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### Structure of Labor Relations

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## HOWARD LESNICK\*

The central problem that Ms. Stone addresses—a problem long thought troublesome for democratic theory—is the fundamental one of justification. In a society committed to democratic values and the equality of all people, how do we justify a working order committed to hierarchy, authority, and obedience? The theory that she calls industrial pluralism responds to the problem by suggesting that the workplace is not an enclave of private power and domination in an otherwise free and democratic society, but that it is rather a place subject to democratic processes much like those that prevail in our public life. As in the larger democracy, the conditions of the work place are said to prevail through the consent of the governed.

The legislative analogy suggests that the parties bargain and mutually agree; although of course there are always winners and losers in particular cases, the system is basically a democratic one. It is justifiable for the winners to win, because of that process.

The Stone paper accurately describes this function of the notion of industrial pluralism. I think that Ms. Stone is also right in asserting that, in fact, there is not substantial equality of power between employers and employees. While there may be particular companies where employees are very strong, in general there is substantial inequality of power in one direction; and because the theory of industrial pluralism tends to mask this empirical truth, our attention tends to be diverted from it.

This occurs in ways that are more complex than I can begin to spell out here. One method is what Ms. Stone calls privatization. By routing the setting of the substantive conditions of employment to negotiations that are regarded as private matters, generally not subject to legal regulation, we support the tendency not to care, as a society, about what the actual conditions of work are; what the pay figures in the contract are, whether this particular contract has a subcontracting clause or not, and so on. Of course that response simply mirrors, in a very important way, the general process orientation of our liberal values, that is, the equation of fair procedure with justice—the idea that, so long as the union had a fair opportunity to negotiate, the result is fair.

David Feller, who effectively represented unions for many years, says that of course there is too much inequality. The point is that the prevailing structure of thought tends to keep pulling us away from acknowledging that. David, your example is really an eloquent confirmation of that process. The Baldwin Piano Works has a very tight management prerogatives clause, and of course you don't like it. No one accuses you of liking it, and no one accuses the theory of industrial pluralism of having caused it. Its cause is the power and militancy of the company. But the very example you use, and the way you develop it, are the core of the problem we are

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considering. Your account echoes, and reinforces, the tendency to view the state of affairs that prevails as legitimate and as presumptively just, or at least as a private matter. Indeed, you began to suggest—and then had to take it back—that for every Baldwin contract, there may be found one with an equal and opposite treatment, where the union has subcontracting buttoned up tight. You took it back because you realize that such an assumption is wildly fanciful; far from 50-50, or 40-60, or whatever, there are probably barely three percent of the second kind of contract and many, many examples like Baldwin. Because of your experience and outlook, the prevailing theory can do no more than tug at your sense of reality, but your example illustrates the power of the theory to divert our attention from the substantive conditions of work and tend to make us think that prevailing conditions are fair, acceptable, or at least the best we can expect.

I want to comment briefly on the notion of joint sovereignty, another central and most interesting aspect of Ms. Stone's paper. It is clearly true that such a concept was very much the ethic of the people who attempted to structure a liberal labor law. And their vision was of something quite genuinely joint. To that degree, they were seeking to resolve the contradiction between a political order committed to democratic participation by a fully enfranchised citizenry and an economic order committed to hierarchy and authority, by enfranchising workers to participate in the governance of their work life. What I take Ms. Stone to be saying—and what I think is true and central—is that although the notion of joint sovereignty presupposes a significant input from labor as well as management in determining the range of important labor relations questions, law and practice have not developed that way.

That state of affairs is not a recent phenomenon. Those who follow labor law are very conscious, because of *First National Maintenance*<sup>1</sup> and other cases and causes, of how the scope of mandatory bargaining seems to be suddenly collapsing. But there is a far longer relevant history. The *Borg-Warner*<sup>2</sup> decision established the principle that the outer limits of the scope of bargaining are defined and enforced by law. Of course it is true, as David suggests, that unions can get around that decision (just as all people and institutions can get around legal restrictions to some significant degree). The fact remains that, not only are the outer limits of compelled bargaining set by the law, the decision to bargain in fact beyond that range is said by the law to be protected from economic pressure. The inner limits of actual bargaining, however, are explicitly made subject to economic power. Thirty years ago the *American National Insurance*<sup>3</sup> decision accepted the principle

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1. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

2. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1953).

3. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404-09 (1952).

that management prerogatives clauses are negotiable. Management is therefore free to use its economic power to contract the sphere of joint control, and labor is not legally free to use its power to expand it.

The significance of *American National Insurance* goes far beyond the asymmetry I have described. There is a direct link between the principle of that decision and the Baldwin Piano Works. So long as an employer is willing to deal with its workers collectively, and to bargain in fact, the law leaves the actual fate of the principle of joint sovereignty to be decided by economic power.

