THE STRUCTURE OF POST-WAR LABOR RELATIONS

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In my article[1] which I will summarize in the next few minutes, I argue that there is a single, unified vision of collective bargaining that is embodied in all post-war labor law doctrine and all post-war writings about industrial relations. This vision is both a definition of what collective bargaining is, and a vision of the ideal relationship between unions and management in society as a whole. It has become so pervasive in all thinking and writing about labor relations that, like the ambient air, it is almost invisible.

What I will try to do today is to explain what that vision is and define its major elements so that we can look at it, evaluate it, understand its functions, and consider whether it is an accurate and useful description of the industrial world. First I will try to articulate that vision, then say something about how it has come to be embodied in and enforced by court decisions, and finally, provide some criticisms of it. I will argue that the vision fails to present a plausible description of the industrial world and that it entails a prescription for class relations which has harmed the development of union strength over the last twenty-five years in America.

I call the vision "industrial pluralism." It is the view that collective bargaining is industrial self-government. In this view, management and labor are seen as political parties—each one represents its constituencies at the bargaining table as political representatives represent theirs in a legislature. The negotiation process is described as a legislative process in which the two parties meet and legislate the rules by which the workplace will be governed. The rules that result—the collective bargaining agreement—are termed a statute or a constitution for the workplace.

The governmental metaphor is central to the industrial pluralist model. Private arbitration plays a key role in the model: that of the metaphoric judiciary. A collective bargaining agreement, like a statute, requires rule application and rule interpretation. A collective bargaining agreement gives rise to innumerable questions concerning the meaning of the rules when they are applied to the varied and often unanticipated situations that arise daily. In the industrial pluralist model, these questions are decided by the arbitrator, who is the judge: the neutral, impartial entity who can interpret and apply the rules because he was not part of the original rule-making process. With a separation between the judicial and the legislative function, the

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1. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (Copyright © 1981 by Katherine Van Wezel Stone). Portions reprinted here with permission of the author.

industrial pluralists claim that there is a separation of powers which makes the workplace a microcosmic democracy.

In this scheme arbitration is not a mere afterthought, but rather goes to the heart of the collective bargaining process. Under the National Labor Relations Act (NLRA), management and labor have a statutory duty to bargain and to produce a written agreement. The agreement that results specifies rules which limit management's discretion and provide certain benefits and protections that the workers or the union have been able to obtain. The question that repeatedly arises is, what happens when management breaks the agreement by failing to provide the benefits or afford the protections specified? If the union has no mechanism to enforce the agreement, then the duty to bargain under the NLRA is reduced to a meaningless charade, and the collective agreement itself is nothing but a sham. The central question under the NLRA, therefore, is, What power do unions have to enforce their collective bargaining agreements? Without that power, the rights conferred by the Act are chimeric at best. Under the industrial pluralist vision, the collective agreement is only enforceable at arbitration. The arbitrator, as judge, decides if there has been a breach and fashions a remedy.

The industrial pluralist vision has institutional implications for the role of industrial relations in the broader judicial and legal process. The principal implication is that other types of legal and judicial processes should be kept out of the workplace. The model describes the workplace as an autonomous, democratic institution. Any intervention by outside process, be it a court, an administrative agency, or legislative enactment, would only disrupt its self-regulating, democratic process.

All of the major case law development in the post-war era can be seen as establishing the institutional structure to effectuate the industrial pluralist vision of industrial relations. The key cases in this process were *Lincoln Mills*[2] and the Steelworkers Trilogy.[3] In *Lincoln Mills,* the Supreme Court held that an agreement to arbitrate could be specifically enforced by a union. The Court found it to be the "policy of our national labor laws" to further private arbitration in collective bargaining agreements, and it therefore authorized federal courts to fashion a common law to promote arbitration.[4]

In the Steelworkers Trilogy the Court articulated a presumption of arbitrability, which is that if there is any doubt about whether a dispute is subject to arbitration, arbitrability should be presumed.[5] In the Trilogy the

2. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

3. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

4. 353 U.S. at 456-57.

5. 363 U.S. at 585.

Court also held that a court should enforce arbitration agreements and order arbitration without regard to its view of the merits of the underlying grievance.[6]

Another important case in this development was *Carey v. Westinghouse*,[7] which involved a dispute that implicated both interpretation of a collective bargaining agreement and a question squarely within the jurisdiction of the National Labor Relations Board (NLRB). The Supreme Court held that in such a situation the jurisdiction of the NLRB over the statutory issue should be deferred in favor of the jurisdiction of the arbitrator.[8] The concept of deference also developed inside the NLRB, culminating in the *Collyer Insulated Wire*[9] decision, in which the Board said that it would withhold its processes and not decide disputes which allege statutory violations when the dispute is subject to an arbitration clause in the collective bargaining agreement.

Another decision that established and reflected the industrial pluralist view was *Boys Markets v. Retail Clerks*,[10] in which the Supreme Court said that injunctive relief was available to employers against strikes by unions in violation of no-strike clauses for issues that were subject to arbitration.[11] *Boys Markets* therefore gave employers an incentive to make as many issues as possible subject to arbitration, and make the injunctive power of the courts available to enforce the national labor policy of private arbitration.

I want to set forth two criticisms of this vision. The first one concerns the implausibility of the vision as a description of labor relations. The view of management and labor as jointly establishing the rules for governing plant life presupposes the possibility of equal power of management and labor and equal input into industrial conditions. This presupposition, which I call the premise of joint sovereignty, is, I will argue, a false premise.

The premise of joint sovereignty is false in part because the law does not permit such equal input. The law makes a distinction in the duty to bargain between mandatory subjects of bargaining and permissive subjects of bargaining.[12] Indeed, there are even illegal subjects of bargaining,[13] such as bargaining over such things as wage rates for employees not within the bargaining unit. Only over mandatory subjects may a union bargain to impasse and, failing agreement, engage in a protected strike. On the other hand, permissive items of bargaining are items which unions can discuss,

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6. 363 U.S. at 567-68.
7. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).
8. *Id.* at 272.
9. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).
10. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).
11. *Id.* at 249-53.
12. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).
13. *See, e.g.*, NLRB v. Nat'l Maritime Union, 175 F.2d 686 (2d Cir. 1949) (bargaining for discriminatory hiring hall clauses was illegal).

but not to the point of impasse, and which therefore cannot be the subject of a protected strike. It has become increasingly clear that not all subjects that are important to unions are within the mandatory sphere. One example of a permissive subject is the decision in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.,* [14] which held that unions cannot force bargaining over the pension benefits of retired workers.

Perhaps the most important limitation on mandatory bargaining comes from the decision in *Fibreboard Paper Products Corp. v. NLRB*[15] in which the U.S. Supreme Court considered whether management had a duty to bargain over its decision to subcontract out bargaining unit work.[16] Three Justices said in a concurring opinion that there is no duty to bargain over management decisions that lie "within the core of entrepreneurial control."[17] These kinds of decisions include major investment decisions, decisions about type of technology, location of the plant, nature of the product and the scope of the enterprise. The *Fibreboard* concurrence has become the majority rule. It has been applied to prevent mandatory bargaining over subcontracting, technological change, and plant closings.[18] Last year, in the case of *First National Maintenance v. NLRB*[19] the Supreme Court applied the doctrine of *Fibreboard* to hold that there is no duty by management to bargain over a partial closure of its operations.

