

**IAPR TECHNICAL PAPER SERIES**

**RECONCILING DIFFERENCES DIFFERENTLY: EMPLOYEE VOICE IN  
PUBLIC POLICY MAKING AND WORKPLACE GOVERNANCE**

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January 2007

Technical Paper No. TP-07001

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## RECONCILING DIFFERENCES DIFFERENTLY: EMPLOYEE VOICE IN PUBLIC POLICY MAKING AND WORKPLACE GOVERNANCE

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### Introduction

At one time, collective bargaining and labor standards were tightly coupled policy responses to labor problems; standards would set a rudimentary floor and unions would strive to raise and embellish them. Unions were given, and gladly accepted, the task of reaching for more than the minimums. Paul Weiler's academic contributions and his myriad activities as a leading policy-maker and adjudicator have all advanced the position that the task of the state is to locate and administer the appropriate calibration in balancing the countervailing powers of employers and workers through a system of collective bargaining.<sup>1</sup> Harry Arthurs has described how this delicate balance sought by

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<sup>\*</sup> Daphne Taras, Professor of Industrial Relations, Haskayne School of Business, and Professor of the Institute for Advanced Policy Research, University of Calgary. This is a companion piece to the contribution of Harry Arthurs, which analyses the important role of the state when collective bargaining has not reached its promise. We served together as Commissioner (Arthurs) and Expert Advisor (Taras) of the Federal Labour Standards Review, whose report *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* was released on October 2006 (<http://www.fl-s-ntf.gc.ca/en/index.asp>). We cooperated in developing our respective contributions to this symposium. This article expresses my personal views, not those embodied in the Review, and not those of the Labour Program of Human Resources and Social Development Canada.

<sup>1</sup> For his academic contributions, see, for example, his books *Reconcilable Differences* (Toronto: Carswell, 1980) and *Governing the Workplace* (Harvard University Press, 1990). Weiler was one of the first scholars who addressed declining American union density, arguing that much of the decline could be explained by the lack of a labor law regime supportive of unionization. In "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," *Harvard Law Review* 96, 8, pp. 1769-1827, he urged that the US adopt features of the Canadian regulatory approach. Weiler was tremendously influential in Canada as he fashioned and administered British Columbia's labor code. It was not simply the wording of the laws that guided labor relations, but also the subtleties of his discretion in the adjudication of the law. My favourite decision made by the BC Board after Weiler had set the norms, and a wonderful illustration of finding the right calibration, dealt with employer interference during union organizing. The Board wrote that "the employer retains the right to communicate with its employees, however, the employer's exercise of the right must be squeaky clean." See *Fleetline Parts and Equipment Ltd.*, BCLRB Decision number 29/80. Despite that the US and Canada have labor laws that expressly give employers free speech rights, the Canadian boards have interpreted these rights within the context of the employment relationship, where they are neither absolute, nor a shield for employers who attempt to

Weiler has shifted.<sup>2</sup> With the decline in collective bargaining as a mechanism for advancing all working peoples' aspirations, Arthurs urges us to acknowledge that the state must fill the vacuum left in the spaces from which unions have often-unwillingly been ejected. Wise decisions by labor board chairs, and here Weiler was the exemplar, can no longer address what ails our workplaces. The ambivalence about, and benign neglect of labor standards cannot continue. The diminution of union power means that labor standards must shoulder a greater burden than had been anticipated.

There are three dilemmas. The first is that policy reform in the area of labor standards requires worker input. While ordinary workers have a great deal at stake in the terms and conditions set out in labor standards statutes, there exist few permanent, stable institutional mechanisms to represent worker interests in public policy formation aside from unions. What policy springboards would bring non-union workers into policy development? Although unions often advocate on behalf of all workers, it is increasingly important to ask whether there are other agents representing non-union workers' voice in policy-making. Developing consultation mechanisms for groups of non-union workers is a topic in which union interests and non-union workers' interests are incongruous. There is evidence (discussed later in this article) that non-union workers are eager to participate in workplace initiatives such as joint committees, councils, employee associations. Yet unions view such moves with great suspicion, believing that only unions provide the appropriate – and exclusive -- mechanism for collective representation. This is the classic principal-agent conundrum<sup>3</sup> as between unions and

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campaign in order to influence workers against the union.

<sup>2</sup> In a companion article in this symposium, see H.W. Arthurs, "Reconciling Differences Differently: Reflections on Labor Law and Worker Voice After Collective Bargaining."

<sup>3</sup> Kathleen Eisenhardt. "Agency theory: An Assessment and Review," *Academy of Management Review* 14, 1 (1989): 57-74. Here there is significant goal incongruity between principal and agent. The central dilemma investigated by principal agent theorists is how to get the union (agent) to act in the best interests

non-union workers, and it forces us to be more reflective about who carries workers' interests into policy-making involving voice.

The second dilemma is how to address employer arguments that state activism and public policy reform are not required in an era of high involvement workplace practices. Employee voice, say some employers, will naturally be incorporated into the employment setting because it is a key feature of new managerial philosophies on directing work. Further, the social responsibility movement embraces a voluntaristic and soft-law response to labor market imperfections. Corporate codes of conduct and similar initiatives – are they a substitute for or a complement to a system of vigorous state directives, hard law amendments, and a regime of enforcement?

A third dilemma is situated at the workplace level and involves Paul Weiler's fascination with workplace governance<sup>4</sup>. The grand dream that collective bargaining could solve workplace power imbalances is fading. The union threat effect that allowed non-union workers to enjoy some spillover from the gains of collective bargaining is no longer operative in many industries and regions. Is there a role for the state in crafting countervailing worker power to the employers' ability to unilaterally set terms and conditions in the take-it-or-leave-it world of individual employment? Are there appealing and sensible policies that acknowledge, incorporate, and perhaps even promote non-union voice? In an era in which there has been a fierce deadlock in the US over any reform involving collective bargaining, there may be ways of advancing collectivities at the workplace while adroitly sidestepping the impasse over collective bargaining reform.

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of the principal (non-union employees) when union is representing also its own legitimate interests, and has greater access to policy-makers and an informational advantage over non-union employees.

<sup>4</sup> Weiler, *Governing the Workplace*, op. cit. See also Weiler's "Enhancing Worker Lives through Fairer Labor and Worklife Law in Comparative Perspective," *Comparative Labor Law and Policy Journal*, 25, 2005: 143-148.

## I. “Policy Portals” for Non-Union Voice: Noticing the Dog that Doesn’t Bark

It is exceptionally difficult to locate a nexus of organizations that represent non-union employee interests. Compare this to the organized sector. Although the building blocks of union-management are at the workplace level, the union itself transcends the borders of the employer. It gathers and exchanges information, and can rise many tiers above workplace governance to get a bird’s eye view of employment trends. Unions also have developed additional expertise in matters such as employment insurance, occupational health and safety, and anti-discrimination laws. Unions are natural candidates for policy inclusion.

