations. Labor Law is usually an elective course in our schools, and yet, at the same time, I think that the centrality and importance of these issues is what makes labor law so rewarding and so interesting to us. It's a gateway to some of the largest issues of public policy that are before the country. And from my perspective, the work laid out actually plays a central role in the American promise. I think it contributes to—without trying to be too patriotic or too heavy here—life, liberty, and the pursuit of happiness. Political liberty, economic opportunities, the chance to make a difference through hard and good work, open and free markets—all of these important concepts are affected by the rule of law extending to workplace relationships. And it should always be borne in mind that the workplace is a national meeting ground where Americans of all backgrounds come together more often and for longer periods of time than at any other place.

I think we have a record here with our federal, state, and local laws, even though they may be imperfect. These laws express important American values that have been achieved in our labor relations: Respect for the notion of a minimum standard or safety net, minimum wages, overtime compensation, workers' compensation, unemployment insurance, and social security based upon workplace earnings. Respect for the chance to participate regardless of gender, race, or nationality and regardless of disability, age, or other factors which we have learned over the last fifty years are irrelevant to job performance. Respect for management decisions by employers, based upon business purpose, because I think there is still a large reservoir of good faith and confidence in the decisions made by the employer as to which markets to go into, the products to be manufactured, the machines to be used, and all the rest. And I think there is an ongoing reservoir of good will there.

Another important aspect that I think is largely an American invention is the use of a secret ballot in selecting bargaining representatives. We've had some criticism at this conference of the fact that American collective bargaining and union representation laws have not really kept up and that they are not really effective any

longer, but it seems to me that the idea of a secret ballot election for selecting bargaining representatives is a very important and original invention for the Americans.

Respect for arms-length bargaining and collective bargaining in good faith as a legal requirement. I think there has been some indication throughout that bargaining is not really effective and that unions are declining in their importance. I think our laws still uphold the concept of good faith bargaining and with some teeth and some ability to enforce it.

Another concept which I think is fairly unique to the American situation is the respect for the integrity of a deal. Collective bargaining agreements and individual employment agreements are given the force of law. When you look at some of the European and other countries' experiences, really, historically contracts have not been legally binding—in the sense that they were going to prevent strikes and there was going to be respect for the deal which had been made for the life of the contract.

I think another factor I would like to mention is respect for the possibility of reform in human behavior. Equal employment opportunity, which is a transforming yet deeply conservative ethic, was revolutionary after WWII and it really now is ingrained in American life. Finally, one of the most hopeful stories of the twentieth century—respect for representative government.

There have been tremendous changes in labor and employment law that have taken place over the last fifty years. Most employment laws were enacted because of hotly debated issues in Congress, state legislatures, or municipal councils. At the national level, the National Labor Relations Act ("NLRA"),<sup>1</sup> as some of you I'm sure know, was first proposed by Senator Robert Wagner and reluctantly endorsed by President Franklin Delano Roosevelt. The Civil Rights Act of 1964<sup>2</sup> probably came about as a result of the tragic assassination of President John Kennedy and the mood of the country at that time. It still was debated for over a year and was finally drafted as a sort of cloakroom compromise. Of course, one of the most controversial and actively litigated provisions of that law, the provision against sex discrimination, was added by Judge Smith of Virginia in a House committee in an effort to derail the entire enactment of the Civil Rights Act. As a consequence, there is very little legislative history on it. Of course, there is a lot of history since then and it has been extended far beyond what I think most people at the time probably anticipated it would be. For example, the Civil Rights Act has been used to strike down the state protective law most states had limiting the number of hours of work for women or children on the grounds of federal preemption. We also have the Civil Rights Act of 1991,<sup>3</sup> which was a compromise result of two years of controversy and intense negotiation in Congress.

We also have in the United States, and particularly in the recent past, respect for the rule of law. There is widespread acceptance in America of the use of the judicial

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1. National Labor Relations Act (NLRA), Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1994)).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1994 & Supp. IV 1998)).

3. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 2 U.S.C. §§ 601, 1201-1202, 1219-1220 (1994)).

system, including trial by jury, to determine employment rights and terms of employment. To a great extent, we trust state and federal judges to give content to the general mandates and employment laws. Professor Theodore St. Antoine previously discussed the subject of resolution of employment law and contract disputes through arbitration. The use of private arbitration to resolve employment disputes is still a very viable and very important issue and I think it's one of the achievements of the American industrial relations system.

These values and their expression may seem commonplace to many of us, but they actually were the subject of much public controversy and debate—some still are.

Professor Dau-Schmidt, in a recent article in the *Indiana Law Journal*, talks about the four ways of influencing or changing the employment relationship: individual bargaining, collective bargaining, laws and regulations, and the developing common law.<sup>4</sup> I would add a fifth, the corporate campaign, which I think is becoming increasingly important as a means of addressing concerns in the employment relationship. Over the past fifty years, you take those four or five if you want to, one or the other has been in ascendancy at any particular time.

Collective bargaining was in ascendancy for a long period of time during the 1930s and 1940s. Individual bargaining became important at least as far as the technical and professional groups were concerned. Then laws and regulations became more important as we went into the Me Generation, where people were simply looking out for number one and not interested in institutions—whether it was the labor union, the political party, the family, or the church. At the decline of these institutions in people's lives, a lot of laws and regulations were enacted. And then, of course, there were developments in the common law. A lot of them started in California. We were sometimes on the cutting edge, but now, hopefully, we have adopted a more reasonable approach. I think the courts have realized that they are not really the best and final resort for a lot of employment decisions. I think maybe that's why the courts have backed away from that.

Anyway, this Symposium, from my perspective, has reaffirmed the importance of labor and employment law as a field of study, as a field of professional practice, and as a field which deeply affects the industrial lives of nations and the private hopes and dreams of people. Labor and employment law has a future and it will be influenced and shaped by many of you here today. I have every confidence we are in good hands. Thank you.

ALVIN GOLDMAN: Let's turn to two of those good hands, Kenneth Dau-Schmidt.

KENNETH DAU-SCHMIDT: I have gotten to speak more than anyone else at this conference so far, so I am going to keep my comments fairly short in hopes that we will have more time for questions and discussion at the end of this panel. I did want to address at least two issues though. I think in some ways these two issues are a microcosm of many of the issues we have been discussing.

First of all, I was going to pick up Chic Bourne's challenge from yesterday on the discussion of education. If you recall, yesterday the subject of education came up a

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4. Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 688-700 (1993).

lot. Chic wanted us to talk more about education because he thinks it is an important item and I agree with him. If the subject of this Roundtable discussion is what we have learned from the recent past, one thing I think that we have learned is that education is of paramount importance. Even though education and job training are not traditionally thought of as labor and employment law issues, I think that because of the changes that are occurring in job training and the importance of keeping employers involved in job training, it is going to be an issue in labor and employment law in the future.

Why is education so important? We have already talked about how this new information technology has interceded itself into the workplace in ways that we never would have imagined in the past. Our workers are going to have to learn this new technology and keep up to date on this technology in order to do their jobs adequately and compete. I don't know how many years ago people would have thought a professor couldn't do his job adequately without knowing something about computers and software, but it's true nowadays. Also, with the rise in international competition, we need to have skills that will make our workers more productive; so that when we are out there competing in the world we won't be competing with low-wage, low-productivity workers, but will instead be competing with high-wage, high-productivity workers. It's very important that we adequately train our children and future generations so that they can compete with high skills and become high-productivity workers who will get a high wage in the international economy. Finally, another reason why it is important in this new age is that the pace of change seems to have quickened with the global economy and new technology. As a result, as I talked about a little bit yesterday, human capital, or skills and training, become obsolete more quickly and, as a result, we need more frequent renewal of our skills. Thus, I think one thing we should take away from this conference is that education is of paramount importance and that it is going to be of even greater importance in the future.

