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BOOK REVIEW

BACK TO THE FUTURE OF LABOR LAW

GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW, by Paul C. Weiler.* Cambridge: Harvard University Press 1990. Pp. 311. \$29.95

MATTHEW W. FINKIN**

Professor Paul Weiler surveys the American workplace and is displeased.¹ He perceives a "yawning representation gap,"² a disjointure between the aspiration of American workers for "direct indigenous"³ systems of meaningful participation in the decisions that govern their workplace lives and determine their working futures,⁴ and the almost total absence of such systems, save for a bureaucratically remote trade union movement in sharp decline.⁵ Accordingly, he questions whether something in American law has contributed to this condition.⁶ He concludes that such a state of affairs may well exist, that the time has come for "a major overhaul of our labor laws,"⁷ and he offers a set of proposals toward that end.

Before doing so, Professor Weiler confronts the arguments against legal intervention in the labor market that adherents of the "law and economics" school have assayed.⁸ He starts first with an analysis of the dismissal of ostensibly "at will" employees and later moves on to the role of labor unions.⁹ Contrary to the

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1. P. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

2. *Id.* at 44.

3. *Id.* at 295.

4. *Id.*

5. *Id.* at 296-97 *passim*.

6. *Id.* at 225.

7. *Id.* at 226.

8. *Id.* at 16 *passim*.

9. *Id.* at 48 *passim*.

assumptions of neo-classical economics, as Robert Solow recently observed, "The labor market might just be different in important ways from the market for fish."¹⁰ And Weiler draws heavily from a significant body of research in labor economics more fully to confirm that observation. His assiduous martialing of the evidence, his detailed explication of why that should be so, will be helpful, perhaps even invaluable, for those who believe that an exacting reply to modern Manchesterianism is a necessary predicate for legal analysis and reform.

The concern here, however, is not with the precise contours of Professor Weiler's economic assessment; that has been powerfully analyzed elsewhere.¹¹ The concern here is with the legal landscape Professor Weiler would design; and on that account the book contains two surprises. First, it is surprising that so extensive a venture into "the future of labor and employment law" should produce not a single new idea. Rather, Professor Weiler's methodology is to canvass the current inventory of proposals for legal change, so as to piece together from it a package of reform. It is no less surprising that what Professor Weiler chooses from a very wide selection offered over the years, including some that we might consider radical even today,¹² are, with a singular exception, a marginal adjustment to the legal status quo in the law of individual employment and a partial return to the legislative status quo ante the Taft-Hartley Act¹³ in the law of collective bargaining. This is not to deny the merit of many of these proposals; but it is a comment on the intellectual state of the academy that *laissez faire* arguments are taken so seriously, while a reformist program, partially undoing the reactionary legislation of 1947, is proposed as "a major overhaul."

I. THE WRONGFUL DISMISSAL PROBLEM

The stage is set by the change in employer policies and employee expectations from the turn of the century to the present.

10. R. SOLOW, *THE LABOR MARKET AS A SOCIAL INSTITUTION* 30 (1990).

11. See Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. ____ (forthcoming 1991); Linder, Book Review, 9 LAW & INEQUALITY ____ (forthcoming 1991) (reviewing P. WEILER, *supra* note 1). I am indebted to Professors Gottesman and Linder for sharing their views with me.

12. For example, the Plumb Plan would have given elected workers one-third of the seats on the board operating the Nation's railroads after the First World War. H.R. 8157, 66th Cong., 1st Sess. (1919).

13. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1988)).

At the turn of the century (and despite the presence of complements of long-serving, especially-skilled employees), it was not widely assumed that the employment relationship would be of long duration. A common assumption rather was of a continuing "spot market" in labor, in which incumbent workers had to compete almost day-by-day for their jobs with an army of the unemployed waiting at the gate.¹⁴

The employment relationship was generally assumed to be "at will." In the absence of a contract expressly to the contrary, the employee was legally free to quit for any or no reason and at any time, and the employer was equally free to discharge for good reason, bad reason, or no reason at all. One result was a footloose independence, a willingness to quit or to strike. Another result was a rate of employee turnover that modern standards would consider horrendous.¹⁵

Today, nonunion employers—to retain stable complements of trained employees, to reduce turnover and training costs, and to keep unions out—have adopted structures of "internal labor markets," lines of progression, promotion, and benefits that encourage long service.

One consequence is the widespread expectation—and reality—of job security in a great many non-unionized jobs. . . . Another is the dependence such creates as people come to rely upon the job not only for a steady income, but for medical insurance and other vital benefits, to the point of creating, in the view of some critics, a new "industrial feudalism."¹⁶

These workplace developments run in tandem with a larger change in what Lawrence Friedman has called the "legal culture," fomented or abetted by the creation of the welfare state:

Its most salient characteristic is an attitude I have called the general expectation of justice. It stands in contrast to the attitudes prevalent in the past: resigned fatalism, diffuse rage, sullen apathy, or passive contentment. . . . [A] significant portion of the population possesses a heightened sense of entitlement, an expectation of possible redress in the face of calamity or injustice.¹⁷

14. A. COX, D. BOK, R. GORMAN, & M. FINKIN, *LABOR LAW* 513-14 (11th ed. 1991).

15. *Id.* at 514.

16. *Id.* at 515.