Even within the mandatory area of bargaining, however, there is still no "joint sovereignty." A doctrine called "retained management rights" has emerged which says that not all questions that arise in the course of plant life, even if they're within the scope of mandatory bargaining, are subject to arbitration or are grievable by the union. One area in which retained management rights are often asserted concerns shop practices in existence at the time the collective agreement is negotiated. Such practices could comprise an almost infinite list, such as the time of the shifts, the existence of wash-up time, the existence of Christmas bonuses, the right to receive phone calls, and the right to smoke on the job. Shop practices are rarely specified in a collective agreement, because it would be almost impossible to do so. They form part of the unspoken background against which an agreement is negotiated.

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14. 404 U.S. 157 (1979).

15. 379 U.S. 203 (1964).

16. *See id.* at 210 (management is required to bargain " 'with respect to wages, hours, and other terms and conditions of employment. . . .' The duty [to negotiate] is limited to these subjects . . .").

17. *Id.* at 223 (Stewart, J., concurring, joined by Douglas, J., and Harlan, J.).

18. *But see* Brockway Motor Trucks, Division of Mack Trucks, Inc. v. NLRB, 582 F.2d 720, 724, 735-38 (3d Cir. 1978) (imposing on truck manufacturers a duty to bargain over the decision to close one plant, as opposed to a complete business closing, in which there is no duty); Western Mass. Elec. Co. v. NLRB, 573 F.2d 101, 106 (1st Cir. 1978) (employer must bargain where employer's decision to contract out takes away jobs previously held by employees).

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

The question that arises in many contexts is: Can management, during the term of a collective bargaining agreement, make a unilateral change in an existing practice not specified in that agreement? This issue arises in many forms. Is there a duty to bargain over such a change? Is a change in existing practices grievable? Can such a dispute go to arbitration? And if so, how should the arbitrator rule? In other words, does the collective bargaining agreement presumptively include, or presumptively exclude, existing practices? Which side, management or labor, controls the silent terms of the collective bargaining agreement?

The question of how to decide which areas of plant life are within the realm of joint sovereignty and which are within the realm of unilateral management control comes up repeatedly in industrial relations. It could be answered if there were a principle by which to determine the boundary between the realm of joint sovereignty and the realm of retained management rights. The theory of industrial pluralism requires such a principle in order to demonstrate that there is in fact a realm of joint sovereignty so that the input that the union has is not merely at the whim of management. It also needs such a principle to decide the daily questions that arise in a nonarbitrary way.

The theorists of industrial pluralism have tried to articulate a viable boundary, but have failed. For example, Arthur Goldberg, one of the leading architects of this view, states that one could draw this boundary by distinguishing between management's right to manage and its right to direct the work force.[20] He believes these are two different rights with different sets of consequences. Managing the business involves determining "the product, the machine to be used, the manufacturing method, the price of the products, the plant layout, the plant organization, and innumerable other questions."[21] These, he says, are "reserved rights, inherent rights, exclusive rights," in which the union cannot have input.[22] The other type of right—the right to direct the work force—is a procedural right, over which the union has a right to have equal say.[23] Under this procedural right, management is only entitled to act first, to give directions. The union then has the right to negotiate and to grieve, and to take such a dispute to an arbitrator.

Goldberg suggests that the right to manage is in the realm of retained rights, the right to direct in the realm of joint sovereignty.[24] It is unclear, however, what happens when issues such as the manufacturing method, the

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20. Goldberg, *Management's Reserved Rights: A Labor View* in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS: PROC. NINTH ANN. MEETING NAT'L ACAD. ARB. 118 (J. McKelvey ed. 1956), [hereinafter cited as MANAGEMENT RIGHTS].

21. *Id.* at 123.

22. *Id.*

23. *Id.* at 120-21.

24. Goldberg, *supra* note 20, at 123-27.

type of product, the organization and location of the plant have an impact on wages and conditions of employment. The company may want to move to a new location, phase out a production line, or automate jobs. These steps may look like managing the business to management, but may be considered wages, hours and working conditions to the workers who are intimately affected by them. What looks like managing to management, indeed, very often looks like directing the work force to the workers.[25]

Another theorist who has attempted to draw a line between the two realms is labor economist Neil Chamberlain.[26] His functionalist approach claims that the very definition of management implies certain functions that only management may perform, such as deciding investment policy, plant location, the pace and layout of production, and the nature of the product. Similarly, certain functions are inherent in the definition of workers—i.e., performing production tasks. Joint sovereignty, according to this view, exists only in areas where management and worker functions overlap. It does not exist in areas exclusively within management's function.

Using the definitions of the inherent functions of management and labor to determine the boundary between retained management rights and joint sovereignty is a circular argument. If management's defined function includes deciding plant location, pace of work, type of technology, and nature of the product, then the union is automatically excluded from having any input into those decisions. Chamberlain attempts to avoid this transparent circularity by developing a standard of relevancy. He argues that one can determine the area of joint sovereignty by deciding which areas are "relevant" to the union-management relationship. "[T]he fact of recognition of the union as bargaining agent carries with it the obligation by management to seek agreement with the union on matters *relevant* to the union-management relationship before taking action. But by no means does this interpretation carry with it the corollary that the functions of management are thereby being shared."[27] Thus, Chamberlain argues, the collective bargaining process "binds management to prior consultation and negotiation with the union on a certain *generally understood* range of subject matter."[28] Unfortunately, Chamberlain's formulation fails. If it were "generally understood" which issues are under unilateral management control and which ones the union has a right to have input into then the problem of determining the boundary would not continually arise.

The industrial pluralists cannot develop a viable boundary principle because there is a contradiction within their theory itself. They cannot accept a pure "retained rights" approach because under such a view, very

25. Goldberg tries to reconcile this conflict, but fails. *Id.* at 123-24.
26. Chamberlain, *Discussion* in MANAGEMENT RIGHTS, *supra* note 20, at 138.
27. *Id.* at 145 (emphasis added).
28. *Id.* at 148 (emphasis added).

few areas of plant life and very few disputes would be in the realm of joint sovereignty. The realm of joint sovereignty would be a miniature island of democracy in a large, autocratic ocean. Futhermore, the island would always be in danger of being submerged because management strategy at the bargaining table would be to keep as many items as possible out of the collective agreement. Conversely, the union strategy would be to include as much in the agreement as possible. Management would have nothing to gain by any additional language in the contract; it would therefore evade the duty to bargain. Collective bargaining would lose the illusion of being a joint determination of wages, hours and working conditions, and would instead look like the old days of open warfare.

On the other hand, none of the pluralists adopts a pure joint sovereignty point of view, where there are no rights retained by management. Indeed, one cannot adopt this position without giving up currently held definitions of private property. In reality, there is no way to draw a line between wages, hours, and working conditions on the one hand, and running the business on the other. Decisions about plant location, choice of technology, nature of the product and so forth often determine whether workers will have a job at all. Investment policy decisions may well have the greatest impact on unions, and are therefore the most crucial decisions for unions to influence.

