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THE DUTY TO BARGAIN OVER LAYOFFS IN OTHER WESTERN COUNTRIES: A VIEW FROM AN AMERICAN PERSPECTIVE

Athanassios Papaioannou*

The value in learning that others follow different premises to different conclusions is not to prove that ours are wrong, but to compel us to confront the question whether ours is right. . . . At the very least, we are encouraged to think the unthinkable and to consider the possibility of that which has been assumed impossible. 1

I. INTRODUCTION

During the last decade, industrial relations in the United States have been pressured and strained by the recession of the early eighties and strong foreign competition. It was in this decade that many American employers reduced their workforce as a means to cut labor costs and increase competitiveness. 2

Due to the rampant layoffs, 3 American unions shifted their attention from bargaining on wage increases to bargaining for increased job security. Management, however, was often not willing to discuss job security issues. They argued this was a business decision and was part of the managerial prerogative. 4 Furthermore, manage-

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2. Aaron, Plant Closings: American and Comparative Perspectives, 59 CHI.-KENT L. REV. 941 (1983) (stating that "a sign of our current economic plight [is] that the problem of plant closings, including partial shutdowns and relocations, is now high on the list of national concerns.").

3. Id. at 941 (stating that during the first three months of 1982, 350,000 United States workers lost their jobs either permanently or temporarily).

4. See Young, The Question of Managerial Prerogatives, 16 INDUS. LAB. & REL. REV. 240 (1963) (presenting management's approach to the issue and a very interesting critique of its acceptance by the courts). Although Young's article was written more than two decades
ment argued, and convinced the courts, that unions did not have the right to strike and press for such negotiations since those issues were considered to be outside the scope of the employer's duty to bargain.  

Unsurprisingly, much litigation arose out of these issues. Labor disputes best resolved in the workplace or on a legislative level were finally resolved in the courtrooms. The courts, as well as the National Labor Relations Board, since 1983, did not prove to be very friendly toward unions. In a series of decisions the courts significantly limited the duty to bargain and considerably undermined the national policy favoring collective bargaining as a means of resolving labor disputes, a policy that was expressed in the National Labor Relations Act of 1935 (hereinafter "N.L.R.A.").

The restrictive approach taken by American jurisprudence does not provide adequate solutions to the increasing demands of a modern economy that requires more cooperative industrial relations, including increased dialogue and flow of information between labor and management. Thus, the initiative has been left to the inventiveness and the good will of the parties.

In addition, American labor jurisprudence has been remarkably out of touch with the developments in other Western countries. There, major legislative reforms have been in place since the early seventies when the first signs of economic crisis became apparent. The reforms were aimed at broadening the dialogue between employers and employees over the crucial issue of job security.

This paper will examine the developments in other Western countries and contrast them with the situation in the United States.

ago, its validity remains intact.


This is not an attempt to suggest a lighthearted transplanting of foreign legal systems and institutions. Labor law is one area of law where reforms based solely on foreign models would create many problems. Labor law provisions do not exist in a vacuum. They take their substance under the given political, economic and social relations of the country where they are enacted. Given the inherently political nature of labor law, one cannot ignore the particular conditions of a given legal system and simply hope that its success in regulating labor relations in one country will be equally successful in another.

However, one should not underestimate the importance of studying how other countries have dealt with the problem of bargaining over layoffs. Among the major Western countries, the American system gives the least influence to employees regarding decisions which may deprive them of their jobs. In addition, the American system does not encourage the broadening of the workers' role in the running of their companies. Other countries have developed more elaborate and more comprehensive systems for protecting the interests of both the workers and their companies. These systems have not destroyed the capitalist system or eliminated the “free enterprise” economy as several American employers and writers would have us believe. Countries that have developed these industrial relations systems, such as the Federal Republic of Germany (hereinafter “F.R.G.”), Sweden, and Japan, are noted for their economic stabil-
ity and social prosperity, as well as for the fact that their companies are among the most competitive ones in the world.¹³

This paper does not argue that it was solely because of their industrial relations that these countries achieved such a strong position in the world economy. However, it suffices that their labor law systems have not prevented these countries from achieving their economic goals while offering better protection to their workers than the U.S. offers.

Thus, by showing that no cataclysmic effects have been brought to those countries by such labor legislation, this article hopes to support the idea that American labor law should broaden the employer's duty to bargain so that it covers decisions that lead to the loss of jobs. Opponents of such reforms may then be more inclined to discuss the problem in realistic rather than apocalyptic terms.

The first part of this article provides an overall description of the different developments of the duty to bargain over layoffs in the U.S. and in the other Western countries.¹⁴ The second part details the various ways that other countries have promoted the right of workers to participate in decisions that threaten their jobs.¹⁵ The discussion will focus on the legal systems of the F.R.G., France, Japan, Sweden and the United Kingdom (hereinafter "U.K."), although references to other countries will be made.¹⁶ This limitation is primarily dictated by the fact that these are the Western countries whose legal systems of labor relations provide a wide variety of ways to deal with the complex problem of bargaining over layoffs. In addition, comparing the industrial relations of these countries with those of America's is more relevant due to the parity of economic development.¹⁷

Although the narrow scope of this comparison demands general observations about the various countries rather than a detailed discussion of each legal system, every effort will be made to avoid misleading analogies and generalizations that underscore the differ-

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¹⁴ See infra text accompanying notes 24-83.
¹⁵ See infra text accompanying notes 84-193.
¹⁶ The author's familiarity with Greece's industrial relations accounts for some of the particular references made to that country.
¹⁷ See Clarke, Industrial Relations in a Changing Economic Environment: The Post-war Experience of Advanced Market Economies, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 39 (R. Blanpain ed. 1985) [hereinafter COMPARATIVE LABOR LAW] (providing a brief account of how the industrialized countries have dealt with their relations in the economic crisis of the last two decades).
The third part of this article will briefly compare the individual protections offered to workers in a variety of countries. This is not the main concern of our study, but it is offered because knowledge of the protections that individual workers enjoy by social legislation will enable a better understanding of the balance of power between unions and employers during negotiations over layoff decisions.

The article will conclude with a general assessment of the development of the duty to bargain in other Western countries, some comments about the limits that reality imposes on the labor systems of Western countries, and a rebuttal to some of the most common misperceptions that exist in the U.S. about the industrial relations systems of other countries.

II. A General Overview

Historically, the duty to bargain over layoffs was nonexistent. In Sweden it was commonly accepted, especially since the so-called December Compromise between the unions and the employers in 1906, which determined that the employer had the right to “direct and distribute the work, to hire and dismiss workers at will, and to employ workers whether they are organized or not.”

In France, collective bargaining traditionally takes place on an industry level and, until recently, was only concerned with monetary issues such as wages, paid vacations, etc.

In the F.R.G., collective bargaining traditionally took place on a regional and industry level and never encompassed issues such as job security. In fact, the works councils did not have, up until 1972,
the extensive consultation and codetermination powers that they now enjoy.29

In the U.K., the laissez-faire approach is the cornerstone of its industrial relations policies.30 The duty to bargain never arose as a main issue on the legislative level until the seventies.31

In Japan, the concept of lifetime employment and the belief that labor disputes must always be discussed between the employer and his workers has existed since the Second World War. However, it was not until the seventies that the system was tested under the strain of the multiple international economic crises that occurred in industrial relations.32

Finally, the European Economic Community (hereinafter "E.E.C."), which was conceived to play a major role in the implementation of labor policies by emphasizing the need for consultation between the two parties, did not develop an elaborate policy on social issues concerning industrial relations until 1974 when the "Social Action Programme" was approved by the Council of Ministers of the E.E.C.33

* * *

The economic crisis of the seventies, which brought a prolonged recession, was the chief catalyst of proworker policies. While major industries faced acute problems in adjusting to the new economic conditions and implementing "rationalization" programs, unions became increasingly concerned about the effects of recession upon their members' jobs and thus shifted their focus from wages to job security, demanding increased bargaining and more protection against these "rationalization" plans.34

Meanwhile, in most European countries governments composed

29. See infra text accompanying notes 89-111.
31. Summers, Comparative Perspectives, supra note 11, at 149.
of Social-Democrats were in power and the fight against unemployment became a top priority. Some countries tried to find solutions by getting directly involved in the labor market and Sweden's Labor Market Board is a most characteristic example. Other countries, such as the F.R.G., adopted comprehensive procedures which enabled the parties to find solutions to their common problems.

Moreover, during the seventies union membership rose and unions reached the peak of their political and social power.