17. L. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 60 (1990).

The question then is whether the law ought to come to grips with these changed economic realities and heightened expectations, especially in terms of job security.

Professor Weiler prefers to address wrongful dismissal through the system of grievance arbitration that collective bargaining would provide almost inevitably.¹⁸ The collectively bargained solution to the wrongful dismissal issue, however, would turn upon the much more widespread adoption of unionization, a condition not likely to be realized soon. And so Professor Weiler assays whether "second best" alternatives exist.

He rejects the judicial application of some generalized communal norm of good faith or fair dealing: the transaction costs are high; the likelihood of a jury's "erroneous" judgment is too great; the impact of high tort damages may deter employers from discharging employees who should be discharged; and the benefits are likely to flow disproportionately to those financially able to secure competent counsel.¹⁹ On the other hand, he would maintain the tort of discharge for a reason violative of public policy.²⁰ On these issues, Professor Weiler's recommendations embrace the prevailing state of the law, for the overwhelming majority of jurisdictions have rejected an open-ended invitation to juries to decide whether employers have acted fairly in the discharge of otherwise at-will employees, save, notably, Montana,²¹ and, most jurisdictions that have considered the question have held that a cause of action is available for a discharge violative of public policy.²²

Professor Weiler would allow judicial enforcement of employer policies affording job security when there is sufficient evidence that the employer has placed these provisions on a "voluntary, contractual footing"²³: "earlier legal barriers to a judicial finding of more than an at-will cast to the employment relationship are simply no longer appropriate in an economy in which employees are typically led to believe that they will have an enduring career"²⁴ with their employer. However, he urges courts to accede

18. He does propose one modification. Noting the practice of some public sector unions, Professor Weiler would allow the individual to pursue a discharge to arbitration if the union declines to take the case. P. WEILER, *supra* note 1, at 92-93. This idea was elaborated upon more fully in Sands, *New Developments in the Duty of Fair Representation: Practical Problems, Practical Solutions, and Legislative Proposals*, in N.Y.U. 37TH ANN. NAT'L CONF. ON LAB. 12-1 (R. Adelman ed. 1984).

19. See P. WEILER, *supra* note 1, at 80-83.

20. See *id.* at 100.

21. See *id.* at 96; see also *infra* notes 49-54 and accompanying text.

22. See P. WEILER, *supra* note 1, at 79.

23. *Id.* at 100.

24. *Id.*

to disclaimers of contractual obligation.²⁵ First, he reasons that "[t]hose employees who accept and continue in their jobs on such an at-will basis should be held to that arrangement, even if later they come to regret the outcome of such a status."²⁶ Second, judicial disregard of such provisions will deter more generous employer treatment:

In effect, a more onerous legal liability would thus be imposed on firms which had voluntarily taken steps to try to reduce the incidence of unfair dismissals inside their operations, while leaving with the luxury of at-will the less conscientious employers that made no effort to provide their workers with reasonable protection against arbitrary treatment by their managers.²⁷

Third at work is Weiler's "skeptical appraisal of the operation of wrongful dismissal litigation."²⁸ As he explains, "the substantial burden that the experience and the prospect of such lawsuits now imposes on employers . . . is simply not warranted by the kinds of relief and protection actually obtained by ordinary workers whose lack of bargaining power initially inspired judicial concern."²⁹ Finally, he argues to authority: "[S]o far no court has been prepared to invalidate such contractual waivers of legal liability."³⁰

In this, too, he endorses the legal status quo, for most courts that have recognized the contractual status of unilaterally promulgated employer policies have also acceded to boilerplate disclaimers of contractual status. Most, but not all. Other courts, by denying employers summary judgment on the basis of such

25. *See id.*

26. *Id.*

27. *Id.* at 54-55. If this is sound, there is no reason why a court should require a disclaimer at all; why, that is, it should not simply hold such rules to be noncontractual, as has the Supreme Court of Nevada. *Vancheri v. GNLV Corp.*, 777 P.2d 366, 369-70 (Nev. 1989):

Standardized disciplinary procedures are generally positive additions to a business. They provide employers a method of cautioning employees, and afford employees an opportunity to improve job performance in order to retain employment. They also create a general consistency and security in the work place. If we were to hold that the establishment of standard disciplinary procedures for employees is, in and of itself, sufficient to convert an at-will employee to an employee who can be fired only for cause, employers would be reluctant to continue to establish them.

28. P. WEILER, *supra* note 1, at 101.

29. *Id.*

30. *Id.* at 55.

boilerplate have not been loath to allow juries to invalidate them.³¹ I am far less persuaded than Professor Weiler by the soundness of the majority view.

This is not to deny that the importance of a legal theory is to be tested, at least in part, by its conformity "with the principles followed by the courts in decided cases."³² But it is to inquire what the normative principle is and whether the majority view on disclaimers is in conformity with it. In other settings, courts have disregarded employer disclaimers of legal obligation or of the contractual status of bonuses, benefits, or other rules when the consequence of acceding to the disclaimer would be to nullify the underlying obligation.³³ The larger principle is that an employer may not take away with one hand what the employer gives with another.

