CHAPTER 4

EMPLOYEE EMPOWERMENT—COLLECTIVE BARGAINING'S FUTURE ROLE

I. INTRODUCTIONS

CALVIN WILLIAM SHARPE*

I am happy to welcome you to what promises to be a stimulating debate about employee empowerment and collective bargaining. There has been much discussion in recent years about the decline in union density in the United States. That decline can be accurately described, I think, as precipitous, as unions at their zenith in 1954 represented 35 percent of the nonagricultural work force, but represented approximately 27 percent in 1970, 23 percent in 1980, and approximately 15 percent in 1995. In this context it is not surprising that we wonder about the future of collective bargaining.

If it is true, as some surveys show, that, quite apart from increased wages and benefits, employees join unions because unions provide the backing necessary for employees to speak up and to be heard, they provide a grievance procedure for employees to air complaints, they provide employees with a sense of security, and they ensure that the employees are treated with a respect and dignity, these are the attributes that we have chosen to capsulize in this debate as employee empowerment. If it is true that unions have been a primary source of employee empowerment in the past, it seems appropriate to ask whether unions will continue to be a source of employee empowerment. So the question for our debaters here is, "Will collective bargaining play a significant role in the future empowerment of employees? Yes, no, maybe."

Taking the affirmative position on this question is Tom Geoghegan. Tom is a Chicago lawyer and author. He is a graduate of the Harvard Law School and Harvard College. He represents international local unions and other employee groups, such as

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Steelworker groups in plant closings and Teamster members seeking union democracy. He also undertakes public interest lawsuits in such areas as child labor and public health. Tom is the author of *Which Side Are You On?*,[1] a book that was nominated as one of the five best nonfiction works by the National Book Critics Circle.

In his book, Tom wrote the following:

> I realize Americans are individualists. I know this is the culture of narcissism, and that community, solidarity, etc., are on the way out. But if the labor laws changed, if we had laws like France or Poland, I think Americans would join unions like crazy, simply out of self-interest, raw Reaganite self-interest.[2]

Taking the negative position is Richard Epstein. Richard is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago where he has taught since 1972. He has written seven books on subjects as disparate as employment discrimination in health care and numerous articles on a wide range of legal and interdisciplinary subjects. Richard was for a decade the editor of the *Journal of Legal Studies* and is currently the editor of the *Journal of Law and Economics.*

In a 1985 article in the *Los Angeles Daily Journal* entitled, "Sorry, We Don't Need the NLRB—Or Its Enabling Legislation," Richard said the following:

> Labor unions do nothing to restore the equality of bargaining power. Instead, they seek to cartelize labor markets to generate supercompetitive wages for their members, to the prejudice not only of the company but also of excluded, non-union workers and of the public at large. . . . There is a fine way to eliminate the debates over the performance of the NLRB: repeal the special labor legislation that is its sole reason for being.[3]

Obviously the negative position.

Taking the "maybe" position is Tom Kochan. Tom is the George M. Bucker Professor of Management at the MIT Sloan School of Management. He has written seven books on organizational behavior, human resources and industrial relations, and the domestic and international economies, including *The Transformation of Ameri-*

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[1]Geoghegan, Which Side Are You On? Trying to Be for Labor When It's Flat on Its Back (Farrar, Straus & Giroux 1991).

[2]*Id.* at 267.

[3]Epstein, *Sorry: We Don't Need the NLRB—Or Its Enabling Legislation*, L.A. Daily J., July 24, 1985, p. 4.

can Industrial Relations,[4] which won the 1988 Academy of Management award for the best scholarly book on management. He has also written numerous articles on the myriad problems of the workplace. From 1992 to 1995, Tom was the president of the International Industrial Relations Association. From 1993 to 1995, he was President Clinton's appointee to the Commission on the Future of Worker-Management Relations.

In the award winning *Transformation* book, Tom and his co-authors, Harry Katz and Robert McKersie, posed several questions, including the following: "Is there still a 'need' for unions? . . . Should collective bargaining be promoted, or are new forms of employee participation and representation needed to supplement or substitute for this process? Are fundamentally new strategies for organizing and representing workers needed if the labor movement is to reverse the membership losses of recent years?"[5] And he generally gives the following answer: "[I]ndustrial relations practices and outcomes are shaped by the interactions of environmental forces *along with* the strategic choices and values of American managers, union leaders, workers, and public policy decision makers."[6] "[T]he strategic choices made by leaders of management, labor, and government will shape the answers to these questions."[7] And I think that this is an answer that amounts to his position in today's debate, "maybe."

Our debate moderator is Ben Aaron, known to all of us here in the Academy as a leading light. Ben is Professor of Law Emeritus of the UCLA Law School. As you all know, Ben has written numerous books and articles on domestic and comparative labor law and industrial relations. Like our other distinguished panelists, Ben's career has been rich not only as a scholar but also as a public servant. This service extends to pivotal junctures in our national history and the history of labor relations in this country. From 1942 to 1945, Ben was a staff member at the National War Labor Board. He was a public member of the National Wage Stabilization Board from 1951 to 1952. And his organizational presidencies include the following: the National Academy of Arbitrators in 1962, the Industrial Relations Research Association in 1975–1976, and the International Society of Labor Law and Social Security in 1985–1988.

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[4]Kochan, Katz & McKersie, The Transformation of American Industrial Relations (Basic Books 1986).
[5]*Id.* at 6.
[6]*Id.* at 5.
[7]*Id.* at 6.

Ben was also the director of the UCLA Institute of Industrial Relations from 1960 to 1975 and secretary of the American Bar Association's section on Labor Relations Law from 1975 to 1976. Ben received the American Arbitration Association's distinguished service award in 1981.

