

Alternative Models of Meaningful Interaction

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This essay proceeds from five presuppositions. First, that employees care about their wages and working conditions, health and safety, job security and fair treatment, about the quality of the products they produce and the services they provide, about the quality of those who manage the enterprise and its future. Second, that many employees want to have a meaningful say in these matters. Third, that it is desirable from an economic as well as from a socio-political perspective that that felt need be accommodated.¹ Fourth, that the primary model U.S. law affords to fill that need, the National Labor Relations Act, no longer does. And, fifth, that for political reasons the prospect of major federal legislative change is nil.

If these presuppositions are correct then a question worth considering is whether there are alternative legal models, elsewhere in extant U.S. law or abroad, that could be expanded upon in the former or adapted in the latter, that would come at least part way to address the demand for voice. The quick snapshot that follows is only suggestive; it is not intended to provide a comprehensive compendium.

For ease of discussion, what follows distinguishes the voicing of an individual concern in which an employee, directly or as assisted by another, seeks to secure an extant right or benefit or to lay claim to one, from the voicing of that which so affects a number of employees that it cannot be realized effectively without some group action or collective representation. The distinction is artificial: an employee who persuades her employer to grant her a pay increase will have manifested to her coworkers that such could be had. Recall that Oliver Twist was chosen by his fellow orphans for that very purpose, whence managerial reluctance or, in extreme cases

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¹ A useful survey of the literature is provided by Maria González, *Workers' Involvement at the Workplace and Job Quality in Europe*, REC-WP Working Paper 08/2009.

like Oliver’s, retribution, lest the making of the sought-for concession embolden others, singly or collectively, to ask for more. Thus, it pays to reemphasize that the distinction is useful only for an orderly discussion.

I. Models of Meaningful Individual Interaction

Richard Freeman and Joel Rodgers’ survey of what American works want revealed not only a yawning representation gap, but the presence of rather nuanced desires in terms of the form or forms in which employee voice would be expressed. Significantly, they learned that for some issues employees preferred to deal with their employers directly or with the help of a coworker rather than to work through a group or a collective agency. The sorts of issues in which this preference was expressed are set out below.

Some Employees Prefer Individual Voice; Others Prefer Group Voice.

Percentage who prefer to solve problems	Depending on the problem				
	Benefits	Health/safety	Training at job	Unfair treatment	Sexual harassment
with the help of fellow employees	66	53	44	39	34
By self	33	36	54	59	65
Don’t know	1	1	2	3	1

Source: RICHARD B. FREEMAN & JOEL RODGERS, WHAT WORKERS WANT Exhibit 3.7 at 82 (updated ed. 1999)

Perhaps because it would be expected as a matter of sound human resource management that an employee who raised these or similar concerns would be engaged with, Freeman and

Rodgers did not pursue what more the law could do or even whether the law ought to do anything at all. But this neglected area has recently drawn attention.² Though the lines are indistinct, it may be useful to distinguish individual employee voice in three situations: (1) a demand to secure an established right or benefit; (2) a demand for a future right or benefit; and (3) a demand for fair treatment.

A. Securing an Established Individual Right or Benefit

All but small employers enmesh employees in a web of rules governing pay, working conditions, and benefits. An employee who applies for a benefit or who seeks to exercise a workplace right, as provided for as a matter of company policy or in compliance with an employment law, will necessarily initiate a course of personal dealing. In that practical sense there are millions of little bargains taking place between employees and their employers every day. But the law in the United States is rather bewildered by it.

On the one hand, we have the Americans With Disabilities Act and Title VII's prohibition of discrimination on grounds of religion. Under these an employer has a legal duty to accommodate an employee with a statutory disability or with a religious objection to a working condition. In a term crafted to define that obligation in the former but equally applicable to the latter, the law expects the employer to engage in a "meaningful interactive process"³ with the employee in a joint effort to see whether an accommodation can be reached

² CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* (2010); Modehai Mironi, *Reframing the Representation Debate: Going Beyond Union and Non-Union Options*, 63 *INDUS. & LAB. REL. REV.* 369 (2010); Anne Marie Lofaso, *Talking is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 *EMP. RTS. & EMP. POL'Y J.* 55 (2010); Yuval Feldman, Amir Falk & Miri Katz, *What Workers Really Want: Voice Unions and Personal Contracts* (Working Paper Dec. 18, 2009), available at <http://ssrn.com/abstract=1527100>.

³ The phrase is found in the regulations of Equal Employment Opportunity Commission interpreting the Americans With Disabilities Act. 29 C.F.R. § 1630.2(o)(3) at Appendix 1, Pt. 630, outlining the steps for a "flexible, interactive process." The federal courts have applied it. *Cf.* *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 407 (2002)

without undue hardship on the conduct of the business. The phrase captures the concept of interest-based bargaining—where both parties are expected to understand one another’s needs and seek to achieve a specific result—and subjects that process to judicial scrutiny.