The inability of unions to have input into these kinds of decisions can have devastating effects. The negotiations between General Motors and the United Auto Workers in 1970 are a graphic example of this. The UAW placed on the bargaining table a demand to abolish the internal combustion engine because its analysis of the energy situation predicted an impending energy crisis that would have dire consequences for the automobile industry. Because its advice was not heeded and because the issue was not a mandatory subject of bargaining, the auto industry has suffered and the union has been decimated. True joint sovereignty would give unions input into investment decisions, thereby challenging prevalent notions of the entailments of private ownership.

The industrial pluralist viewpoint has also had detrimental effects on the labor movement as a whole because of its insistence on arbitration as the only method of deciding industrial disputes. Arbitration places all such disputes in a private, invisible forum. It does not afford the kind of due process protections one might hope to find in an administrative agency or a court. Arbitrators are not public officials, and are therefore neither bound to uphold public office, nor are they accountable to a public process. They are not bound by rules of procedure or evidence. Arbitration awards are seldom published and when they are published, they have little precedential value. As a result, various doctrines which offend notions of due process have become prevalent. For example, the "obey now—grieve later rule" says that if a worker is given an order that violates the collective agreement,

the worker nonetheless must obey the order and file a grievance later.[29] Failure to do so results in discipline for insubordination, even if the worker was correct about the contract violation. The rule is involved in almost all insubordination cases, which represent approximately twenty-five percent of all arbitrated discipline cases. It is a severe rule because the right which the worker claimed by the grievance is often the right not to follow an improper order. That right is entirely lost by having to grieve after the fact. Once the order is obeyed, the grievance is functionally moot.

Other arbitral doctines also offend traditional notions of due process. One doctrine says that an employer's business justification can be sufficient to override or negate explicit terms in a collective bargaining agreement.[30] Another holds that when there is a credibility question to be resolved, it should be resolved against the worker and in favor or the company because the grievant has a motive to lie.[31] These doctrines and others of their ilk, although not held by all arbitrators nor present in all decisions, are deeply enmeshed in the arbitral decisional law. The prevalence of such management-serving arbitration doctrines must be attributed to the private and invisible nature of the arbitral forum where the public cannot easily monitor developing trends or mobilize pressure for change.

This brings me to a larger critique of industrial pluralism—that the privatized structure that has been set up by industrial pluralism to handle labor disputes has functioned to impede the development of classwide action among the labor movement as a whole. Because the settlements of labor disputes are rendered invisible, the disputes themselves come to be defined in the most minute, narrow and economistic fashion. It becomes difficult for any individual worker or union to identify trends and there is no point at which pressure could be applied to change them. This makes it very difficult to build classwide alliances around shared and pervasive problems. Because the theory dictates that the important decisions about labor relations are made in a privatized forum, and that the political process must keep out, the political process becomes unavailable as a forum in which struggle for change can take place. This means that the kind of forcefulness and militancy that can develop when people define their rights collectively and subject this definition to public debate has been systematically thwarted by the impact of the industrial pluralist vision.

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29. C. Schmidt Co. v. Allied Indust. Workers, Local 157, 66 Lab. Arb. (BNA) 90, 93-94 (1976) (McIntosh, Arb.); Chrysler Corp. v. UAW, 62 Lab. Arb. (BNA) 161, 166 (1974) (Alexander, Arb.) (but a worker need not obey an illegal order or an order that would place her or him in physical danger); Pac. S.W. Airlines v. S.W. Indep. Stewardess Ass'n, 62 Lab. Arb. (BNA) 1189, 1195 (1974) (Gentile, Arb.); Ford Motor Co., Spring & Upset Bldg. v. UAW, 3 Lab. Arb. (BNA) 779, 780 (1944) (Shulman, Arb.).

30. *Cf.* Fruehauf Corp. v. Aluminum Workers Int'l Union, Local 203, 52 Lab. Arb. (BNA) 1051, 1057 (1969) (Jenkins, Arb.) (a particular interpretation of a collective bargaining agreement was incorrect because it would have rendered the company helpless).

31. *See* Ford Motor Co. v. UAW, 1 Am. Lab. Arb. Awards (P-H) §67,274 at 67,619-20 (1975) (Shulman, Arb.); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 188 (1960) (citing cases).

RESPONSES

JULIUS GETMAN*

Rarely have I heard a paper that I find more challenging and provocative and with which I disagree more fully than that of Ms. Stone. I disagree with both her general conclusions and almost all of the particular instances that she mentions.

First, I do not believe that there is an Industrial Pluralist Model which explains all of the developments in labor law and relations since the end of the First World War. Second, I do not believe that there is a single, unified vision of collective bargaining discernable in the writing of labor law scholars, particularly with respect to the extent to which such bargaining achieves equality between labor and management.

The validity of Ms. Stone's model is easy to challenge since the model lumps together under one label commentators who have disparate views. Moreover, it is an easy task to point out the model's internal contradictions. Ms. Stone's suggestion that legal scholars agree about the extent to which collective bargaining achieves equality is similarly dismissible. Even among those of us who believe that collective bargaining is a good thing—a point on which a general consensus does exist—few argue that collective bargaining necessarily achieves equality. Most of us merely believe that collective bargaining is a good starting place in the effort to achieve equality. Anyone who has taken part in the collective bargaining process knows that the process generally moves the parties in the direction of equality but inevitably reflects existing disparities of power.

The concept of a separation of powers in industrial relations has long been challenged in the more sophisticated writings on arbitration. Several of the writers Ms. Stone refers to as industrial pluralists have pointed out that arbitration can only be understood as part of the collective bargaining process. One cannot understand the development of labor arbitration without understanding that arbitration is the final point in the grievance system and that this system is a major device to enable workers to get increased (not equal) power. Yet Ms. Stone fails to deal with the grievance system at all, which marks the most striking omission in her analysis.

I don't know whether I am an industrial pluralist. I disagree with most of the ideas which Ms. Stone attributes to them. But I believe strongly that the grievance system, which culminates in arbitration and has been developed through collective bargaining, has been a useful device for increasing the rights of workers. I attribute this achievement neither to the wisdom of arbitrators nor to the wonders of the arbitration process. The major contri-

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bution is made in the earlier steps of the grievance process. That is where most of the cases are decided and where the local union achieves influence over managerial decisions.[1]

Ms. Stone's analysis places a tremendous overemphasis on legal rhetoric and the importance of law. For example, she discusses the Steelworkers Trilogy as if it were an enormous watershed in labor relations and largely responsible for the important role that arbitration plays. In fact, the arbitration process was largely formed before the Trilogy was decided.

If the courts had said that they were not going to get involved in these disputes, and that the significance of arbitration awards was to be decided by labor and management, I think we would now see greater willingness on both sides to abide by their commitment to use and obey the process. I find it interesting that for so many years prior to the Trilogy, labor and management jointly developed the current system. They used arbitration widely and routinely obeyed arbitral decisions at a time when no one knew whether arbitral decisions were enforceable by courts.

Another flaw in Ms. Stone's analysis is that she confuses the holding of the cases with the reality of industrial relations in her discussion of the distinction between mandatory and permissive subjects of bargaining. Justice Stewart's rhetoric in *First National Maintenance*[2] is atrocious, but the mandatory-permissive distinction is much less significant in practice than the case suggests. Those who have been involved in bargaining know that one can in fact insist upon bargaining over permissive topics. A permissive topic can be included as part of a package proposal or can be indirectly tied to a mandatory topic. It is a mistake, therefore, to assume that the mandatory-permissive distinction defines the limits of collective bargaining. Collective bargaining goes well beyond the neat, ideological structure suggested by some of the court opinions and apparently accepted by Ms. Stone.