Ben, who, not surprisingly, has also thought about today's subject, said in a 1984 article:

> In the area of collective bargaining, I think the role of unions will shift from that of innovators to that of consolidators and enforcers. Most basic conditions of employment are now covered by legislation; more will be in the future. Unions will continue to seek improvements in wages, hours, and working conditions through collective bargaining—but the improvements will be marginal. The role of the enforcer of employment guarantees will become increasingly important; but as in Western Europe, most of these guarantees will be created by a statute, administrative regulations, executive orders, and judicial decisions, rather than by collective bargaining agreements.[8]

A moderate position if you will. At this time I turn the program over to Ben Aaron.

II. THE DEBATE

BENJAMIN AARON, MODERATOR*
RICHARD EPSTEIN
THOMAS GEOGHEGAN
THOMAS A. KOCHAN

Benjamin Aaron: Thank you, Calvin. Good morning, ladies and gentlemen. Let me briefly explain how we are going to proceed. The person to whom a question is initially addressed will have three minutes in which to answer. The other two will each be permitted a comment not to exceed two minutes, after which the initial speaker will have one minute for the last word. This process will continue until each speaker has been asked two questions. Any time remaining will be reserved for questions from the audience. Time limits for answers and comments will be strictly enforced by

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[8]Aaron, *Future Trends in Industrial Relations Law*, 23 Indus. Rel. L.J. No. 1, 56 (Winter 1984).

*In the order listed: Benjamin Aaron, Past President, National Academy of Arbitrators; Professor of Law Emeritus, University of California, Los Angeles School of Law, Los Angeles, California; Richard Epstein, James Parker Hall Distinguished Service Professor of Law, University of Chicago, Chicago, Illinois; Thomas Geoghegan, labor lawyer, Depres, Schwartz & Geoghegan, Chicago, Illinois; Thomas A. Kochan, George M. Bucker Professor of Management, Sloan School of Management, Massachusetts Institute of Technology, Cambridge, Massachusetts.

Calvin Sharpe with the aid of a little gong. The questions will be asked of the speakers in alphabetical order. So we will start with Mr. Epstein and then Mr. Geoghegan and finally Mr. Kochan. Here we go.

Professor Epstein, in your 1983 *Yale Law Journal*[1] article critically analyzing New Deal labor legislation, you wrote approvingly of the common law position that "Every person owns his own person and can possess, use and dispose of his labor on whatever terms he sees fit."[2] May one reasonably infer from that statement that you believe that any legislation or private agreement purporting to empower a collectivity of employees by giving them an influential voice in the determination of wages, hours, and working conditions binding upon all members of that collectivity would be unwise, unfair, and inefficient?

Richard Epstein: You may. It seems to me that that is the clear implication of my position. Labor law, it seems to me, is one of the most fundamental areas of thought because it does deal with the question of how we are going to dispose of labor. What will be the effective distribution of individual rights? And how do those individual rights, once defined, relate to the question of overall social efficiency. In answering these questions, it is important to remember that all rights and all duties are correlative, so whatever limitations you are prepared to impose on management for the benefit of labor will, in fact, have a cost on the other side. And that cost will be borne not only by management but also by workers, who are excluded from the union, and by the public at large. The question one must ask then is whether or not the gains that we seek to give workers through empowerment legislation are justified in terms of the collateral costs imposed upon those other groups. It is a very difficult question to answer in principle, but I think a couple of guidelines may be put forward.

First, I think the most important of these is, why not use competitive arrangements in which people offer their services at whatever price they can command to employers who hope to pay as little as they can. Why might that arrangement be inferior to one in which workers are forced into collectivities whether they want to or not, where the groups must then bargain with an employer in an arrangement that often will require the use of arbitrators, who are needed to overcome the enormous differences that arise when

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[1]Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357 (1983).

[2]*Id.* at 1364.

there are strong forces on both sides of the table, with no easy exit option.

Second, responding to needs for dignity for workers raises a severable question. First of all, to the extent that you can improve the overall level of material well-being in a society, workers will benefit from that. So if a competitive system in the aggregate will out-produce a noncompetitive system with collective bargaining organizations, we should expect workers to share in the benefits. The second point is that in a competitive situation, so long as workers have an effective option to leave, employers will have to develop very strong incentives to make conditions attractive for their employees. Just because we do not have a statute that mandates employee empowerment does not mean that nothing will be done on that score, or that employers will be indifferent to this matter. To the extent that employers can find ways to make the job more attractive to employees by giving them more job security and so forth, they will have the incentive to do that so long as they benefit as well from that increased security. When worker retention rates are high, performance is consistent, or productivity is high, the employee benefits as well.

I do not know of any mechanism outside voluntary exchange to achieve these results. Adopting an alternative system in which one party must bargain with another creates a system of bilateral monopoly, one that operates inefficiently, in fits and starts.

Benjamin Aaron: Thank you. Now we'll have comments, first from Mr. Geoghegan.

Thomas Geoghegan: The system of "voluntary exchange" that Professor Epstein has talked about does not exist anywhere. It never has existed in the United States, it does not exist now. I would like to make two quick points about his "unregulated market" ideal. Number one, what Margaret Thatcher did in England; number two, the survey of Professors Freeman and Rogers.

First, Margaret Thatcher, allegedly pursuing laissez faire, came in to end a system of unregulated exchanges between labor and management. Her main legacy in Britain was to impose labor laws in a country that has always resisted them. The Blair government is now coming in with card checks and other rules that will right that balance. Likewise, in the United States we have a system of intense labor law regulation that the employer community and laissez-faire right is deeply committed to because it discourages unionization. As a friend of mine at UNITE likes to say, "In their wildest dreams the employers couldn't have a legal system better

than they have now." The system eliminates secondary strikes, imposes all sorts of restraints and shackles on unions with serious sanctions, with no sanctions on employers when they violate the labor laws on their side. So nobody—right, center, left, business, labor, whatever in the United States or in any other Organization for Economic Cooperation and Development (OECD) country—has ever pushed for "voluntary exchange." It does not exist.