However, the economic crisis of the seventies cannot alone explain the changes in the labor policies of Western countries. Another major factor was the social unrest of the late sixties, which came about, in part, as a result of the deep discontentment with the existing social systems and their lack of respect for the dreams and the needs of the individual. This social strife had important ramifications for Western labor relations. One major source of the people's

35. In the F.R.G. the Social-Democrats ruled from 1969 until 1982. In Sweden they have been in power since the thirties and lost it only temporarily in 1976. In the U.K. the Labour Party was in power from 1974 until 1979.

In France, although the socialists did not come into power until 1981, the center-wing government which ruled France during the seventies was faithful to the populist ideology of De Gaulle. Thus, it showed a sensitivity to issues of industrial relations unconnected with the American concepts of market economy and laissez-faire labor policies of the eighties. Reynaud, France, in INDUSTRIAL DEMOCRACY, supra note 26, at 55; see also France, in EUROPEAN INDUSTRIAL RELATIONS, supra note 28, at 180-99 (providing an account of the protective legislation passed by conservative governments in France).


38. See infra text accompanying notes 93-102 (discussing this in more detail).

39. In the U.K. for example, the late seventies saw the apogee of the unions' membership, accompanied by a militancy with hardly any precedent, in the post-war era. See Price, Union Growth in Britain: Retrospect and Prospect, 21 BRIT. J. INDUS. REL. 46, 46-47 (1983).

But the influence of unions in a given country is not measured by their membership. In France for example, where the percentage of union membership has been traditionally low, unions' position was favored by the protective policies followed by the governments of the seventies. See supra note 35 (discussing France).


41. Cf. BARKIN, The Third Postwar Decade (1965-75): Progress, Activism and Tension, in WORKER MILITANCY, supra note 40, at 2 [hereinafter Barkin, The Third Postwar Decade] (saying that the people called "for fundamental changes in the structure of the capitalist system to make it more consistent with the visions of employees and trade union movements."); Clarke, supra note 17, at 51 (saying that the uprising of the late sixties "tested an existing social order, including sometimes the leadership of [the] trade unions.").
discontent was the alienating nature of their jobs, which fostered resentment for the way that their workplaces were run.42 The employees asked for more participation in decisions that affected their lives and claimed property rights in their jobs.43

Futhermore, union members were dissatisfied with the bureaucratic and alienating nature of their unions.44 This was evident in Central and Northern Europe, especially in France45 and Sweden46 where the unions had become highly centralized bureaucracies that rarely heard the voices of their members.

Unions tried to respond to this internal challenge to their authority by pressing for the satisfaction of their members’ demands. Thus, in countries like Sweden, the F.R.G., and France, extensive legislation was enacted bringing some degree of democracy and participation in the decisionmaking process of the companies.47

A clear tendency toward decentralization of industrial relations appeared in France,48 Sweden,49 Italy (to a certain extent),50 and the F.R.G.51 The increased role of works councils is merely one aspect of this decentralization trend.52 The trend satisfied the grassroots de-

42. See generally Kirchlechner, New Demands or the Demands of New Groups? Three Case Studies, in CLASS CONFLICT, supra note 40, at 161-76.

43. See also Barkin, The Third Postwar Decade, supra note 41, at 2 (saying that the people demanded “sweeping improvements in terms of employment, working conditions, and worker and trade union rights in the economy and political life.”); cf. Harrison, Closure Notification in Western Europe, in DEINDUSTRIALIZATION, supra note 36, at 229 (stating that “[t]he idea that the workers should have a legally justifiable collective bargaining right to ‘notify and consult’ emerged in western Europe as a widespread political issue in the wake of the mass labor unrest of the years 1968-69.”).

44. Cf. A. CAREW, DEMOCRACY AND GOVERNMENT IN EUROPEAN TRADE UNIONS 172 (1976) (discussing a “rank and file revolt”).

45. The impressive increase in the membership of the socialist C.F.D.T. which emphasized grass-root politics and advocated the “auto-gestion” of the factories has a lot to do with this public feeling. The same can be said about the decline in the force of the highly centralized, communist C.G.T.U. See Raynaud, Elitist Society Inhibits Articulated Bargaining, in WORKER MILITANCY AND ITS CONSEQUENCES, 279 (S. Barkin ed. 2nd ed. 1983) (providing the two unions approaches).

46. See Summers, Worker Participation, supra note 5, at 214-16.

47. In the U.K. there was no similar movement and this may be attributed to the limited effect that the social unrest of the late sixties had upon that country.


52. See Barkin, Summary and Conclusion: Redesigning Collective Bargaining and Capitalism, in WORKER MILITANCY, supra note 40, at 384 [hereinafter Barkin, Summary and
mand for more involvement in the running of the companies and the unions. It was also adopted by employers who found centralized industrial relations an impediment to making the readjustments that would meet the needs of the changing economic environment. More decentralized bargaining and agreements meant more flexibility, and this was precisely what the individual employer needed during a crisis period.

The trend of decentralization and company-level agreements facilitated the increased requirements of consultation before workforce reductions and other issues related to productivity could take place. Some aspects of these decisions are still negotiated on a more centralized level and some are even statutorily regulated, for example severance payments and advance-notice periods. In addition, procedural matters, such as the manner of consultations, can also be regulated from the top. However, bargaining over managerial decisions such as a merger, a closure, or reorganization which involves workforce reductions, must be discussed on the company level. This is because the decision demands an accurate appreciation of the partic-

Conclusion] (stating that the works councils “grew out of the demand for workers representatives in the shop, employers’ resistance to adversary relations with unions, and the desire of governments for cooperative attitudes between the parties.”)(emphasis added)).

53. See Barkin, Summary and Conclusion, supra note 52, at 398-99; cf. Clarke, supra note 17, at 46 (stating that “[i]f enterprise bargaining is the predominant level, there are clear advantages in respect of relating negotiations to productivity, profitability, and the conditions of the local labour markets.”). But see Eyraud & Tchobanian, supra note 48, at 244 (describing the fear of French employers that company-level negotiations may limit their managerial prerogatives).

54. See Raynaud, supra note 45, at 284-85.


[T]he most crucial factor explaining the decentralization of the American system is, in my view, the breadth of subjects regulated by collective bargaining. Because collective agreements in the United States reach subjects that relate so directly to working conditions, the production processes, the kind of work performed, and the employees’ rights at the workplace, negotiations on many of these matters must be decentralized.

Id.

56. See infra text accompanying notes 218-27 (discussing advance notice periods).

57. An example was the national agreement reached in Sweden between employers and unions in 1982 which imposed the procedures for the collective bargaining at the company-level. See infra note 126 and accompanying text.

58. See, e.g., Summers, Worker Participation, supra note 5, at 194 (stating that in Sweden “[b]oth the unions and the employers seem to agree, at least in principle, that the functions of codetermination . . . must be performed by the local organization dealing directly with the individual employer.”); see also infra text accompanying notes 130-42 (discussing the duty to bargain over layoffs in Britain); infra text accompanying notes 92-102 (discussing the F.R.G. where the bargaining over these issues takes place between the employer and his works council).
ular financial situation of the company. Thus, the decentralization of collective labor relations by new legal provisions and labor institutions has overcome the long established customs and attitudes of employers, unions and governments, and has broadened the workers' role in decisions affecting the very existence of their jobs.

Based on the European experience, as described herein, it is easy to assume that the same two factors would lead to a need for workers and their representatives in the United States to play a bigger part in layoff decisions. The first factor is the prolonged recession that continued until the early eighties and shifted the unions' focus from wages to the preservation of their members' jobs. The second factor is the decentralized nature of the collective bargaining process, that provides the appropriate structure for bargaining over job-security issues. However, there are a number of political, social and ideological factors that have determined the direction that American industrial relations have taken from those of the major Western countries as previously discussed.