*First National Maintenance* makes clear the extent of the law's rejection of the premise of the principle of joint sovereignty, that the concept of mandatory bargaining will remain broad and fluid. It is very important to realize that it is not a sufficient answer to the question of the significance of that rejection, simply to regret or criticize it. Certainly, the decisions involved were not inevitable, and might have come out differently but for a few too many unfortunate occupants of seats on the Supreme Court in recent years. That truth should not make us lose sight of the more basic fact that the decisions are neither accidents (of bad lawyering or bad facts) nor mavericks. There has been a long-term trend in the interpretation of the National Labor Relations Act, which tends to accommodate it increasingly to the ideological value system that gave rise to the need for the Act. That development is an extremely complex and fundamental matter, which two of this morning's panelists, Jim Atleson and Karl Klare, have begun to write about in a challenging and thought-provoking way. As we approach the fiftieth anniversary of the passage of the Act in 1935, the time is certainly appropriate to attempt to examine the matter fully. I believe that, if we were to look at the duty to bargain (the good faith concept and the scope of mandatory bargaining), the right to strike, the jurisdiction of the Board, the election process, the grievance and arbitral processes, we would see a long-term secular trend of increasing accommodation to values that predated the Act, and an increasing trivialization, if you will, of the reach of the Act. What has happened to the scope of mandatory bargaining simply reflects that development.

Of course it would be fatuous to blame that series of developments on the ideology of union lawyers or liberal academics, or to blame it on anyone. What is true, however, is that this long-term tendency is facilitated by the liberal ideology expressed, to a significant degree, by the notions of joint sovereignty and industrial pluralism.

Arbitration is a good example. I believe that Ms. Stone is right when she asserts that the ways in which arbitration tends to channel and institutionalize conflict reenforce inequality. That does not at all deny that arbitration also performs and was designed to perform functions that enhance accountability and limit discretion of management in ways that provide important protection to workers. But we have been trumpeting the values of arbitration in that second way for several decades now, and should be able

to find room at the same time to acknowledge that arbitration individualizes grievances and thereby tends to weaken the joint control idea.

Moreover, we too easily lose sight of the extent to which arbitration has accommodated itself to the prevailing preference for order, authority and productivity, and the like. To say that grievants do very well in arbitration when they are fired is really to demonstrate the phenomenon eloquently. I don't think that thirty or forty years ago one would have reacted that way to the decisions that are coming down today. When an employee is fired and eleven months later is reinstated without backpay, he or she has in a very real sense been fined ten or fifteen thousand dollars for an offense. There is almost no offense that an individual—especially one earning eighteen thousand dollars a year—can commit in the public order that carries with it a fifteen thousand dollar fine. Yet that is not regarded as an extremely serious penalty; it is regarded as “getting off,” but without back pay.

Ms. Stone cites some arbitral awards from the twenties, some by William Leierson, one of the architects of the theory of industrial pluralism, that illustrate graphically how our frame of reference has shifted profoundly (if imperceptibly) over the years. In one, an arbitrator ordered the company not to lay people off, but to spread and share the work equally; another prevented subcontracting in the name of industrial self-government; one approved featherbedding devices for displaced workers; another ordered the discharge of supervisors as a response to a worker's complaint of abusive treatment. Our norms have changed little by little over the years, but enough time has gone by that the distance we have traveled has become vast.

It is very difficult to understand that process of change, and the task is not one of assessing blame. What I think is true, however, is that doctrines like *Lincoln Mills*<sup>4</sup> and the Steelworkers Trilogy<sup>5</sup> began by serving the function of enhanced worker self-determination, and went on to disserve it. Ms. Stone's unwillingness to give much credence to the first part of that dynamic may justifiably get some of us older folk angry, but it is the rightness of the second part that I have been paying attention to now and suggest that we ought to be willing to pay attention to.

The process is one by which the law has not challenged, but rather has tried to accommodate itself to, basic premises about work and democracy. One premise, of course, is the equation of justice with process, which goes far beyond labor law and is endemic to law, indeed endemic to public life. A second is our commitment to hierarchy as a necessary predicate of production, a panicky fear that if we question hierarchy more than a certain minimal amount, we will soon all be living in rags, and eating raw meat or (worse yet) raw vegetables. A third is our traditional consciousness of work,

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4. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

5. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

which legitimates the view that we treat an employee not as a person, but as a portion of a person hiring out that portion to do a job. The liberal ideas of industrial pluralism and joint sovereignty, like our labor law, took on the job of doing the best they could in that world without challenging its premises. What Ms. Stone has done is to show us how little we can do without challenging those premises.