It is ironic that while most of the language to which Ms. Stone objects comes from court opinions, she expresses a preference for judicial resolution over arbitration. I believe that arbitrators are more responsive to the labor interest than are courts. This is largely the result of union contributions to the cost of the arbitration. Ms. Stone is concerned by the existence of an arbitration doctrine which recognizes that grievants are not disinterested when they testify in disciplinary cases. She ignores the fact that despite this doctrine, grievants do extremely well in arbitrated disciplinary cases. If one reads through a volume of arbitration reports, it is striking how frequently employees are reinstated in disciplinary cases, even those who were guilty of serious offenses. Arbitrators have developed a line of jurisprudence about the term "just cause" which is quite favorable to employees.

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1. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 923-25 (1979).

2. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

Arbitrators consider not only what the employee did, but also whether management used fair and proper procedures when it imposed discipline. This arbitration process, together with the grievance system, has imposed severe limits on management.

I don't understand Ms. Stone's argument advocating the development of class-consciousness because it is unclear what she proposes as an alternative to the existing grievance systems. As I have already noted, she appears to favor court adjudication, but I find it difficult to imagine class-consciousness emerging from a series of decisions by the district courts, which are further removed from the realities of the labor movement than are arbitrators. On the other hand, Ms. Stone may be arguing that class-consciousness will arise from the resolution of grievances through use of strikes, mass action, or other form of concerted activity. Yet some union representatives observed earlier in this colloquium that workers generally do not want to strike over individual grievances. I have been involved in several cases in which employees recognized that a co-worker had a legitimate grievance but were unwilling to risk their own jobs by striking, so nothing was done.

It may be true that when professional representatives participate in the dispute resolution process, union members are less certain that the victory is attributable to the strength of the union. Fortunately, the grievance system minimizes the role of professional advocates; in all of the steps of the grievance procedure, rank-and-file union members do the negotiating.

It is interesting that Ms. Stone complains about the informality of arbitration since this is what permits labor to control the process. In that respect, arbitration contrasts favorably with judicial adjudication, where most working class people feel uncomfortable, and where the union must employ lawyers instead of business agents who are used for arbitrations. I cannot understand, therefore, how court adjudication would be more likely to develop class-consciousness. It's a mistake to overdramatize or romanticize strikes. A short, successful strike is an exciting and moving experience which can destroy a union and damage society.

DAVID FELLER*

Let me first confess to being an "industrial pluralist"; but I define the term somewhat differently than Ms. Stone. The problem with her paper and the longer article which appeared in the Yale Law Journal,[1] which I have read with some care, is that it makes certain assumptions about "industrial pluralists" which are plainly incorrect.

First of all, she assumes that the premise of industrial pluralism is equal power at the bargaining table. That simply is not so. I am an industrial pluralist precisely because I recognize that there are enormous differences in the relative strengths of employers and unions at different locations. There are some places where unions are weak, because replacements are readily available if the union strikes, and therefore inequality of bargaining power exists. There are other locations where the reverse is true.

The law may define a particular subject as an area of joint control. But this implies nothing about the relative economic strength of the parties and, therefore, nothing about the outcome of bargaining in that area. The Supreme Court said, in the *Fibreboard*[2] case, that contracting out was a mandatory subject of bargaining, i.e., that it is in the area of joint control. After *Fibreboard,* I had the misfortune of negotiating an agreement for a union at the plant in Mississippi where the Baldwin Company makes pianos. We negotiated a provision on contracting out. We put it in the area of joint control by providing that the company could contract out any work at any time for any reason and that no grievance could be filed against that action. We did so because we had no options in that the union did not have sufficient strength to strike and shut down the plant over that issue. On the other hand, I also negotiated contracts, long before *Fibreboard,* which said that the company shall not contract out any work at any time under any circumstances. In those situations the union had the strength to force the employer to agree to such a provision.

The industrial pluralist recognizes these differences between relative management and union power; indeed, that is why he or she is called an industrial pluralist. We also recognize that there are injustices as a result of the differences in the relative bargaining powers of the parties in different situations. But we do not believe that the remedy for these injustices lies in the legal definition of the proper subjects of unilateral management control and those of joint sovereignty. Ms. Stone says that I am inconsistent be-

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1. Stone, *The Post-War Paradigm in American Labor Law,* 90 YALE L.J. 1509 (1981).
2. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964).

cause I do not think that the distinction between those two areas is important. Although I don't think the distinction is important, there is no merit in the charge of inconsistency.

I don't think the distinction is important because any distinction between the matters subject to joint control and those subject to unilateral management decision can be concerned with one of two quite different things. The first is a description of how the parties actually operate. One could define the area of joint control by looking at the way most collective bargaining agreements come out. But the results of the free collective bargaining process are only slightly related, if at all, to the academic discussion of what is or is not a mandatory subject of bargaining. Free collective bargaining is an attempt to work out problems in a setting in which each party negotiates with knowledge of the respective economic strengths and weaknesses of the other parties and uses its own economic strength to back up its position. This descriptive way of determining what is in the area of joint control and what is in the area of unilateral management control examines the results of that bargaining, results which are, in the end, a function of the degree of power of the parties.

I would agree with Ms. Stone that in general I don't think unions do not have enough power but that doesn't mean that every union does not have enough power. I know of some situations, although not many, in which the union has too much power. I know of many more where I think the employer has too much power. But that has nothing to do with the law about what is a mandatory subject of bargaining and what is reserved to management. What it does concern is the way the law functions with regard to strikes and replacements, boycotts, and many other areas that Ms. Stone did not address.

The other way to divide the areas of joint control and management prerogative is to use the legal concept of what is a mandatory subject of bargaining. It is this legal distinction which I think is unimportant. I thought it was made clear, although perhaps emphasized insufficiently this morning, that the distinction is only important when an unwary employer who doesn't know that something is a mandatory subject of bargaining takes unilateral action. The fact that the subject is mandatory, with a duty to meet and confer, rather than permissive, makes no substantial difference except in that case.

A simple example will suffice. The Supreme Court, in a case cited by Ms. Stone,[3] held that pensions for retired workers are not a mandatory subject of bargaining. While this is true, I challenge you to name a major collective bargaining agreement in the past three or four years in which there has not been a negotiated improvement in the pensions of already retired workers. Although it was not a mandatory subject of bargaining, the unions

3. Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

felt that it was important enough to insist on and, when unions did insist on improved pensions, management agreed.

Now technically, of course, a union violates the Act if it bargains to an impasse and strikes in support of a demand on a nonmandatory subject. But that obstacle, if the union is careful, is more apparent than real. The 1949 basic steel strike occurred during a reopener permitting bargaining and a strike on limited subjects, including insurance, but forbidding strikes on any other matter. There was no mention of pensions in the agreement, although pensions had been held to be a mandatory subject of bargaining. Because the Labor Board had held that there was a continuing duty to bargain on subjects not covered by a collective bargaining agreement, a presidential fact-finding board recommended that the companies provide four cents, noncontributory, for insurance and six cents, noncontributory, for pensions. Despite this recommendation the union because of the limited nature of the reopening and the right to strike pursuant to it would have violated the agreement if it struck in support of the recommendations for pensions.