If this principle is sound, then none of the arguments Professor Weiler assays are persuasive. As to the claim of voluntariness, one has to be careful to attend to the nature of the disclaimer. If the employee is hired truly "at will," conveying that message

31. To select but two decisions that antedate Professor Weiler's book, the manual in *Morris v. Coleman Co.*, 241 Kan. 501, 738 P.2d 841 (1987), provided in pertinent part that it was intended "[t]o provide all of us as Coleman employees of the Company, through written reference, a better understanding of our privileges and obligations which are an inherent part of our employment. *Nothing in this policy manual should be construed as an employment contract or guarantee of employment.*" *Id.* at 506, 738 P.2d at 844 (emphasis partially added). Nevertheless, and observing that "[t]he disclaimer . . . does not as a matter of law determine the issue," *id.* at 514, 738 P.2d at 849, the court held that the trial court should not have granted the employer's motion for summary judgment. *Id.* at 518, 738 P.2d at 851. So, too, the disclaimer in *Zaccardi v. Zale Corp.*, 856 F.2d 1473 (10th Cir. 1988), provided:

This Personnel Policy Manual is made available to all Zale Corporation management personnel as a guide to be used in making decisions or communicating information on personnel matters. The text is a compilation of past policies and procedures, previously unwritten customs, and recent developments. Collectively, it contains the current personnel policies, practices, and procedures of the company.

While every effort has been made to create a manual which is specific as possible the policies and procedures set forth are a guideline and are not intended to cover and cannot cover every contingency, circumstance or situation. *This manual is not intended and shall not be interpreted to be a formal legal contract, binding on the company.*

Id. at 1476 n.5. Observing that "[a] contractual disclaimer does not automatically negate a document's contractual status," *id.*, the court reversed the district court's award of summary judgment for the employer. *Id.*; see also *Seehawer v. Magnecraft Elec. Co.*, 714 F. Supp. 910 (N.D. Ill. 1989).

32. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 664 (1973).

33. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 553-54 (reviewing authority).

emphatically would be perfectly appropriate, and the employer would accordingly take the risks attendant to attracting the kinds of employees willing to work on that basis.³⁴ Such an approach is distinguishable from the promulgation of rules assuring job security—progressive discipline, fair evaluation, or just cause for discharge—while simultaneously disclaiming that the employer legally need act in accord with them. Such a disclaimer is not really directed to the employee, who is likely to hear only the substantive promise;³⁵ the disclaimer is directed to the courts.

From this perspective, the argument for the deterrence of conscientious employers and the reward of less conscientious ones is misplaced. A conscientious employer will not make substantive commitments that it is unwilling to honor and should not hesitate to say so. The opportunistic employer would want the power legally to escape its obligation. Consider the situation that would exist if Professor Weiler's university promulgated the following in its Faculty Handbook:

Notice of Non-reappointment and Reappointment: It will be the practice of the University, *without contractual obligation to do so*, to give written notice at the following times to officers of instruction whose services are no longer required: A) Deans will give notice each year to those whose terms expire and whom they do not propose to recommend for reappointment, not later than December 15 of that year³⁶

It would be interesting to hear Professor Weiler explain to a junior colleague, who learns on June 20 that her appointment

34. Cf. *Yazujian v. J. Rich Steers, Inc.*, 195 Misc. 694, 701, 89 N.Y.S.2d 551, 558 (1949): If this contract meant what defendants now claim it means, it was their duty to express that meaning in unmistakable language. The contract was not designed for signature by persons skilled in the law. If defendants wished to have the right to fire at will they could have stated, in type at least as large as that in which they set forth the employee's representation that "he fully understands its terms and conditions", somewhat as follows: "The Employee agrees that he may be fired from his job at any time for any reason or no reason." It is doubtful that applicants for jobs would flock to defendants' offices were their intention in this regard so plainly stated.

35. The permanent strike replacements at the New York Daily News have signed what the reportage has called a "release," giving management the right to discharge at will. Kilborn, *The Daily News Strike Tests the Will of Weakened Labor*, N.Y. Times, Jan. 27, 1991, at 1, col. 1. As one replacement told the reporter, however, "I have been hired for good" 'That's what I was told when I was hired. I believe them.' *Id.*

36. *Greene v. Howard Univ.*, 412 F.2d 1128, 1132 (D.C. Cir. 1969) (emphasis added) (quoting the Faculty Handbook of Howard University).

will not be continued after its expiration on June 30, why judicial accedence to the disclaimer will conduce toward greater administrative conscientiousness. The District of Columbia Circuit was not so persuaded.³⁷

Nor do I see the logic in refusing to give effect to these obligations because the beneficiaries will not be "ordinary" workers. Professor Weiler nowhere explains how those who would seek to vindicate their rights under unilaterally promulgated employer policies differ from "ordinary" workers. "Extraordinary" workers would command individually negotiated contracts of employment containing detailed provisions governing duration, remuneration, and discharge. Employers, however, have urged the legal vitality of boilerplate disclaimers in unilaterally promulgated employer policies with a fine impartiality to deny the contract claims of truck drivers,³⁸ couriers,³⁹ assembly line workers,⁴⁰ technicians,⁴¹ other hourly employees,⁴² tellers,⁴³ secretaries,⁴⁴ sales personnel,⁴⁵ nurses,⁴⁶ mental health care workers,⁴⁷ and low level managers.⁴⁸ Even if some blue collar workers find it more difficult financially to vindicate their rights under these policies than some white collar workers, that scarcely seems a principled ground to deny the latter their rights.