Second, what do employees want in the United States? The Freeman/Rogers survey shows that a third of the nonunionized work force want to be "in" unions. Here is the most interesting part of the study: The other two thirds who say they *don't* want to be in a union also say that what they want is a social and legal structure that is pretty much like the works councils that the central Europeans have. So the unanimity, this desire to be "represented," is one of the striking social facts about the United States today. And the other fact is under our law, a system of laissez faire does not even remotely exist now. We have the most overregulated of all labor law regimes, but now it is set up more for the benefit of companies and not unions.

Benjamin Aaron: Thank you. Now Mr. Kochan.

Thomas A. Kochan: Thank you. The days when common law could dictate how we structure the employment relationship went out in the 1800s. And I believe they certainly should not return as we go into the next century. The employment relationship is a human relationship. It is not like any other commodity. We learned a long time ago that markets do not regulate human behavior in the same way that they regulate the selling of computer chips or shoes for horses or the kind of biotechnical technology that is coming down the road. We have a society that values human work. We have a society where employees want rights at the workplace; they want the flexibility to be able to choose whether or not to be represented at the workplace. In a democratic society or in an economic system that values freedom of choice and individualism and rights for employees, this is not an issue for the employer to decide. It is not the employer's role to decide unilaterally whether or not it wants to provide benefits to employees or whether or not it wants to have the kind of workplace culture that encourages participation and provides a certain level of wages, hours, and working conditions. This, in our society and in all democratic societies around the world, must be a joint process. Some employees can do this individually because they have the individual bargaining power. Many, however, require some form of collective

representation. It is the role of our society to structure a legal system that allows this process to take place fairly and efficiently.

All we need to do is look at the economic history of the last 15 years to understand that market forces even in a booming economy do not necessarily produce the kinds of results for employees that Professor Epstein suggests. The economy has grown, macroeconomic indicators and unemployment rates are all very positive, yet we have had a declining real wage, increasing wage inequality, and increasing social tensions at the workplace. We, as a society, need to set the rules to allow the parties at the workplace to deal with these issues fairly and effectively.

Benjamin Aaron: Thank you. Now Mr. Epstein, you have one minute for the last word.

Richard Epstein: I think what has been said is quite ironic. I agree with Mr. Kochan that there are some very serious problems in the labor arena. The odd thing is why he would attribute those problems to a set of policies that I have endorsed when in fact he has absolutely vanquished the field on labor policy. If you want to find out what the source of the malaise in labor markets has been in the last 15 years, do not talk about the dewy-eyed reformer who has not had the slightest political success. Look at current institutions and ask how successfully have they addressed the issues in question.

I also agree with Mr. Geoghegan that this is a situation in which labor markets in the United States are completely "out of whack." Now when I talk about undoing the labor statutes, I am not speaking as a management hack. I am doing so because I think that the entire system is completely out of balance and that we would be far better off without any restrictions. As to the British system, it was never a pure common law system. Its most important feature is that the common law tort of inducement to breach of contract, for example, was explicitly repealed by the Trades Disputes Act of 1906. And that allowed huge amounts of activities outside the ordinary common law framework to take place and to bolster union power.

Benjamin Aaron: Thank you. Now we turn to Mr. Geoghegan for his first question. Mr. Geoghegan, your book, *Which Side Are You On?*, presents a depressing—one might say almost despairing—picture of the labor movement in the United States today. In analyzing the unions' current low estate, you emphasize particularly what you regard as the loss of the effective right to strike. In your opinion, would laws denying employers the right perma-

nently to replace economic strikers and forbidding federal courts to enjoin any peaceful strike, including one in violation of the no-strike agreement, be sufficient to redress the inequality in bargaining power between employers and their employees that you believe presently exists?

Thomas Geoghegan: I don't know. I do feel that if the balance of unionized work force versus nonunionized work force were restored to the levels of the 1950s the issue of replacement strikers would probably disappear. That is, if you gave—and I've long advocated this as a political strategy as well as a legal one—people the right to join a union freely and fairly without being fired, you would get back to high levels of union representation that would discourage the union-busting employers who are now currently in the mode of going house-to-house and shooting the remaining holdouts. But that use of replacements was really only effective in the 1980s. It was only when the unionized share of the work force began to drop to levels like 10 percent in the private sector that employers could begin using the replacement worker strategy much more effectively than in the golden era when unions had huge numbers. In 1958, labor was at 38 percent, but the real economy back then was in the north and midwest in cities like Chicago where the true rate was probably 50–60 percent. It seemed like everybody was in a union or expected to get into one. And you had a kind of commitment to it that is similar to the social democratic regimes that are in western and central Europe now. The idea of replacing people, using scabs just was not a viable option because too many people were in the labor movement. Here I would steal a page from Professor Paul Weiler at Harvard and say the *Boys Market*[3] decision in 1970 was a disaster for labor, not so much for the merits of the decision, but for the fact that the Supreme Court came in and did something that no arbitrator in his or her right mind would do: it gave the employers a big prize, the no-strike injunction, took away a bargaining chip from labor and gave it nothing in return. We had no labor law reform, nothing. So that when the issue of reform, of improving the organizing rights of workers arose in the late 1970s, what could we trade? A John Dunlop might say that the Supreme Court had already taken away from labor the best thing it could have given up.

I very much feel that the most effective political strategy is not to go to Americans and say, "Give us the right not to be replaced."

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[3]*Boys Markets v. Retail Clerks Local 770*, 398 US 235, 74 LRRM 2257 (1970).

Rather, "Let me give you the right to make up *your own mind*—freely and fairly, without being fired—as to whether or not you want to join a union." And by that I mean card checks, more serious sanctions for NLRB violations.

Benjamin Aaron: Thank you. Now for the comments. Mr. Kochan.