The usual configuration in serious policy initiatives begins with the striking of a panel, commission, or investigation of some kind. In 1993 and 1994 the Dunlop Commission<sup>5</sup> comprised a bi-partisan group of labor relations experts from business, academia, and unions. The Canadian equivalents were the Sims Commission of 1996<sup>6</sup> and the Arthurs Commission of 2006<sup>7</sup>. These types of policy reviews involve a conventional multipartite panel of unions, employers, academics, practitioners, supported by a government-staffed secretariat to lend expertise. But almost absent from the appointment process are ordinary citizens, the non-union workers, who comprise over two-thirds of our industrial landscape, many of whom are likely more affected by employment standards than are unionized workers (who generally exceed the statutory floor by an appreciable amount).

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<sup>5</sup> Dunlop Commission. *Commission on the Future of Worker-Manager Relations: Final Report*. Washington D.C.: US Department of Labor, Secretary of Labor and Secretary of Commerce, 1994.

<sup>6</sup> Sims Commission. Andrew Sims, *Seeking a Balance*. Canada: Human Resources Development, 1996.

<sup>7</sup> Arthurs Commission. *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century*. Canada: Human Resources and Skills Development Canada, 2006.

Who sits at the employment standards policy table? Union umbrella organizations such as the AFL-CIO in the US, and the CLC and CSN in Canada accept invitations with alacrity, and urge their affiliates to formally speak out in support of union recommendations. Employer groups are well-prepped and send delegates to make employer-friendly submissions. The problem is that non-union groups appear in a more haphazard, uncoordinated way, making it difficult to know the extent to which the groups or individuals who participate in public hearings actually represent any interests but their own. One disgruntled bank employee can proffer a spellbinding anecdote; another enraged group of abused workers can mesmerize. Labor standards may well be regaining moral cachet, but the advocates for stronger state regulation are still lacking the characteristics of a successful social movement. They are without strong institutional structures, power, visionary and charismatic leadership that transcends localism, and regular entrée to the offices of the most influential politicians. Absent serious corroborating evidence gathered through systematic research, it is impossible to build policy recommendations.

In many policy initiatives, research becomes a type of proxy for the direct voice of non-union workers. The US Dunlop Commission relied upon a “Worker Representation and Participation Survey.” Studies are commissioned from distinguished scholars, and small armies of statisticians are unleashed to torture findings from extensive, but more-often-than-not imperfect, data sets. These studies can be very useful. For example, in an unusual experiment, the Canadian federal sector has offered a type of non-union arbitration system that provides neutral adjudicators empowered to reinstate or otherwise provide remedial justice to employees dismissed without just cause. Some members of the employer community argue that this system ought to be retired, as it is onerous and costly, and drags employers through lengthy proceedings only to have them forced to re-employ poor-quality employees. Eventually, research was produced to

sort out the legitimacy of this vision. It was found that in the entire federal jurisdiction, only 57 employees were reinstated by order of arbitrators in a four year period between 2001 and 2004 (and probably fewer still actually showed up for a return to work).<sup>8</sup>

Another example of useful research was to answer the simple question, how many federal workers actually earn minimum wage? Here, Canadian statisticians reported that only 577 workers (out of 840,000) earn the bare minimum, although 18,000 earn between the minimum and \$10 an hour.

There is much to be said for good research<sup>9</sup>, but there is also much to be said in policy-making for the power of the impassioned story, the memorable personal appearance, and the opportunity for a dialogue. Knowing this, and aware of the need to balance public hearings and solicit submissions, policy commissions are quite energetic in trying to locate and invite all possible non-union representatives to participate.

Advertisements are used. When they do not produce the desired effect, personal phone calls are made to advocacy groups looking for ways of including non-union workers.

Sometimes it is necessary to quietly offer funding to groups that otherwise could not afford to make submissions. Here is a portrait of those who participated on behalf of non-union workers, based on the Arthurs Commission experience:

1. *Legal Aid Clinics*: Fueled by an alliance between law schools and poverty-rights groups and government-funded legal aid, legal clinics serve the needs of walk-in clients and are active in social reform initiatives. A prototype might be Toronto's Parkdale Community Legal Services clinic ([www.parkdalelegal.org](http://www.parkdalelegal.org)). Parkdale is now part of a province-wide network of 70 clinics. Most major cities in North America have legal aid

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<sup>8</sup> Based on statistics reported in Geoffrey England's research for the Commission, "Unjust Dismissal and Other Termination-Related Provisions: Report to the Task Force on Part III of the Canada Labour Code Regarding the Termination of Employment Provisions of the Canada Labour Code," page 51. Arthurs Commission website <http://www.flis-ntf.gc.ca/doc/re-rpt-18e.pdf>.

<sup>9</sup> For a discussion of the contributions of scholars to labor policy, see Morley Gunderson, "How Academic

clinics that serve the particular needs of the socially and economically disadvantaged. Some specialize in immigrants, farm workers, or women's needs.

The strengths of this type of agency are its commitment to its mission, the dedication of its workers, and its embeddedness within a high-needs local community in which workers are particularly vulnerable on the job market. The weaknesses, however, are the continuous turnover of staff members, the frantic scramble of the workload, the lack of expertise in employment law by neophyte lawyers, and the multiplicity of individual rights issues that present themselves to the clinic. There is little time to ponder matters of collective interests of workers, or to envision any statutory revision.

2. *Union Outreach*: Occasionally, unions will enter the non-union scene by establishing pilot projects to help represent non-union workers in their relations with employers or government agencies. In the city of Winnipeg, for example, the Canadian Union of Postal Workers set up a Workers Organizing Resource Centre ([www.mts.net/~worc/](http://www.mts.net/~worc/)) as a five-year pilot project. The funding and long-term prospects of such experiments are tenuous. The mandate is to advocate for unorganized workers and also to organize them. WORC reported that, in its first four and one-half years, it provided assistance to 2,400 people. Almost half of these cases involved provincial employment standards matters such as dismissal, harassment, pay problems, and various alleged violations of the law. Other unions are known to have opened storefront clinics, or to take on – *pro bono*, as lawyers would put it – individual rights cases of interest to the union. American unions have experimented with associate memberships so that workers whose place of employment is not unionized can nonetheless have access to union services and some group benefits.

In the US, Wal-Mart seems to have inadvertently galvanized a generation of non-union workers into lobbying for legislative changes such as higher minimum wages and a package of compulsory health benefits. In the case of Wal-Mart workers as well as workers for other major American employers, the relevant unions often provide the funding and impetus.

Again, these are fragile institutional structures for non-union workers; they depend entirely upon the kindness of unions and the perceived threat that the employment conditions of non-union workers will undermine union contracts. The union goal is to organize these workers. In a sense, this is not an alternative form of representation, but instead a kind of marketing loss-leader for union organizing efforts.