Having exhausted the current catalogue of common law alternatives, Professor Weiler turns to the possibility of legislation and takes as his object lesson Montana's 1987 Wrongful Discharge From Employment Act,⁴⁹ "the first time an American legislature had treated the matter."⁵⁰ His concern is with both the manner of administration and the remedy. Reinstatement, he notes, is

37. *Id.* at 1135.

38. *See Swanson v. Liquid Air Corp.*, 55 Wash. App. 917, 781 P.2d 900 (1989).

39. *See White v. Federal Express Corp.*, 729 F. Supp. 1536 (E.D. Va. 1990).

40. *See Pyle v. Ledex, Inc.*, 49 Ohio App. 3d 139, 551 N.E.2d 205 (1988).

41. *See McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866 (Wyo. 1990).

42. *See Gale v. Hayes Microcomputer Prod.*, 192 Ga. App. 30, 383 S.E.2d 590 (1989) (\$5.40 per hour).

43. *See Audette v. Northeast State Bank*, 436 N.W.2d 125 (Minn. Ct. App. 1989).

44. *See Seehawer v. Magnecraft Elec. Co.*, 714 F. Supp. 910 (N.D. Ill. 1989).

45. *See Kramer v. Medical Graphics Corp.*, 710 F. Supp. 1144 (N.D. Ohio 1989); *Uebelacker v. Cincom Sys., Inc.*, 48 Ohio App. 3d 268, 549 N.E.2d 1210 (1988).

46. *See Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783 (Alaska 1989).

47. *See Bennett v. Evanston Hosp.*, 184 Ill. App. 3d 1030, 540 N.E.2d 979 (1989).

48. *See Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389 (D. Minn. 1989); *Chambers v. Valley Nat'l Bank*, 721 F. Supp. 1128 (D. Ariz. 1988); *Tohline v. Central Trust Co.*, 48 Ohio App. 3d 280, 549 N.E.2d 1223 (1988).

49. MONT. CODE ANN. § 39-2-901 (1987).

50. P. WEILER, *supra* note 1, at 96.

unlikely to be viable in the absence of a union for reasons he develops,⁵¹ but which Professor Martha West has argued more powerfully elsewhere.⁵² Furthermore, monetary awards pose a "dilemma":

[A] legal remedy that pays only modest amounts of lost wages seems to trivialize the argument [that the wrongful loss of the job is a serious deprivation], to undermine the claim that this is such an important priority for employment law reform. Yet if the proponent of job tenure responds to this argument by agreeing to escalate the size of the remedy (that is, by valuing the lost job at tens or even hundreds of thousands of dollars), the risk of erroneous awards against employers becomes too significant (at least in the American constitutional culture) for these cases to be entrusted to an administrative tribunal rather than to a court, notwithstanding the substantial cost of providing due process in the court system. This is the apparently insoluble dilemma of the discharge issue.⁵³

Montana has resolved the question by capping recovery in a fashion that tends to trivialize the remedy *and* preempts any additional common law claim for discharge, leaving at least some employees worse off than they were before the statute. One legislature that is at least titularly American, however, that of the United States Virgin Islands, enacted a law in 1986 that gives an administrative remedy *and* judicial relief "for compensatory and punitive damages" to any employee who is dismissed without just cause.⁵⁴ In other words, the American experience may evidence that the choice is not quite as stark as Professor Weiler's dilemma would suggest.

Given his assumption, however, Professor Weiler proposes a modest statutory floor for those "who have a distinctive need for help"⁵⁵ amounting to a scheduled benefit for a termination

51. *Id.* at 86.

52. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1.

53. P. WEILER, *supra* note 1, at 85.

54. V.I. CODE ANN. tit. 24, §§ 76-79 (Supp. 1990). The law exempts employers when a contract modifies the statutory obligation, *id.* § 76, but the territorial Supreme Court held that an employee's statement that the employee understands that the employer has the right to terminate him at any time, signed at the time the employee was hired, was ineffective to modify the statutory obligation. *James v. West Indian Burgers, Inc.*, 24 V.I. 67 (1988) (statement that existed in an informational document was not an employment contract for the purpose of the Act).

55. P. WEILER, *supra* note 1, at 102.

without just cause, administered akin to unemployment compensation. Even here, however, Professor Weiler would crib on the commitment:

A statute should be drafted which affords such protection only to workers who have a distinctive need for legal help: one would exclude those still mobile employees who invested a relatively short period of service with their employer, and also those people who are sufficiently high in the corporate structure that they can be expected to negotiate a "parachute" of their own.⁵⁶

I disagree with Professor Weiler's underlying assumption. Unemployment compensation is presumptively available for those who need to maintain an income stream while seeking employment. Compensation here should be irrespective of economic need—though need may well exist. If a statute is to require compensation, it should be for the wrongful termination of the employment relationship, for the blow to one's status and the dislocation of one's life.⁵⁷

This proposal would work a change, but not an especially dramatic one. A 1981 survey of over 1,300 responding companies indicated that employer severance pay policies cover sixty-five percent of the office personnel of large companies, forty percent of the office personnel of smaller companies, and thirty-five percent of nonoffice employees (mostly unionized workers).⁵⁸ Average compensation tends to be modest, a flat two weeks' pay for most, but progression in accordance with longevity is built into others.⁵⁹ Professor Weiler's proposal, in other words, would require that all employees be given, as a matter of law, what a significant minority now enjoy as a matter of employer policy or collective agreement.