Thomas A. Kochan: I agree that the striker replacement debate is really a misguided debate. It is misguided in two respects. First, the real effect of striker replacement is less at the bargaining table and much more, as Tom just mentioned, in the organizing process. Our data show that you see a higher proportion of threats to use striker replacements in first contract bargaining. And one of the most effective threats that an employer can pose to employees, who are thinking of organizing or are in the process of organizing, is that they can be permanently replaced if they go on strike. And that chills the organizing process quite effectively. So I think if we are going to talk about reforming our labor laws we have to think about them holistically. Do not think about striker replacement in the absence or in isolation from the other aspects of the law around organizing and collective bargaining.

Having said all that, there is a second diversion. We have focused on striker replacement in the Congress over the last couple of years, I think, to the peril of other much more essential needs, that is, fundamental labor law reform. Not labor law reform within the existing system, but a reform that would look at the basic fabric and structure of our laws and ask what forms of representation are appropriate. How do we structure labor law so that there are more choices so employees have a range of choices about whether to participate effectively as individuals, in groups, collective bargaining, through corporate governance arrangements at the workplace, and other forms. We have to broaden the analysis of labor policy and stop focusing on the sideshow of striker replacement.

Benjamin Aaron: Thank you. Mr. Epstein.

Richard Epstein: I am not so sure that it is a sideshow. The issue has been a very important one, but I think it is instructive to note that the original decision with respect to the ability of an employer to hire replacements in the event of a strike dates from 1938, if I am not mistaken, immediately after passage of the NLRA. It turns out that this right has been held more or less in the same legal posture over the last 50 or 60 years. And the question one must ask is: Why is it that you would want to treat a constant legal environment as the source of a major recent decline with respect to labor participa-

tion? To be sure, I think that the threat to hire replacements is always a credible one and is of some value, but I am not sure that a change in the law on this issue would make much difference one way or the other on the level of unionization. It seems to me the key determinants in the decline in the labor movement have nothing to do with legal rights and duties of the NLRA, at least on these issues. I think it has much more to do with the change in the composition of the work force. The move away from large assembly line plants in which collective bargaining can easily take place to a service economy where people can telecommute to work and engage in individual choices makes collective bargaining a relatively inefficient system. So long as one recognizes that these forces will continue apace it seems somewhat utopian to assume that you can improve the situation in any way, shape, or form by saying, in effect, to an employer, "If you don't agree to worker demands, we are going to shut you down." Ironically, it is not at all clear that the permanent replacement law will actually help union organizations, assuming one sees it to be a benefit. If I were an employer and knew that in the event of a strike I could not hire permanent replacements, I would be fighting much more fiercely at the beginning to keep the union out of my shop precisely because I know that the cost of being unionized would be much higher than would otherwise be the case. Behind the talk about fraternity, brotherhood, and empowerment lies a great deal of economic muscle.

Benjamin Aaron: Thank you. Now, Mr. Geoghegan, one minute to sum up.

Thomas Geoghegan: I would agree that the replacement striker issue is not a great idea. I strongly disagree with Professor Epstein. It is public policy and not the "global economy" or the change in the skill mix that determines any country's degree of unionization. But there is a relationship between our lack of unions, our low wages, and our low skills. The United States is the only major OECD country that is uniquely hooked into a "low wage equilibrium." We keep spitting out an enormous, disproportionate number of low-wage, low-skill jobs. I note that in other countries, in Canada, for example, unionization in the 1980s actually increased as Canada moved to a service sector economy. The unions are stronger in Germany, too. Professor Kathleen Thelen at Northwestern has been writing about this: how the German unions are actually stronger now, not weaker, as we read in the United States. She says that if anything the difficulty in Germany is that the employer

groups are so weak that they cannot effectively engage with the unions. In Britain you have just seen the sea change in which the labor government will put in place card checks à la Canada. You will see a great shift in labor-management relations there. You can pick your unionization rate by the public policies that you put into place. If we gave our American people a true civil rights act that let them join unions freely and fairly without being fired, with the same remedies you now have to enforce the civil rights law, you would see an enormous increase in the rate of unionization in the United States.

Benjamin Aaron: Thank you. Now Mr. Kochan your first question. The fact-finding report of the Dunlop Commission on the Future of Worker-Management Relations included a finding—supported in part by those set forth in the Kochan, Katz, and McKersie book, *The Transformation of American Industrial Relations*[4]—that a majority of American workers want to have opportunities to participate in decisions affecting their jobs, the organization of their work, and their economic future. However, the recommendations of that Commission, of which you were a member, seem to place principal emphasis on greater employee involvement within the present system of collective bargaining, and urge, among other things, speeded-up elections and stiffer penalties for employer unfair labor practices—all leading to increases in the bargaining power of unions. Do you perceive any tension between the Commission's findings and its recommendations on this point?

Thomas A. Kochan: The recommendations of the Commission spoke not only to the need to strengthen the collective bargaining process and to provide workers a real right to choose whether or not to be represented, it also spoke to two other important issues.

First, it legitimated the notion that if we have a fair and effective choice for employees, then we can open up the law to encourage broader forms of participation in union and in nonunion settings. The American business community needs employee participation in order to be competitive in world markets at high living standards. We need a national policy that encourages this business strategy and supports employee participation. At the same time we need a policy that allows workers to choose what form of representation they want to have in their workplace.

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[4]Kochan, Katz & McKersie, The Transformation of American Industrial Relations (Basic Books 1986).

Second, the report highlighted the importance of providing a way to resolve disputes that are now too often being settled in the courts. We all know about the growth of litigation in society in general and in the workplace in particular. If we gave workers and employers the tools and the right legal structure to engage in problem-solving and conflict resolution, we could use the expertise of members of this Academy and other organizations around the country to resolve disputes closer to the workplace.

Having said that, the Commission report goes only so far. I personally believe we should have a broader array of alternatives than those recommended by the Commission. The Commission was an effort, probably a "last ditch" effort, to find a mechanism that would gain support from the business and the labor community in this country. Unfortunately, that is not possible today. So we have a responsibility to think more broadly, more openly, about what are the right forms of participation and representation that remain unconstrained by the political reality of the moment which is gridlock and impasse. Given this gridlock, employee rights will be neither effectively represented at the workplace nor will employer interest be effectively responded to by the current structure of law. We have a much taller order ahead of us. That is, we must go back to basic principles and ask: How do we compete at high living standards? How can our labor and employment laws encourage this? How can employees have freedom of choice at the workplace with the kinds of participatory practices and representation structures that they consistently say in survey after survey they want and they need? And, how can we move ahead with the political process of putting this kind of structure in place?