The main political reason for this difference is that labor did not have the strong support of any political party. Consequently, the necessary legislative reforms, which would protect the interests of the workers as a class, were not initiated. An active policy on the part of Congress to promote the workers' interests and encourage unionism has been absent since the Roosevelt era. In the last two decades, despite the increasing social and economic problems that

59. See Summers, Worker Participation, supra note 5, at 192.
60. See supra notes 55-58 and accompanying text; cf. J. Crips, Industrial Democracy in Western Europe 16 (1970) (arguing that "because collective bargaining in Western Europe has tended to be more national or regional in character, other mechanisms were bound to emerge to serve the more parochial company and plant level concerns of workers."). But see Lawrence, Union Responses to Plant Closures, in Deindustrialization, supra note 36, at 211 (arguing that plant-bargaining, as is usually the level of bargaining in the U.S., over investment decisions is not effective, in contrast to company-level bargaining).
62. See supra text accompanying notes 48-56. But see Lawrence, supra note 60, at 211.
63. See Hooks, supra note 37, at 247 (stating that "[s]ocial welfare reformers have lacked the support of either a powerful aristocracy or a socialist movement. . . . As a consequence, they have met with only partial successes and many failures."); see also Galenson, The Historical Role of American Trade Unionism, in Unions in Transition 65 (S. Lipset ed. 1986) (noting that the unions' links with the Democratic Party have nothing to do with the links of their European counterparts with their countries' political parties).
64. See Summers, Comparative Perspectives, supra note 11, at 142 (finding a shift from the 1930s public policy of encouraging collective bargaining and unionization to a post-war "legal neutrality or indifference"); see also Edelman, New Deal Sensitivity to Labor Interests, in Labor and the New Deal 180-81 (M. Derber & E. Young eds. 1957) (noting President Roosevelt's stance on the issue was rather ambiguous).
American labor faces, there has been no major piece of legislation that would promote the interests of labor as a social group. And while at one end the unions had no success making legislative advances, at the other end they lost all judicial battles as they could not persuade the judges to expand the scope of the duty to bargain.

Thus, unions have no political tools to advance their cause and their only weapon, economic action, was rendered impotent by recession.

On a social and ideological level, the situation for unions and workers is by no means better. Union membership had fallen below 20% of the nonagricultural labor force, and society has shown, since the end of the war, a persistent hostility towards organized labor. Unions are considered corrupt, bureaucratic and nonrepresentative of their members' interests, while their claims for bargaining are viewed as an impediment to the efficient functioning of companies. By contrast, businessmen are esteemed and admired by society and their opinions are given great deference by the media, politicians and the people.

Lastly, the predominance of classical economics in academia,
coupled with the frequent use of the vague notion of efficiency versus fairness, has raised questions regarding the utility of unions as social institutions.\footnote{73.}{73} Theoretical issues that were solved long ago in other Western countries reappear now in the United States, questioning the very need for the existence of unions.\footnote{74.}{74}

Consequently, American unions have not been able to become powerful political institutions that could serve as the voice of protest for the working people.\footnote{76.}{76} The movement of the sixties took place without the support or the participation of most American unions, and actually occurred in spite of the opposition of several unions that supported the Vietnam war.\footnote{79.}{79} Because American unions have been a very conservative social force (at least when compared with their counterparts in other western countries) they have been unable to build the powerful social alliances that would enable them to promote their aims.\footnote{77.}{77} Thus lacking any stable and influential political allies, they lost the battle.\footnote{78.}{78}

Finally, it is often emphasized that a major role was played by the adversarial attitude of unions towards employers in the U.S. and their reluctance to support forms of industrial democracy.\footnote{79.}{79} These attitudes may account for a lack of progress in the implementation of institutional forms of worker participation (such as participation on the boards of directors or works councils).\footnote{80.}{80} It is irrelevant as to

\footnote{73.}{73. For anyone accustomed to other western countries' perceptions of unions, it is surprising to see highly esteemed academics in the U.S. arguing that the main function of unions is to facilitate the cartelization of the labor market. See, e.g., Posner, Some Economics of Labor Law, 51 U. CHI. L. REV. 988, 990 (1984). The important social and political functions that unions fulfill in a modern society, when they are free to successfully operate, are undermined or ignored.}

\footnote{74.}{74. See, e.g., Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 YALE L.J. 1357, 1394-98 (1983) (criticizing governmental intervention to encourage collective bargaining).}

\footnote{75.}{75. Cf. Clarke, supra note 17, at 43 (stating that "[v]irtually from the beginning of the post-1973 era, the trade unions found themselves the major force, internationally, in expressing disagreement, even alarm, at the policies on which governments were embarking.").}

\footnote{76.}{76. Rosen, The United States: A Time for Reassessment, in WORKER MILITANCY supra note 40, at 342-43.}

\footnote{77.}{77. See id.}

\footnote{78.}{78. See M. GOLDFIELD, supra note 67, at 11 (noting that the American unions are the only ones in the Western world with a steady decline since the 1950s).}

\footnote{79.}{79. See, e.g., Duties, supra note 8, at 565.}

\footnote{80.}{80. This is why those forms of participation have basically prospered in countries like the F.R.G. where labor relations are rather consensual. Cf. J. CRISPO, supra note 60, at 112 (noting that the language used by the German statute for the works councils "is hardly the language of collective bargaining and industrial relations in the normally accepted interpretation of those terms, [r]ather it is directed towards more consensual, constructive and harmonious relations between employers and employees.").}
noninstitutional forms of participation (such as collective bargain-
ing), which in fact are based on the hypothesis of adversarial rela-
tions. Consequently, American unions have always attempted to
bargain with employers over a wide variety of issues. Due to the
hostility of employers, however, these efforts have been largely un-
successful, making each success, like that of the auto-industry,
(where management found it beneficial to bargain with the powerful
U.A.W. and grant some forms of job security to its employees),
note-worthy.

III. THE MEANS CHOSEN TO INVOLVE LABOR IN LAYOFF
DECISIONS

There are basically three ways in that industrialized countries
have enabled labor to participate in decisions affecting job security:
(1) the establishment of works councils with consultation and/or
codetermination rights; (2) the broadening of the duty to bargain
or consult with the unions regarding such decisions; and (3) the
establishment of labor representation in the boards of directors or
the supervisory boards of companies. Most industrialized countries,
with the major exceptions of the U.S. and the U.K., have chosen a
combination of at least two of the aforementioned means of labor
participation. Each of these means demand separate examination.

A. Works Councils

Many countries have opted to create the institution of works coun-
cils. These may be defined as a committee of workers, elected by the
entire workforce of a particular company or plant, that is authorized
to receive information and be consulted by the employer on a whole

81. See Note, Employee Codetermination: Origins in Germany, Present Practice in Eu-
    rope, and Applicability to the U.S., 14 HARV. J. ON LEGIS. 947, 988 (1977) (authored by J.
Bautz Bonanno) (stating that “[w]hile bargaining is undoubtedly itself a form of codetermi-
nation, it is a form which is reactive and adversarial rather than participatory and cooperative.”).
82. See Summers, Worker Participation, supra note 5, at 187 (saying that American
unions have never conceded to the employees the prerogatives that their Swedish counterparts
did until the seventies).
83. Cf. Comment, The Saturnization of American Plants: Infringement or Expansion of
Workers' Rights, 72 MINN. L. REV. 173 (1987) (authored by Lori M. Beranek). But see
84. See infra notes 89-96 and accompanying text.
85. See infra notes 97-111 and accompanying text.
86. See infra notes 112-57 and accompanying text.
87. See infra notes 158-93 and accompanying text.
88. See infra notes 130-45 and accompanying text (discussing systems of labor partici-
pation in the U.S. and U.K.).
range of issues.

This institution of labor participation in the company's affairs dates back to the early twenties when the Weimar Constitution of Germany provided for its creation. This was due, in part, to an effort by the state and the unions to integrate the working class, which had just been involved in a bloody revolution after the Great War. In the same decade, works councils were established in Austria, Denmark, Norway and Czechoslovakia. Abolished by the Nazi regime, the works councils were reestablished in the F.R.G. after World War II by the workers themselves, and were encouraged by the Occupation Forces, particularly the U.K. Subsequently, works councils have evolved into what has been rightfully called the "center-piece, or the backbone of workers' participation in the Federal Republic of Germany." For our purposes however, the most important development was the 1972 legislative reform implemented by the social-democratic government of Willy Brandt in the F.R.G., which substantially broadened the powers of the councils.

German works councils, established in companies with at least five employees, must be informed and consulted when management considers massive layoffs, or when an employer contemplates decisions that "entail substantial prejudice to the staff or a large sector thereof." The employer must "consult over the decision itself," to use the American terminology. Such decisions involving plant closures, mergers, relocations, reorganization and "rationalization measures," for example, are the kinds of decisions that American jurisprudence under the N.L.R.A., and to a certain degree under the Railway Labor Act (hereinafter "R.L.A."), have found to belong to the sacrosanct area of the employers' exclusive discretion.