Thereafter, however, the law becomes rather muddled. Where a statute conferring an employment benefit or protection contains an express anti-retaliation provision the employee would be protected in asserting a claim under it. But in the absence of such a provision the issue becomes more complicated. At one point, the Labor Board held the individual invocation of a labor protective law to be protected by the Labor Act as well on a theory of constructive concert of action for mutual aid or protection;⁴ but that doctrine has been abandoned.⁵ In many jurisdictions, retaliation for making a claim under a labor protective law would be actionable in tort, as in violation of the public policy the statute expresses; but it is possible that a court, conceiving of the statutory protection as conferring merely a private benefit that involves no broader public interest, would deny the applicability of that tort.⁶ And where a non-statutory benefit or protection is claimed, where, that is, the realm of individual bargaining would be broadest, the Labor Board has distinguished the *unprotected* advancement of an individual’s “purely personal” claim, *e.g.*, of being short-changed by an employer,⁷ from the protected advancement of a claim by or with the support of a group. In the former, the at-will rule would allow the employer to dismiss the employee for having the temerity to ask; that the dismissed employee might be able to secure the benefit as a matter of contract does not mean that she

(Stevens, J. concurring). And it has been enacted in cognate state law. *E.g.*, Cal. Gov. Code §12940(n) (2005) (“timely, good faith, interactive process”).

⁴ *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

⁵ *Meyers Indus.*, 281 NLRB 882 (1986) *aff’d sub. nom.* *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

⁶ *E.g.*, *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997).

⁷ *E.g.*, *Ryder Truck Lines, Inc.*, 135 NLRB 936 *enf’d den. on other grounds* 310 F.2d 233 (5th Cir. 1962).

would have a contractual right to retain her job.⁸ All told, where the law sounds so uncertain a trumpet it is understandable that, to the extent the law figures in at all, employees would not be encouraged to exercise individual voice.

The law abroad often contains mandates for meaningful individual interaction analogous to the ADA. To cite but one rather salient example, the German Part-Time and Limited Term Employment Act (TzBfG) allows an employee to request a reduction in working time. The employer must discuss the request with the employee “with the goal of coming to an agreement” and must consent unless operational reasons are prohibitive.⁹ Claims of non-compliance with these obligations may be brought before the labor court. Other examples abound; indeed the law often contemplates the fact that individual bargains will be struck and sets the parameters within which such individual bargains will be allowed.¹⁰ But what differentiates the foreign scene from the United States most starkly is the near ubiquitous prohibition abroad of wrongful dismissal. In most of the developed world it is impossible to discharge an employee not only for invoking a protective law, but for requesting any workplace right or benefit.

⁸ THE RESTATEMENT (THIRD) OF EMPLOYMENT LAW would make a discharge for claiming a benefit under an employment *law* actionable; but not a discharge for claiming a non-statutory benefit. That might be dealt with as a matter of good faith and fair dealing, but the Restatement has framed that doctrine to limit a discharge effected to *prevent* the accrual or vesting of a benefit, not the payment of one already accrued. Inasmuch as the benefit has accrued the employee would be entitled to it as a matter of contract, but the contract action would accord damages for the loss of the benefit, not the job. *See* the critique of the Restatement, Labor Law Group, *Working Group on Chapter 2 of the Proposed Restatement of Employment Law*, 13 EMP. RTS. & EMP. POL’Y J. 93 (2009).

⁹ The law is discussed by Maximilian Fuchs, *Germany: part-time work—a bone of contention*, in EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS 121 (Silvana Sciarra, Paul Davies & Mark Freedland eds., 2004).

¹⁰ Under the English Working Time Regulations of 1998, an agreement made with a group of employees, its representatives, or an individual employee may derogate from the forty-eight hour work week the law sets out which entails a process of bargaining, in the latter on an individual basis. *See generally* SIMON DEAKIN & GILLIAN MORRIS, *LABOUR LAW* §§ 4.75–4.78 (5th ed. 2009). Italian and Spanish law similarly allows an individual agreement to regulate the amount of overtime the employee may be required to work. Canadian law allows employers to modify work schedules in excess of legal limits by vote of 70% of the affected employees. The need in Canada to “create incentives for interaction between employers and employees” was argued for by HARRY ARTHURS, *FAIRNESS AT WORK* 120 (2006).

B. Requesting a Future Right or Benefit

Under § 7 of the Labor Act, an employee may not be dismissed for engaging in concerted activity for mutual aid or protection, but she can be dismissed for individual activity for individual protection. Consequently, employee Twist may not be dismissed for saying, “Please sir, *we* want some more,” but he can be dismissed for saying, “Please sir, *I* want some more,” for example, to ask for a raise of \$2.80 a week.¹¹ The distinction between individual speech for individual benefit and group speech for the benefit of each individual in the group is as well established in precedent as it is weak in theory and perverse in practice. I will return to it at the close. Suffice it to say, even as Twist’s collective demand may not be retaliated against neither need it be engaged with.

Turning abroad, New Zealand’s Employment Relations Act of 2000, as amended in 2004 enacts a robust scheme of individual representation. The parties to an employment relationship—including the employer and the individual employee¹²—“must deal with each other in good faith.”¹³ And good faith

requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative . . .¹⁴

This obligation applies to

- (ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement;
- (bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:

* * *

¹¹ Litton Systems, Inc., 173 NLRB 1024 (1968). In today’s dollars, the request would be for a raise of \$12.52 per week, http://www.bls.gov/data/inflation_calculator.htm.

¹² § 4(2)(a).

¹³ § 4(1)(a).

¹⁴ § 4(1A)(b).