Such legislation would not be unprecedented. In 1949, the legislature of another titularly American jurisdiction, Puerto Rico,

56. *Id.*

57. I am dubious, moreover, about the practical need for these exemptions. An exemption for high level employees would be unnecessary to the extent their "parachutes" exceed the statutory floor. An exemption during relatively brief periods of probation would be defensible, but Professor Weiler would exempt those of "short service" without further explanation.

58. Conference Board, Rep. No. 813, Profile of Employee Benefits 46 (1981).

59. In other words, and in contrast to the proposed statutory exclusion of those of short service, most employer severance pay policies are geared to compensating those of short service essentially for mistaken hiring.

required a month's pay as an "indemnity" for the discharge without cause of nonprobationary employees serving without a definite term.⁶⁰ This was extended in 1976 to include "an additional progressive indemnity equivalent to one week for each year of service."⁶¹

I find Professor Weiler's package of proposals passing strange. He argues that, absent a union, there is almost a "total absence of voluntary agreements between employers and individual workers which would provide a contractual guarantee of tenure in the job."⁶² Professor Weiler takes this as evidence of market failure inasmuch as unionized employees invariably secure such protection, so to argue for the legislation he proposes:

Especially now that thousands of court cases have made it clear how often American management arbitrarily wields its authority to fire long-service employees, it stretches the imagination beyond belief to suppose that there is no context in which such a guarantee would be worth more to nonunion workers than it would cost their employers to provide it to them.⁶³

Professor Weiler ignores the fact that many of these thousands of cases concern the contractual status of employer promises of job security, either given informally, in the course of discussion about the job and its prospects, or as a matter of promulgated policy. Courts have often denied the former on grounds of the legal indefiniteness of the commitment,⁶⁴ by a wooden application of the rule requiring consideration additional to the performance of services to render a commitment to "permanent" employment enforceable,⁶⁵ in a few cases by an even more wooden application of the doctrine of mutuality of obligation,⁶⁶ and by the frequent application of the statute of frauds to oral commitments of greater than a year's duration.⁶⁷ Courts have denied the latter by genuflection to boilerplate disclaimers. Professor Weiler does not

60. 1949 P.R. LAWS 50.

61. P.R. LAWS ANN. tit. 29, § 185a (1985).

62. P. WEILER, *supra* note 1, at 72. For a slightly different formulation of the same arguments, see *id.* at 78.

63. *Id.*

64. See 1 H. SPECTER & M. FINKIN, *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* § 2.10 (1989).

65. *Id.* § 2.11.

66. *Id.* § 1.06.

67. *Id.* § 1.18.

discuss the former body of law, but he does endorse the latter— notwithstanding his condemnation of “legal barriers to a judicial finding of more than an at-will” relationship.⁶⁸

Contrary to Professor Weiler, it is not that employers do not give commitments to job security and, because of market failure, law is needed to fill in the gap. Rather, employers often do lead employees “to believe that they will have an enduring career,” but the law refuses to enforce such promises.⁶⁹ What Professor Weiler proposes in the latter case, however, is to have courts strip ordinary workers of their common law rights and give them instead a scheduled benefit—which should not be of more than a “floor” lest the remedial structure be skewed unduly in favor of middle managers, who somehow are less worthy of legal solicitude than the “ordinary” workers for whose benefit this proposal was devised.⁷⁰

II. DECLINE OF THE LABOR MOVEMENT AND REFORM OF THE LABOR ACT

The means most available to close the “representation gap” is unionization, but, for a variety of reasons that Professor Weiler surveys,⁷¹ the labor movement has been in decline for more than two decades. One of the contributing factors might be the Labor Act itself, and Weiler considers a variety of legal changes that might create a fairer environment for the selection of union representation and the exercise of collective bargaining.⁷² He endorses most, but not quite all, of them. This is an area that he has worked over before.⁷³ On further reflection, he now recommends (1) “instant elections” for union representation, (2) tort damages for individuals discharged for union activity, (3) compensatory damages for employer refusals to bargain in good faith, (4) a substantial curtailment of the employer’s power to hire permanent strike replacements, and (5) modification of the law of secondary boycotts under section 8(b)(4) to allow unions to

68. See P. WEILER, *supra* note 1, at 101.

69. See, e.g., *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 126 (Tex. App. 1986) (assurance to prospective employee that the position offered “was for a permanent career position . . . [which] would definitely last until my normal retirement at age 65” stated only an at-will job).

70. See P. WEILER, *supra* note 1, at 101-03.

71. See *id.* at 105-33.

72. See *id. passim*.

73. See Weiler, *infra* note 74; Weiler, *infra* note 89.

picket struck products. I am in sympathy with all of these recommendations. None are new.