At the same time, in some ways, we have seen education take a back seat in our priorities in our nation. We basically have three legs to support education: We have people who pay for their own education, we have state-supported education, and we have employer-provided training. And in some ways, employer-provided training is really the most important leg of that. It's the most important leg because employers know what skills they want employees to have for the job. Also, employers have many opportunities for employees to acquire skills while they are working on the job. We have seen states retreat, to a certain extent, on funding for education. Furthermore, as I talked about yesterday, even though employers still think training is important, because of the new short-term nature of the employment relationship, employers aren't as willing to invest in training because they are afraid they are just going to lose that trained employee to another employer. As I talked about yesterday, some employers are consciously going out to raid skilled employees without training their own. Because education is so important, I hate to see any one of those three legs decline. State funding of education—that's a political issue we'll have to debate in the legislature about how much the state is going to fund or subsidize education. But as to how to keep employers in training—that's an issue I'd like to talk about here.

I made some suggestions yesterday about how we might formulate multi-employer training councils. And something that I found attractive about the proposition was that, first of all, we could use a public/private partnership to solve the funding

problem. We'd say that employers would have to contribute to these training programs if they were going to benefit from them. Another benefit from multi-employer training councils was that they would be a way of keeping employers involved in training so that they would have input as to who would be trained and also provide employees the opportunities for training. So, education is important and I think it is important that we maintain all three of the legs that support education in this country.

We need to think about this problem of education in the international context, and here I have a question that perhaps Cathy can address in her part of this discussion. What sort of strategy do we want to adopt as a country with respect to training? Do we want to, as I advocated, be a country who tries to give our employees, our children, highly productive skills? Are we going to be one of the highly educated countries and get most people in our country high-wage jobs? Or, are we going to be a country that competes at a lower level of productivity and ends up with lower wages? The reason why I wanted Catherine to discuss this subject is because this must be an issue that has come up in the European Union. They must have countries there that are talking about it. I can imagine Spain saying, "When we get into competition with Germany, Germany has this incredible system of public education and job training, even for workers who don't go to college." And Spain is, I would imagine, saying, "How are we going to compete with these people? We are going to end up with all the low-paying, low-skill jobs and they will end up with all the high-paying jobs." They must have thought about these questions. I'm just curious as to what debates are going on in the European community and how other countries have approached this problem.

The second issue that I wanted to talk about was the issue of employee representation in the workplace. I guess I'm about halfway through my career here; perhaps it's just a little bit of midlife angst or whatever. I enjoy labor and employment law. I think there is probably no better area of the law for many of the reasons that Willard described. It's a very important relationship, it's a very interesting area to work in. But in some ways it's also frustrating. It's frustrating in that the entire time I have studied labor law, both sides have complained very bitterly about the law. Both management and unions complain about the law, but nothing ever changes. Unions seem to be complaining more about it recently, but certainly management has wanted to see amendments of the law too. Most recently we have seen efforts with the Teamwork for Employees and Management Act ("TEAM Act")<sup>5</sup> and efforts to loosen the restrictions of section 8(a)(2).<sup>6</sup> Nothing ever seems to come of these efforts to amend the law. It's a long-term political stalemate. We all know that the filibuster problems in the Senate have always frustrated reform even when there has been a majority in Congress that might want some kind of changes. I'm not even advocating which change should occur, but it would be beneficial to see some new things tried—some of the things we have talked about, some of the alternatives in representation.

But short of reforming the Senate, a thought occurred to me that one reason we

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5. Teamwork for Employees and Management (TEAM) Act of 1997, H.R. 743, 104th Cong. (1996).

6. National Labor Relations Act (NLRA) § 8(a)(2), 29 U.S.C. § 158(a)(2) (1994).

have this political deadlock is because the stakes are so large. If we changed the NLRA, we would change it for the entire country. I know there are very good reasons why we have a federal labor-law policy and why we have federal enforcement of bargaining contracts. We certainly wouldn't want to set that up on a state-by-state basis. But, I wonder with respect to some of these other options we have talked about, which would be the representative employee councils, minority bargaining, the two-tier system, or the Team Act. I wonder if we could allow state-by-state variation with respect to some of these practices. In other words, they could amend the NLRA so that it would not preempt state law if a state wanted to allow or actively undertake employee-representative councils, or they might undertake a two-tiered system in bargaining. I'm sure there are some practical problems to be worked out, but we would leave the basic NLRA structure in place with respect to traditional collective bargaining. But if we allow some state variation and try some of these other forms of employee representation, we could find out whether some of these systems are as bad for employers as the employers think they would be or if they are as bad for employees as the unions have thought they would be. These are the ideas that occur to me in reflecting on the experience of the recent past.