89. W. Kolvenbach, Employee Councils in European Companies 110 (1978).
91. Id. at 135-36.
94. See also id. at 148.
95. The Supreme Court has on several occasions ruled that "managerial decisions, which lie at the core of entrepreneurial control," are not mandatory subjects of bargaining. Fibreboard Paper Prods. v. NLRB, 379 U.S. 204, 223 (1964) (Stewart, J., concurring); see also Pittsburgh & Lake Erie R.R. v. RLEA, 109 S.Ct. 2584 (1989) (holding that an employer who decides to sell a business does not have a duty to bargain); First Nat'l Maintenance v.
As far as the effects of these decisions are concerned, the works councils have codetermination rights. In these cases, the employer must present to the works council a proposal that will mitigate the effects of the decision upon the employees.\textsuperscript{97} If the two parties cannot reach an agreement, the dispute is submitted to the binding authority of a tripartite Arbitration Commission,\textsuperscript{98} which formulates a so-called “social plan” to provide for the compensation of the laid-off workers, retraining programs, etc.\textsuperscript{99}

Thus, the management prerogative is retained where the decision itself is concerned, although, unlike N.L.R.A. caselaw, there is a consultation duty. However, the effects of this decision are not part of the prerogative, and the employer has to abide by the rulings of the arbitration committee. This sharing of authority over the effects of the decision ultimately affects the employer’s authority over the decision itself. As one commentator said, “the prospect of the works council insisting on a costly social plan causes employers to work out an agreement with the works council as to the changes to be made so as to minimize the impact on the workforce or avoid a social plan entirely.”\textsuperscript{100} In light of this remark, the inability of the works councils to call a strike\textsuperscript{101} does not prevent the councils from affecting the decision of the employer.\textsuperscript{102}

In addition to the F.R.G, other countries have adopted similar provisions, even though their works councils have fewer powers. In France, for example, the so-called “shop committees” have consultation rights. There, the works councils are required to be established

\textsuperscript{97} Summers, Comparative Perspectives, supra note 11, at 148.

\textsuperscript{98} Weiss, The Role of Neutrals in the Resolution of Interest Disputes in the Federal Republic of Germany, 10 COMP. LAB. L.J. 339, 351 (1989) [hereinafter Weiss, The Role of Neutrals in Germany].

\textsuperscript{99} Bosch, West Germany, in WORKFORCE REDUCTION, supra note 32, at 179.

\textsuperscript{100} Summers, Comparative Perspectives, supra note 11, at 148. In order to have a more complete picture of the power of the works councils in these consultations, one must also consider their broad information rights about which we will talk later. See infra text accompanying notes 197-212.


\textsuperscript{102} See Weiss, Industrial Employment Rights: Focusing on Job Security in the Federal Republic of Germany, 67 NEB. L. REV. 82, 97 (1988) [hereinafter Weiss, Industrial Employment Rights] (stating that “[t]he mere possibility of the works councils involvement in many cases may lead the employer to exclude dismissal as an instrument of personnel policy; without facing such difficulties [i.e. negotiations with the council and binding arbitration], dismissal would be used.”).
in all companies with fifty or more employees.\textsuperscript{103} The law, passed in October 1982 by the socialist government of Mitterand, substantially expanded the issues on which the employer must consult the shop committees before making a decision.\textsuperscript{104} Thus, the committee must be consulted about decisions affecting the size and the structure of the workforce, layoffs and even decisions such as major investments, acquisitions, or sales of branches, mergers, etc.\textsuperscript{105} Unlike the German works councils, no codetermination rights are given to the French commit.\textsuperscript{106} Nevertheless, the opportunity that the workers have, as a matter of law, to influence the decisions that affect their jobs is much greater than it is in the U.S.\textsuperscript{107}

Many other European countries including Denmark, the Netherlands, and Belgium, have also established the institution of the works councils.\textsuperscript{108} In general, the authority of the works councils has been significantly expanded in all Western European countries in the past two decades.\textsuperscript{109} The works councils seem to be the best accommodation of the workers' desire to have more impact on job security issues on the one hand, and the employers' traditional resentment towards any interference by the unions on the other.\textsuperscript{110} Employers generally look upon works councils as part of their corporations, whereas unions are considered outsiders.\textsuperscript{111}

\textbf{B. The Duty to Bargain or to Consult}

Other countries, such as Sweden and the U.K. have chosen another path to protect the workers' right to influence layoff decisions by es-

\textsuperscript{103} Glendon, \textit{supra} note 27, at 463.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} at 465.
\textsuperscript{107} Compare the French provisions with the American judicial approach. \textit{See, e.g., supra} note 96 and accompanying text (providing an example).

A similar labor institution, established in practice but not by law, is the Japanese joint consultative committees. \textit{See} Okamoto, \textit{Japan}, in \textit{INDUSTRIAL DEMOCRACY, supra} note 26, at 201-05 (characterizing them as the "most significant institutional arrangement for worker participation . . . operating in Japan.").
\textsuperscript{109} \textit{See, e.g., Austria, Changes to the Works Constitution Act}, 152 EUR. INDUS. REL. REV. 28 (Sept. 1986).

Even in countries with no previous experience with this institution, some pieces of legislation have recently been introduced. \textit{See, e.g., Greece, ILO Convention 135 Ratified}, 156 EUR. INDUS. REL. REV. 5 (Jan. 1987).
\textsuperscript{110} Cf. T. DeVos, \textit{supra} note 90, at 168 (stating that "[i]n firms whose workers are not unionized, works councils and higher pay can help prevent workers from becoming unionized and union leaders from directly influencing company policy.").
\textsuperscript{111} \textit{Id.}
establishing the duty of the employer to bargain or consult with his company's union before making such decisions. These were mainly countries with no strong tradition of works councils, like Sweden, or where the traditional hostility between employers and organized labor did not leave much chance for the success of the institutional and cooperative form of worker participation embodied in the works councils.

The best example is Sweden. As previously stated, until the seventies, the management prerogative to control the reduction of the company's workforce was well established by national collective agreements. However, in the social turmoil of the late sixties and the economic instability of the seventies, the unions, and particularly L.O., pressed the friendly government of the Social-Democrats to pass legislation that would require employers to bargain over issues of job security. The Codetermination Act of 1976, passed with the consensus of public opinion, over the opposition of the right wing parties, and despite the fierce reactions of the employers' association (hereinafter "S.A.F.") is probably the most advanced piece of legislation in Europe concerning the employer's duty to bargain with unions.

The duty to bargain over layoffs can be found in two sections of the Swedish statute. Section 10 states that the union has the right to negotiate with the employer "on any matter relating to the relationship between the employer and any member of the organization who has been employed by that employer." In section 11 the Act further establishes a duty of the employer to negotiate, on his own initiative, any "important alteration to his activity" or any "important alteration of work or employment conditions for employees who

112. See infra notes 118-37 and accompanying text.
113. See Comment, The European Community's Draft Fifth Directive: British Resistance and Community Procedures, 10 COMP. LAB. L.J. 429, 449 (1989) [hereinafter Resistance] (stating that, in the U.K., "[t]he ingrained adversarial relationship between unions and management will not support a system that requires cooperation, mental flexibility and attempts to listen to each other.").
114. See supra notes 24-25 and accompanying text.
115. This aspect of the managerial prerogative had been upheld by the Swedish courts. See Elvander, Sweden, in INDUSTRIAL DEMOCRACY, supra note 26, at 146.
117. Cf. Fahlbeck, The Role Of Neutrals in the Resolution of Industrial Disputes in Sweden, 10 COMP. LAB. L.J. 391, 397 (1989) [hereinafter Fahlbeck, The Role of Neutrals in Sweden] (stating that "the broad scope of the duty to bargain leaves virtually nothing outside the area of collective bargaining.").
belong to the organization." So as to leave no doubt regarding the scope of the duty to bargain, the introductory text of the bill stipulates that "[t]he Act shall be interpreted as an expression of the opinion that it is no longer the employer alone who can make decisions, but that decision making shall be divided between employer and employee through negotiation and agreement." Coupled with a liberal interpretation of the Act by the Swedish courts, the new law leaves no room for the employer to claim any prerogative to exclude collective bargaining over workforce reductions. In Sweden as in other countries, the ultimate authority to make these decisions still rests with the employer, but in Sweden, few strikes result.