A. *Instant Elections*

In an earlier piece, and relying upon Canadian provincial legislation, Professor Weiler argued for the certification of unions simply on the basis of a union designation card count.⁷⁴ On the basis of the recent introduction of the "instant election"⁷⁵ in two Canadian provinces, Nova Scotia and British Columbia, he now argues for the adoption of that system here. In his earlier piece, Professor Weiler noted that the Labor Act prior to Taft-Hartley contemplated certification of a union upon a card count and the NLRB utilized that approach until, by decision in 1939, the Board abandoned that alternative in preference for a secret ballot election.⁷⁶ Thus, he properly noted that a certification upon a card count "would not be alien to the American experience."⁷⁷ Neither would instant elections. On November 27, 1945, the NLRB amended its Rules and Regulations to insert footnote two in section 203.3: "At any stage of the investigation, either before hearing or after hearing but before transfer of the case to the Board, the regional director may in cases which present no substantial issues, conduct a secret ballot of the employees, or he may decline to continue the investigation."⁷⁸ In other words, the Rules provided for instant elections.⁷⁹

Neither the instant election nor a return to nonelectoral means of determining majority support would be a radical idea. For example, New York's public employee collective bargaining law allows for the determination of representation status "on the basis of dues deduction authorization and other evidences."⁸⁰ Membership plus designation of representation from substantially more than a majority of the unit should obviate the need for an election, as dissenting Board member Smith argued in 1939.⁸¹

74. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

75. P. WEILER, *supra* note 1, at 255.

76. Cudahy Packing Co., 13 N.L.R.B. 526 (1939).

77. Weiler, *supra* note 74, at 1806 n.137.

78. 10 Fed. Reg. 14,499 (1945).

79. The Board's Annual Report emphasized this. 10 NLRB ANN. REP. 15 (1945).

80. N.Y. CIV. SERV. LAW § 207(2) (Consol. 1982).

81. Cudahy Packing Co., 13 N.L.R.B. 526, 533 (1939) (Smith, dissenting).

B. Tort Damages for Discriminatory Discharge

Earlier Professor Weiler made a compelling case for the weakness of the Act's remedial scheme for discharge due to union activity.⁸² He now explains:

When the NLRA was enacted in the mid-thirties, employment at will was the prevailing common law regime, so it seemed reasonable to confine the scope of the new legislative intervention within the strict compass of contract remedies (in fact, the range was even narrower). A half-century later, the legal environment has been transformed. . . . [M]ost states now recognize a tort action for the individual employee who has been fired in contravention of some identifiable public policy, such as for exercising the right to file for workers' compensation benefits.⁸³

He argues that a discharge for this reason should be subject to the same relief as any other discharge for a reason violative of public policy and that the preemptive effect of the NLRA on the state's ability to afford such a remedy should be eliminated.⁸⁴

The same conclusion has been drawn more recently by Michael Gottesman, but by a different line of historical reasoning and with greater analytical power.⁸⁵ The draftsmen of the Labor Act did not confine the remedial scheme to within the "compass of contract remedies," for that would have implicated the possibility of a right to jury trial under the seventh amendment. Rather,

the proponents of the Wagner Act desired to commit its enforcement to an administrative agency that could bring specialized expertise to the eradication of the practices against which the bill was aimed—a choice that meant there would not be jury trials. . . . In due course, Congress' decision to limit the monetary remedy to backpay accompanying reinstatement enabled the Supreme Court in *NLRB v. Jones & Laughlin* to reject the ensuing seventh amendment challenge on the familiar ground that the amendment "has no application to cases where recovery of money damages is an incident to equitable relief." Hence, Congress' limiting the remedies as it

82. See Weiler, *supra* note 74.

83. P. WEILER, *supra* note 1, at 248.

84. See *id.* at 249.

85. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

did in order to commit enforcement to an administrative agency furnishes no justification for inferring an intent to preclude stronger remedies in court actions under state law.⁸⁶

Inasmuch as Professor Weiler elsewhere recommends modification of federal law to achieve his ends, however, his choice not to seek a federal course of action here is puzzling. Indeed, in 1961 a subcommittee of the United States House of Representatives recommended the creation of a civil action for double or triple damages plus attorney fees in such cases.⁸⁷

C. Compensatory Damages for Refusals to Bargain

In an earlier consideration of the weakness of refusal to bargain remedies, Professor Weiler recommended, again on the basis of the Canadian experience, the arbitration of the first contract of a newly certified union. He no longer finds that proposal feasible and recommends instead a cause of action for refusals to bargain that would make employees whole for their employer's illegal behavior.⁸⁸ He noted in a footnote to his earlier piece that the Board had rejected that remedy in 1970 on the ground that it lacked the necessary power.⁸⁹ The Board did so, however, by the narrowest of margins and in the context of three trial examiners' conclusions to the contrary. After twenty years it may well be a reform whose time has come.

D. Strike Replacements

In 1938, the United States Supreme Court, in dictum, allowed employers to resist economic strikes by hiring permanent replacements.⁹⁰ Scholars have since spilt a lot of ink on that question. Professor Weiler has argued that employers should be required to show legitimate business necessity as a precondition of permanence, and he reiterates that position here.⁹¹ Such a change in law would easily fit into the general framework of

86. *Id.* at 408-09 (citation omitted).

87. See O'Hara & Pollitt, *Section 8(a)(3) of the Labor Act: Problems and Legislative Proposals*, 14 WAYNE L. REV. 1104, 1125 (1968).

88. See P. WEILER, *supra* note 1, at 250-51.

89. See Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 360 n.29 (1984) (citing *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108-09 (1970)).

90. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

91. See P. WEILER, *supra* note 1, at 267.

section 8(a)(3) analysis that the Supreme Court developed. But it is, at best, a half measure. Professor Weiler suggests that few employers will actually be able to prove that they "needed to promise permanent tenure to replacements in order to maintain [their] operations."⁹² The perhaps shocking answer is that we do not know. Shocking because virtually no empirical research exists on when and why employers avail themselves of permanent replacements, what jobs they occupy, what they are paid as compared to the strikers, or how long they tend to stay. Professor Weiler buttresses his approach by stressing how tepid in legal reality the promise of permanence is:

What employers actually promise replacements is most accurately characterized not as *permanent* tenure in their jobs, but only *priority* over the strikers in the allocation of available jobs at the end of the strike. . . .

Moreover, if the union manages to bring to bear on the employer enough strike pressure to win a decent settlement, the agreement will almost invariably provide for rehiring the strikers and dislodging the replacements. So all the employer really offers its replacements is the *chance* that they will retain their jobs at the end of the strike.⁹³

By this reasoning, the employer would have to show that it could not continue its business by internal transfers, by the utilization of supervisory or managerial personnel, or by seeking to hire persons to whom it had offered *no* chance that they would retain their jobs at the end of the strike before the employer could hire those to whom it offered a chance of retaining their jobs after the strike. I imagine that this burden would not be so difficult, depending upon the jobs at stake and the nature of the labor market.

More importantly, I am skeptical of Professor Weiler's assessment of the consequence of "permanence."⁹⁴ The promise of permanence traditionally has entailed a commitment not to be displaced in strike settlement. For reasons explored elsewhere, such a commitment may preclude a strike settlement returning the strikers to their jobs because of the contractual status of such commitments as a matter of state law. Thus, it becomes

92. *Id.*

93. *Id.* at 268.

94. See Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547.

much more important to limit the employer's ability to replace a worker permanently if one is to maintain a statutory regime of collective bargaining.

Some employees' skills are such that an employer cannot readily replace them. The labor market may effectively constrain the employer's ability to avail itself of the privilege to replace. I see no reason why the law should not create a parallel prohibition for those for whom the labor market would not so constrain employer behavior.

Indeed, Professor Weiler proposes an alternative rule, again predicated upon Canadian precedent, to prohibit permanent replacement for a six-month period from the date of the strike.⁹⁵ In effect, this would place a six-month limit on strikes in which the employees are vulnerable to replacement. It is difficult to assess the proposal without study of the experience under it. But the old adage is that the employer cannot take a short strike and the union cannot take a long one.⁹⁶ If so, if the parties have not resolved the strike in six months, it may well be time for the union to call it off. If, however, employers in highly seasonal industries could induce a strike as they enter the off-season, they could hire their way out of the strike (and out of unionization) at the expiration of the moratorium period. The simpler approach would be a flat prohibition upon permanent replacement.

E. Boycotting Struck Products

Professor Weiler explains why section 8(b)(4) should be modified to allow a striking union to ask fellow workers not to provide services to, or handle products from, a struck employer.⁹⁷ As he notes, the gravamen of his reasoning was advanced by Howard Lesnick in 1962.⁹⁸

F. Including Managers

Professor Weiler is critical of the United States Supreme Court's decision in *NLRB v. Bell Aerospace Co.*⁹⁹ to exclude

95. See P. WEILER, *supra* note 1, at 268.

96. See Livernash, *The Relation of Power to the Structure and Process of Collective Bargaining*, 6 J.L. & ECON. 10, 15 (1963).

97. See P. WEILER, *supra* note 1, at 269-73.

98. See *id.* at 271 n.56.

99. 416 U.S. 267 (1974).

managerial employees from the Act's coverage,¹⁰⁰ and of its later decision in *NLRB v. Yeshiva University*¹⁰¹ to apply a very extensive notion of managerial status into the situation of professional employees.¹⁰² Not only the logic but the consequences of these decisions trouble him:

When these legal decisions are placed side by side with the vast expansion of the managerial structure in American enterprise, with the proliferation of staff positions in the head office, the result is that growing numbers of American workers are denied any access to the NLRA and forced to rely on their attenuated bargaining power as individuals in the open market.¹⁰³

I share his belief that these decisions, especially *Yeshiva*, are not easily defended¹⁰⁴ and have the potential of denying statutory protection to a significant and growing segment of the labor market. I am puzzled, however, for these are the very employees whose rights under employer policies Professor Weiler would eviscerate by having courts accede to boilerplate disclaimers on the ground that they would be disproportionately benefitted in contradistinction to "ordinary" workers.

Moreover, Professor Weiler's expression of solicitude echoes against his total neglect of a segment of the labor market that is far more precariously situated economically, whom Marc

100. See P. WEILER, *supra* note 1, at 216.

101. 444 U.S. 672 (1980).

102. See P. WEILER, *supra* note 1, at 216.

103. *Id.*

104. In criticizing the illogic of *Yeshiva*, I once conjured up a hypothetical case as a *reductio ad absurdum*:

Assume, for example, that there is an institution where the faculty has no voice in the fashioning of educational policy Assume further that faculty elects a union and bargains for a system of committees and the like that gives them a voice in the development of educational policy. In order to be fully consistent, the Court would have to hold that once that role is secured—even by collective agreement—the employees become ousted of the Act's protection. But that would make no sense at all, for it is perfectly clear that these employees . . . perform functions as a result of management's *concessions* to their claims; they do not act on the employer's behalf but act in their own collective interest pursuant to a collective agreement. Thus it seems to me most unlikely that the Court would reach so bizarre a conclusion.