Benjamin Aaron: Mr. Epstein, your comment please.

Richard Epstein: Yes, I always think there is an enormous tension in the kind of position that Mr. Kochan takes. That is, we start with the assumption that, in order to compete successfully in a world economy, we recognize that employers must be able to secure the cooperation and good morale and participation of their work force. Evidently, it is in the employer's interest to do so. It seems to me that that is undeniably correct. Any person who has worked in labor relations will tell you that the single most important feature of any job relationship is morale. Bad morale leads to resentment, and resentment leads to all sorts of petty intrigues, and the entire firm will start to disintegrate.

I think employers and personnel people are well aware of this phenomenon. They just need to look at the recent debacles in the

military to see exactly what can happen when personnel issues are not correctly handled. Once it is clear that it is in their interest to do so, why on earth do we now need a system of laws that tells them that they must be compelled to do the things that they will do anyhow. The question you must ask is whether state compulsion and the threat of lawsuits will, in fact, improve the level of voluntary cooperation that will take place. I cannot believe that they will.

In addition, the entire process is frustrated not only by collective bargaining arrangements but also by other sources of a massive increase in litigation in the employment relationship. It is very clear that, even apart from unions, the employer is unable to fire somebody from a job today; everybody is a member of some protected group: it is age, sex, race, disability or some other kind of condition. What happens, then, under these circumstances is that the law opens up employers to enormous threats from large numbers of people who now realize that they can keep their jobs without having to cooperate, precisely because retaliation by lawsuit is available to them. Ironically, the employment law, as opposed to the labor law, is in tension with the very objectives that the employer supports. I agree with Mr. Kochan; what we have to do under these circumstances is to begin again from ground zero. A few more antiquarian common law principles here would go a long way to achieving that end.

Benjamin Aaron: Thank you. Mr. Geoghegan.

Thomas Geoghegan: I know the best thing employers could do for "morale." It would be to share the productivity gains of the enterprise with their workers. And if there is any cause for demoralization in the work force, that is by far the greatest. I am sympathetic to what Professor Kochan says but I feel a little uneasy when the talk goes to eliciting loyalty and psychological reasons for bringing in more employee voice and more unions. I think that people are much more interested in the bread and butter stuff: money. Show me the money. And that is what is the fundamental mission of even the employee voice initiatives.

During the two months I spent in Germany recently, I was talking to an American businessman there who was going on about how much Americans like him hate the unions. And I asked, "Well, which unions specifically?" As he went on, I said, "Wait a second, you're talking about the works councils; the works councils aren't unions." and he looked at me, as only an American businessman can, and said, "Come on, of course they're unions." So maybe it is true that anything that strengthens "employee voice" is going to

help the cause of unions. And what is the most important cause of unions? It is not getting loyalty out of employees but setting a country's wage policy in such a way that everybody has a say. That's how we get efficient use of labor resources; not squishy stuff like Professor Epstein talks about: "Employers have an interest in this, and blah, blah, blah." Let's get rid of the touchy, feely stuff and look at the numbers. The numbers show that something is wrong. Profits have gone way up, even our productivity, in our low-productivity United States, has gone up somewhat. Professor Gordon at Northwestern says it has gone up more than estimated. Whoever is right, workers have gotten nothing. That comes home to people. The final thing that we have to do—the reasons we need unions back—is to stop all our investment out of low-wage, low-skilled jobs. You punish investment like that by raising wages for those jobs, albeit moderately, over time. The idea is to use wages to steer investment into higher-wage, higher-skilled things, so you do not have this whole army of working poor surrounding Hyde Park where Professor Epstein teaches and soon making up the majority of all our cities.

Benjamin Aaron: Thank you. Now, Mr. Kochan, one minute to get in the last word.

Thomas A. Kochan: Employers have a self-interest in making profits. But, in the United States they can make profits in a variety of ways. They can do the kinds of things we have been discussing to capitalize on their employee skills and motivations and abilities in order to compete on the basis of both high productivity and high wages and high labor standards. Or, they can compete on the basis of minimizing costs by trying to find ways to limit the rights and the voice of employees and compete in ways that are unacceptable to the vast majority of the American public. We have a very diverse economy. Anyone who goes into a restaurant knows that one has a choice of restaurants. Some restaurants have very high-skilled, motivated employees, and some do not, and we can tell the difference. So it is not just the consumers, it is not just the employees, but it is the overall society that has a stake in giving employees and employers the incentives to engage in productive employment relationships that produce both high productivity and profits. And then we should encourage employers to respond by sharing those profits in ways that maintain the morale, motivation, and effort of their employees. There is no natural law of economics or of management behavior that will lead us there. We have to encourage it; that is what our laws should do. Employees should have a

voice in these discussions. They have an interest in making sure employers compete on a basis that achieves the kind of benefits that will support employee expectations. That is what we have to do. We cannot leave it to the market and we certainly cannot leave it simply to employer choice. Given the range of choices, some employees, a good number of employees, in the United States will be left out.

Benjamin Aaron: Thank you. Now we go to Mr. Epstein again for his second question. In a 1984 *Chicago Law Review* article, you presented a spirited defense of the contract-at-will, asserting, among other things, that any attack on the contract-at-will in the name of individual freedom is fundamentally misguided because the contract-at-will is sought by both parties, and any limitations upon the freedom to enter into such a contract limits the power of workers as well as that of employers. Do you, therefore, believe that any attempt to empower employees by abolishing or drastically limiting the contract-at-will by legislation, judicial decisions, or collective bargaining agreements would be self-defeating?