3. *Non-Union Advocacy Groups*. Although quite rare, there is a cluster of organizations devoted to the rights of unorganized workers. Perhaps North America's most prominent example is the Quebec-based *au bas de l'échelle* (loosely translated as At the Bottom of the Ladder) ([www.aubasdelechelle.ca/accueil.html](http://www.aubasdelechelle.ca/accueil.html)). Since 1975, this independent, non-profit group has been funded by different government ministries, private donations, and contributions from its members. Its central mandate is explicitly to defend and advance the rights of unorganized workers. It coordinates its activities with the 30 other agencies and groups that comprise the *Front de défense des non-syndiqué-e-s* (the Front for the Defense of the Non-Unionized). Only in the province of Quebec is there such a developed network for non-union workers. There are no comparable initiatives in other provinces and similar groups in the US are not readily located.

4. *Interest Groups*: There are many established groups that populate the political landscape whose interest in a particular issue might cross-cut employment. For example, women's advocacy groups such as the Canadian Women's Legal Education and Action Fund has expertise in maternity and parental leave, and other provisions of particular concern to women workers. LEAF is a well-funded, highly articulate advocacy

agency. There are any number of small immigrant aid groups who speak about the vulnerability of new immigrants, and particularly for those with language barriers who work as seasonal farm laborers. Breastfeeding leagues are surprisingly policy-conscious in providing convincing arguments about the need for work breaks to help nursing mothers. Charitable groups, church groups, and anti-poverty groups all urge a higher minimum wage to allow for a dignified life, and promote labor standards that provide for diversity of religious and cultural practices.

Many but not all of these groups lacked resources or expertise. Most could not mobilize workers. Their own agency employees were themselves vulnerable workers, working long hours without much job security or employment benefits.

5. *Think Tanks and Policy Groups*: The public policy stage is populated with a variety of permanent or semi-permanent institutions that provide research and analysis of important topics. For example, in Canada there is the Vanier Institute of the Family ([www.vifamily.ca/](http://www.vifamily.ca/)) which regularly contributes submissions and policy briefs to any public policy initiative whose mandate may affect the lives of Canadian families. The Canadian Centre for Policy Alternatives ([www.policyalternatives.ca/](http://www.policyalternatives.ca/)) is an independent, nonpartisan institute that produces research on matters involving social justice. The Canadian Policy Research Network ([www.cprn.com/](http://www.cprn.com/)) commissions academic research on important social policy matters, including the conditions of vulnerable workers. The US is even more amply-endowed with think tanks. Such groups create town-gown bridges that help academics make contributions to policy development. Though some think tanks are known to be sympathetic to workers, many others are not. As a group, they cannot be relied upon to advocate for workers; rather, many agencies gain lasting influence and prestige precisely when their research is viewed as rigorous and unbiased.

6. *Individuals*: Letters and occasional submissions from individuals are received by policy reviews. It is noteworthy, however, that many individual workers, and even small

employers, ask that their names be removed and their information posted anonymously. Personal submissions from aggrieved workers singly or in tiny groups occasionally peppered cross-country hearings. Individual employees are beginning to use the internet to address information-asymmetries that previously favoured employers<sup>10</sup>, often in the privacy of their homes, but there is little prospect that individuals can provide a counterweight to the coordinated and resource-rich array of employers and industry groups which inevitably appear before policy-makers, represented by articulate spokespersons with impressive briefs in hand.

This anonymous exercise of individual voice is consistent with the finding that well over 90 percent of employment-related complaints received by the Canadian federal and provincial employment standards hot lines come from *former employees*. When the employment relationship is still viable, workers are extremely reluctant to assert their rights or make their voices heard. Non-union employees are too often silenced by the prospect of having to trade-off self-empowerment versus the risk of job loss. By contrast, a union is a vehicle that plays a vigilant watchdog role and protects workers against reprisal. Union leaders and officials are paid to undertake this role, and they have expertise. Non-union workers take on this role without compensation, with a deficit of knowledge, and often at considerable personal cost. It is no wonder that individuals ask for their names to be removed from letters, and that few workers make personal appearances.

7. *Enterprise-based non-union representation groups*: The only survey to have produced estimates on this non-union variant is by Lipset and Meltz. Roughly 14 percent of Canadians are represented in this group, (and, despite legal restrictions

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<sup>10</sup> Daphne Taras and A. Gesser, (2003). "How New Lawyers Use E-Voice to Drive Firm Compensation: The 'Greedy Associates' Phenomenon." *Journal of Labor Research*. 24: 1: 9-29.

against “company unions” in the United States, an equal number of Americans belong to such associations).<sup>11</sup> As Canada allows for non-union forms of representation at the workplace (unlike the US), it is instructive to examine the record of policy hearings for both the Sims and Arthurs Commissions (the former on collective bargaining policy and the latter on employment standards). It would have been extremely interesting to have had submissions from groups representing joint industrial councils, employee committees, self-help groups, and others of a similar ilk. Despite publicity and encouragement, enterprise-based worker groups rarely appear in public policy work. The closest thing at the Arthurs Commission was a submission by the airline company WestJet about the need for greater flexibility to meet the needs of their workers. Although WestJet employees belong to a formal non-union structure called the Pro-Active Communication Team, no PACT representatives appeared, and the WestJet submission was not jointly authored.

8. *Occupational associations*: These are non-union groups based on occupational affiliation rather than the employer-employee relationship. For example, engineers, architects, information systems professionals, lawyers, doctors, librarians, and academics all have associations dedicated to their trade. According to data compiled by Lowe and Schellenberg, 19 percent of Canadians belong to professional associations, and 10 percent belong to staff associations.<sup>12</sup> With the exception of a loose federation of

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<sup>11</sup> Seymour Martin Lipset and Noah M. Meltz. “Estimates of non-union employee representation in the United States and Canada: How different are the two countries?” pages 223 to 230 in Bruce E. Kaufman and Daphne G. Taras, eds., *Nonunion Employee Representation*. (Armonk, New York: M.E. Sharpe, 2000). These data are derived from an omnibus survey undertaken in 1996 by Lipset and Meltz. Workers were asked “Do you have any formal nonunion employee representation at your workplace; are you covered by it”; and other ancillary questions. Five percent of workers say they are members of these non-union associations, 14 percent are covered by them, and almost 20 percent of non-union workers say there are non-union representation forums available at their workplaces. US figures are similar, despite very significant differences in the law pertaining to the legality of non-union labor organizations.

<sup>12</sup> Lowe, G. and G. Shellenberg. *What’s a Good Job? The Importance of Employment Relationships*. Ottawa: Canadian Policy Research Networks, 2001. According to their survey, 48% of Canadians have

independent truckers, the Arthurs Commission heard almost nothing from this cluster. Yet the Commission addressed questions of importance to them, including the definition of who is an employee and who is truly an independent contractor, and whether professionals and managers ought to have recourse to a particular system of arbitral justice that gives them greater job rights (a unique feature of the Canadian federal system described earlier).