ALVIN GOLDMAN: Catherine had indicated to me before we started that she thought she'd said enough for today, but Ken has made sure to put the ball into her court, so go ahead.

CATHERINE BARNARD: What I thought I would do is to focus my comments around observations of an outsider looking in at your remarkable system. Having listened intently these last couple of days, things have struck me that I have and have not heard. I'm going to focus my comments around three points: the "third way," the enforcement of rights, and funding education.

The "third way" is a big thing in the United Kingdom at the moment. I don't know if it's terminology that means very much to you or not—I'm told it's borrowed from your terminology—but it's something that Tony Blair has been very excited about. It's the "third way," somewhere between the U.S. and U.K. deregulatory approach with low labor standards and high levels of employment and the contrasting European model, a continental European model of high levels of labor standards but also combined with high levels of unemployment. And this is the way you got Blair and government, and that, to an extent, is being replicated at the European community level. The idea somehow manages to combine those two extreme models by marrying the notions of flexibility and security.

Now, what's very interesting is that the continental Europeans have to come to terms with this and that means flexibility, what is meant by flexibility. And the area of flexibility that has attracted much attention is numerical flexibility for employers to hire and fire workers or at least be able to avail themselves of workforce as and when needed. This has created a considerable role for temporary agencies. It's very striking that in Italy temporary agencies were illegal until two years ago and likewise in Germany they were unlawful until very recently. What's very interesting about what the Italians have done in introducing the legislation on temporary work agencies is that they've imposed a training levy on each employer who uses the services of a temporary agency. It's a five percent levy on every employer who takes on a temporary worker, and that levy goes to pay for the training of these high-skill



workers. I think it's quite an interesting example from the debates we had yesterday about how you might try and reconcile the problems experienced by these more precarious members of the workforce.

As I mentioned before, trade unions or the social partners have been given a key role in managing this flexibility and combined security. I wouldn't repeat what Ken has been saying about different models of partnership as opposed to trade unions. I just would like to draw your attention to a couple of other comparative insights. First of all, in Scandinavian countries there are very high levels of unionization. We're talking eighty to ninety percent of the work force unionized. What is very striking is that the trade unions have a very important role in administering the social-security schemes, health-insurance schemes, and so forth. For those people who are considering the future of trade unions, what seems to be quite interesting is whether trade unions could be given particular responsibilities for managing change, whether it be through managing some of these health care-insurance schemes particularly at the time you've got a transient workforce—a workforce which has many employers, or whether the trade union might have a role to play. That role would actually be a very different role from the conventional confrontational role which typified relationships between employers and trade unions in the past. It does seem to me that if trade unions have the more responsible role in terms of legislating, in terms of managing change, then questions about industrial action start to lose their prominence as a function of the trade-union movement. I think that this is something that the trade-union movement hasn't fully taken on board. But if they are going to have this role, a sophisticated role which is divorced from the us/them type approach, then clearly some of the other aspects of the functions will have to change.

The second point I wanted to make is about the importance of rights. I was very struck listening to your discussions this morning about jury trials and the role of the jury. I was particularly struck by the practitioner who described, with some concern, the roles of pro se litigants, and their inability to perhaps look after the litigation as effectively as a lawyer could do. There is something very troubling to me in the perspective of access to justice that people should be denied access to the court.

In the United Kingdom, we have a labor tribunal system. It's called the employment tribunal—similar to what you find in Italy, France, Germany, and so forth. What's interesting in our system is that each side pays their own costs, which means that it's free for any employee who feels their rights are being infringed to go to the tribunal. It's virtually cost-free for the individual employee. For the employer it is not cost-free because usually the employer instructs lawyers, whereas the employee very often doesn't have the resources to do so, which means that for the employer there's significant incentive to settle. It will maybe cost less to settle than to actually fight the dispute. But because of the volume of litigation that is taking place in the United Kingdom, now we have 100,000 cases per year, we have also introduced some form of ADR, compulsory arbitration, subject to very strict conditions that became law last year. I haven't gotten anything back in statistics to give to you—it's rather too soon—but I do think it's quite interesting how we found some developments in that regard.

