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Lee Modjeska

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ESSAY

Reflections on the House of Labor

*Lee Modjeska**

Much has been said of the deteriorating condition and possible fall of the house of labor.[1] This Essay contains some idiosyncratic reflections on certain aspects of the situation. Contrary to the mainstream of thought, my suspicion, to use Justice Frankfurter's words, is that those "economic and social concerns that are the *raison d'etre* of unions"[2] remain dominant in our society, that unionism may be inevitable if not indispensable, and that our days of relative labor calm may be ending.

National labor policy repeatedly has recognized the reality of modern society, viewed against a long history of industrial unrest, that a union is essential to ensure equality of bargaining power between employees and employers. Intolerable employment situations necessitated the organization of American unions. Individual workers, dependent on their daily wage and unable to move, were helpless against employer mistreatment. Group strength, channeled into the collective bargaining process, gave the worker the power to be heard and counted with the least adverse impact upon interstate commerce.[3]

Justice Brennan captured these fundamental organizational-representational principles: "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improve-

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* Joseph S. Platt-Porter, Wright, Morris and Arthur Professor of Law, The Ohio State University College of Law; B.A., Antioch College, 1955; J.D., The University of Wisconsin, 1960.

1. For a thoughtful assessment of the union condition see Craver, *The Vitality of the American Labor Movement in the Twenty-first Century*, 1983 U. ILL. L. REV. 633.

2. International Ass'n of Machinists v. Street, 367 U.S. 740, 800 (1961) (Frankfurter, J., dissenting).

3. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937); American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921).

ments in wages, hours, and working conditions."[4]

Solidarity principles nurtured in the industrial revolution have not withered through evolution of a service and distribution economy. On the contrary, solidarity principles were unequivocally revalidated in the service context when the United States Congress in 1974 eliminated the nonprofit hospital exemption from the National Labor Relations Act (NLRA).[5] Congress expressly determined that unionization was necessary to remedy the inferior wages, hours, and working conditions of disenfranchised health care employees and the concomitant adverse impact on the delivery of quality health care services.[6]

Senator Cranston, floor manager of the bill, presented evidence that hospital workers worked long hours and were notoriously underpaid, causing high and constant turnover with a resultant threat to an adequate standard of medical care. He presented further evidence that unionization and collective bargaining at several hospitals resulted in lower turnover and better job stability and security. At two hospitals, for example, annual turnover rates dropped from 1,200 to 1,500 percent to 24 to 30 percent after unionization.[7]

The import of the health care episode, with congressional endorsement of the amelioratory impact of unionization, cannot be minimized or denigrated. Continuing the theme set by the Wagner Act in 1935, Congress again chose unionism and collective bargaining to solve national labor related problems. Stated otherwise, Congress may remain somewhat less than sanguine about reliance on employer enlightenment and social conscience, and individual self-help.

Nor has the individual employee's quest for a place in the sun diminished with time. As Professor and former Solicitor General Archibald Cox observed many years ago, "The basic urge which leads men to organize, the spark which gave unions life and the power of growth under favorable conditions, is the human drive toward self-advancement."[8] Workers organize and join unions for a host of reasons including improvements in wages, hours, and working conditions; job security; protection against arbitrary treatment; assistance of "counsel" in grievances; and a voice in general employment policy. These human urges transcend the vagaries of the economy.

Workers in the silicon valleys, retail shops, and service and distribution megacenters dream of the brass ring and the good life as much

4. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

5. Pub. L. No. 93-360, § 1(a), 88 Stat. 395 (approved July 26, 1974) (codified at 29 U.S.C. § 152(2) (1982)).

6. *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 497-98 (1978).

7. *See id.* at 497 n.14.

8. A. Cox, Cases on Labor Law 18 (4th ed. 1958).

as their counterparts in the mines, mills, and trucks. Further, one need only be awake to know that employment inequity and injustice remain serious problems in our society. The average worker, not to mention those at minimum and subminimum levels, needs union with his or her coworkers to command attention—much less the power to effect change.

Not long ago the generality reigned that management could discipline or discharge for good cause, bad cause, or no cause at all. The New Deal and its progeny of social legislation made some inroads on this doctrine of unfettered management by proscribing certain forms of discrimination (*e.g.*, race, sex, union activity). A major inroad, and concomitant breakthrough for industrial due process, came with union success in negotiating "just cause" requirements into labor contracts. Such employee protection against arbitrary management remains one of the most fundamental reasons for and benefits of unionism.

Increasing judicial erosion of the employment at will doctrine, which recognizes civil causes of action for wrongful discharge of nonunionized employees, cannot supplant this system of workplace self-government. Formal, costly, cumbersome, and lengthy court litigation is no substitute for the informal, inexpensive, simple, and expeditious relief available under the grievance and arbitration procedures contained in most collective bargaining agreements.

Further, the labor arbitrator—not the court—has expertise concerning the multifaceted dimensions of the employment community and the common law of the shop. As Justice Douglas once noted, "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[9]

The rapid pace and change of modern business would appear to strengthen rather than diminish the need for worker combination, for management has its eye on the dollar not the sparrow. Constantly streamlining in the eternal struggle for cost efficiency and profit, the typical enterprise has little concern for the worker, particularly workers of lesser skills.

The United States Supreme Court has recognized that corporate reorganizations "will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations."[10] Absent a strong union with the power of disruption, management has little incentive to focus on such considerations as work preservation, job security, or transi-

9. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).
10. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).

tional protection. For the ultimately displaced worker even severance pay makes union dues worthwhile.

Some speak of a need for heightened union "responsibility" in confronting the problems wrought by domestic and global competition. (Some wags wonder why unions must be any more or less responsible than other human institutions.) Somehow unions are deemed responsible when they accept wage cuts and layoffs, and irresponsible when they fight for labor-protective solutions. The reality is that millions of workers already at marginal levels of existence cannot be expected to go gently into that good night.

It is said that unions have become corrupt and thereby have forfeited their right and capacity to represent the working class.[11] Unions are not corrupt; rather, some officials in some unions are corrupt. Needless to note, corruption in officialdom is not unique to union institutions.

Some contend that the entrenched complacency of union leadership has destroyed the institution's interest in or capacity for the fight, and that high unemployment with the resultant availability of replacements has rendered the strike weapon obsolete. On the contrary, I suspect the future will bring a return to labor militancy and strife.

The very external and internal forces that so batter the house of labor today virtually ensure retaliation. Backed to the ropes by market, governmental, employer, dissident, and other forces, the leadership will take off the gloves in a fight for survival. The relative labor peace of recent decades may be deceptive. As labor increasingly perceives itself victimized by overreaching employer and governmental pressure for concessions, labor may return to a hard line with demands for concessions from someone other than the worker. As labor increasingly perceives the brave new world of conciliation-cooperation as the fist inside the velvet glove, labor may shun the outstretched hand.

The winds of labor strife may be rising. Once again, as in the minefields of Harland County, Kentucky fifty years ago, we may all be forced to answer the question, "Which side are you on?"[12]

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11. *See generally* PRESIDENT'S COMM'N ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR UNIONS (1986).

12. F. Reece, Which Side Are You On? (1932) (source on file with Author). The poem in its entirety reads as follows:

They say in Harlan County
There are no neutrals there,
You'll either be a union man
Or a thug for J.H. Blair
Which side are you on?
Which side are you on?

Id.