Finkin, *The Yeshiva Decision: A Somewhat Different View*, 7 J.C. & U.L. 321, 324 (1980-81). The NLRB later reached exactly that "bizarre" result. See *College of Osteopathic Medicine and Surgery*, 265 N.L.R.B. 295 (1982).

Linder¹⁰⁵ and others¹⁰⁶ have treated in a valuable body of scholarship, such as homeworkers, agricultural workers, and persons classified as "independent contractors." They enjoy few, if any, of the benefits accorded ordinary workers, they are exempted from the Labor Act, and they may be in far greater need of unionization than managers and professionals.

III. "CLOSING THE REPRESENTATION GAP"¹⁰⁷

One would expect an extended essay on the "future of American labor and employment law" to dwell upon the future needs of American workers—their anxieties and felt necessities. I suspect that such a list would include issues of workplace health and safety; maintenance of medical and pension benefits; job security and insurance against job loss; and a less tangible but no less deeply felt concern for "respect" as an individual¹⁰⁸ for fair treatment and for recognition of individual privacy and dignity. Though collective representation may be expected to address many of these, I am not at all sure that a "representation gap" would be perceived by a great many workers as an issue they independently would press.¹⁰⁹ Yet that is Professor Weiler's singular focus. Toward that end, he makes two proposals for closing that gap. First, he would repeal section 8(a)(2) of the Labor Act—the "company union" prohibition.¹¹⁰ Considerable controversy exists concerning the role of this provision in blunting employer efforts to involve employees in the internal government of the workplace. Professor Weiler's solution, whatever its merits, at least recognizes that the legislature must decide policy on this question—not a revisionist NLRB or courts who feel free to

105. See Linder, *What Is an Employee? Why It Does, But Should Not, Matter*, 7 LAW & INEQUALITY 155 (1989); Linder, *Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers*, 23 U.C. DAVIS L. REV. 733 (1990); Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555 (1989).

106. See, e.g., R. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989).

107. P. WEILER, *supra* note 1, at 307.

108. M. LENDLER, *JUST THE WORKING LIFE: OPPOSITION AND ACCOMMODATION IN DAILY INDUSTRIAL LIFE* 102 (1990).

109. Blue collar workers especially do not appear to be deeply interested in participating directly in managerial decisions other than those they perceive as having an immediate impact upon themselves. For one participant observer's attempt to explain why that is so, see *id.*

110. See P. WEILER, *supra* note 1, at 193, 214 n.39.

disregard the plain language and intent of the law because they think it now an "anachronism."¹¹¹

Second, Professor Weiler recognizes that employer-established committees, quality circles, and the like, however they may conduce toward greater productivity, product quality, or employee morale, will not have the kind of independence necessary for an authentic system of "direct indigenous" employee representation.¹¹² He proposes accordingly to mandate a system of Employee Participation Committees (EPCs)¹¹³ along the line of German works councils—a model much discussed in American literature.¹¹⁴

I find the proposed EPCs difficult to square with two features of Professor Weiler's general critique. First, he argues that we "rely far too much on the law for resolving labor problems, be it under the NLRB or in other contexts."¹¹⁵ What he proposes, however, is yet more law. Second, his argument is built upon the assumption of an unfilled need for "direct indigenous" forms of representation. Yet Professor Weiler would have a mandate from above fill that need: a law to command and, presumably, to supervise the establishment of such systems.

Given the NLRB's dismal record in recent years, I am less sanguine about the capacity of government effectively to achieve the end Professor Weiler desires. But it seems to me that means are readily available for fostering truly "direct" and "indigenous" forms of representation. The Labor Act does not forbid "members only" representation.¹¹⁶ Spontaneous protests by work groups in the nonunionized workplace are protected; and Clyde Summers has recently suggested that a more than colorable argument exists for a duty to bargain on a members only basis in the absence of an exclusive representative.¹¹⁷ Even if the Labor Act is not so read, Michael Gottesman's rethinking of preemption argues for a potential role for state law to protect such systems.¹¹⁸ Either of these approaches would foster the "direct indigenous"

111. See, e.g., *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 293 (6th Cir. 1982), stating that "the adversarial model of labor relations is an anachronism."

112. See P. WEILER, *supra* note 1, at 200-20.

113. See *id.* at 282-95, 310.

114. See *id.* at 284 n.73.

115. *Id.* at 275.

116. See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236-37 (1938).

117. See Summers, *Unions Without Majority—A Black Hole?*, 66 CHIL.-[KENT L. REV. — (forthcoming 1991) (Piper Lecture).

118. See Gottesman, *supra* note 85. Professor Gottesman has more recently suggested a narrower mandated workplace safety committee. Gottesman, *supra* note 11.

participation of employees, "from the ground up" so to speak, with a minimum accretion of legal regulation. They may well be pointing to the future.

IV. CONCLUSION

Professor Weiler's is the first effort, offered at this time of rapid economic, demographic, and legal change, to piece together a comprehensive picture of how the law ought to deal with the employment relationship. It is, for that reason, a path-finding work; and as such, it has sought to be guided by whatever signposts thus far exist. Consequently, the value of the book may lie less in its particular proposals than in the fact of the effort having been made. *Governing the Workplace* should stimulate a far-reaching debate; and in this, Professor Weiler has performed an invaluable service.