Of course, our system does give considerable power to the judges, and the judges have always had a considerable role in the British system of contracts and employment. But one development in the last eighteen months to two years or so that has taken place and has assumed really a considered importance is the development

of the implied term in contracts of employment: what we call the duty of mutual trust and confidence, which I think has some parallel to your good faith and fair dealing clause. What's very interesting about the development of this clause is that it borrowed some continental European ideas. Particularly, the notion, to preface, that it entered through the common law through this implied term, mutual trust and confidence. I think our judges would use that clause to stop some of the more egregious breaches of contract that seem to go almost unnoticed in our system. But it does give the judges at least the power to massage the contract for employment—at least allow the contract for employment to develop. I think it would be through this implied term that privacy issues will be dealt with extensively.

The final point I wanted to make was about education. I wouldn't dream of commenting extensively on your system, but what I would like to say is I'm very struck by how generous previous alumni have been when they give back to their alma mater and give to help fund valuable positions. In the United Kingdom, we started to realize we are not going to get very much more money from the government to pay for higher education and we must call upon the generosity of our former students. And there is a famous story that is told at Cambridge about an attempt by a past chancellor to raise some money from a particularly wealthy lawyer in London. He approached this lawyer asking him for some money and the lawyer said, "Didn't your research department tell you that I have a very sick mother who needs a lot of care?" "No," says the vice-chancellor. "Well, did your research department tell you that I have a brother who has nine children and he is impoverished?" "No," said the vice-chancellor. "And did your research department tell you that I have a sister who is on the breadline completely destitute?" "No," says the vice-chancellor. "Well, I didn't give them any money either." I think the message I'll take back with me is that American lawyers are more generous than British ones.

ALVIN GOLDMAN: Before we open up the floor, and that is what I think I should do right now, I have just one little point, based on a representation made in the last session. A characteristic of the British employment tribunal that you should be aware of is that it's a tripartite tribunal. It consists of a judge who is designated by the employer groups, a judge who is designated by the labor groups, and then a neutral judge. Most of the time their decisions are unanimous. I point that out because the individual appearing pro se coming before a tribunal of that sort is in a somewhat different type of environment, I think, than would be an individual coming before an arbitrator who has been selected the way we select arbitrators and where one party would be a lot more knowledgeable about the background of the particular individual who is serving as the arbitrator.

Let me pose a question that has been intriguing me since Ken's initial presentation. I don't know where this leads, but when he was describing the globalization of the workforce, certainly a portion of the workforce, I was thinking to myself: "Well, is there any part of the workforce that has had to deal in a global market for an extended period of time? Does our legal system, does our business system, have experience with this sort of thing?" And it occurred to me that it has. We were pretty big in the last century in what was called the whaling trade. That was a global market. The cod catchers had another global market. I would think fur trading may well have been another global market. And then the question is, "Well, how did employment relations get resolved in those markets?"

The only one that I think I know a little bit about and I can't vouch at all for the accuracy of this, but I certainly know that, from reading *Moby Dick*, if from nothing else, back in the whaling trade days there was a fixed system of profit sharing. Each member of the crew, depending on that member's rank in the crew, from the captain on down, received a certain portion of the total take when they brought the ship in with its catch. And so, if the Icelandic whalers were operating with the same system, if the British whalers were operating with the same system—if the Portugese whalers were operating with the same system, somehow they worked things out pretty well. They were in the same position, whether they were going to bring the ship into port in California to sell what they caught, bring it into port in Britain, or elsewhere. Somehow, it seems to me the people in that trade managed to work out a system so that they were not caught up with competition that drove each other's wages down.