- (d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:
- (e) making employees redundant . . .¹⁵

And the Act adds an illustrative specific:

an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees [is required to] provide to the employees affected—

- (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before the decision is made.¹⁶

The employer's obligation to be "active and constructive," to be "responsive" to and "communicative" with the individual employee in relation to any matter on which an employment agreement may be made seems to come close to the U.S. idea of engaging in a "meaningful interactive process" save that it applies across-the-board to all extant and future issues, not only to the claim of a specific statutory entitlement. The specific treatment of economic displacement affecting even a single employee, requiring notice and an opportunity to be heard before the decision is made, will be discussed at the close. Suffice it to say, this law is very much a work-in-progress, how the scheme of statutorily-mandated individual good faith dealing will work out in practice remains to be seen;¹⁷ but it does present a model that accommodates rather robustly the felt need for self-representation.

C. Fair Dismissal and Other Grievances

As we have seen, absent contract or positive law an employer in the United States may dismiss an employee arbitrarily. I should hope most employers would attempt to avoid such

¹⁵ § 4(4).

¹⁶ § 4 (1A)(c).

¹⁷ Gordon Anderson, *Good Faith in the Individual Employment Relationship in New Zealand*, 32 COMP. LAB. L. & POL'Y J. (forthcoming 2011).

behavior. In the ordinary course, one would expect an allegation of employee misconduct to be investigated with at least a modicum of care: good management would counsel such at least out of concern for liability should discipline play out disparately vis-à-vis a statutorily protected group. But, as Madison observed, “If men were angels, no government would be necessary”¹⁸ and the law reports are replete with instances of arbitrary termination decisions.

In the investigative phase, before a discharge has been decided upon, the individual non-unionized employee had a right under the Labor Act to secure the presence of a coworker, but the availability of that statutory right has been made discretionary with the Labor Board as a matter of administrative law. Currently, it does not exist.¹⁹ It does exist abroad. In France, for example, if a dismissal is being considered the employer must conduct an interview with the employee in which the employer must explain the basis for and the nature of the proposed sanction and in which the employee has a statutory right to be assisted by a coworker.²⁰ More expansively, the German Works Constitution Act (BVerfG) not only gives the Works Council a role in the dismissal process—it must be informed of any proposed dismissal and has a right to exercise a suspensive veto, albeit rarely exercised—it gives employees the right to complain to management about any unfair or disadvantageous treatment.²¹ The employer is required to deal with the grievance and to remedy it if management considers it to have merit. The Works Council is mandated to take the grievance up if it considers it justified and is authorized to take the dispute to binding arbitration.²²

¹⁸ The Federalist No. 151.

¹⁹ IBM Corp., 341 NLRB No. 148 (2004).

²⁰ JEAN PÉLISSIER, ALAIN SUPIOT & ANTOINE JAMMAUD, DROIT DU TRAVAIL ¶ 903 at p. 1010 (23d ed. 2006).

²¹ BVerfG§ 84.

²² § 85. Thus, however, does not apply to a claim of an infringement of a legal right. Such claims can only be heard in the labor court

Japan has no works councils. But it has witnessed the recent rise, modest so far, of “community unions”—bodies that qualify as a “union” under Japanese law but that are rooted in the local community rather than being tied to the company as traditional unions are.²³ Any employee, but especially part-time workers, temporary workers, agency workers, or foreign workers—that is, the most disfavored workers in Japan who are not represented by traditional enterprise unions but whom the community union movement seeks to serve—who has a claim of unfair treatment may join the union (merely by a call on its “hotline”) whereupon the union is authorized to press the employee’s grievance with the employer with which representative the employer must deal.

In sum, throughout much of the developed world employees may represent themselves and be assisted in bringing individual grievances, not only in the sense that that employer may not sanction them for having done so, but in the more robust sense of requiring the employer meaningfully to engage with the employee and her representative over the grievance. Not so here.

II. Models of Collective Interaction

The most common models for the legal exercise of collective voice are plural unionism, codetermination, and systems of information sharing and consultation. Each is briefly reviewed below.

²³ Edson I. Urano & Paul Stewart, *Beyond Organised Labour in Japan—The Case Study of the Japanese Community Union Federation*, in *COMMUNITY UNIONISM* ch. 6 (Jo McBride & Ian Greenwood eds., 2009); Oh Hak-Soo, *Occurrence Mechanism and Resolution Process of Labor Disputes: Cases of Community Unions (Kyushu Area)*, 7 *JAPAN LAB. REV.* 83 (2010).

A. Plural Unionism

The United States is one of the few countries in the world to adopt a system of exclusive representation by majority rule. Most others have adopted some form of plural unionism which recognizes both the individual employee's right of association and an obligation on the part of employers to deal with them. In some systems, that obligation is owed to the most representative organization; but as Martin Vranken points out, "The presence of union pluralism . . . is not at all precluded by the requirement for unions to be most representative!"²⁴ for which a number of unions may qualify simultaneously.²⁵ Turkish law closely resembles the United States in that the "most representative" union must have a membership of 10% of the sector and a majority in the enterprise.²⁶ In Israel, however, a "special collective agreement" applicable to a particular employer or undertaking can be negotiated with the organization that represents the largest number of employees to whom the agreement will apply irrespective of their membership so long as it represents at least one-third of them.²⁷

Plural unionism avoids most disputes about whether the employee is represented; but it presents the reciprocal problem of how to manage or structure a workable bargaining system. In Japan, where each employee is represented by any union he or she chooses, from 10–13% of employers have more than one union representing workers in common classifications.²⁸ The employer may bargain to conclusion with the union representing a majority and insist upon those terms with the minority unions. If those unions refuse to agree, the employer may implement the agreed upon terms for the employees those union represent so long as the terms are

²⁴ MERTIN VRANKE, DEATH OF LABOUR LAW? COMPARATIVE PERSPECTIVES 85 (2009).

