COMMENT ON WEISS

CRAIG BECKER

On March 23, 1988, the United States Supreme Court rejected a constitutional challenge to a 1981 amendment to the Food Stamp Act which provided that no household could become eligible to receive food stamps during the time that any of its members was on strike (*Lyng* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 108 S. Ct. 1184 [1988]).[1] At the same time, the West German Parliament amended the Act of Employment Promotion to disqualify from unemployment benefits all employees thrown out of work by an industrial conflict who are represented by a union which asserts claims "equal in kind and in extent" to those which are the subject of the dispute (p. 763). This amendment is currently being challenged before the West German Constitutional Court (p. 764). These attempts to withdraw state support from striking workers and those indirectly affected by work stoppages, whether they be the striker's family or workers in another region, are but one of the parallels between West German and United States labor law brought to mind by a reading of Professor Weiss's article.

Existing comparative studies of labor law have emphasized what Derek Bok called "the distinctive character of American labor laws" (Bok, 1971: 1394).[2] These studies have sought to root the unique American system of labor relations in differences in culture or social organization (Bok, 1971) or, conversely, to explore the implication of a distinctive legal ideology for the American labor movement (Forbath, 1987; Rogers, 1987). This focus on differences has also raised the question of "transplantation": whether and under what circumstances it is possible "to use a pattern of law outside the environment of its origin" (Kahn-Freund, 1974: 27). But perhaps precisely because Weiss's article is not expressly comparative, it raises doubts about the "exceptionalist" premise of this body of comparative work. By focusing not on the broad outlines of West German regulation of labor, but rather on current tensions within the law, Weiss's article allows us to perceive that despite vast differences between the West German and American systems—differences in the form and extent of labor organization,

[1] The amendment also provided that a household's allotment of stamps could not be increased because the income of a striking member decreased.

[2] See also Mathews (1953: 63–89), Lenhoff (1951), Summers (1966), and Aaron (1982).

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in the legal regulation of labor relations, and, generally, in the relationship between state and society in the two nations—when industrial conflict spills into the courts, it centers on the same set of legal issues in both countries. For each respect in which Weiss finds West German employers and unions are attempting to "redefin[e] the system according to their respective needs" (p. 760), a parallel exists in the United States.

This is not to underestimate the differences between the two nations. In 1982, 37.1 percent of West German workers were union members compared to 17.8 percent in the United States.[3] Moreover, 90 percent of West German workers enjoy terms of employment negotiated by unions, but fewer than 30 percent of U.S. workers benefit from union contracts (Summers, 1980: 377). West German unions are also far more centralized than American unions. West Germany has one-tenth the number of national unions which exist in the United States, and the ten largest unions represent more than 90 percent of union members in West Germany, but only 48 percent in the United States.[4]

These differences in the extent and nature of organization are matched by differences in the law. West German law does not provide for government-supervised representation elections, or adopt the principle of majority rule, or enforce unions' right to be the exclusive representative of all employees in a designated unit whether the employees are union members or not. Technically, collective bargaining agreements in West Germany govern only the terms of employment of union members, but, in practice, employers apply their provisions to members and nonmembers, and West German law provides for extending the terms of an agreement to employers who have not consented to be bound if at least half the workers in the relevant geographic area are covered by the agreement (Summers, 1980: 377–78). Collective agreements in West Germany set only the minimum terms of employment and may not provide for any type of union security. Outside the arena of collective bargaining, West German law creates a separate form of worker participation known as codetermination. Outlined by Weiss (pp. 768–70),[5] the system of codetermination provides both for elected works councils in each plant and for worker representation on companies' supervisory boards. And even a worker not covered by a collective agreement is protected by West German law against "socially unwarranted dismissal."[6] An employer must

[3] Troy and Sheflin, *Union Sourcebook* (1985: 3–10, 7–17). Cited in Rogers (1987: 25). The U.S. percentage dropped to 16.8 in 1988 (Daily Labor Report No. 18 at B-13, January 30, 1989).

[4] Windmuller (1981: 49–50). The figure is for 1977–78. Cited in Rogers (1987: 28).

[5] See also Summers (1980).

[6] Summers (1976: 511) quoting Law of August 10, 1951, An Act to Provide Protection against Unwarranted Dismissals [1951] BGB1 I 499 § 1(2).

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consult the works council before giving notice to the employee and, if the council objects, must retain the employee until the matter is resolved by the labor courts.[7]

It is these differences that make all the more striking the parallels between the "basic debates" within the West German labor relations system and those currently reverberating in the courts and administrative tribunals in the United States. Although Weiss fails to group or categorize the controversies he discusses, they revolve around three central issues: the scope and form of worker participation in management, the bounds of institutionalized conflict between labor and management, and the role of the state in this conflict.