Although this list above seems quite rich and variegated,<sup>13</sup> it by no means guarantees that workers' voices will be heard in policy-making deliberations. First, there was no focus or coherence in their submissions, nor did their efforts cumulate in the formation of a new alliance or social movement capable of shifting public policy. The Arthurs Commission never had to turn away a single group because of time or space constraints; quite the contrary. Its dance card occasionally was empty. Second, many of the groups that appeared at the public hearings either had very limited knowledge of employment standards and argued for a principled approach, or had very deep knowledge and burrowed in on a narrow topic without a grasp of any larger statutory scheme. Third, these groups – particularly those offering direct service to vulnerable workers -- often lacked permanent institutional structures and financial resources that would ensure their longevity, preserve their expertise, and make them candidates for inclusion in policy development. Fourth, there was little knowledge of collective forms of voice. Most groups discussed individual employment. Finally, there was substantial,

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some form of collective representation, a figure which includes a 32% unionization rate, plus the 19% who belong to professional associations and 10% who belong to staff associations. The figures add to greater than 100% because there is some double-counting here, as with nurses and teachers who are unionized and also covered by professional associations. With elimination of double counting, the non-union affiliations add another 16% to the base unionization rate, hence totalling 48% of Canadians.

<sup>13</sup> There also were appearances by employment agencies, temporary help and staffing agencies, and head-hunters. Upon closer inspection of their submissions, it becomes clearer that they are best categorized as employers rather than as agents representing non-union workers. They had strong self-interest in protecting their industry against changes in labor standards.

well-funded, and articulate countervailing influence by employer associations such as Chambers of Commerce, Boards of Trade, and industry-specific employer groupings.

There is a public interest in providing workers – not just unionized workers – with input in policy reform. Over the last 50 years, the proliferation of complex statutory schemes that affect workers is astonishing. There are human rights developments, workplace readjustment schemes, training programs, workers' compensation funds, insurance and medical plans, privacy laws, and government pension programs. But still, non-union workers – particularly those in small firms without human resources departments – have little or no capacity to advocate their own cause. Lacking power, resources, knowledge – and therefore agency – they continue to depend for the identification of their interests and the vindication of their rights almost entirely on government agencies.

This is what Andrew Sims described as the “government as service provider” model, and he worried about its inadequacies.<sup>14</sup> Cash-strapped governments tend not to reform their laws and policies; rather, they cut program budgets and eviscerate service delivery. Benign neglect also results in poor enforcement of the laws. Non-union workers who cannot afford lawyers, and do not have the time off-work to consult legal aid workers, are bemused and bewildered into paralysis when confronted by the complex regimes that are supposed to protect their interests. Yet (outside the province of Quebec) there is little solace for the so-called “working poor” through well-developed interest advocacy groups who both help navigate the shoals of employment rights and are an influential presence on the policy stage.

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<sup>14</sup> Andrew Sims, “A Canadian Policymaker’s Perspective on Nonunion Representation.” Pages 518-523 in Kaufman and Taras, *Nonunion Employee Representation*, supra, note 9.

Contemplating non-union representation in policy development is like noticing the dog that doesn't bark. It takes a while to absorb the palpably unsatisfying lack of a platform for non-union workers to achieve influence in policy-circles. This is the original agency problem – the most vulnerable workers are most in need of representation, and the representation they get is the most ephemeral kind.

## II. Voluntarism, Best Practices, Codes of Conduct: Nice Bark, No Bite

There is a voluntaristic soft-law movement afoot that ought to be examined for its potential to develop employee voice. Much of this movement involves compliance and ratcheting labor standards, particularly around terms and conditions of work.<sup>15</sup>

Corporations have been developing voluntary codes of conduct, some of which actually might contain employment conditions.<sup>16</sup> There even is some development of external agencies to investigate and validate companies' assertions, a model that Cynthia Estlund labels "monitored self-regulation".<sup>17</sup>

Codes of conduct and other similar initiatives are neither a universal phenomenon nor do they contain any substantive provisions that address employee

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<sup>15</sup> For an optimistic scenario, see Archon Fung, Dara O'Rourke & Carles Sabel. "Realizing Labor Standards." 26 *Boston Review* (Feb. 2001). For a review of this field, with emphasis on the use of self-regulation in the domestic arena, see Patrick Macklem and Michael Trebilcock's submission to the Federal Labour Standards Review entitled "New Labour Standards Compliance Strategies: Corporate Codes of Conduct and Social Labeling Programs," available on the Commission website at [www.flsc-ntf.gc.ca/doc/re-rpt-12e.pdf](http://www.flsc.ntf.gc.ca/doc/re-rpt-12e.pdf). In labor standards research, most attention has been placed on international standards and norms. See Janette Diller, "A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives," (1999) *International Labour Review* 138, 2 (1999), and Michael Urminsky, ed., *Self-Regulation in the Workplace: Codes of Conduct, Social Labeling and Socially Responsible Investments* (Geneva: International Labour Office, 2002). There was little evidence put before the Arthurs Commission of any significant movement to enshrine labor standards concerns in codes of conduct, or to incorporate employee voice in establishing superior workplace conditions (other than in unionized settings), despite attempts to seek such information.

<sup>16</sup> A newly-created position is the chief ethics and compliance officer, and in the ideal world, this person reports directly to the company's chief executive officer and has unfettered access to the company's board of directors. See *The Evolving Role of the Ethics and Compliance Officer* (44 pages, PDF, released November 16, 2006) at the Conference Board of Canada website from a link at <http://www.conferenceboard.ca/documents.asp?rnext=1833>. The US *Sarbanes-Oxley Act* has created quite a mini-industry among accountants to bring about corporate compliance.

<sup>17</sup> Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation," *Columbia Law Review*

voice. Rather, the focus is on managerial efforts to ameliorate substandard employment conditions among companies with at least one of the following four characteristics: (1) Companies with premium brands which are able to command premium prices because the corporate brand has perceived value (e.g. Nike, Banana Republic, and Cuisinart) depend on consumer goodwill, making these companies exceedingly sensitive to accusations of running sweatshops; (2) Companies in which labor is a small fraction of production costs, which deal in fungible products (e.g. petroleum, uranium), and in markets in which they are able to capture extraordinary rents may find it prudent and possible to deflect criticism of their employment policies by bettering labor conditions; (3) Companies which embrace welfare capitalist ethics or led by visionary capitalists irrespective of the markets in which they operate (e.g. Filene's in the 1890s, and South African businesses in the 1990s set up to rescue impoverished women); and (4) Companies under intense public scrutiny whose employment conditions come under intense public scrutiny (e.g. Wal-Mart) because they are suspected of discriminatory practices, predatory pricing, or other forms of anti-social behavior. It is hard to condemn voluntarism, but it is appropriate to question how much it can really achieve to develop the voice of working people.<sup>18</sup> Perhaps the whole point of codes is to pre-empt voice, to suppress conflict, to decrease the likelihood of scrutiny, and to reduce the workplace irritants that would lead to the development of vocal leaders among working people.

Is this a fair depiction? Not entirely, since there is evidence that corporate voluntarism (although not via corporate code campaigns) can be directed at employee voice. Some businesses always had a streak of social responsibility, whether driven by

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105, 2 (March 2005): 319-404.