The strike activity that Sweden has experienced in the eighties has for the most part been concerned with wage increase issues on a national level, and does not seem to have affected job security bargaining at the company level. This is impressive because the issue of layoff bargaining is not easily handled, as demonstrated by the fact that national negotiations over the procedural details of layoff bargaining took several years before being successfully concluded in 1982. Before concluding the discussion of Swedish law, two additional points demonstrating its overall philosophy should be mentioned. First, the unions have veto power over a decision of the employer to subcontract. Second, and probably most important, is the

120. EUROPEAN INDUSTRIAL RELATIONS, supra note 28, at 49 (emphasis added).
121. See Summers, Worker Participation, supra note 5, at 199 (citing several such decisions).
122. Summers, Comparative Perspectives, supra note 11, at 146.
123. Summers, Worker Participation, supra note 5, at 212 (stating that "[t]he codetermination system as it is now being developed seems to contemplate that the unions' economic strength will not be used to influence the employers' decisions. . . . The effectiveness of the employee's participation will be limited to the employer's willingness to listen and be persuaded.").
125. Where labor relations are centralized, as in Sweden, (if despite the aforementioned recent trends, see supra text accompanying note 49) and industrial conflict escalates to a multi-company level, bargaining over layoffs on a company-level is rather unlikely to end up in a strike. See Summers, Worker Participation, supra note 5, at 190. Unless absolutely necessary, no party risks a major confrontation over a dispute in one individual company. Id. Closely related to this lack of strikes on a company-level is the preference of Swedish unions for political rather than economic action. See Summers, The Usefulness of Unions in a Major Industrial Society- A Comparative Sketch, 58 Tul. L. REV. 1409, 1427 (1984) [hereinafter Summers, The Usefulness of Unions].
126. See Summers, Worker Participation, supra note 5, at 210; see also Sweden, in EUROPEAN INDUSTRIAL RELATIONS, supra note 28, at 51.
127. Gospel, supra note 30, at 347; cf. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 204 (1964) (ruling that bargaining over subcontracting is required, but no veto power is given to the union).
provision of the law that gives the unions a priority of interpretation of their collective agreement. In other words, if a union argues that an employer's decision is violating an agreement that he made under the codetermination law, the employer may not implement his decision until the issue is adjudicated.

The United Kingdom is another country whose laws require bargaining over layoffs. Generally, in the U.K., both parties (especially the unions) have resisted any regulation of industrial relations imposed by Parliament. However, the Employment Protection Act of 1975 was passed as part of the Social Contract made between the Labour Government and the unions to avoid inflationary wage increases. The law established the duty of the employer to consult with the recognized union over redundancies at the earliest opportunity.

The employer also has to consult with the recognized union when he contemplates transferring the ownership of his company. In compliance with the relevant E.E.C. directive, the Thatcher government (with some delay and an apparent reluctance) issued the Transfer of Undertakings Regulations in 1981. According to the Regulations, which apply only to the transfer of ownership of a company as an ongoing concern, the employer must inform the recognized union about the decision to transfer the enterprise and consult with the union about the effects that the transaction will have upon the employees. The Regulation, like the E.E.C. directive, says that the existing employment contracts, which play an important role in England, are automatically assumed by the new employer.

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129. Id. at 161 (explaining the reasoning of the provision as “[t]he legislative intention is not to encourage the established union continually to use its priority of interpretation, [o]n the contrary, the power is considered as a means to exert pressure on the employer in order to induce him to come to amicable solutions for differences over interpretation.”).

130. Resistance, supra note 113, at 443-44.

131. J. CRISPO, supra note 60, at 58.

132. If an employer is going to dismiss at least 100 or more employees, it must consult with the union at least 90 days in advance of the first dismissal; if the number of the employees to be dismissed is 10 or more then the required minimum advance-notice period is 30 days. See LORD WEDDERBURN, THE WORKER AND THE LAW 295 (1986).

133. Duties, supra note 8, at 576.

134. Id. at 576-77.

135. See LORD WEDDERBURN, supra note 132, at 300 (emphasizing that the decision is considered fact).

136. Cf. Duties, supra note 8, at 577 (citing § 8(1) of the Transfer of Undertakings Regulations 1981). The collective bargaining agreement situation is different from that of the European directive where it is explicitly stated that the agreements continue to exist after the
nally, in conformity with the E.E.C. directive, the regulation provides that no dismissal will take place as a result of the transfer itself, but does allow dismissals for an “economic, technical or organizational reason entailing changes in the workforce.”

Generally speaking, the consultation requirements under British law are weak compared to those of other Western countries and are further weakened by the fact that the employer is bound to bargain only with a “recognized union,” (a union with which he has already signed a contract). Moreover, the courts, faithful to their antiunion tradition, have on several occasions interpreted these provisions narrowly. Thus, like any legislation regulating collective bargaining, the consultation legislation had a limited effect upon British industrial relations.

In the case of redundancies, however, British law offers worker’s more protection than American law. In Britain, the trade unions are permitted to strike if the employer refuses to bargain over such issues. This weapon is not always effective in the case of redundancies, but it offers more protection than American labor law, which forbids the unions to strike over nonmandatory issues of bargaining.

Generally, under the influence of the directives on collective redundancies and the transfer of undertakings, and under the pressure of trade unions and public opinion, all Western European countries have more or less provided substantial consultation rights to the unions or the works councils with respect to proposed work force reduc-

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137. Duties, supra note 8, at 577.

138. See Lord Wedderburn, supra note 132, at 298 (mentioning the I.L.O.’s position is, in interpreting its guidelines on multinationals, that where no union is recognized by the employer, the latter should consult with the workers’ representatives); see also Docksey, Information and Consultation of Employees: The United Kingdom and the Vredeling Directive, 49 Mod. L. Rev. 281, 307 (1986) (suggesting that Britain should adopt the Greek system of consultation, whereby, if no union exists in a company the employer must consult with the workers’ representatives who are elected by them ad hoc for the purposes of the particular consultation).

139. See Duties, supra note 8, at 577.

140. Cf. Gospel, supra note 30, at 351 (stating that “legislation in the area of recognition. . . has had only limited impact on the collective bargaining system in Britain.”).

141. Summers, Comparative Perspectives, supra note 11, at 149.

In comparison, American law, as interpreted in First National Maintenance, maintains that job security bargaining involves only the effects of an employer's decision, yet it is still not clear when the effects bargaining must begin in order to be effective. In comparison, American law, as interpreted in First National Maintenance, maintains that job security bargaining involves only the effects of an employer's decision, yet it is still not clear when the effects bargaining must begin in order to be effective. The situation worsens when the dispute decision is a merger that, according to caselaw, nullifies the previous collective bargaining agreement and places the union representing the merged company's work force under the threat of decertification. Finally, the Japanese system also differs from the American system regarding the matter of bargaining over layoffs. Although, as previously mentioned, the basis of Japanese labor law is the N.R.L.A., the collective bargaining practice is quite different. Aided by the decentralized structure of Japanese industrial relations, the Japanese employer consults and bargains with the union on any change in the conduct of his business that might lead to workforce reductions. Unlike the American system, no distinction is made between mandatory and permissive subjects for bargaining and "in fact almost all the issues over which the employer has any control are regarded as coming within the scope of bargaining." Thus, consultation with unions or joint consultative committees, or works councils, previously mentioned, extend to issues that are outside the scope of the duty to bargain under the N.L.R.A., issues such as sales and investment policies. Arbitration is not considered an efficient alternative to collective bargaining in Japan, as it is inconsistent with the desire to find coop-


146. See supra note 9 (discussing this).

147. Summers, Comparative Perspectives, supra note 11, at 151 (stating that "[t]he law has little relevance to the bargaining process, for employers accept the principle of joint decision making with the enterprise union.").

148. See Hanami, Japan, in WORKFORCE REDUCTIONS IN UNDERTAKINGS 174 (E. Yemin ed. 1982) [hereinafter UNDERTAKINGS].

149. T. HANAMI, LABOUR LAW AND INDUSTRIAL RELATIONS IN JAPAN 121, 122 (1985) (also saying that "in enterprises where union-management relations are more mature, they [the two parties] will agree to avoid unnecessary and useless confrontation; [sic] settling the matter instead by mutual understanding in the form of consultation.").

150. See supra text accompanying notes 89-111.

151. W. GOULD, supra note 9, at 12-13.
erative solutions rather than confrontational settlements. Litigation is very infrequent in the case of labor disputes since it is commonly accepted that the courts are not the appropriate forum to solve “internal” problems. Instead, solutions to these issues are arrived at by a commonly accepted practice, not imposed upon the parties by law. This practice reflects the tendency of the Japanese employers not to choose workforce reductions unless they are absolutely necessary. As one commentator said, “Japanese firms have evolved a system of graded steps for reducing . . workers in all but the most stringent of circumstances.” The same commentator has observed that “[o]ne is left with the impression that so far, the problem [of dealing with workforce reductions] has been well managed by internal standards.”

C. Labor Representation on Corporate Boards

The introduction of worker representation on corporate boards, be they boards of directors or supervisory boards, allows workers to influence management decisions, including but not limited to decisions regarding layoffs.