²⁵ *Id.* at 87–88.

²⁶ Contrary to official statistics, non-official sources estimate union density in Turkey at about 8% as of 2004. Melda Sur, *The Fundamentals and Limits of Managerial Prerogative in Turkish Labor Law*, 30 COMP. LAB. L. & POL'Y J. 313, 327 (2009).

²⁷ Collective Agreements Law of 1957 (as amended) [Israel] §§ 2, 3. I am indebted to Shelley Wallach for an up-to-date translation of this law.

²⁸ TAKASHI ARAKI, LABOR AND EMPLOYMENT LAW IN JAPAN 162 n.3 (2002).

“reasonable”—majority acceptance being a factor in the judicial determination of reasonableness.²⁹

The most interesting experiment in plural unionism is the recent Fair Work Australia law of 2009 (FWA), an elaborate and, to an outsider, maddeningly complicated system that resonates against the prior conservative government’s Workplace Relations Act of 1996, known as the “Work Choices” Act, which, in turn, radically altered the institutions of Australian labor law that had been stable for a hundred years.³⁰ Under the FWA, an “enterprise” collective agreement (for a non-greenfields enterprise) requires the employer to bargain with any employee organization if even a single employee of the enterprise is a member of it or with any person appointed by an employee,³¹ which could be the employee herself.³² It is possible therefore that an employer must bargain, and bargain in good faith, with a diverse group of unions, representatives of individual employees, and the self-represented all at the same bargaining table. However, in order to take effect an enterprise agreement must be approved by the agency that administers the Act, called Fair Work Australia, which in turn must be satisfied that the agreement has been “genuinely agreed to by the employees covered by the agreement”³³ by a vote of approval by a majority of the employees to be covered by it.³⁴

B. Co-Determination

The poster child of co-determination is the German Works Constitution Act (BVerfG), though there are analogous co-determinative systems elsewhere, *e.g.*, in Austria and the

²⁹ *Id.* at 57.

³⁰ A useful guide to the background is supplied by Andrew Stewart & Anthony Forsyth, *The Journey from Work Choices to Fair Work*, in FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY ch. 1 (Anthony Forsyth & Andrew Stewart eds., 2009).

³¹ § 176(1)(b), (c). Under § 174, employees must be given notice of their representational rights.

³² § 176(f).

³³ § 186(2)(a).

³⁴ §§ 181, 188.

Netherlands (by statute), in Sweden (where the union performs the function of a works council under the Swedish law), and Denmark where codetermination was established by an Agreement of Cooperation made with the confederation of trade unions. In the German system employees in almost every workplace are authorized to elect a works council, though in practice only employees in the larger enterprises do. The works council has extensive information sharing and consultation rights, *e.g.*, over health and safety, environment protection, manpower planning, training, and a good deal more. In companies with more than 100 permanent employees a works council finance committee must be established with which extensive data on finance, marketing, production, investment, transfer or reduction of operations, work methods, environmental policies, and more must be shared. But beyond this the works council is given co-determinative authority on a number of matters: work rules, work hours, leaves, safety regulations, work group performance, the introduction and use of technical devices to monitor the behavior or performance of the employees, and more. The employer may not act in these without the agreement of the works council; and such agreements are enforceable contracts. If the works council and the employer cannot agree the matter is to be resolved by binding arbitration, rarely resorted to.

C. Information Sharing and Consultation

There are a wide variety of systems of mandatory information sharing and consultation. Prior to the European Union Framework Directive requiring employee consultation and participation in matters of a workplace health and safety in 1989,³⁵ many states had already

³⁵ See generally Roger Blanpain, *Representation of Employees and Plant and Enterprise Level*, 15 INT'L ENCYCLOPEDIA OF COMPARATIVE LAW ch. 13 (1994).

legislated to that effect.³⁶ In 2002, the European Union adopted a Framework Directive mandating the member states to provide for information sharing and consultation in enterprises employing more than fifty employees,³⁷ following its directive for the establishment of European works councils (EWC) for qualifying multinational European employers.³⁸ Again, such systems were already in place—in Germany, as we have seen, but, with weaker rights, in France and Belgium, for example.³⁹ The scope of the EU obligation is set out directly:

2. Information and consultation shall cover:
 - (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
 - (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
 - (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).
3. Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.
4. Consultation shall take place:
 - (a) while ensuring that the timing, method and content thereof are appropriate;
 - (b) at the relevant level of management and representation, depending on the subject under discussion;

³⁶ Waclaw Szubert, *Safety and Health at Work*, 15 INT'L ENCYCLOPEDIA OF COMPARATIVE LAW ch. 7 (1983).

³⁷ Directive 2002/14/EC.

³⁸ See generally ROGER BLANPAIN, EUROPEAN WORKS COUNCILS (2009). The impact of EWCs is assessed by Ulrich Mückenberger, *Workers' Representation at the Plant and Enterprise Level*, in THE TRANSFORMATION OF LABOUR LAW IN EUROPE (Bob Hepple & Bruno Veneziani eds., 2009).