KENNETH DAU-SCHMIDT: Well, there is a lot to be said for employer-employee profit sharing. If nothing else, it gives the employers and employees a direct joint interest in the success of the firm. But profit sharing also makes that interest variable in terms of what is received. I don't know if this is why they arrived at profit sharing in the whaling industry, but we've seen how the global economy—as firms become more flexible—we've seen that more and more risk is put on employees and that would be consistent with profit sharing too. Because now, rather than getting a guaranteed wage, your take from the firm would depend on whatever variation is out there in the marketplace.

Another thing, if you recall, I talked about the fact that as employment relationships become more short-term, one problem is employees become less loyal. And they have to be monitored more closely. You might think that profit sharing would help with that loyalty problem and to a certain extent it would because, as I said, it would promote a more direct unity between the interests of employers and employees. But you still would have to monitor employees because you could be the whaler who holds back and doesn't pull on the oars. Everybody else is pulling, everybody else helps catch the whale, and you still get a share of the profits. So while profit sharing solves some problems in the new economic environment, I don't think it solves them all.

ALVIN GOLDMAN: I think one who was holding back would quickly find how cold the water was in that situation.

[Laughter]

FIRST AUDIENCE MEMBER (UNIDENTIFIED): This is not a question, it's simply a comment: I can think of two books that are relevant to this discussion. The first is *The Perfect Storm* which describes conditions in the international whaling and fishing industry. That system of profit sharing still prevails. But it occurred to me while Ken was commenting that there was another book that everybody ought to read if you're going to be in this business. It's about eight or ten years old and it's not a joke—maybe you've all read it and think it is. Next time you're in a bookstore, find and read, buy and read *Rivethed*. You need to read it. It's real life in the factories in America today.

SECOND AUDIENCE MEMBER (MATTHEW FINKIN): I would like to pick up briefly on Alvin's reference to the maritime trades. Historically, that employment relationship was impermanent, to say the least. A seaman contracted to ship out for each voyage only. This may be echoed by the rise of greater job impermanence today. And few employments were more nationally unbounded: the crews were polyglot; the ships, however owned, might fly the flag of any number of nations; and the workplace was ambulatory, moving from nation-state to nation-state. In these highly "globalized" circumstances, a general maritime law—a Law of the Sea going back to the Hanseatic League, and even to ancient times—was widely acknowledge in the domestic laws of the most commercial states. In employment, an International Seamen's Code was promulgated by the International Labor Organization. But it remains to be seen whether or not that development is a model for the future or is historically limited to the unique circumstance of workplaces that move with their workers from country to country. As matters currently stand, capital flows in and out of countries to create or destroy jobs and people flow internationally (if they can) to take those jobs; but the jobs remain firmly embedded in a national legal framework.

ALVIN GOLDMAN: Another interesting aspect of that particular model is that it probably is the situation in which our country developed the very first social benefit system. It included the old-age homes for seafarers and a publicly operated medical treatment system including the maritime hospitals. Originally, they were financed by a tonnage tax and then eventually the tonnage tax disappeared and the financing just came out of the general treasury. I think in part this reflected the realization that it's great if you come back after your first voyage as a whaler and you have a great catch and you've got a lot of cash in your pocket. But if there was a disaster at sea and you are lucky enough to make it back alive, you're destitute. So there was a need to find some way to reduce the risks of what was an important industry. And so, the industry got Congress to pass what may well be the first social-welfare legislature in the United States.

THIRD AUDIENCE MEMBER (UNIDENTIFIED): We might want to comment that since, say the Johnson administration, the U.S. Congress has been doing most of the bargaining for the American workers. And that it will continue to do so, with legislation that seems important to the labor movement as a whole. This has affected the role of unions and what they see as the needs of American workers. After all, they're in a political environment now and need to maintain their positions by—so to speak—bargaining for legislation.

WILLARD CARR: This is the point I was trying to make. You have these different avenues from which you can approach these labor relations problems and one of those, of course, is regulation. I think that with the breakdown of many of our institutions, including the labor unions—due to a loss of respect for those institutions and a loss of the sense of belonging, with everybody out for themselves—that people became more politically active. People became more politically active, the legislatures were pursued, and then they enacted a lot of these laws. I imagine that will continue.