This system, unlike other means of workers’ participation in managerial decisions, has not expanded much in the Western world. This is due not only to the employers’ resistance to such reforms, but also to unions fears, in most countries (with the notable exception of the F.R.G.), that board participation will give them too little power by integrating the labor movement into the capitalist system in such a way as to cause the workers to identify with the company rather than with their own class. This also explains the resistance
of the highly politicized unions of France, Italy, and to a great extent, the U.K. towards labor representation on corporate boards. Even the Swedish unions, which actively and successfully pressed for the passage of a statute establishing labor’s participation on the boards of directors, do not see it as a means of achieving actual codetermination of the company’s affairs; rather they perceive it as the way to secure all of the necessary information about the company so as to successfully conduct collective bargaining.

Today, this institution has been implemented only in the E.E.C. countries of Denmark, Luxembourg and the F.R.G. and in the Western countries of Sweden and Austria.

There are two ways of involving labor in corporate boards and each country’s choice is based on its system of corporate administration. One way, which is applied in the F.R.G, involves the participation of workers in supervisory boards that are separated from the boards of directors. The other way, which is simpler and technically easier to apply in the United States, involves the participation

“traditionally suspicious of board level worker representation as a system prone to ‘ensnaring workers’ representatives within the enterprise, . . . ’” (quoting LORD WEDDERBURN, THE WORKER AND THE LAW 66 (1986)); see also Waschke, supra note 108, at 93 (saying in regard to the French unions that “[w]ith their ideological attachment to the principle of confrontation between unions and management they reject any idea of co-determination or co-operation with the capitalistic system.”).

160. The Bullock Report of the mid-seventies suggested the introduction of labor representation in the corporate boards and had the support of the Labour Party which was then in government. The report was buried under the turmoil of the 1979 strikes and the coming into power of the conservatives. This concept of institutionalized participation in the company’s affairs never found warm support among organized labor in the U.K.. See J. ELLIOTT, CONFLICT OR COOPERATION? THE GROWTH OF INDUSTRIAL DEMOCRACY 221-63 (1978) (providing an analytical account of the Bullock Report and the initial reactions to it).

161. See J. CRISPO, supra note 60, at 49, 97.

162. Waschke, supra note 108, at 91-100.

In the Netherlands, a unique system of participation exists in which the workers, while not directly represented in the boards, may veto the appointments made by the shareholders or the management to the supervisory boards through their works councils. See Albeda, The Netherlands, in INDUSTRIAL DEMOCRACY, supra note 26, at 119-22.

In Greece, the socialist government elected in 1981 attempted to introduce worker representation on supervisory boards by composing these boards of representatives of management, unions, government, and various social groups. See Law 1385/1983. The boards would be established on an industry-regional-wide level. Although this law was passed in Parliament, the strong opposition of the employers and the relatively indifferent attitude of several unions prevented the law from actually being implemented. See generally MITROPOULOS, I ELLINIKI EMPIRIA TON EPOPTICON SYMVOULION (The Greek Experience With the Supervisory Boards) 1985 Synd. Epith. 8.

163. See Vagt, Reforming the "Modern" Corporation: Perspectives from the German, 80 HARV. L. REV. 23, 50-53 (1966) (illustrating the supervisory board’s role in German corporations).
of workers on the boards of directors (the Swedish system). Since the German and the Swedish systems of codetermination are the most representative of the two forms of institutional codetermination, an examination of each, with an eye towards assessing the role they can play in the decision making process when layoffs are contemplated by management, is in order.

In Germany, there are three systems of labor representation on supervisory boards. The first and more liberal system governs the steel and coal industries, which have played a very important role in the development of the F.R.G. The Codetermination Statute concerning these industries was passed in 1951 and applies to joint stock and limited liability companies with more than 1,000 employees. The composition of the board is based upon the parity principle. The worker representatives are selected by the works councils, the union that covers the company’s employees and the German Federation of Labor (hereinafter “D.G.B.”). An independent person is elected by the equally divided board, and his vote breaks the rarely occurring tie. The labor director, who is a member of the managing board of the company, has extensive authority and will be appointed by the supervisory board, unless this appointment is vetoed by a majority of the workers’ representatives on the board.

The second system of worker representation on the supervisory boards in the F.R.G. is also based, theoretically, on the parity principle, and applies to companies with more than 2,000 employees in industries other than coal and steel. The Codetermination Act of May 4, 1976 was passed notwithstanding the fierce reactions of German employers and American multinationals with subsidiaries in the

164. See infra text accompanying notes 181-93.
165. See supra note 158 and accompanying text.
166. T. DeVos, supra note 90, at 140.
167. Waschke, supra note 108, at 94.
168. J. Crispo, supra note 60, at 84.
169. If the two parties do not agree on the selection of this person, then the ultimate authority lies with the shareholders. However, as one commentator said, this has never occurred. See Waschke, supra note 108, at 94.
170. See Vagts, supra note 163, at 68. Cf. Mueckenberger, Labor Law and Industrial Relations, in ECONOMIC CRISIS, TRADE UNIONS AND THE STATE 252-53 (O. Jaccobi, B. Jessup, H. Kastendieck & M. Regini eds. 1986) [hereinafter ECONOMIC CRISIS] (stating that “[i]f capital constantly had to resort to the power of the casting vote, the efficiency of the supervisory board as a functional organ of the company would be severely restricted.”).
171. Hetzler & Schienstock, supra note 158, at 38.
172. Waschke, supra note 108, at 95.
F.R.G., who among others, tried unsuccessfully to have it declared unconstitutional by the German Federal Constitutional Court.

This fierce reaction from the employers, who had by then regained the social status that they had lacked when the act concerning the steel and coal industry was passed, had some success. For example, while the supervisory board is composed of an equal number of shareholders' and workers' representatives, the labor side includes managerial representatives who tended to identify with the employer's side. This compilation, coupled with the tie breaking vote of the chairman (who, in case of disagreement over his selection, is appointed by the shareholders), seriously undermines the parity principle.

Another employer accomplishment was that the labor director was to be appointed through the normal procedure of voting in the supervisory board, thus eliminating the workers' representatives' veto power.

The third system of representation in the F.R.G. applies to companies with less than 2,000 but more than 500 employees. According to the Works Constitution Act of 1972, the workers' representatives have one third of the seats on the board.

The Swedish system of participation on the companies' boards is simpler from an American perspective. The companies have one board and, according to the law passed in 1972 and reenacted in 1976, every company with more than 25 employees is required to allow its workers to have two representatives on its board of directors which are to be appointed by the unions.

Conscious of the inherent limits that any scheme of codetermination may have in a capitalist society, the unions did not seek to achieve parity representation as in the F.R.G.. Instead, the unions saw participation on corporate boards as a means of getting

173. See T. DeVos, supra note 90, at 173-78.
174. Id. at 143-44, 178.
175. See supra note 158.
176. See J. Crispo, supra note 60, at 86.
177. T. DeVos, supra note 90, at 141.
178. Id.
179. Waschke, supra note 108, at 95.
180. In the mid-seventies, 0.6 million workers were covered by the law concerning the steel and coal industry. Hetzler & Schienstock, supra note 158, at 41. Another 4.5 million worked in companies covered by the 1976 Act and 9.3 million in firms affected by the 1972 Act, which applies the one-third participation scheme. Id.
181. Its full name is the Act on Board Representation for Employees of Joint Stock Companies and Cooperative Associations. Summers, Worker Participation, supra note 5, at 203 (citing F. Schmidt, Law and Industrial Relations in Sweden 85).
both an inside view of the company's affairs and direct access to all the information that they would need for bargaining with the employers. 183 For them, minority representation was participation enough to complement the bargaining process with their companies. 184

It is not easy to comparatively assess the impact that codetermination had upon decisions that, directly or otherwise, involved layoffs. It must be noted, however, that the Swedish system of participation on corporate boards provides access to a body that has much more authority and information than the supervisory board has under German corporate law. 185 The supervisory board does not get involved in the everyday affairs of the business and thus, is in an inferior position as to the managing directors. 186 That supervising director "understands relatively little about the affairs of the firm" 187 may have serious consequences upon the execution of his duties.