Richard Epstein: I think it is. You keep asking the same questions, and I keep giving the same answers.

The logic of contractual exchange is, I think, pretty clear. Looked at from the ex ante perspective, voluntary agreements generally work to the benefit of both parties. Most may not turn out ideal, but, in terms of expectations, they are what the two parties want. The moment you say to individuals, "Look, we are going to give you some protection above and beyond what you want," it is not as though the rest of the contract remains completely unchanged or that the patterns of employment remain completely unchanged. Other responses will be introduced. What will these responses look like?

If you have a law, for example, that makes it more difficult for an employer to fire workers, it means that the checks and examinations you will make of those workers before you hire them are going to increase. It means that you will search for workers who have better credentials and reliability because you would rather avoid the risk of dismissal. This, in fact, will have a negative impact on the very people that everybody here wants to protect so much, namely, marginal workers who do not have impressive résumés but who want to be given the chance to prove what they have on the job and who know that unless they are given the chance to do so, they will not be able to prove anything at all. So what we do is to make it more

difficult for them to get that first leg up by saying in effect to an employer, "If you want to hire these high-risk workers, you have to understand that in order to dismiss them you will have to face litigation of one kind or another."

Once you change the nature of the employment relationship so that dismissal could be for cause, it completely alters management-employee relationships. The threat advantages of an employee are very much greater than they would otherwise be. This will lead employers perhaps to be a little bit more cautious in the way in which they criticize workers. It may lead employers to be a little bit more careful in their written evaluations. It may in fact increase the cost of running the system, some of which costs are going to have to be borne by employees in the form of lower wages. It is just a big mistake, as a matter of general principle, to assume that the way in which we protect people is to limit the kinds of choices they have at the onset of the arrangement, all on the grounds that thereafter they will be better off by the choices that we make for them. I want diversity in the workplace as much as everybody else, and you do not get that by a uniform set of federal initiatives. You do achieve diversity by employers adopting different strategies and by workers knowing that they can leave a particular job because there are many other people who could hire them. That is the way you create a vibrant economy. You do not create that economy by imposing this guilt mentality in which every move made by every employer and every employee is subject to legal second-guessing at enormous public expense for no particular public good.

Benjamin Aaron: Thank you. Mr. Geoghegan, your comment.

Thomas Geoghegan: But I am the one who wants to expand employee options. I want to expand their option to join a union without being fired. If we cannot do that, then the employer should not have the "option" to stop those employees from collectively withdrawing their work, from having secondary boycotts, from having mass picketing. Professor Epstein has two colleagues at the University of Chicago Law School—Professor Holmes and Professor Sunstein—who have pointed out a paradox. Far from being laissez faire, Professor Epstein's approach assumes heavy state regulation, and it is heavily "law dominated." Look at the principle of corporate limited liability. It takes a lot of law to have laissez faire. The question really is not whether we should have "law" in these voluntary relationships. We will. In no conceivable sense under any set of scenarios will such relationships be truly voluntary. Mine is

more voluntary than yours. The question is what kind of relationship do we want? That is a decision that in the end cannot be left to the market and never has been. The market is simply the computer hardware that we use, public policy is the software. You must have software of some kind. Now, the software that I would propose (to keep up this analogy) is simply to give employees greater choice to have voice and to participate. It is this very thing that will lead to more equitable outcomes and more equitable income distribution.

Benjamin Aaron: Thank you. Now, Mr. Kochan, your comment.

Thomas A. Kochan: I think we need to see the real world as it actually exists rather than as we might think about it in some very abstract theory. Let's look at how employment practices became what they are today. Let's go back and do the historical survey of what life was like prior to the development of due process at the workplace. Why did we have the revolts of the 1930s? Why did the War Labor Board, many of the leaders of this Academy, decide in the 1940s that the way to improve employment relations, the way to discipline management and the way to discipline workers at the workplace, was to set in motion due process requirements of grievance procedures and arbitration. This is part of the way in which we make progress in society. We search for an understanding of what employees expect and for what works effectively at the workplace. We experiment with private institutions and public policies, and we find ways to accommodate the complex set of interests at the workplace. That is the way we think about labor policy historically, and we need to return to that way of thinking about it at the moment.

Today, we still have people who believe that if we just left it to the free market everything would be fine. Well, that experiment was run a long time ago, and it failed. It will fail again in the future. We have a diverse set of employees, a diverse set of employment relationships, and we must accommodate their different needs. What we have now is a hodgepodge of arrangements that are not effective in enforcing legal requirements at the workplace. Why do we not find a way to make it very simple and say that there must be due process for discharge? We have just-cause principles that many here have helped develop over the years. Let's apply them, let's use our talents and go from there.

Benjamin Aaron: Time. And now Mr. Epstein.

Richard Epstein: I am never quite sure who is living in the fantasy world. What I am trying to do is to explain why the current

system fails. Now I am told, in effect, that the current system fails because the radical reforms that I propose are, in fact, in place. But I do not think this is how it is.

The issue that one must face is whether or not all these goods that Mr. Geoghegan and Mr. Kochan want are, in fact, free goods. Imposing these restrictions on how employers are allowed to behave may increase the choice of options for employees who clear the hurdle for jobs, but it will reduce the likelihood of obtaining jobs in the first place. You cannot get blood from a stone. You cannot assume that if productivity does not increase, that somehow or other employees will obtain some distributional gain that will in the long run yield higher wages for workers. The greater problem that workers face has nothing to do with the competitive workplace. The key issues are the total number of workers seeking employment and the educational achievements they bring to the jobs. The recent studies on this have been quite clear. If you want to explain why there are declining wages in large segments of the work force, look to public education for your answer. You will discover that if workers do not have the skills for these jobs, they will not receive, under any benevolent form of social organization, wages above their marginal productivity.

Benjamin Aaron: Thank you. Now we'll move on to Mr. Geoghegan's second question. Mr. Geoghegan, can you conceive of any arrangement outside the present system of collective bargaining that would effectively empower employees in their relations with their employers?