What happened is best illustrated by an exchange which occurred between the union and Bethlehem Steel, at the last of a series of fruitless meetings before the strike. The lawyer for the company summed up the situation by addressing the then District Director, Joe Maloney, in the following fashion: "Let us understand the situation. If we don't give you four cents noncontributory for insurance by Monday, you're going to strike us. Is that right?"

Mr. Maloney said: "That's right, John."

The company lawyer then said: "And if we don't give you six cents noncontributory for pensions, you're going to strike us on Monday. Is that right, Joe?"

Joe replied: "But John we've already got you on strike for insurance!"

The end result, of course, was that the strike was settled by provision for both pensions and insurance, because the union was able to strike successfully.

I discovered in the *Union Carbide*[4] case, to my great distress because I was on the losing side, that there is no violation of the Act if a party offers, in addition to a package containing a nonmandatory subject, an alternative package limited only to mandatory subjects of bargaining. It is for that reason, as well as his 1949 experience during the steel strike, that Heath Larry, negotiator for United States Steel and later head of the Iron and Steel Institute, said that the distinction between mandatory and permissive subjects is unimportant and should be abolished. After all, he said, all the union has to say is that if you don't want to bargain about this permissive subject the price is a fifty-cent higher increase in wages. He was wrong, of course. The distinction remains of consequence, as I said earlier, in the case

4. Oil, Chemical & Atomic Workers, Local 3-89 v. NLRB, 405 F.2d 1111 (1968).

of unilateral action. But he was certainly right in thinking that it makes little difference in the outcome of bargaining or the degree to which employees exercise control at the workplace. Those are, in the end, a function of the relative strengths and desires of the parties in the economic contest which ensues if they cannot reach an agreement during collective bargaining.

There is enormous variation in the content of collective bargaining agreements. Longshore agreements specify how many loads you can put in a sack. The steel industry has a past practice clause which preserves all past practices unless there is a change in the conditions giving rise to the practices. There was a steel strike in 1959, the largest strike in American history in terms of the total worker days lost, because the companies wanted to eliminate that past practice clause. They were unable to do so. On the other hand, there are agreements which specifically deny the right of a union to insist on past practices unless those practices are referred to and described in the agreement. In short, there is no principle as to what is in the area of joint sovereignty and what is in the area of unilateral management control other than the determinations reached in collective bargaining.

I am a pluralist because I believe that the best system is a system in which we allow the interested parties to work out a solution to their problems in light of the economic conditions that then exist whether the problem is plant closings, buying from abroad, contracting out, or even prices. As the recent Ford agreement shows, when the economic situation is such that a problem needs to be addressed, the parties will bargain about it, even at a time when the agreement is closed and there is, therefore, no mandatory duty to bargain about anything covered by the agreement. For years General Motors would not bargain about prices but, as the negotiating process which led to the recent concessions illustrates, they were willing to do so because the economic situations of the parties had changed.

If you really want to attack the existing structure of our labor laws the attack should not be directed at the subjects which Ms. Stone has addressed but rather at the serious deficiencies in our labor laws which limit and define the economic powers of the parties. The subjects to address would also include the structural deficiencies which have substantially limited the speed and the effectiveness of the Labor Board's enforcement powers. More importantly, I would address the problem of strike replacements. There is nothing in the statute which explicitly confers upon employers the right to permanently replace strikers. That right arose out of a dictum of the Supreme Court in the *Mackay* case.[5] Eliminating the right of employers to permanently replace strikers would, with almost surgical precision, redress the balance of power in those situations, and only those situations, where it is in need of redress. In those industries such as steel or autos or rubber, there would be no effect because employers accept the fact that the union

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

can strike effectively and make no attempt to operate or hire replacements. But in those situations in which joint sovereignty is mythical because the employer has not only the right of replacement but also the power to use it because of the available labor supply, such a change in the law would be enormously helpful. But Ms. Stone does not address those areas because she is concerned with abstract considerations of law which have, almost literally, nothing to do with reality.

Now let me briefly address the subject of arbitration. Ms. Stone argues that the institution of arbitration has given away the rights which workers would have in the courts. Again, however, what she says has very little to do with reality. If a worker believes she is denied a right secured under the collective bargaining agreement and she can show that the union breached its duty of fair representation in not taking her case to arbitration, or in presenting her case in arbitration, then under *Vacca v. Sipes,*[6] she can obtain a judicial adjudication of her grievance.

I have read about four hundred cases involving breach of the duty of fair representation and the small number won by workers clearly shows that the assumption that workers would do better in the courts than in arbitration is erroneous. In many cases the courts find a breach of the duty of fair representation but then, having opened the courthouse door, they conclude that the employer's action was not a breach of the collective bargaining agreement.

This is particularly true in discharge cases. In the courts the plaintiff has the burden of proof, because she is suing for breach of contract. She has to prove that the employer violated the agreement by discharging her. But, in arbitration, the normal rule in a disciplinary case is that the employer has both the burden of coming forward with the evidence and the burden of proof. Indeed, many arbitrators say that discharge is industrial capital punishment and the employer must prove the employee's offense beyond a reasonable doubt. No court in the world has ever gone that far.

The late Arthur M. Ross summed it up humorously in an address years ago to the National Academy of Arbitrators on cases of discharge for sleeping on the job. He said, "[I]t is well established that the only reliable means of substantiating guilt beyond a reasonable doubt is to lift the grievant from the chair in which he has been snoring and bounce him off the floor until he opens his eyes, blinks in confusion, and angrily inquires, 'What's the big idea waking me up in the middle of a shift?' Otherwise the grievant may successfully claim that he was momentarily resting his eyes or that he was deep in meditation concerning the problems of the job."[7]

I agree that in one sense the arbitration system and the grievance process have led to a lack of class consciousness among workers. The

6. 386 U.S. 171 (1967).

7. LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS, PROCEEDINGS OF THE 17TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 145 (M. Kahn ed. 1964).

arbitration system does provide a channel for discontent and provides at least a modicum of justice. There is never perfect justice because you are never able to resolve all your problems through collective bargaining, not only because of the imbalances which exist in economic power, but also because not all problems can be anticipated. That's why at periodic intervals agreements are renegotiated not only with respect to wages and benefits but also with respect to the provisions governing the day-to-day relationship of the parties at the workplace. This too, I concede, has the effect of channelling discontent and may lead to less militancy than would immediate and spontaneous job action to redress grievances, although in the end the latter method clearly is less effective in providing substantive justice.

It is correct, therefore, to say that if you didn't have the grievance and arbitration system, there might be more class consciousness on the part of workers. But that seems to me to be just another way of saying that what we need is increasing misery of the working classes in order to get a revolution. In that thesis I do not concur.

HOWARD LESNICK*

The central problem that Ms. Stone addresses—a problem long thought troublesome for democratic theory—is the fundamental one of justification. In a society committed to democratic values and the equality of all people, how do we justify a working order committed to hierarchy, authority, and obedience? The theory that she calls industrial pluralism responds to the problem by suggesting that the workplace is not an enclave of private power and domination in an otherwise free and democratic society, but that it is rather a place subject to democratic processes much like those that prevail in our public life. As in the larger democracy, the conditions of the work place are said to prevail through the consent of the governed.