³⁹ Pélissier et al., *supra* note 39, at ch. 4.

- (c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees’ representatives are entitled to formulate;
- (d) in such a way as to enable employees’ representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
- (e) with a view to reach an agreement on decisions within the scope of the employer’s powers referred to in paragraph 2(c).⁴⁰

Note that on some critical matters—the transfer of an undertaking that may result in job loss or job loss due to plant closings or large-scale layoff (“collective redundancies”)—the consultative process must be carried on “with a view to reaching an agreement”⁴¹ which, as Simon Deakin and Gillian Morris point out, “take it close to collective bargaining.”⁴² Important for purposes here, the duty to consult with a view to reach an agreement with a representatives designated by the affected employees for that purpose means that employees who are not represented by a union must be given notice and an opportunity to elect representatives.⁴³

An even more comprehensive approach is taken in the Fair Work Australia statute. Consultation about future management decisions is a term to be negotiated in an enterprise agreement failing which a default “model consultation term” is implied by law.

Model consultation term⁴⁴

- (1) This term applies if:
 - (a) the employer has made a definite decision to introduce a major change to production, program, organization, structure, or technology in relation to its enterprise; and

⁴⁰ Article 5, Directive 2002/14/EC. Mandated information sharing and consultation was an alien concept in Great Britain. How the law has played out on such stony soil is explored by Aristeia Koukiadaki, *The establishment and operation of information sharing and consultation of employees’ arrangements in a capability-based framework*, 31 ECON. & INDUS. DEMOCRACY 365 (2010).

⁴¹ This pursuant to the Council Directive on Collective Redundancies, Art. § 1, 98/59/EC, and the Council Directive on Transfers of Undertakings, Art. 7, § 2, 2001/23/EC.

⁴² SIMON DEAKIN & GILLIAN MORRIS, *LABOUR LAW* 791 (5th ed. 2009).

⁴³ *Id.* at 802–06.

⁴⁴ Fair Work Regulation 2009, Schedule 2.3 (regulation 2.09).

- (b) the change is likely to have a significant effect on employees of the enterprise.
- (2) The employer must notify the relevant employees of the decision to introduce the major change.
- (3) The relevant employees may appoint a representative for the purposes of the procedures in this term.
- (4) If:
 - (a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and
 - (b) the employee or employees advise the employer of the identity of the representative;

the employer must recognise the representative.

- (5) As soon as practicable after making its decision, the employer must:
 - (a) discuss with the relevant employees:
 - (i) the introduction of the change; and
 - (ii) the effect the change is likely to have on the employees; and
 - (iii) measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and
 - (b) for the purposes of the discussion—provide, in writing, to the relevant employees:
 - (i) all relevant information about the change including the nature of the change proposed; and
 - (ii) information about the expected effects of the change on the employees; and
 - (iii) any other matters likely to affect the employees.
- (6) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.
- (7) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.

* * *

- (9) In this term, a major change is *likely to have a significant effect on employees* if it results in:
 - (a) the termination of the employment of employees; or

- (b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or
- (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
- (d) the alteration of hours of work; or
- (e) the need to retrain employees; or
- (f) the need to relocate employees to another workplace; or
- (g) the restructuring of jobs.

Turning to domestic law there is almost no provision for information sharing and consultation in the United States. On workplace safety, the Clinton administration proposed that employee safety committees should be mandated by federal law but, as Professor Estlund has observed, it fell victim to “the chronic gridlock of labor law reform.”⁴⁵ Thirteen states do mandate workplace safety committees, but few if any exist in the absence of union representation.⁴⁶ On plant closing or mass layoff, federal and cognate state laws provide for relatively brief notice to the affected employees,⁴⁷ but no provision is made for prior information sharing and consultation whether or not with a view to the making of an agreement before the decision is made.

III. Toward a Better Realization of Employee Voice

Meaningful employee interaction with employers is an active issue worldwide and, as we have seen, a variety of models have been adopted. Some—plural unionism, co-determination, information sharing and consultation, and individual self-representation—live alongside one another in a single jurisdiction. Yet in the United States only one legal model predominates, which has proven to be both ill tuned to the times and resistant to reform. In the shadow of that

⁴⁵ Estlund, *supra* note 2, at 80.

⁴⁶ Matthew Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees*, 5 U. PA. J. LAB. & EMP. L. 75 (2002).

⁴⁷ 29 U.S.C. §§ 2101–2108.

law, however, company unionism is apparently flourishing despite § 8(a)(2)⁴⁸ and many companies have signaled their support of employee affinity groups on the basis of sex or sexual orientation, race, disability, ethnicity, and more which can and do make claims and present grievances and which, to that extent, function as soft-bound forms of company supported members-only bargaining.⁴⁹ So, too, do employers deal with community based work centers that, akin to the Japanese community unions, are focused on particular immigrant groups but, in contrast to Japan, without a legal obligation on the part of employers to deal with them.⁵⁰ The question is whether the legal models we have reviewed have anything to offer and, if they do, what might be put in place.