<sup>18</sup> Even the often-acerbic Harry Arthurs has a hard time mustering ammunition against voluntarism, in H. W. Arthurs, "Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation," in Conaghan, Fischl and Klare, Eds., *Labour Law in an Era of Globalization* (2002), pages 471-488.

paternalism, muscular Christianity, welfare capitalism, or simply a desire to share the gains with those who helped produce them. In the non-union setting, some firms developed and supported collective voice for workers long before there were labor laws, and certainly well before union organizing was any real threat.<sup>19</sup> However, the problem with holding up these socially responsible companies as a model is that their practices simply did not disseminate until there developed a viable union threat. Their claims of innate goodness are not persuasive.<sup>20</sup> As Gitelman concluded in his analysis of the Rockefeller companies' concerted efforts to build vehicles for non-union employee voice in the aftermath of the 1914 Ludlow Massacre, "Though worker rights are the central issue around which the narrative revolves, workers themselves play little part. This is the story of power wielded over workers and not by them."

It is worthwhile here to propose the use of a segmentation approach to classify corporate behaviour regarding voice in labor standards. See Figure 1 below. The notion that employers are a monolithic -- or that all unions are the same -- ought to be resisted. Anchoring each extreme of a continuum of enterprises are the good -- the true welfare capitalists and missionaries who allow even collective employee voice to flourish in the

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<sup>19</sup> Sandford Jacoby, *Employing Bureaucracy: Managers, Unions, and the Transformation of Work in American Industry* (Columbia University Press, 1985). *Modern Manors: Welfare Capitalism since the New Deal* (Princeton Univ. Press, 1997). "Employee Representation and Corporate Governance: A Missing Link," *Univ. of Pennsylvania Journal of Labor and Employment Law*, Spring 2001; See also the many chapters in Kaufman and Taras, *Nonunion Employee Representation*, op. cit.

<sup>20</sup> For example, though non-union voice initiative peppered the North American landscape prior to the 1920s, the first concerted effort to disseminate and coordinate the advancement of non-union voice was the Rockefeller companies' joint industrial council movement, supported by the Rockefeller-funded Industrial Relations Counselors. A major motivator was to forestall union organizing. Alternative voice mechanisms coopted workers. For a critical depiction of this era, see H. M. Gitelman, *The Legacy of the Ludlow Massacre: A Chapter in American Industrial Relations*, (Philadelphia: University of Pennsylvania Press, 1988). The quote from Gitelman is from page xv. A sympathetic account of the Rockefeller role (in a book funded by the IRC) is found in Roy B. Helfgott's "Introduction" and Bruce E. Kaufman's "The Quest for Cooperation and Unity of Interest in Industry," chapters 1 and 4, respectively, in Bruce E. Kaufman, Richard A. Beaumont, Roy B. Helfgott, eds., *Industrial Relations to Human Resources and Beyond*. Armonk, NY: M.E. Sharpe, 2003.

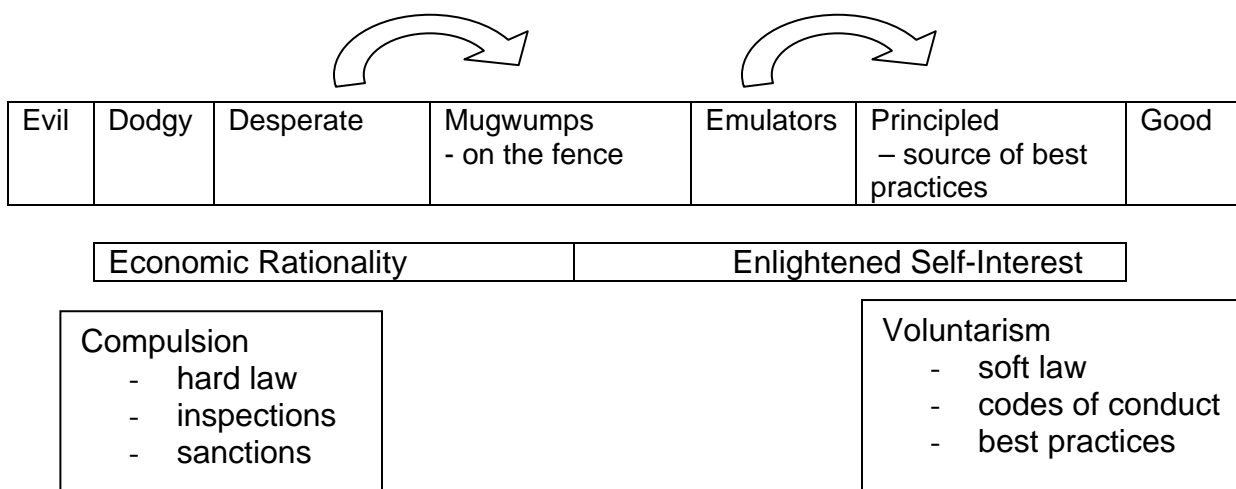
world of work, even when it diminishes their profits (the *Principled*) -- and the evil -- companies that knowingly exploit workers and then terminate workers who complain, even when there is merit to the complaints and listening to employees might actually make business sense (the *Dodgy*). These anchors are not particularly relevant, since they cannot be easily influenced by public policy; their numbers are small, they operate at the margins of practice, and their norms are crafted without regard to public policy declarations. Likely their presence does not influence the majority of companies that operate on the basis of either economic rationality or enlightened self-interest.

Of much greater interest are companies that could go either way. These occupy the space between *Dodgy* and *Principled*. What are their tipping points that would cause movement from one adjacent classification to another? *Emulators*, for example, might be induced by education, communication and resources about best practices to improve their workplace processes and standards. If there is a good business case to be made for employee voice, these companies might develop an interest in capturing the possible gains. For example, they might be enticed to adopt gain-sharing, fairer grievance-resolution systems, or joint committees on work-life balance. On the other hand, if there is no particular light shone on the benefits of voice, they may slip into the more disinterested *Mugwump* category. *Mugwumps* are those firms that have little notion of how employment conditions contribute to their competitive edge, but nevertheless tend to avoid most poor practices or expend the effort to develop good practices. A combination of inspections (the stick) and incentives (the carrot) might make them ponder the benefits of being *Emulators*. *Desperate* companies, experimenting with every possible means of survival, and at risk of moving into *Dodgy* terrain, might be deterred by threats of severe sanctions. If there were meaningful consequences for unjustly dismissing whistleblowers and other employees who exercise their rights to voice, they might be restrained from their impulse to retaliate against such

employees. With some incentives, they might even drop their evil ways and become *Mugwumps*.

Here is the key: labor policy should consist of an array of tactics that would make companies interested in moving at least one category to the right of where they are, and prevent them from slipping to the left.

**Figure 1: Segmentation of Employers Along a Continuum**



While we can cheer on the efforts for industry codes of conduct and best practice innovators, we must not permit ourselves to be lulled into believing that a few such valiant efforts can substitute for a methodical policy treatment that captures all employers.<sup>21</sup> There is no convincing empirical support for the notion that widespread labor standards can be promoted and enforced through employer-based self-regulation.