In California, we had a provision that did away with the eight-hour law regarding overtime pay for working over eight hours. Governor Wilson and the Industrial Welfare Commission did away with the eight-hour law. Now, one of the things that

Governor Davis, the current Governor Davis, campaigned on was that he was going to restore the eight-hour law so that you pay overtime. We are one of only two or three states that paid overtime after eight hours. The current Governor Davis along with the Democratic legislature have now put back into effect the eight-hour law. There is a lot of legislation pending in California which has been pushed by the unions and Davis is actually between a rock and a hard place because he is a fairly moderate Democrat and he doesn't like to have all these things come up on his desk. I was talking to him a few weeks ago and he was saying he would just as soon not see a lot of this legislation, but the unions are in the ascendancy in California and they are working on the legislative front. But they are also engaging in a major campaign to organize additional workers in Los Angeles, for example, and they claim to have unionized 84,000 additional workers in Los Angeles.

I think your point is well taken that the increase in legislation, regulations, EEOC, and a lot of these other things probably made the role of unions less important in a lot of areas. But I don't think the unions are to be counted out or dead on their feet at this point.

FOURTH AUDIENCE MEMBER (UNIDENTIFIED): Also, with respect to that, Congress has seen the lawyers do a better job of representing the workers than unions.

KENNETH DAU-SCHMIDT: I can see some advantages and some disadvantages in both systems. Actually, in the piece that Willard referred to earlier, my *Indiana Law Journal* piece,<sup>7</sup> I talk a little bit about this. You look at these different ways of addressing needs of workers: individual bargaining, collective bargaining, legislation, and common law. Willard wanted to add corporate campaigns. They all have advantages and disadvantages and I think you're right in that we shifted. At one point in our country's history, during the 1930s and 1940s, collective bargaining was what we saw as the primary way of addressing workers' needs. Then, in the 1950s and 1960s, we changed to legislation. Some of the legislation does have some advantages over collective bargaining, but it also has some disadvantages. One advantage it has is that you can pass a law. Collective bargaining, I can't remember what the high water mark for union density was in this country, but it was, what, thirty-five percent?

ALVIN GOLDMAN: Thirty-seven percent.

KENNETH DAU-SCHMIDT: Thirty-seven percent. So, collective bargaining never covered all workers. Whereas if you want legislation that is going to cover all workers, you can pass a minimum-wage law that covers all workers, rather than just thirty-seven percent. Another advantage of it is that employers can discriminate against workers if they are active in a union, whereas if a worker votes for a congressman who is going to pass the same kind of legislation, their employer is less likely to find out about it so they are less likely to suffer retaliation on that basis.

The disadvantage of legislation is, I think, that collective bargaining gives you a more particularized solution to the problem. In other words, there is an advantage in

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7. Dau-Schmidt, *supra* note 4.

legislation in that you can cover everybody, but the disadvantage is that you try to cover everybody with the same solution. It might be that the employers and employees recognize there is a problem here, we need to deal with toxic chemicals, but it might be better to deal with the problem on a firm-by-firm basis through collective bargaining, rather than have one uniform regulation that covers everybody. If you had knowledgeable collective bargaining agents, they could probably take care of it on a better basis than one uniform federal regulation.

So, I think there are advantages and disadvantages to both solutions. I think one reason why we moved from collective bargaining to legislation is that in our system of legal rights we are focused on individual rights. Collective bargaining has never fit well into that system. Whereas, legislation does. I'm not saying that legislation always works well, but at least it fits into our idea of how we address legal problems. Rather than go out and organize a union and address the problem collectively through terms that can be represented in a contract, we pass a law that gives people an individual right that can be enforced in court. Somehow the individual-rights legislation fits better into the way Americans think about the law. So that's another reason why I think legislation has overtaken collective bargaining.

ALVIN GOLDMAN: We are now almost fifteen minutes beyond the scheduled time. I think it is most appropriate that the final word of this discussion has come from the new Willard and Margaret Carr Professor of Labor and Employment Law. I want to thank all of you for your patience and for your excellent contributions.