Thomas Geoghegan: No, there is nothing other than collective bargaining. But I do not particularly like our present system of collective bargaining. In *Working Under Different Rules*,[5] Professors Freeman and Katz have an interesting essay where they look at how wages are set among the OECD countries. They point out that the more centralized the collective bargaining, the better the income distribution. And the more decentralized and more flexible the bargaining—or no bargaining as we have here in the United States—the wider the income distribution. Now here is another benefit: The higher the wages under centralized bargaining, the more there is a push—and sometimes an enormous push—within those countries to educate their workers to improve their skills for the high-wage level jobs that are available because of this central-

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[5]Freeman & Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries*, in Working Under Different Rules, ed. Freeman (Russell Sage Found. 1994), 29.

ized bargaining. The more flexible the bargaining and the wider the wage range, the less incentive there is for people to drop out of the labor market. Why should they improve their skills? Because wages can be so low, there is a limited number of high-wage, high-skilled jobs available. I agree with Professor Epstein that education is the key, but the problem is the United States, unique among the OECD countries, keeps turning out jobs for which no education is necessary. And indeed we have a glut right now of college BAs. In 1995, the Bureau of Labor Statistics pointed out that this glut had been stable so far through the 1990s. We have at least one in five employed BAs in "noncollege" jobs. And these are really "noncollege" jobs because they define "college jobs" very generously. You need to have a system of collective bargaining that will produce the wages and equity and economic levels you want. I think you could walk into a "hypothetical country" (Ruritania, let's say) and walk around the streets of the city for awhile, and you can tell, based on what you see—how decayed the neighborhoods are, the squalor in the streets—how the country sets its wages: i.e., by centralized bargaining as in Northern Europe or by decentralized non-union bargaining like here.

Benjamin Aaron: Mr. Geoghegan, I'm sorry I have to interrupt you; your time has expired.

Thomas Geoghegan: Yes, sorry.

Benjamin Aaron: Mr. Kochan.

Thomas A. Kochan: I am a very strong believer in the collective bargaining process. It serves many firms and many employees in American society well. But I do not think it is the only way to structure an employment relationship, and I do not think it is the only way in which employees influence employers to deal with employees effectively, fairly, collaboratively, and harshly, when necessary, to achieve their objectives. I believe that collective bargaining is a very flexible instrument. We have demonstrated that in partnerships as radical as the Saturn Corporation or the kind of partnership that is being put together by a coalition of employees and unions at Kaiser Permanente at the moment. We have demonstrated in the airline industry that we can make employee ownership work under some circumstances. Under some circumstances it may not work. We also see the effects of works councils, American-style works councils, in a variety of settings. We do not call them that, but they are the functional equivalent.

Let's open up our law to provide for a variety of different mechanisms and let's watch the market work. Here I am in full agreement with Professor Epstein, but let's make the structures open structures that can evolve over time. If the kinds of partnerships that we see in some organizations work effectively, they can spread to others. But let's not constrain ourselves to think that because collective bargaining has been the system we have carried with us since 1935, it is the only way in which employees can have a voice at the workplace.

Benjamin Aaron: Thank you. Mr. Epstein, your comment please.

Richard Epstein: I think there is a certain irony again about the discussion here. If one were to try to discover, for example, the source of difficulty in education, one would point most forcefully and most passionately to the rise of unionization under collective bargaining in the educational system, which dates from the mid-1960s. It is really quite extraordinary. No matter how you slice the data, three numbers come out simultaneously.

First, the decline in educational achievement begins in the mid-1960s. Second, the vast increase in educational expenditures in the United States begins about that time. And third, there is a very large increase in unionization about that time in the United States. I do not think these three phenomena are unrelated.

In a system with strong union protection, a guild mentality takes over. Flexibility in the workplace is no longer treasured and every worker defends his or her own particular fiefdom, or particular institutional prerogatives.

The idea that the way to solve these problems generally is to enshrine this system institutionally seems to me to be the greatest of all possible mistakes. What Tom Geoghegan is arguing for is a system of national wages and national prices in order to dictate how resources will be allocated. The short answer is that the informational difficulties associated with the rigidities that the system introduces will lead, within a generation, to paralysis for the very individuals whom you are trying most to help.

Benjamin Aaron: Thank you. Now, Mr. Geoghegan, one minute for your final response.

Thomas Geoghegan: Really only one sentence. If Professor Epstein truly believes that the increasing gulf between rich and poor and the collapse of our public schools is a result of the increase in unionization, if he believes that in the 1960s, 1970s, 1980s, 1990s unionization in fact was going up and up in the United

States, then we are on different planets. And there is really not much more to say. But there is one thing that I would add: if you walk around this city and look at the low-wage, low-skill factory jobs that exist here, it becomes an advantage in the job market here not to be educated and indeed not to be able to speak English. The employers that are producing these low-wage, low-skilled jobs are not interested in an educated work force. And you can see that in the fact that the Puerto Rican educational attainment is much higher than that of the Mexican in this city, and Puerto Ricans have a much higher percent of working poor and have significantly lower income than Mexicans. We are moving to a two-tier economy. We have an economy that in a sense is actually demanding more and more low-skilled, low-wage, uneducated workers. And that is because we have let wages drop and drop and drop, and that means we invest more and more in lower skills.

Benjamin Aaron: Thank you. No we come to the second question for Mr. Kochan. I would like to return to the matter of the Dunlop Commission recommendations. The Commission recommended that nonunion employee participation programs should not be unlawful simply because they involved discussion of terms and conditions of work or compensation when such discussion is incidental to the broad purposes of these programs. Accordingly, it also recommended that Congress clarify section 8(a)(2) of the National Labor Relations Act and that the National Labor Relations Board interpret it in such a way that employee participation programs operating in this fashion are legal. In your opinion, if these proposals were adopted, would collective bargaining have a greater or a lesser future role in employee empowerment?