The legislative analogy suggests that the parties bargain and mutually agree; although of course there are always winners and losers in particular cases, the system is basically a democratic one. It is justifiable for the winners to win, because of that process.

The Stone paper accurately describes this function of the notion of industrial pluralism. I think that Ms. Stone is also right in asserting that, in fact, there is not substantial equality of power between employers and employees. While there may be particular companies where employees are very strong, in general there is substantial inequality of power in one direction; and because the theory of industrial pluralism tends to mask this empirical truth, our attention tends to be diverted from it.

This occurs in ways that are more complex than I can begin to spell out here. One method is what Ms. Stone calls privatization. By routing the setting of the substantive conditions of employment to negotiations that are regarded as private matters, generally not subject to legal regulation, we support the tendency not to care, as a society, about what the actual conditions of work are; what the pay figures in the contract are, whether this particular contract has a subcontracting clause or not, and so on. Of course that response simply mirrors, in a very important way, the general process orientation of our liberal values, that is, the equation of fair procedure with justice—the idea that, so long as the union had a fair opportunity to negotiate, the result is fair.

David Feller, who effectively represented unions for many years, says that of course there is too much inequality. The point is that the prevailing structure of thought tends to keep pulling us away from acknowledging that. David, your example is really an eloquent confirmation of that process. The Baldwin Piano Works has a very tight management prerogatives clause, and of course you don't like it. No one accuses you of liking it, and no one accuses the theory of industrial pluralism of having caused it. Its cause is the power and militancy of the company. But the very example you use, and the way you develop it, are the core of the problem we are

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considering. Your account echoes, and reinforces, the tendency to view the state of affairs that prevails as legitimate and as presumptively just, or at least as a private matter. Indeed, you began to suggest—and then had to take it back—that for every Baldwin contract, there may be found one with an equal and opposite treatment, where the union has subcontracting buttoned up tight. You took it back because you realize that such an assumption is wildly fanciful; far from 50-50, or 40-60, or whatever, there are probably barely three percent of the second kind of contract and many, many examples like Baldwin. Because of your experience and outlook, the prevailing theory can do no more than tug at your sense of reality, but your example illustrates the power of the theory to divert our attention from the substantive conditions of work and tend to make us think that prevailing conditions are fair, acceptable, or at least the best we can expect.

I want to comment briefly on the notion of joint sovereignty, another central and most interesting aspect of Ms. Stone's paper. It is clearly true that such a concept was very much the ethic of the people who attempted to structure a liberal labor law. And their vision was of something quite genuinely joint. To that degree, they were seeking to resolve the contradiction between a political order committed to democratic participation by a fully enfranchised citizenry and an economic order committed to hierarchy and authority, by enfranchising workers to participate in the governance of their work life. What I take Ms. Stone to be saying—and what I think is true and central—is that although the notion of joint sovereignty presupposes a significant input from labor as well as management in determining the range of important labor relations questions, law and practice have not developed that way.

That state of affairs is not a recent phenomenon. Those who follow labor law are very conscious, because of *First National Maintenance*[1] and other cases and causes, of how the scope of mandatory bargaining seems to be suddenly collapsing. But there is a far longer relevant history. The *Borg-Warner*[2] decision established the principle that the outer limits of the scope of bargaining are defined and enforced by law. Of course it is true, as David suggests, that unions can get around that decision (just as all people and institutions can get around legal restrictions to some significant degree). The fact remains that, not only are the outer limits of compelled bargaining set by the law, the decision to bargain in fact beyond that range is said by the law to be protected from economic pressure. The inner limits of actual bargaining, however, are explicitly made subject to economic power. Thirty years ago the *American National Insurance*[3] decision accepted the principle

1. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).
2. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).
3. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404-09 (1952).

that management prerogatives clauses are negotiable. Management is therefore free to use its economic power to contract the sphere of joint control, and labor is not legally free to use its power to expand it.

The significance of *American National Insurance* goes far beyond the asymmetry I have described. There is a direct link between the principle of that decision and the Baldwin Piano Works. So long as an employer is willing to deal with its workers collectively, and to bargain in fact, the law leaves the actual fate of the principle of joint sovereignty to be decided by economic power.

First National Maintenance makes clear the extent of the law's rejection of the premise of the principle of joint sovereignty, that the concept of mandatory bargaining will remain broad and fluid. It is very important to realize that it is not a sufficient answer to the question of the significance of that rejection, simply to regret or criticize it. Certainly, the decisions involved were not inevitable, and might have come out differently but for a few too many unfortunate occupants of seats on the Supreme Court in recent years. That truth should not make us lose sight of the more basic fact that the decisions are neither accidents (of bad lawyering or bad facts) nor mavericks. There has been a long-term trend in the interpretation of the National Labor Relations Act, which tends to accommodate it increasingly to the ideological value system that gave rise to the need for the Act. That development is an extremely complex and fundamental matter, which two of this morning's panelists, Jim Atleson and Karl Klare, have begun to write about in a challenging and thought-provoking way. As we approach the fiftieth anniversary of the passage of the Act in 1935, the time is certainly appropriate to attempt to examine the matter fully. I believe that, if we were to look at the duty to bargain (the good faith concept and the scope of mandatory bargaining), the right to strike, the jurisdiction of the Board, the election process, the grievance and arbitral processes, we would see a long-term secular trend of increasing accommodation to values that predated the Act, and an increasing trivialization, if you will, of the reach of the Act. What has happened to the scope of mandatory bargaining simply reflects that development.

Of course it would be fatuous to blame that series of developments on the ideology of union lawyers or liberal academics, or to blame it on anyone. What is true, however, is that this long-term tendency is facilitated by the liberal ideology expressed, to a significant degree, by the notions of joint sovereignty and industrial pluralism.

Arbitration is a good example. I believe that Ms. Stone is right when she asserts that the ways in which arbitration tends to channel and institutionalize conflict reenforce inequality. That does not at all deny that arbitration also performs and was designed to perform functions that enhance accountability and limit discretion of management in ways that provide important protection to workers. But we have been trumpeting the values of arbitration in that second way for several decades now, and should be able

to find room at the same time to acknowledge that arbitration individualizes grievances and thereby tends to weaken the joint control idea.

Moreover, we too easily lose sight of the extent to which arbitration has accommodated itself to the prevailing preference for order, authority and productivity, and the like. To say that grievants do very well in arbitration when they are fired is really to demonstrate the phenomenon eloquently. I don't think that thirty or forty years ago one would have reacted that way to the decisions that are coming down today. When an employee is fired and eleven months later is reinstated without backpay, he or she has in a very real sense been fined ten or fifteen thousand dollars for an offense. There is almost no offense that an individual—especially one earning eighteen thousand dollars a year—can commit in the public order that carries with it a fifteen thousand dollar fine. Yet that is not regarded as an extremely serious penalty; it is regarded as "getting off," but without back pay.

Ms. Stone cites some arbitral awards from the twenties, some by William Leierson, one of the architects of the theory of industrial pluralism, that illustrate graphically how our frame of reference has shifted profoundly (if imperceptibly) over the years. In one, an arbitrator ordered the company not to lay people off, but to spread and share the work equally; another prevented subcontracting in the name of industrial self-government; one approved featherbedding devices for displaced workers; another ordered the discharge of supervisors as a response to a worker's complaint of abusive treatment. Our norms have changed little by little over the years, but enough time has gone by that the distance we have traveled has become vast.