<sup>21</sup> See Philip Alston and James Heenan’s devastating critique of principles without compulsion, “Shrinking the International Labour Code: An Unintended Consequence of the 1998 Declaration on Fundamental Principles and Rights at Work?” 36 *N.Y.U. J. of International Law and Policy* 221 (2203-04). See Also Marley Weiss, “Two Steps Forward, One Step Back – or Vice Versa: Labor Rights Under Free Trade Agreements From NAFTA, Through Jordan, Via Chile, to Latin America and Beyond.” 37 *U.S.F.L. Review* 689 (2003), especially pages 689-711, 713-18, and 724-9.

Self-regulation is an optimistic model, but the state of its development in labor standards seems underwhelming.

Nor is there empirical support that the “high performance” workplace paradigm is producing employee voice *on matters important to employees*. Yes, the employer is able to engage employee creativity regarding the employer agenda, including higher productivity and quality control. Sometimes groups are given considerable latitude in determining work pace and norms. No, there have not been major advances made in the ability of workers to collectively discuss the terms and conditions of their employment through the high performance movement, although open-door policies, focus groups and other techniques have promoted *individual* voice in such systems. Elsewhere I have argued that there is considerable confusion between worker representation and employee involvement.<sup>22</sup> Many companies, even those with high performance worksites, have no form of employee representation; and not all representation systems use employee participation and involvement techniques. Further, a lot of companies that say they are practicing high involvement in fact are not – perhaps they are using one or two techniques, but they are not adopting the entire package of practices that interact together to produce positive outcomes for both workers and companies.<sup>23</sup>

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<sup>22</sup> Daphne G. Taras (2003). “Employee Representation and Employee Involvement,” in Kaufman et al, *Industrial Relations to Human Resources and Beyond*, supra note 20. By representation, I mean that workers have a system that allows them the ability and venue to make their collective needs and opinions known to management. By contrast, most employee involvement and participation plans are designed to harness the energies and talents of workers in order to make the workplace more productive.

<sup>23</sup> For example, 3142 union and non-union establishments were surveyed in the 1999 Canadian Workplace Employment Survey. See Statistics Canada publication *Alternative Work Practices and Quit Rates: Methodological Issues and Empirical Evidence for Canada* (Analytical Studies Branch research paper series, Catalogue 11F0019, March 2003). Although about one-quarter to one-half of firms report some elements of high involvement, less than 5% practice a combination of teams, flexible job designs, and profit or gain-sharing. Only 2.1% have adopted all three of these practices plus teamwork-related training. As Anil Verma and Daphne Taras concluded, “Companies claim to be practising high-involvement management, but by selecting only those practices that are easiest to implement or most immediately pleasing, they may not be reaping any particular benefits from the newer management philosophy.” In “Managing the High-Involvement Workplace,” in Morley Gunderson, Allen Ponak and Daphne Taras, *Union-Management Relations in Canada*, 5<sup>th</sup> Edition (Toronto: Pearson, 2005) page 155.

### III. Non-Union Voice at the Workplace Level: Bark, Bite, and a Good Kennel

#### A. Individual Voice

Despite the pessimism of the previous two sections, there are many sensible ways to enhance non-union voice at the workplace level. Although it may seem so obvious as to almost go unsaid, one of the major actions that must be taken for the benefit of non-union workers is better education and communication about existing standards. The best-crafted statutes and regulations in the world mean nothing when they do not influence the behavior of people.<sup>24</sup> Many violations occur because neither workers nor managers are aware of their rights and responsibilities.<sup>25</sup> Labor standards are torturous, arcane, and inaccessible. Immigrant workers often face formidable language barriers. Websites are often poorly designed. Most workers do not even know how to find information. Employers make mistakes, often innocently, because they are unaware that pertinent standards exist. Much scope for sensible state action can address this communication deficit; and happily, much of the change does not require the tedious process of legislative review and amendment. Improving the knowledge of

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<sup>24</sup> For a “scoring” of Canadian and US labor standards, see Richard N. Block, Karen Roberts and R. Oliver Clarke, *Labor Standards in the United States and Canada*, Kalamazoo, Michigan: Upjohn Institute, 2003. They conclude that Canadian provisions are higher than US standards. See also Richard Block, “Comparing Labour Standards Across Jurisdictions,” a research report commissioned for the Federal Labour Standards Review, posted on the Commission website <http://www.flis-ntf.gc.ca/doc/re-rpt-18e.pdf>. The point of the discussion here is not about the quality of the standards themselves, about which Block provides evidence, but whether they are known and whether there is compliance.

<sup>25</sup> Here is a simple experiment that can be replicated in any classroom. This is what happened before and after a one-hour briefing about the content of labor standards to a class of bright undergraduate business majors at the University of Calgary in November 2006. Before the lecture, under 30 percent of students worried they might have gotten a raw deal at work. After the briefing, they were asked “Do you now think you experienced a violation of employment standards laws at your work?” Over 90 percent of students answered “yes” (using an anonymous hand-held remote voting device). Of course, not all of their claims would have been found meritorious by employment standards investigators, but the jump in suspicion is telling. Further, many of these students who had been employing others (in house painting, coaching, and small business ventures) also realized, to their dismay, that they erred in not making timely payments, not paying minimum call-out hours, incorrectly calculating overtime, and failing to keep employment records.

existing laws and standards through educational initiatives, postings, notices, and websites involves non-legislative bureaucratic activity.

Regarding communication strategies, here is where the codes of conduct and social responsibility movement and genuine employee involvement also best fit. The state should be celebrating these efforts, disseminating them, rewarding companies that take this type of leadership. In doing so, the state eventually can support a “new normal”, in which high labor standards are the expectation and deliberately noncompliant companies become pariahs.

Now let us assume that educational initiatives work and people know their rights and responsibilities. They still may not exercise voice. One of the impediments to voice is lack of a receptive hearing by employers. Size matters. Banks, which account for 30 percent of the Canada’s total federal workforce, are responsible for only 0.5 percent of violations. One reason is that such large employers have departments that oversee standards and ensure compliance. Employees in such firms know to whom to direct questions and complaints, and human resource departments have a duty to respond. By contrast, small employers, in particular, lack expertise and are prone to errors. Firms with under 100 workers employ only 14 percent of the federal workforce, but they account for 78 percent of all reported violations. Employees in small firms are effectively silenced by the absence of professionalism. They become victimized when complaining to their boss might well lead to reprisal.

The distressing statistic that most complaints come from workers who are no longer employed confirms that the state has an important role to play in providing justice, even after-the-fact. But workers who call government agencies to ask questions about their rights often suffer long holds, or find that help lines are staffed only during bankers’ hours. It takes a very determined, or very angry, former employee to brave these obstacles. Many other workers are deterred from asserting their rights when they move

on to another job, or simply tire of the process. To foster voice, and to reward employees who express it, governments must provide fast, efficient, and meaningful response.