The percentage of workers' representatives on a corporate board does not necessarily determine the amount of influence workers will have upon the deliberations of the board. 188 Real parity could make a difference, but such a situation would create serious constitutional problems in every capitalist country. 189 Given the lack of parity, the worker directors, being in the minority, will always have to depend on their persuasiveness and not on their percentage of votes if they want to acquire a majority on the board. This will be determined not

183. See supra note 160.
184. See J. CRISPO, supra note 60, at 103 (saying that the Swedish unions favored minority board participation "as part of a totally integrated overall system of individual democracy, including collective bargaining procedures and other forms of worker representation at lower levels in the enterprise.").
185. Cf. Summers, An American Perspective of the German Model of Worker Participation, 8 COMP. LAB. L.J. 333, 339 (1987) (comparing German supervisory boards with American boards of directors, which have strong similarities with the Swedish boards, and finding that directors on American boards have "significantly more information and influence than . . . German directors because boards of directors in American corporations are single tier with much greater role and control than supervisory boards in Germany.").
186. See also T. DeVos, supra note 90, at 173 (stating that "[i]t should be acknowledged, though, that most supervisory boards have been rubber stamping management decisions."); cf. Vagts, supra note 163, at 50, 53 (stating that "[t]he day to day conduct of business is in the hands of a managing board ('Vorstand')" (footnote omitted) and that "supervisory councils . . . have rarely made use of their statutory powers to discipline managing boards.").
187. Vagts, supra note 163, at 52.
188. Id. at 67-68 (stating that the decisions of the German supervisory boards are either made unanimously or are divided across the lines).
189. See T. DeVos, supra note 90, at 144 (suggesting that the German Constitutional Court's decision on the 1976 Act implies that if there were real parity constitutional problems could arise).
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only by the strength of their arguments, but also by the general climate of labor relations in a particular country, exemplified by the way that each side views the other and the expectations that unions have of participation on the boards.

From this perspective, it is not surprising that union representatives have been more persuasive on German boards than on Swedish ones. Labor-management relations are more cooperative in the F.R.G. than in Sweden, and the commitment of the Swedish unions towards a longterm strategy of changing the social balance of power is more evident than that of the German Federation of Labor. The Swedish unions' expectations about codetermination are modest. Additionally, Sweden has had a much more troubled social and political climate since the early seventies. Thus, the workers' participation has had a greater effect in the actual running of the companies in Germany than in Sweden.

IV. OTHER PROTECTIVE ASPECTS OF LABOR LAW

Research showing how other Western countries have dealt with the issue of the workers' role in decisions leading to workforce reductions would be incomplete if other aspects of labor legislation, which enhance the position of the workers and their representatives, were not discussed.

Compared to the United States other countries give labor representatives enormous rights to bargaining information. The American perception, that possession of information means power, makes the employers unwilling to share much information about their companies, and the courts tend to tolerate this attitude. By contrast,


191. An example of this trend is the long struggle of the Swedish labor-movement for the enactment of the Meidner proposals that are supposed to transfer the companies' ownership to the workers. However, just at the peak of the unions' pressure for passage of this radical measure, the Social-Democrats lost the 1976 elections. When they came back to power they had lost much of their radicalism and thus, passed a very modest version of the initial proposal. See Peterson, supra note 49, at 42. Contra Schregle, supra note 92, at 322-24 (stating that the German labor movement, despite the rhetoric that had followed the initial stages of the codetermination reforms, has, during the last decade, lost a great degree of its ideological orientation).

192. See supra text accompanying notes 160-61.

193. Compare Peterson, supra note 49, at 32 (discussing the breaking down of the 'Swedish model') with Jaccobi, Trade Unions, Industrial Relations and Structural Economic Ruptures, in ECONOMIC CRISIS, supra note 170, at 50, 52 (noting that the cooperative nature of the German labor relations did not change in the crisis of the eighties).

194. See, e.g., Detroit Edison Co. v. NLRB., 440 U.S. 301 (1979).
other Western countries view information as a means of reality based persuasion and thus, the sharing of information, either willingly as in Japan, or manditorily imposed by law as in most European countries.\textsuperscript{195} is extensive.\textsuperscript{196}

Information may be acquired by the participation of the workers in the corporate boards, where, because of their position, the labor directors have access to any information concerning their companies.\textsuperscript{197} This is rarely the case as almost all Western European countries give extensive information rights either to the works councils or directly to the unions.\textsuperscript{198} Thus, in the F.R.G., the employer is obligated to provide the works councils with detailed information about the financial affairs of the company on his own initiative.\textsuperscript{199} In firms with more than 100 employees a finance committee is established by the works councils and the employer must inform the committee “in full and good time of the financial affairs of the establishment” including matters such as investments and marketing policies.\textsuperscript{200}

In France, where relations are very confrontational, the socialist government of Mitterand, attempted to promote more cooperative industrial relations, by obligating the employer to provide the shop committees with extensive information covering the financial and economic prospects of the company, reorganization plans, personnel policies, etc.\textsuperscript{201}

Generally, every country that has established works councils has provided them with broad information rights to enable them to effectively fulfill their duties.\textsuperscript{202} Further, the tendency is to increase these

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\textsuperscript{195} See Bellace & Gospel, Disclosure of Information to Trade Unions: A Comparative Perspective, 122 INT’L LAB. REV. 57 (1983) (providing an interesting comparison of the American disclosure of information with the relevant statutes of the U.K. and Sweden).
\textsuperscript{196} Cf. Summers, Comparative Perspectives, supra note 11 at 154-55 (stating that “[w]hen employees are viewed as members of the enterprise and unions or works councils as social partners in the enterprise, their right to full information . . . follows naturally. . . . Even in adversarial relations, the disclosure might be thought to lead to a more rational and objective bargaining.”).
\textsuperscript{197} Cf. Summers, Codetermination in the United States: A Projection of Problems and Potentials, 4 J. COMP. CORP. L. SEC. REG. 155, 165 (1982) (stating that “[p]robably the most significant impact of codetermination on collective bargaining would be to provide the union with information concerning the enterprise that it could use when developing its bargaining policy”).
\textsuperscript{198} See supra note 196.
\textsuperscript{199} Summers, Comparative Perspectives, supra note 11, at 153.
\textsuperscript{200} Id.
\textsuperscript{201} See C. TRAV. III art. L \$ 431.4 (referring to the French Labour Code).
\textsuperscript{202} Cf. C. TRAV. III art. L \$ 431.4 (referring to the French Labour Code).
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rights.203 Of course, this information ultimately goes to the unions because most of the members of the councils are also union members.204 Even in countries without a tradition of works councils the law provides for extensive information rights for the unions. In Sweden the law requires the employer to keep the union “continuously informed about how his activity is developing in respect to production and economically,”205 a phrase which has been liberally interpreted by the courts to cover a broad range of issues that would spoil the sleep of many employers in the United States.206 Finally, the union has the right to inspect all of the company’s books to the extent needed in order to carry out its duties.207

As usual the U.K. is the exception. In the U.K. the duty to disclose information is much narrower because of an exception in the law designed to protect the employer. The employer may withhold information if its disclosure would cause “substantial injury to the employer’s undertaking”208 or if the information to be disclosed is not of such a nature that without it “the union would be to a material extent impeded in bargaining.”209 In considering this requirement, if one takes into account the fact that in the U.K., the employer is not obligated to bargain with a union, the limited effect that the information requirement will have upon the employer210 becomes apparent.

Finally, the problem of secrecy, present in all legal systems, is usually dealt with by requiring the employees’ representatives to keep the information that they receive confidential. The U.S. and the U.K. have preferred to give the employer the right to completely withhold information that he considers confidential.211 It is not a co-

204. In F.R.G., for example, the councils’ members that are supported by the German Federation of Labor consist of about 65 percent of the total number of the councils’ members and this number is increasing in the eighties. See West Germany, Works Council Elections 1987, 169 EUR. INDUS. REL. REV. 20, 21 (Feb. 1988).
205. Summers, Comparative Perspectives, supra note 11, at 153.
207. Fahlbeck, The Swedish Act, supra note 128, at 156-59; see also Greece: New Collective Labour Law, 182 EUR. INDUS. REL. REV. 4 (March 1989)(discussing a recently proposed legislative reform which would give unions extensive information rights on issues like investment programs, employment policies, financing of the company, price policies, etc.).
208. Docksey, supra note 138, at 290.
209. Summers, Comparative Perspectives, supra note 11, at 154.
210. Cf. Bellace & Gospel, supra note 195, at 66 (stating that “[b]ecause of the terms of the Act, the way in which it has been interpreted, and the resultant decline of interest on the part of unions in the use of the law, its direct influence has been slight.”).
211. Summers, Comparative Perspectives, supra note 11, at 154.
incidence that, under the influence of these two countries, the proposed E.E.C. directive dealing with the disclosure of information to the workers' representatives, has been amended to allow the employer to withhold such information.\footnote{212}

Besides collective labor law the substantial protection offered to the workers by individual labor law (an area of law which up until recently was almost unknown in the U.S.) merits discussion. Despite some recent developments in the case and statutory law,\footnote{213} this area remains underdeveloped in comparison to other Western countries. The recent changes in the law represent a long delayed recognition of constitutional rights rather than any really innovative protection arising under labor law.\footnote{214}

By contrast, the concept of employment-at-will has long ago been abandoned by the other Western countries.\footnote{215} Even the U.K., with its tradition of antilabor common law, has passed substantial legislation to enhance the individual worker's property rights in his job. It is very characteristic that this protection was granted to the workers without the major social and political controversies which have taken place whenever collective labor law reforms have been initiated.\footnote{216} This is an indication that, regardless of the predominant political orientations of these societies, there is a general consensus that the stakes of the individual worker in his job are indeed high and that some protection must be offered.\footnote{217}

The three chief means of protection offered to the individual worker are: (1) advance-notice of his layoff; (2) the requirement of a showing of some reason for the dismissal (or the possibility offered to the employee to show the lack of such reason); and (3) redundancy payments.