A. Achievable Federal Legislation

Michael Piore and Sean Safford have argued that one reason for the collapse of the New Deal regime of collective bargaining lies in what they call a “shift in the social axes of

⁴⁸ John Goddard & Carola Frege, *Are “Company Unions” Taking Over and Does it Matter? Union Decline, Alternative Forms of Representation, and Authority Relations at Work* [working paper 2010] (on file with author).

⁴⁹ Michael Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization and the Challenge to Industrial Relations Theory* 9 (Working Paper of 16 March 2006):

In some companies . . . employee groups have been formally recognized and thus become the centerpiece of a firm’s “diversity initiatives”. IBM and AT&T each have over fifty groups including, at AT&T, Asian workers, African-American, Jewish, the disabled, Christians, former military personnel, women and a group for “over 40s”. Some constituencies have more than one network in place at the company. JP Morgan boasts that over 6,500 employees are involved in a variety of affinity groups. One estimate suggests that nearly 70% of large companies have at least one such network (Diversity Best Practices, 2001).

So in 1996, I proposed that we consider moving to a “members only” system of plural unionism. The proposal was criticized by Professor Gottesman in part on the prospect of the balkanization of bargaining along identity lines. Michael Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unionized Workers*, in *THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION* 57, 87 (Matthew Finkin ed., 1994). So, fourteen years on, we do seem to have such a balkanized system but without any legal scaffolding.

⁵⁰ Kim Moody, *Immigrant Workers and Labor/Community Organisations in the United States*, in *COMMUNITY UNIONISM*, *supra* note 23, at ch. 7; David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 *BERKELEY J. COMP. & LAB. L.* 469 (2006).

mobilization.”⁵¹ Today, the boundaries between the workplace, the home, and the community have become increasingly blurred. We are summoned to respond not, as in the past, to the centripetal forces of common economic circumstances that surmount racial and ethnical differences,⁵² but to the centrifugal forces of separate communal identities.

This provocative claim is grist for another mill. But it would blink at reality not to recognize that since the Labor Act was last significantly amended the labor market has become far more segmented occupationally and demographically. In addition, companies have come more and more to shed and acquire workers as skill set needs change, and the risk of adjustment to this, along with much else, has been shifted away from employers on to employees. The idea of a stable “bargaining unit” in a vortex of such change seems, in certain settings, strange and anachronistic. Meaningful employee interaction with employers in such a labor market presents a major challenge.

One partial legislative response would adjust the law of representation to the volatility of the demand for skills and the mobility of workers. In the construction trades workers are often trained under joint apprenticeship programs and certified workers are hired by unionized contractors for short-term project-based needs under pre-hire agreements permitted for that industry, but for that industry alone, under § 8(f) of the Act. There is no reason why such arrangements should not be permitted generally: for unions, in partnership with management, to keep a constant eye on sea changes in skill demand, to contract with vocational and technical schools, community colleges, and four-year institutions for training and upgrading, and to agree with employers to supply these highly qualified workers on an as-needed or project basis (perhaps to be retrained and upskilled in interim periods of unemployment) in return for

⁵¹ Piore & Safford, *supra* note 99, at 3.

⁵² See the masterful treatment by LISABETH COHEN, MAKING A NEW DEAL (1990).

agreements governing their wages and working conditions including contributions to portable pension systems and to education funds to recirculate into the program.

As the making of or exiting from such agreements would be voluntary it is not obvious that the expansion of § 8(f) need suffer from the paralysis of labor law reform. The proposal would merely eliminate a legal barrier to the achievement of mutually beneficial voluntary agreements with employers who see the benefit of it to them. Indeed, the Board could take a step in this direction by abandoning or significantly modifying the *Majestic Weaving*⁵³ doctrine which forbids a union from negotiating future terms and conditions of employment when it lacks a majority among an incumbent workforce. At a minimum, there is a significant difference between, on the one hand, imposing a union on the workforce whose representative status has not been consented-to by a majority (which *Majestic Weaving* mistakes to be the consequence of negotiating an agreement contingent on securing majority status), and, on the other, bargaining for the terms under which future employees, who have consented to be represented beforehand, will be employed.

B. The Protection of Individual Voice

The Labor Board cannot create employer obligations of meaningful employee interaction outside the structure of the Labor Act. But the Board can eradicate indefensible impediments to the exercise of voice under the Act. At a minimum, the Labor Board could return to the vast majority of workers the right to have a coworker present in a disciplinary interrogation; and, in conjunction with that, it could take the necessary next step of requiring employers to inform

⁵³ 147 NLRB 859 (1964) *enfd den.* 355 F.2d 854 (2d Cir. 1966). Professor Estreicher has argued for an allowance of pre-hire agreements but his discussion attends primarily to *Majestic Weaving* not to a broadening of § 8(f). Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 834–39 (1996). See also Andrew Strom, *Rethinking the NLRB's Approvals to Union Recognition Agreements*, 15 BERKELEY J. EMP. & LAB. L. 50 (1994).

interrogated employees of that right.⁵⁴ But that action, howsoever salutary, would be but a rather modest first step.