Hence, a second cluster of recommendations also makes immediate intuitive sense. Laws must be enforced. Laws make promises; compliance keeps them. Even without changes in the substantive portions of existing law, assured higher rates of compliance would make large segments of workers better off, and would provide a real pay-off to the expression of voice in a complaint-based system. In many jurisdictions, compliance procedures for employment standards are woefully inadequate, and government agencies lack the resources to chase down offenders. The Arthurs Commission investigated the federal sector, where there are 840,000 workers employed by 12,000 enterprises. Not a single employer has been charged, or even fined, for any violation of employment standards since 1987. A low probability of prosecution emboldens employers and silences workers. Workers who hear that there are few meaningful sanctions against rogue employers are astonished; parking and traffic tickets are routinely written to employees even for almost-inconsequential violations.

New types of policies also are being initiated in advanced democracies and in collective bargaining settings that address individual voice:

(1) *the right to ask*. Employees are given a statutory right to request increase or decreased hours of work arrangements that meet their work-life balance needs, or otherwise customize their wage-effort bargain as is the case in the UK.

(2) *the right to refuse*. They have the right to refuse work beyond the regularly scheduled hours of work for *bona fide* reasons. Many collective agreements establish and regulate this right, but little is being done to extend it to the non-union employee.

(3) *whistle-blowing protections*. The many provisions across North American jurisdictions addressing whistle-blowers offer workers a greater chance of voice on matters important to the public, without reprisal.

### **Collective Voice**

Given that collective bargaining remains an important pillar of public policy, especially in Canada, is it legitimate and feasible to also promote collective employee voice in non-union settings? The promotion of alternative institutional forms of employee representation depends to some extent on the “representation gap” experienced by employees desirous of representation but unable to get it. Freeman and Rogers’ studies of both American and Canadian private sector workers show that workers are sufficiently committed to their occupations and loyal to their companies that they want to participate in workplace decisions.<sup>26</sup> They seek involvement in, and influence over, such decisions, including benefits and compensation packages, production processes, and workplace practices that affect them. Workers want to be collectively represented and the preferred type of association seems to be some amalgam of the desirable characteristics of both traditional unions and employee participation schemes. The hypothesized ideal association incorporates particular features of collective bargaining: independence from management, use of elected worker representatives, protection against employer reprisal, and a procedurally-just grievance system using outside arbitrators. But it also should have elements that are not part of the typical unionized setting, including considerable management support, an employer-provided budget and staff, and non-conflictual relations.

The AFL-CIO conducted a survey in which 43 percent of respondents said they would definitely or probably vote for a union if an election were held tomorrow. When

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<sup>26</sup> Richard Freeman and Joel Rogers, *What Workers Want*. (Ithaca, NY: Cornell ILR Press, 1999.)

the same question was asked about their support for an employee association, 79 percent said they would definitely or probably vote for it.<sup>27</sup> In short, workers want institutional mechanisms for “voice” but without the risk of conflict, which, they imagine, is inherent in union representation.

But wait. These findings are not the final word. In a survey of 1,751 American professional and technical workers, Hurd and Bunge discovered that when they include an option for choosing a professional association (an option not included in the Freeman and Rogers survey), support for employee involvement committees effectively dissolves (49 percent in the Freeman and Rogers survey and 11.3 percent in the Hurd and Bunge survey); and the professional associations category is strongly preferred over joint committees.<sup>28</sup> Again, here is a finding that workers want representation at work but this survey reminds us that there is some breadth in the institutional form that the representation should take, depending upon the type of worker and industry.

Let us assume that labor standards reformers seek information about the pros and cons of workplace-based non-union collectives. Here are some findings.<sup>29</sup> The long-term success of formal non-union systems such as joint industrial plans and employee-management committees is predicated on two practices: management must meet or exceed union-negotiated compensation packages in comparable industries; and management must devote considerable effort to the proper running of the plans, entailing major expense and commitment. When they work well, they offer opportunities for improved communication flow up and down the hierarchy. Although workers do not

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<sup>27</sup> The survey is discussed in Paul Osterman, Thomas A. Kochan, Richard M. Locke, and Michael J. Piore. 2001. *Working in America: A Blueprint for the New Labor Market*. Cambridge, Mass: MIT Press, 2001.

<sup>28</sup> Richard W. Hurd and John Bunge, “Unionization of Professional and Technical Workers: The Labor Market and Institutional Transformation,” in *Emerging Labor Market Institutions for the 21st Century*, edited by Richard Freeman, Joni Hersch and Lawrence Mishel, Chicago: University of Chicago Press for the National Bureau of Economic Research, 2005.

<sup>29</sup> Based on findings reported in Kaufman and Taras, *supra* note 9. It is important to appreciate that these

overtly engage in hard bargaining, they do develop more subtle tactics for achieving their objectives. The non-union plans are particularly good at allowing workers to fine-tune other otherwise blunt managerial initiatives to better suit the situations of workers.

On the other hand, company-based non-union plans are not necessarily a panacea for solving the woes of 21<sup>st</sup> century employment relations. They have very serious – some argue, insurmountable – flaws. Enterprise-specific forms of employee organization do not have outside watchdogs to intervene should they begin to falter. They lack resources, in-house expertise, technical assistance from professionals, and the ability to learn from other groups in order to expand their power. Only a small number of companies are devoted enough to this alternative vision of labour relations to persist in running these plans over a very long duration. If poorly run, the employees turn to unions (which should make unions happy); even if well run, a succeeding generation of managers may lose interest in continuing the plans. The old “company unions” do not contribute to public policy – rather, they tend to be narrowly focused on the conditions within the employing organization.

One of the blockages to the development of collective voice in the US is that the *National Labor Relations Act*, through the effects of sections 2(5) and 8(a)(2) foreclose non-union representation that deals directly with terms and conditions of employment. In Canada, we are freer to experiment with vehicles for collective non-union voice.<sup>30</sup> The debate over non-union representation was the single most controversial issue in US

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findings are based on voluntary non-union plans, and not on government-initiated joint dealing.

<sup>30</sup> The one area of employee voice in which major advances have been made via public policy is mandatory health and safety committees, but an assessment of them is beyond the reach of this article. In Canada, there are few statutory impediments to running non-union representation plans that expressly deal with terms and conditions of employment. For an explanation of why Canada did not follow the *NLRA* ban on company unions, see Daphne Taras, "Why NonUnion Representation is Legal in Canada," *Relations industrielles/Industrial Relations* 52, 4 (1997): 761-780.

industrial relations policy in the 1980s and 90s. What to do about this problem in part dead-locked the Dunlop Commission and has created many years of acrimony.<sup>31</sup>

It is difficult to imagine why employers and groups of their employees cannot sit together and craft improved working conditions that meet both their needs (especially since statutory health and safety committees have had an excellent record of achievement.) The new buzzword seems to be “flexibility.” Companies and workers both clamor for “flexibility”, each to meet their own idiosyncratic purposes. But “flexibility” means very different things.<sup>32</sup>

For employers, but in allocating work there is no requirement that the affected employees be consulted. Employers vigorously argue that they need more flexible standards, that the world has changed, requiring 24-7 scheduling, rapid responses to crises, and the ability to customize employment practices to meet the challenges of global competition. Labor standards, they argue, were designed for a one-size-fits-all world that does not do justice to their legitimate business needs.