Thomas A. Kochan: It all depends on what unions do with their opportunity to organize workers, to recruit workers, what unions do with their ability to empower workers at the workplace. You must remember that the recommendation Ben just summarized is only one of a complex set of recommendations. I would be fundamentally opposed to, and have testified against, changing the labor law merely to eliminate section 8(a)(2) in isolation. If we do that, we will reduce employee choice at the workplace and will not achieve the values of increased participation and competitiveness. But if we do a comprehensive reform of our labor law, we can allow employees to choose whether they want to be represented by a trade union for collective bargaining purposes, whether they want to be represented as individuals and small groups informally at the workplace without a union, or whether they want an organization—

call it a union, call it an association, call it whatever you want—that would provide a full set of services at the workplace. This type of "full service union" might also provide technical expertise and training in participation, safety and health, and representation on individual grievances around discrimination or other problems at the workplace. We can find the right mix for different employees. So we need to have a comprehensive change in our law. If we have that kind of change, there will be a period of experimentation where unions and other groups, whatever we call them, will find ways to meet the needs that employees have at the workplace—and meet them in ways that employers find compatible with their competitive interests and, which, in fact, enhance their competitive performance. That is what the Commission was set up to do. Obviously we did not achieve it. We did not achieve it because perhaps we were too constrained by the existing positions of business and labor. So we have to keep the fire burning on these issues until the day comes when the political environment is ready to do the right thing.

Benjamin Aaron: Thank you. Mr. Epstein, your comment please.

Richard Epstein: The political environment will never be ready for doing the right thing. The basic difficulties that one faces in a system of public choice are well-known and are very powerful. Determining labor policy for the individual firm through national legislation will lead to the titanic battles of the previous 50, 60, 100 years. On the merits of the particular proposal, I think that here is a classic illustration where in fact the value of participation was indeed frustrated by the contours of the National Labor Relations Act. There is little doubt in my mind that the ability to form a company union—call it an informal association or something else—is one of the things that would arise in a voluntary competitive market. The basic struggle or tension is this: If you have industrywide bargaining, unions now perform two functions. First, they cartelize an industry, and second, they may provide some useful functions in the grievance area. The issue for many employers is how can they resist the cartelization, on the one hand, and still use the union as an intermediary for personnel and grievance disputes. A reversal of section 8(a)(2) would allow the employer to take advantage of the useful functions associated with unions as well as third-party representation, without having the large-scale industrywide risk with respect to wage cartelization. I continue to believe that if one is thinking not only about those workers who are fortunate enough to join a union and to obtain the benefits that it

provides, but also about the full level of the work force, the point to remember is that in a competitive industry one can achieve the level of outputs that could not be achieved under any regulated system. The repeal of section 8(a)(2) would increase the competitive options. I think we should move forward with it now even if we cannot make the kinds of comprehensive reforms that have been suggested.

Benjamin Aaron: Thank you. Mr. Geoghegan.

Thomas Geoghegan: If employers wanted section 8(a)(2) gone, it would be gone. There is just not enough sentiment among the employers to get rid of it. It has never been a big item on their agenda. If it were gone, I doubt that anything would look much different from what it does now. It was the Dunlop Commission's interest (I always felt) to look for something to trade off. We will give the employers the end of section 8(a)(2) in return for the right to organize, and it just did not work. The question is: Why is it that the United States has not achieved labor law reform? Or, why is it that the United States maintains a legal system that allows for the collapse of unions here? I doubt it has much to do with political ideology or the culture or what have you. After all, Presidents and the House of Representatives have repeatedly pushed for labor law reform or passed labor law reform over the last 30 years. What happens is labor reform gets incinerated in the Senate. What is unique about the United States is that you have an institution like the Senate where 40 senators representing the 20 smallest states, representing a population base of nine percent, can block any initiative. A senate majority has done this with labor law reform over and over and over. If there was anything close to a system of functioning majoritarian democracy—yes, even with checks and balances—and with the separation of powers but with a principle of one person, one vote, then we would have labor law reform, as a friend of mine says, six times in the last 20 years.

Benjamin Aaron: Thank you. Now, Mr. Kochan, you have the very last word. One minute please and that will bring us in on time.

Thomas A. Kochan: I would make a wager with everyone in this room and anyone else who cares to take an interest: Let's just give these issues to the American public. Let's allow the American public to decide what is fair at the workplace, what values to pursue, and what kinds of options workers and employers ought to have to do their job in our society. If we were to do that, instead of leaving it to the Senate to filibuster or to the politics of Congress or to the negotiation of business and labor interests, we would have a much

different system of employment relations and labor-management relations. We would have collective bargaining because 60–70 percent of American society endorses the notion that workers should have the right to be protected under collective bargaining or have the right to decide. We would have employee participation because 70–80 percent of the American work force say they want the right to participate at the workplace. If we took this step, we would have a much more diverse set of institutions than we have today. The problem is we try to centralize these discussions in Washington, in interest groups. We as professionals often are not bold enough to take positions that neither labor nor business will support. Our job is to raise these issues, take them to the American public and the next time, if there is a next time for having a debate over what is the appropriate form of labor law, let's not do it in Washington, but let's take it around the country. And let's do it the way grassroots Republicanism showed us a long time ago is a good way to make public policy. Leave it to the people whose lives are at stake. Leave it to the people who are on the front lines. Leave it to the employers who have to deal with these issues on a daily basis, not their lobbying groups in Washington, and I think we will get somewhere. Our job in the meantime is to have these kinds of debates, to learn from experiments out there that industry and labor are engaged in, to keep these issues on the American agenda, and at some point then to insist that we allow workers to have some control over their lives and employers to have the kind of flexibility that they need to compete at high labor standards.

Benjamin Aaron: Thank you. This brings us to the end of our program. I am sorry that time does not permit any questions from the floor. On behalf of all of you, as well as myself, I want to thank our three participants for their immensely articulate and stimulating comments and responses to the questions. We are very grateful to you all.