The Board could address the much larger questions of the right of the employee to invoke a protective law and to present any other work-related grievance without facing the prospect of discharge for having done so. The elements of the statutory theory of protection in the former situation were in place; they need only be refined, re-explained, and reasserted. The latter, however, entailing a major reinterpretation of § 7, would surely encounter stiff judicial resistance, especially from those in thrall of the dictionary.⁵⁵ But the historical undergirding for that step has been established⁵⁶ and the nonsensical, even perverse distinctions the Board and the courts draw under the current state of the law must surely appeal for a more coherent reading: it makes no earthly sense to have the question of whether an employee may ask for a pay increase turn on whether a coworker joins her in making it or to hold the discharge of an employee for requesting it to be unprotected whilst holding a coworker's protest about the unfairness of the discharge to be protected. Nowhere in the civilized world would an employer be allowed to discharge an employee merely for informing her employer that she believed her paycheck was

⁵⁴ Such was seen at the time as inherent in the analogy the Supreme Court applied of the industrially to the criminally accused. Silard, *Rights of the Accused Employee in Company Disciplinary Investigations*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SECOND ANNUAL CONFERENCE ON LABOR 217, 220–32 (T. Christensen & A. Christensen eds., 1970); Lewis H. Silverman & Michael J. Soltis, Weingarten: *An Old Trumpet Plays the Labor Circuit*, 32 LAB. L.J. 725, 736 (1981): “[I]f *Weingarten* has its roots in *Gideon* [whence the titular reference to Gideon’s Trumpet], can it be long before the Board discovers *Miranda*?” The Board refused to do so. *Montgomery Ward*, 269 NLRB 904 (1984).

⁵⁵ *E.g.*, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). One can only hope that Learned Hand might be heeded:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d cir. 1945) *aff’d*.

⁵⁶ Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 345 (1981).

inaccurate or for asking for a raise. As Robert Gorman and I argued thirty years ago, the history of § 7 evidences that “at the core of the freedom of the individual to protest in a group lies the freedom of the individual to protest at all.”⁵⁷ This is not to argue that it is politically possible here, as it is in New Zealand, to require employers, as a general principle, meaningfully to engage with their employees in the good faith negotiation of contracts of employment; but it is feasible to protect employees from retribution for seeking such engagement. Even were the effort to broaden the reach of § 7 to be rejected by the courts, the Board would at least have drawn public attention to the indefensible.

C. The Role of the States in the Provision of Meaningful Interaction

As there is no political prospect of amending the Labor Act to make collective representation more available and effective and as the Labor Board is confined by that law attention turns to the states. The role of the states as engines of legal innovation and experimentation in the law of employment is deep and abiding. My home state, for example, is the first to have legislated to deal with the collection and dissemination of employee biometric information⁵⁸ and the fourth to legislate on the use of credit histories for employment purposes,⁵⁹ cutting-edge issues both. But employee representation has come to be seen as so exclusively a federal function that the states have either felt no need to act or have been deterred by the prospect of preemption.

In terms of systems of information sharing and consultation, which several states already mandate in the matter of workplace safety, the federal obstacle would lie in the prohibition on company domination or interference in the administration of, or financial contribution to, a labor

⁵⁷ *Id.* at 345.

⁵⁸ ILCS 740:14/1 to 14/99 (2010 Supp.).

⁵⁹ Public Act 096-1426 (Illinois “Privacy Credit Act” 2010).

organization under § 8(a)(2). As all that is needed is an adequate assurance of the independence of the employees' representatives, that is not insurmountable.⁶⁰ But as the experience with mandated safety-committees in non-unionized settings evidences, top down mandates are not likely to work. Thus we need not dwell on the possibility of putting co-determination structures in place modeled on the German experience.⁶¹ It is more profitable to explore the role of the states in encouraging and accommodating meaningful employee interaction when that is sought to be exercised by employees, from the bottom up.

Models of information sharing and consultation have been adopted throughout Europe and in the antipodes. It is unlikely that a state would be quite so venturesome as to require so broad-based a system as Europe's or New Zealand's, *i.e.*, to require that a works council or the like be established upon employee request for it and which would run the gamut of employee concerns—business planning, environment policies, marketing and product design decisions, and more. But, as a first step, a state could well zero in on an issue or issues of critical importance among which the prospect of job loss looms large today as evidenced by the EU Directive on collective redundancies, in the law in New Zealand and Australia, and in the WARN Act in the United States.

In Europe, decisions affecting job loss must be consulted upon beforehand with representatives chosen by employees for that purpose and “with a view to reach agreement.” In

⁶⁰ See *supra* note 46. See also Martin Malin, *The Canadian Auto Workers—Magna International, Inc. Framework of Fairness Agreement: A U.S. Perspective*, 54 ST. LOUIS. U. L.J. 525 (2010).

⁶¹ Renewing Paul Weiler's call of two decades ago, Steven Befort and John Budd argue for the adoption of the German model. STEPHEN BEFORT & JOHN BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES* 181–86 (2009). Cynthia Estlund is sympathetic but argues that the idea has no political constituency. Estlund, *supra* note 2, at 171. But there are other than political reservations. The German system is historically rooted and inextricably tied to the supporting institutions of sectoral collective bargaining and fair dismissal law. Indeed, German works council members are protected while in office and for a year thereafter from any reduction in wages or work assignment. BVerfG § 37(4), (5). As James Gordley has argued, a foreign model's portability is lessened to the extent that it cannot be abstracted from a network of other legal rules or institutions. James Gordley, *When is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States*, 67 LA. L. REV. 1073 (2007). Such, I fear, is the case with works councils absent such institutional supports.