It is very difficult to understand that process of change, and the task is not one of assessing blame. What I think is true, however, is that doctrines like *Lincoln Mills*[4] and the Steelworkers Trilogy[5] began by serving the function of enhanced worker self-determination, and went on to disserve it. Ms. Stone's unwillingness to give much credence to the first part of that dynamic may justifiably get some of us older folk angry, but it is the rightness of the second part that I have been paying attention to now and suggest that we ought to be willing to pay attention to.

The process is one by which the law has not challenged, but rather has tried to accommodate itself to, basic premises about work and democracy. One premise, of course, is the equation of justice with process, which goes far beyond labor law and is endemic to law, indeed endemic to public life. A second is our commitment to hierarchy as a necessary predicate of production, a panicky fear that if we question hierarchy more than a certain minimal amount, we will soon all be living in rags, and eating raw meat or (worse yet) raw vegetables. A third is our traditional consciousness of work,

4. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

5. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

which legitimates the view that we treat an employee not as a person, but as a portion of a person hiring out that portion to do a job. The liberal ideas of industrial pluralism and joint sovereignty, like our labor law, took on the job of doing the best they could in that world without challenging its premises. What Ms. Stone has done is to show us how little we can do without challenging those premises.

KATHERINE STONE

I'm certainly not going to try to answer all the points raised right now because Howard Lesnick has done much of it for me and because I want to hear what the audience has to say. But there is one point that was raised both by David Feller and Jack Getman that I do want to answer. They both claim that the operation of the mandatory-permissive distinction in practice is a refutation of my thesis. To the contrary, I would argue that their examples of instances where a strong union has been able to compel bargaining on a permissive item supports my underlying argument.

My basic thesis is that the industrial pluralist interpretation of the NLRA has rendered the Act incapable of correcting imbalances of power between labor and management. Even though one of the stated purposes of the Act is to correct such imbalances, the theory of the workplace as an autonomous minidemocracy has led to a procedural rather than a substantive interpretation of the Act. Pursuant to this theory, the Act has been stripped of its power to actively intervene in the labor-management relationship and thereby empower unions. Therefore, in those few instances where a union has enough clout to compel bargaining over a permissive item, to win a grievance over a silent contract term or to compel arbitration over a change in past practice, the impact of the Act is altogether neutral. However, in the majority of situations where the union is not so powerful, industrial pluralism dictates that the law shall be of no assistance at all. Under industrial pluralism, the law becomes a procedural framework rather than a conferral of substantive rights. If the law intends to correct systematic imbalances of power it could do so by intervening substantively in the labor-management relationship and by expanding the realm of joint sovereignty so as to make all issues mandatory subjects and abolish the doctrine of retained rights.

David Feller argues that the existing inequality of power is best corrected by eliminating the *Mackay* rule that permits employers to hire permanent replacements for strikers. I wholeheartedly support this suggestion. I also believe that the way the law differentially regulates the use of economic weapons—permitting permanent replacements, prohibiting secondary boycotts and so forth—significantly affects the balance of power between management and labor. I disagree with his position that that is the only thing affecting the imbalance, or that it is the thing most easily remedied. Even if all legislative regulations of economic weapons were abolished, they would still be regulated by state law. State common law and statutes against trespass, nuisance, assault, interference with economic relations and even conspiracy could, and most likely would, still be employed to break strikes. No regime of pure open economic warfare is possible without abolishing a large number of common law and state law doctrines. Any attempt by federal law to do so might well pose constitutional problems. Furthermore, any property law, contract law and criminal law doctrines, as applied to labor-management affairs, will benefit one side or the other, even doctrines

that prohibit intervention. There is no such thing as neutral legal regulation of economic warfare.

Therefore, without belittling the impact of the *Mackay* rule or other biased regulations of economic weaponry, I do not believe that area to be the most fruitful means of correcting imbalances of power between labor and management. Rather, I believe it more fruitful to look at what kinds of strength a union has in its day-to-day operation, in its ability to enforce the contracts it makes. There, economic power lies in the background, just as it does during contract negotiations, affecting outcomes even though it is not exercised. However, just as rules of law such as the *Mackay* rule modify and define economic power in a strike situation, so too do the doctrines of industrial pluralism define power in the day-to-day life under an existing contract.

Both David Feller and Jack Getman agree with me that there is an imbalance of power, but we disagree as to how it should be remedied. Apparently, both of them believe that unions have more power under industrial pluralism than they would otherwise, and that that is a good thing. I believe we all agree that that is a positive result if it is true. Indeed, I'm willing to concede that it may have been true at an earlier time. Industrial pluralism may have given unions a modicum of more power during the period of an expanding economy by expanding the realm of joint sovereignty, by chipping away at retained rights, and by obtaining nickel-and-dime increases in the wage bargains. Industrial pluralism may work well in a time when the economy is expanding because management has the ability to buy off workers with small concessions of money and power. During such times, management may not mind sharing a few marginal crumbs here and there. But once the economic picture changes and there is an economic downswing—as there is now and will be for some time—the incrementalist approach no longer works. That is when the sphere of joint sovereignty shrinks and the illusion of equal power collapses.

As Howard Lesnick said, we are now seeing this shrinkage of the areas of joint sovereignty in every area of labor law. The incrementalist approach, which may have looked fine during periods of economic expansion, reveals its weaknesses in times like these. What becomes clear is that by having adopted the incrementalist approach earlier, a very high price has been paid. That price is that workers and the labor movement have, in some sense, ended up with the worst of both worlds. They are faced with the demobilizing effect of having third parties decide their disputes for them, and yet they have not received the potential benefits of that process. That is, they have neither been given the real due process rights which are promoted by third party dispute resolution, nor have they been given the opportunity to develop the kind of militancy that comes from defining rights in class-wide and public ways.

DISCUSSION

DANIEL COLLINS, MODERATOR:* Jack Getman has asked for a chance to respond briefly.

JULIUS GETMAN: This last point intrigues me. I quite agree that not all collective bargaining agreements are just. The question is like the question of democracy; it's a lousy form of government, but what is better? That leads me to Kathy Stone's remark that these are matters of legislation that ought to be for the public good. The working class as a whole, particularly the organized sector of the working class (let's not talk about the unorganized sector because there's no industrial pluralism in Ms. Stone's sense there at all) has the right to sue for whatever they get. They have all the rights to engage in strikes, and to bargain against no-strike clauses and arbitration proceedings. The unorganized people could do all those things; we're only talking about the organized sector. In the organized sector where you have arbitration, (and certainly arbitrators don't solve the problems for the parties) the parties solve the problems in the collective bargaining agreement; the arbitrators simply tell them what their collective bargaining agreement means. If the parties don't like it, they can change the collective bargaining agreement, and they often do.