At the same time, unions, workers, and advocacy groups argue with equal passion and sincerity that they need more flexible standards to meet their work-life balance needs, to care for children or fragile parents, to have more control over their

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<sup>31</sup> It should be noted that Weiler strongly supported the development of non-union employee representation and removal of the NLRA restrictions impeding its practice in many of his writings, including “Governing the Workplace: Employee Representation in the Eyes of the Law,” in Bruce Kaufman and Morris Kleiner, eds., *Employee Representation: Alternatives and Future Directions*, (Industrial Relations Research Association, 1993, pages 81-104). The Section 8(a)(2) issues are captured in Matthew W. Finkin, ed., *The Legal Future of Employee Representation* (ILR Press, Ithaca, New York, 1994.) Canadian-American differences in the treatment of non-union representation are described in Kaufman and Taras, *supra* note 9. Note that Taras is not, and never has been, a fan of the US TEAM Act amendment approach to the NLRA restrictions. Rather, like Weiler, she would like to see enhanced protections for collective bargaining laws and policies, and vigorous prosecution of companies that use non-union representation to interfere with employees’ statutory rights to choose to unionize. Only then does it make sense to open the door to non-union systems.

<sup>32</sup> For a thoughtful deconstruction of the meaning of “flexibility,” see Sandra Fredman, “Control over Time and Work/Life Balance: A Comparative/Theoretical Perspective,” at the Arthurs Commission website [www.flr-ntf.gc.ca/doc/re-rpt-17e.pdf](http://www.flr-ntf.gc.ca/doc/re-rpt-17e.pdf).

time. They want protections against unsociable hours, and the ability to request working relationships that meet their own needs without egregious disruption to the employer.

Instead of an impasse over a contested terrain, perhaps there is an opportunity for reconciliation here, the glimmering of a workplace portal that would allow voice. Could there not be a new regime that allows employers a way to customize their workplaces and employees a way of proposing workplace arrangements that better suit their needs? Perhaps, in certain circumstances, labor standards could be varied but only if there is bona fide communication and consultation between managers and groups of affected employees.

A system of voluntary workplace consultation committees may be an ideal vehicle that opens a dialogue between employers who want productivity enhancements and workers who want greater voice over their employment terms and conditions. This is much easier to achieve in Canada, where there is not a legal impediment to employee-employer joint dealing. Hence, it was in Canada that the Arthurs Commission made a recommendation for voluntary workplace consultation committees to enable the development of customized labor standards, particularly on matters of control over time, that are simultaneously more sensitive to the needs of both employers and employees.

In principle, consultation is a good thing, but *non-union* consultation arrangements are exceedingly dangerous creatures.<sup>33</sup> Worker committees often lack resources. Workers may not be given adequate time to investigate their agenda -- except perhaps when it perfectly coincides with managements' desires. Workers can be fired ("at will" in the US, and with sufficient notice in Canada). The possibility of

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<sup>33</sup> See 7 articles on worldwide developments in a special issue of *Industrial Relations Journal* on "Consultation and Non-Union Employee Representation," 37, 5 (September 2006). Daphne Taras and Bruce Kaufman assess the topic for Canadian and US workplaces in "Non-union employee representation in North America: Diversity, Controversy, and Uncertain Future," pp. 513-542. It also should be noted that Canadian unions did not greet this recommendation with enthusiasm. Quite the contrary.

reprisal makes workers hesitate to speak out. Further, it is tempting for managers to use non-union plans as union substitution schemes, and thereby threaten the ability of unions to organize workplaces. It is chilling but not surprising that most non-union representation vehicles in North American labor relations are management-initiated and management-dominated, and that unions oppose them.

Hence, moves towards non-union consultation must be accompanied by vigorous legislative and non-legislative safeguards. Any manipulation of this opportunity by the employer would be an unfair labor practice, resulting in meaningful penalties. Just as collective bargaining is required to be in good faith, employee consultation would require an analogous standard, with the development of meaningful remedies.

To some readers, workplace consultation committees are an ambitious and optimistic policy recommendation. To others, this is a little bit of pixie dust that barely addresses the imbalance of power between unrepresented workers and their employers. Fans of European works councils will see workplace consultation committees as rather toothless creatures. Employers might worry that they are a Trojan horse, introducing workplace representation rights where they had not previously existed. Unions might fear that substitution schemes might weaken their ability to organize. Workers might be reluctant to exercise voice rights even when they are protected – for no amount of hypothetical protection saves workers from the glare of their foremen or the vagaries of reprisal. Although there are many dangers, Paul Weiler would urge us to accept that this project is worth the risks.

## **Conclusions**

This discussion of non-union voice is in considerable contrast to the collective bargaining regime, in which union and management both know that legislative rules are merely a backdrop to their activities. In the collective bargaining regime the parties are relatively free to craft agreements that meet their needs. They are in control of the

contents and distribution of collective agreements, the education and training of their members, and the enforcement of their contracts through their own private system of justice. Over time, the state role has receded. Of course, so too have US unions.

By contrast, in the labor standards arena, which governs almost all employees, the role of the state is centrally important. In a “government as service provider” model, the state must take its role to heart and embrace its responsibilities. Wise policy-making can foster a regime that generates norms, regulates conditions, and enforces rules. Labor standards require a trilateral relationship among workers, employers, and an activist state. Vigorous measures must be taken by the state to include worker voice in policy-making, as it is not in the natural course of things that non-union workers have institutional vehicles to advocate for them in labor standards. In advanced industrial democracies, taking on a more activist role makes perfect sense when the state also supplies education, health care, and training – the state is merely protecting the human assets it has helped craft.

While many employers are in compliance with both the word and the spirit of labor standards, there are many others who are not. There is little evidence that volunteerism and corporate leadership will advance labor standards for all, even though there are wonderful best practice models that deserve emulation. These leading companies should not be unnecessarily burdened by a bureaucratic and heavy-handed regime. But let there be no mistaking the need for a strong state role to set the basic standards, investigate complaints, protect workers who exercise their rights from reprisal, and ensure that all parties are aware of and comply with legislated standards.

The legitimacy and enhancement of employee voice are critical ingredients that support an effective compliance and enforcement strategy. Knowledge of standards is imperative, by both employees and employers. Employee voice is particularly important if there is to be a more heavy-handed hard law crackdown aimed at deliberate offenders.

On a more positive note, the state can also oversee the introduction of a regime allowing for greater voice and more labor standards flexibility as long as there is genuine consultation with workers affected. Workplace consultation committees, offered by the state as a *quid pro quo* for customizing labor standards, might be the key to crafting policies and practices that better respond to changing conditions at work. Where the union is not there to be the guardian, agent, and watchdog of worker voice, it is imperative that the state activate.