New Zealand, the employee(s) or their representatives must be given the information and good time and manner as to allow meaningful consultation which must be carried out in “good faith.” In Australia, the employer must give “prompt and genuine consideration” to what the employee’s representatives have to say after the decision is made but before it is implemented. In the United States, federal and some cognate state laws require notice of plant closing or mass layoff to be given to affected employees; but no law, federal or state, requires a process of meaningful interaction about the decision with employee representatives, selected on an ad hoc basis for that purpose, better to allow the affected workers, their families, and the communities to engage with the employer about possible alternatives to termination or means of adjustment before the decision is taken or implemented. Given the breadth of experience on that issue abroad, as much in common law as civil law jurisdictions, there is no good reason why a state should not be able to take such an approach here. Experience under such a law might provide a platform for the expansion of information sharing and consultation to other issues.

D. The Labor Board as an Agent of Change

As such a law would set up a mechanism to implement a form or forms of employee representation outside the Labor Act it would surely be challenged on the ground of federal preemption; and as the terrain is new the result is uncertain. Professor Estlund quite correctly points out that since the Taft-Hartley Act the law of federal labor preemption “essentially ousts the states . . . from tinkering with the machinery of union organizing, collective bargaining, and labor-management conflict.”⁶² Though the Board is authorized to make agreements with state agencies for the latter to assume jurisdiction in certain employments, the Board has taken the position that the state law must track the federal one in every respect as a precondition of such an

⁶² Estlund, *supra* note 2, at 42.

agreement⁶³; none have been made. Thus the preemption argument is that as Congress has provided only one model for the expression of employee voice—collective bargaining by an exclusive representative—the state cannot adopt alternative models even where, in executing them, the state would not be requiring anything federal law actually forbids. The theory would call for a total “occupation of the field” by federal law; and because it is so sweeping it becomes rather fragile. Could a state adopt a law modeled on New Zealand’s requiring employers to notify an employee that a decision is likely to affect her continuing employment and, at her request, to supply the information relevant to that decision and to allow her to comment on the decision before it is made? There would seem to be conceivable preemption objection to this. Could the state take the next step, to require that employer-employee interaction to be conducted “in good faith”? Again, there would seem to be no conceivable federal ground of objection. Could “good faith” require the interaction to be conducted with a “view to making an agreement”? Again, why not? Should the state be precluded from applying such a law when two employees would suffer job loss? Or, instead of self-representation, they chose to select a common representative? As Professor Estlund has argued, there really is no reason why the Labor Act should not be viewed as setting a floor of rights as, for example, does federal antidiscrimination law.⁶⁴ So long as the states are not commanding what federal law forbids or invading the zone of economic conflict meant to be left unregulated by any law there is no reason to view the Labor Act as so occupying the field as to preclude the states from making better, more fine-tuned accommodations to the exercise of employee voice by providing models other than the federal one.⁶⁵ In an area were nonsensical and perverse results abound it would

⁶³ See, e.g., *Produce Magic, Inc.*, 318 NLRB 1171 (1995).

⁶⁴ Estlund, *supra* note 2, at 41–44.

⁶⁵ Gottesman, *supra* note 49.

surely rank among them to hold a federal law that has failed to secure widespread worker representation to be an insurmountable barrier to the better realization of that end by the states.

Because the law of preemption in the hands of the judiciary the Labor Board's role is at once circumspect but potentially influential. To the extent the theory of preemption is grounded in a judge-made policy of state non-interference in a federal administrative scheme, the doctrine of primary jurisdiction should come in to play, not as deployed by the Court in *Garmon*,⁶⁶ as preclusive of state action, but in its true administrative law sense of ascertaining the considered judgment of the administrator of the scheme that is claimed to be interfered with.⁶⁷

The Board could take the initiative by formulating interpretive rules, guidelines, or advisory policy statements, to address what forms of state action it sees as complementing the federal scheme. The Board should see itself not as a labor court, passively awaiting cases to be brought to it, but as an administrative agency with the capacity to set its own agenda. That agenda, as set out the NLRA's Findings and Policies, is to "encourage[] practices fundamental to the adjustment of industrial disputes . . . by restoring equality of bargaining power between employers and employees," *i.e.*, to encourage meaningful employee interaction with employers, to restore employee voice. Consequently, the Board could educate itself on alternative models of employee interaction, perhaps by sponsoring a conference or conferences involving university researchers, federal and state officials, unions and other non-governmental organizations and by serving as a clearinghouse thereafter, perhaps in conjunction with the Federal Mediation and Conciliation Service. On the basis of its understanding of desirable practice the Board could encourage the states to act, proposing model state laws, and, critically, defining how *it* sees these laws in the context of federalism and the Board's role in it. As preemption doctrine is judge-

⁶⁶ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

⁶⁷ RICHARD PIERCE, SIDNEY SHAPIRO & PAUL VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 5.8 (5th ed. 2009).

made the Board's address would be only advisory; but, should one or more states respond to the call and should those responses be challenged on preemption grounds, the challenge would have to explain why the considered judgment of the agency, whose role in the administration of the law may be central to the preemption claim, should be disregarded.

It asks a great deal of the Board to invite the states to assume an activist role in employee representation. But as the Board's role is to encourage meaningful employee voice and as the Act has failed to do so it falls to the Board to place its mission in a broader perspective. The Board can strive better to enforce the floor of rights under the model it was given even as it encourages other models that give employees voice by other means