Weiss's discussion of the scope of collective bargaining highlights the tension between, on the one hand, workers' right to bargain over "working and economic conditions," which is founded in the constitutional guarantee of freedom of association, and, on the other, respect for "management's prerogatives," which arises from constitutional protection of private property (p. 765). Precisely the same tension exists in the United States between the statutory duty, defined in the Wagner Act, to bargain over "wages, hours and other terms and conditions of employment" (29 U.S.C. § 158(a)(5)) and a conception, as Justice Potter Stewart articulated it, of an inviolate "core of entrepreneurial control" (*Fibreboard* v. *NLRB*, 379 U.S. 203, 223 [1964]). As in West Germany, this conflict has arisen most sharply and appeared to be most irreconcilable in the area of investment decisions (p. 765).[8]

Intimately connected to questions concerning the scope of employee participation are concerns about its form. Weiss describes an ongoing legal debate about whether workers can increase their representation on companies' supervisory boards through collective bargaining. In the United States, unions have negotiated for representation on the boards of directors of companies in the automobile, airline, trucking, and food processing industries.[9] In addition, unions have granted wage and work-rule concessions in exchange for shares of stock, giving workers an ownership interest and thus a direct voice in the management of their employers (Stone, 1988: 78). But these new forms of participation have only complicated the basic question of the proper scope of worker participation, entangling it in issues of tactics, diversion, and cooptation and problems of corporate law as well as raising new questions of labor law.

By directing attention to the "new mobility" and the "level" of collective bargaining as well as the controlling principles of *ultima*

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[7] Ibid.

[8] See, e.g., *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981) (no duty to bargain over partial closing).

[9] "Labor's Voice on Corporate Boards: Good or Bad?" *Business Week* 151 (May 7, 1984), 152–53, cited in Stone (1988: 77, n.21).

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ratio and the "peace obligation" (pp. 761–62, 767–68), Weiss's essay also highlights escalating controversy over the legitimacy of particular tactics within legal systems designed to institutionalize conflict between labor and management. Litigation in West Germany concerning the "new mobility" finds its American parallel in management's efforts to deprive labor of all means of exerting pressure short of a full-scale strike upon impasse in bargaining—including sit-down strikes (*NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 256-57 [1939]), diverse "in-plant" tactics,[10] and "corporate campaigns."[11] Similarly, West German construction of the "peace obligation" is replicated here in interpretation of both express and implied no-strike clauses in collective agreements. As Weiss notes, each of these issues implicates "the balance of power between the parties" (p. 767). Sensitive to the close link between legal rules and structural conflict, courts and scholars have confronted these issues by formulating two divergent modes of analysis: a formal approach that elaborates existing legal rules without continually reconfronting the underlying question of power, and an empirical method that investigates respective bargaining power and seeks to readjust the balance (p. 768).

Finally, Weiss's discussion of the denial of state support to employees thrown out of work as a consequence of strikes sheds light on the problem of the state's "neutrality" in labor disputes (p. 763). The same problem is raised in the United States both by the federal government's recent disqualification of strikers and their families from receiving food stamps (*Lyng*, 108 S. Ct. 1184 [1988]) and by a host of state statutes depriving strikers of unemployment compensation (D.C. Code Section 46-111[f]). The limits set on entitlement programs expose how the state's exercise of authority outside the bounds of direct regulation of the employment relation necessarily compromises its putative role as a neutral in administering the labor relations system. The exercise of such authority and its effect on labor-management relations is even more obvious, of course, in the state's protection of private property. Weiss argues that the system of law itself may predispose state actors against the interests of organized labor. He contends that the West German civil law has an "individualistic structure" and therefore that current attempts to "reintegrate" labor law into the civil law have grave implications for collective action (p. 770). Similar arguments have recently been made with respect to the common law tradition in the United States (Tomlins, 1985). These arguments suggest that neutrality is "an empty concept" and

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[10] See, e.g., *Phelps Dodge Copper Prods. Corp.*, 101 NLRB 360, 368 (1952) (slowdown); *Pacific Tel. and Tel. Co.*, 107 NLRB 1547, 1549–1550 (1954) (intermittent stoppage).

[11] See, e.g., *Texas Air Corp., et al.* v. *Air Line Pilots Assoc., et al.*, No. 88-0804-CIV-HOEVELER (S.D., Fla.) (use of racketeering statute to attack array of union tactics including corporate campaign).

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demonstrate why both labor and management, during periods of heightened conflict, seek "to influence through the law the instruments of the law of collective labor bargaining" (pp. 760, 765).

Weiss's survey of recent trends in West German labor law allows us new perspective on U.S. labor law. Rather than taking a comparative approach, sketching the outlines of institutions and rules governing West German labor relations, and contrasting those in the United States, he provides a detailed view of chronic and emerging tensions in the West German system. His interpretation would have been enhanced by further attention to the social and ideological forces guiding industrial conflict into particular legal forms; and so, too, would fuller description of the political landscape have heightened our understanding of how these tensions stand to be resolved and the relevant legal rules reformulated. Nevertheless, Weiss's focus permits us to see that despite enduring differences in the industrial relations of West Germany and the United States, the contemporary "climate of conflict" between labor and management is expressed in common legal forms in the two countries.

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