The real question is whether, if we made labor relations a matter of public concern, the workers would somehow be better off. I think this is a statement that needs some practical demonstration. In those countries in this world in which wages, hours and working conditions are set by legislation, (such as in the nationalized steel industry by the socialist government in Britain), I will match a steel worker under that terribly regressive system of collective bargaining with what prevailed in the British steel industry when it was previously done by political power. But that's a pragmatic question. I do believe that we have injustice, and that there are reasons why the law should be changed, but I think that that law should be changed in the way we change other laws to make our democracy work better, and that is to make those changes which would rectify the most obvious imbalances of power. I don't think we ought to have legislation that would make everything just. The essence of a free society is the notion that you allow some people to do things that are unjust and whenever you try to make a change to rectify an injustice, the question is not, Is there an injustice? The question is, What is the loss when you try to correct that injustice? Only when you make that balance should you go ahead and do something by law rather than by private action. I'm trying to figure out where we disagree, and despite Howard Lesnick's eloquence I certainly am not persuaded that we're really all in agreement at all. I also disagree with you, Howard,

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although I thought that was a wonderful presentation and did help me to understand better why I disagree with both you and Ms. Stone. Part of it is about the relationship between theory and reality. What I get is a sense from Ms. Stone's descriptions that if you want to determine whether the labor movement is better off, you have to look at the opinions and look at the theory. And thus the theory, as Ms. Stone properly points out, is moving in the wrong direction, from our point of view, towards a greater recognition of so-called reserved management rights, that therefore the labor movement is weaker than it had been. I don't think that's the way it works. If you look at the product of collective bargaining, and not at the rhetoric of the courts, you'll find that there has been movement in the direction of greater worker sovereignty, partly through collective bargaining and partly through the arbitration process. Ms. Stone properly faults the arbitration process for having the wrong ideology, but has failed to demonstrate that there is any better alternative for actually advancing the interests of workers.

Our next major disagreement is how to evaluate the achievement of the labor movement in the United States. Ms. Stone says that there has been some incremental progress here and there, but I feel that there has been an enormous, magnificent achievement by the labor movement under this system. It is really a terrible mistake to look at the rhetoric of the courts and not at the achievement of the labor movement. It is a mistake because the labor movement does not define itself in these rhetorical terms to make light of what it has achieved in terms of the enormous increase in dignity. In my heart I am an unreconstructed unionist, and I believe in this system of collective bargaining but I am also suspicious. I am suspicious of attempts to develop a theoretical overview which is going to define the agenda for the American working class which they have not chosen to define for themselves. An enormous advantage of collective bargaining, which David Feller has alluded to, but which I feel much more strongly needs to be emphasized now, is that it does permit the workers to set their own agenda about what is important for themselves, regardless of the distinction between mandatory and permissive subjects of bargaining. We can debate and write learned articles about this distinction, but it is not enough to say, "Well it's true you can get around it." The distinction is not at all central to the basic notion of who sets the agenda for the American labor movement, which is set by themselves. One of the things I find rather inspiring about collective bargaining is that it is a process which gets the workers themselves very much into the defining of what they want, and insisting upon what they want and articulating their goals and interests.

KATHERINE STONE: Both Jack Getman and David Feller appear to concede that the relative power of management and labor is sorely imbalanced. However, they both ignore that fact and instead suggest that collective bargaining gives workers an opportunity to bargain for whatever they want. They use this proposition as the basis for their defense of the entire indus-

trial pluralist privatized structure and its prescription of judicial nonintervention. Yet, as I said before, one of the purposes of the NLRA is to correct imbalances of power. If unions were roughly equal in power to management and strong enough to bargain for and achieve whatever they wanted, there would be no need for labor laws such as the NLRA in the first place. But the industrial pluralist interpretation of the Act has created a myth of equality and at the same time prevented it from operating as an instrument to achieve true equality.

The pernicious effects of the myth of equality are evident in decisions made in cases brought under Title VII. Presently, courts are frequently holding unions jointly liable with management for employment discrimination in decisions concerning hiring, employment testing and other things over which unions have no control. This joint union-management liability is premised on the unstated assumption that unions, as equal parties to a collective bargaining agreement, are jointly responsible for all employment conditions. The same trend is beginning to emerge in litigation over industrial health and safety problems under OSHA.

There is one more point I would like to make. Both Jack and David accuse me of proposing that the agenda for workers be taken out of the hands of workers themselves. I do not believe that anything I have said or written could support that accusation. I propose neither that nor a world of constant strikes. Industrial pluralism fosters such false alternatives by making the present method of resolving labor disputes appear natural and inevitable.

The alternative to a privatized forum for resolving labor disputes is, very simply, a public forum, such as an administrative agency, a court, a legislature, or some combination of these. I do not purport to present a blueprint for precisely what alternative is best. Rather, I am proposing that a public forum of some sort would be in the interests of workers and unions because it would enable alliances to be galvanized around issues of concern to the entire working class. The majority of the public are, after all, workers, so that bringing labor issues into the public arena and rendering the decisionmakers publicly accountable would most likely lead to more beneficial outcomes than unionized workers presently receive. This does not mean taking decisions out of the hands of workers any more than the arbitration system already does. If labor issues were up for grabs in the political process, then workers would have input through the normal political channels and unions would have incentive to mobilize and build class-wide alliances in favor of labor's programs. It is only because most labor issues are currently kept out of the political arena by industrial pluralist ideology that one can sustain the illusion that the political process offers workers no possibility of effective change.

AUDIENCE COMMENT: My name is Herman Benson; I have a question for Professor Getman. He made one comment just in passing which I find so

intriguing I would like to have it clarified. He said that to a certain extent he prefers arbitration to the courts because the union pays its share of the arbitration costs. I was just wondering if he feels that the arbitrator's decisions are to that extent biased because they happened to be paid by the employer and the union, while the judges for good or bad are not influenced in that same way. Could you clarify that or say something more about that?

JULIUS GETMAN: It took a great deal to work that out. I have an article[1], a widely unread article in the Yale Law Journal, in which I try to spell out why I think that the process of having both parties pay for the arbitrator tends to have a beneficial effect, and not because I have a very high regard for arbitrators. The process is better than even some of the people who justify it, and certainly better than the language of arbitrators, because it attunes arbitrators to the priorities of the parties. I can understand the case against this, but what results from splitting the cost of arbitration is arbitration which traces the results of negotiations, if the parties had been able to work things out on their own. Therefore, it is better than having a judge who would be less involved with currying favor. Ms. Stone correctly points out the pivotal point, which is that many arbitrators curry favor with labor and management. This may on some level seem slightly morally reprehensible, but when you say this to arbitrators, they tend to respond as though their virtue had been challenged. Nevertheless, it turns out to be beneficial.

AUDIENCE COMMENT: My name is Jeff Blum. Mr. Getman, both you and Mr. Feller have pointed out instances where the reality of labor relations differs from the legal doctrine. Any effort to construct a broad theory which takes into account legal doctrine as a whole is going to be somewhat flawed in understanding the empirical reality. But I'm bothered a little bit by a tinge of anti-intellectualism in some of the things you say, and I wonder if you really mean that you are opposed to the enterprise of trying to construct broad structural theories.

JULIUS GETMAN: You have gotten to the heart of a certain neurotic aspect of my personality. As a professor at the Yale Law School with a strong anti-intellectual tinge which comes out of my background, I think you're quite right, it's there and I probably carry it to excess. It is hard to be where I am and deal with the people that I regularly deal with without developing some of this feeling. I only mean to say I'm not totally trustworthy on this. I think you're right, it's very perceptive.

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1. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).