\footnote{212} Interestingly enough, the language used in the directive is almost identical to the British one. Article 7, paragraph 1 of the proposed directive allows the members of E.E.C. to permit the employer to withhold information the disclosure of which “could substantially damage the undertaking's interests or lead to the failure of its plans.” Docksey, \textit{supra} note 138, at 290.


\footnote{214} These remarks do not aim to undermine the importance of these modest changes in American labor law. They are made to show the distance between individual labor law in the U.S. and laws of other western countries, which will be discussed later.

\footnote{215} See Summers, \textit{Comparative Perspectives, supra} note 11, at 141.

\footnote{216} Raday, \textit{supra} note 66, at 129 (stating that “the [p]rotection of individual job security costs the employer little, while collective bargaining security requires the employer to bear the far heavier burden of responsibility for economic change and mismanagement.”).

\footnote{217} See Bellace, \textit{supra} note 33, at 416-17 (contrasting the European attitude to that of the U.S.).
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All countries have provisions that require the employer to notify employees of any planned layoff and this obligation is independent of any notification requirement of the workers' representatives for the purpose of consultation. Thus, in the F.R.G., this period varies from two weeks to three months for blue-collar workers and from six weeks to six months for white-collar workers. In the U.K., the period is from one to twelve weeks. Although most countries base the length of the period on the length of the employee's past service, the Swedish requirements are based upon the age of the dismissed worker, and can reach six months. Japan, on the other hand, has a fixed period of 30 days for advance notice.

In contrast, the United States was, until recently, the only major Western country with no advance-notice requirement imposed by law. In 1988 however, a law was passed by the Congress and reluctantly signed by President Reagan which provided for a two-month period of advance-notice. Although this is a significant step towards a more protective approach to the problem of layoffs, there are considerable limitations in the law's application. First, the law does not apply to all firms and to all kinds of situations where layoffs occur. Second, there are other limitations to the application of the law which, although they seem reasonable, carry with them the danger of abuse by the employers, an abuse tolerated by many friendly courts. Even this modest piece of legislation was passed over the fierce reactions of employers and was initially vetoed by the Reagan Administration (only to be approved because of the coming elections).

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218. See Harrison, European and American Experience, in DEINDUSTRIALIZATION, supra note 36, at 260.
219. Bellace, supra note 33, at 439.
220. Id. at 435.
221. Summers, Comparative Perspectives, supra note 11, at 156.
222. Hanami, supra note 148, at 181.
225. The law does not apply to companies with more than 100 employees and only if their management shuts down a plant with 50 full-time employees or layoffs one third of the workers at a facility in a period of six months. See id. Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, § 2, 102 Stat. 890 (1988) (codified as 29 U.S.C. §2102).
227. See 24 WEEKLY COMP. PRES. DOCS. 990 (August 2, 1988) (providing President
tory protection will be offered in the United States in the foreseeable future.

As far as the justification for dismissal is concerned virtually all Western countries have developed, either statutorily or judicially, some protection for the worker. Most restrictions apply to the reasons for which a particular employee was selected to be laid off by the employer.

In the F.R.G., the layoff must be “socially warranted” according to the Protection Against Dismissal Act. The courts tend to adopt a balance of factors approach in this area, by taking into account all the surrounding circumstances, needs and interests involved in a particular dismissal. In France, the courts have long recognized the notion of “abuse of right,” but the judges tend to defer to the employer’s judgment. In the U.K., the concept of “unfair dismissal” exists which, although generally inapplicable to redundancies, applies to the criteria of selection of the particular employees to be dismissed. In Sweden, all dismissals must be for cause and the relevant statute gives some guidelines to the courts as to what should not be considered “for cause.” If the decision is challenged in the Swedish courts, the employee is entitled to remain on the rolls until the decision has been awarded. Finally, in Japan the courts have, on the basis of the constitutionally protected right to work, developed the concept of “just cause” as a requirement for dismissal and they consider it as part of the “public order.” However, they seem to limit their scrutiny to the selection of laid-off workers, and not to the economic reasons for the dismissals themselves.

Reagan’s statements at the time of the Bill’s enactment); see also Susser, Election-year Politics and the Enactment of Federal “Plant closing” Legislation, 14 EMP. L.J. 849 (1988).

228. Bellace, supra note 33, at 439.

229. See Weiss, Industrial Employment Rights, supra note 102, at 86-89 (providing an analysis of the concept of social justification of a dismissal).

230. The concept of “abus de droit” was first applied by the French Supreme Court in 1926 and was enacted into law in 1928. Comment, Employment at Will, the French Experience as a Basis for Reform, 9 COMP. LAB. L.J. 294, 299 (1988). An act passed in 1973 required that the dismissal be for genuine and serious cause. Id. at 303. Although the “traditional trend in France seems to favor a restricted application of the concept of unjust cause” the employees are still better off than in the U.S.. Id. at 308. It had to be noted that this problem is basically offered only for noneconomic dismissals.

231. Bellace, supra note 33, at 436 n.106.


233. Id.

234. T. Hanami, supra note 149, at 85.

235. It must be remembered here that a certain portion of the Japanese labor force is protected against layoffs by the long established practice of life-employment. According to this
Most of the industrialized countries have statutory provisions for redundancy payments. In the U.K., a lump sum payment, based on the worker's age, length of past service and previous weekly pay (up to one and a half week's pay for each year of service for people over the age of forty), is provided.\textsuperscript{236} In the F.R.G., while there is no statutory specification of the compensation to be paid, the employer is required by law to formulate with his works councils a plan for the protection of the dismissed workers,\textsuperscript{237} and these plans generally provide generous compensation.\textsuperscript{238} In France, apart from the compensation provided upon dismissal (whether caused by economic reasons or by reasons related to the worker himself), there is a provision for periodic allowances for up to one year after the dismissal.\textsuperscript{239} In Italy, the statute provides for compensation of the white-collar workers only and it is one month's wage for every year of service.\textsuperscript{240} Virtually all countries have similar provisions established by law and furthered by collective agreements.

These differences between the individual labor law of the U.S. and the other Western countries have immense consequences in the field of collective bargaining. Unions, which in the U.S. are the only representatives of the employees, are at a clear disadvantage as compared with their counterparts in other industrial countries because they have to fight for the fundamental and elementary protection that is elsewhere provided by law.\textsuperscript{241} The workers in other countries have a minimum of protection from which they can start their collective action, American unions must start from almost zero protection for the jobs of their members.\textsuperscript{242}

Many American unions, which have considerable power and enjoy the dedicated support of their members, have been able to secure substantial protection for their individual members. But if one looks at the content of these provisions, he will soon realize that they are
far behind the protection offered in other Western countries. Though they have achieved some protection, this has not been done without a certain cost. The bargaining process is one of give and take. To achieve through collective bargaining what other countries' workers enjoy because of the law, they had to forego other tasks and thus lose something in comparison with their foreign homologues.

Thus, the decision to leave the protection of the individual workers to the process of collective bargaining should not be considered a neutral one where the State plays the role of Pontius Pilate. It is a political choice between the interests of the employers and those of the employees, and heavily impedes the unions' ability to effectively carry out their functions as agents of collective bargaining.

V. A GENERAL ASSESSMENT

Although countries other than the U.S. have been far more innovative in promoting industrial relations through broadening the channels of communication between the two parties, there are legitimate objections that can be raised as to whether what we have discussed so far, proves that the workers in other countries play a broader role in making decisions that reduce a company's workforce.

The most obvious objection is that the actual reality in these countries might be quite different from the image that the law creates. Indeed, in several countries there is evidence that the rights actually accorded to the workers by law are less extensive than they appear to be in theory.

In countries such as the U.K., where the courts are an outspo-

243. See Raday, supra note 66, at 128; see also Bok, supra note 8, at 1418.
244. Cf. Raday, supra note 66, at 124 (stating that "[j]ob security has been purchased by unions in a market which gives no such initial right."). (emphasis added).
245. Klare, Workplace Democracy, supra note 10, at 63 (stating that "[t]he at-will doctrine is 'neutral on the side of the employer.' ").
246. American reality offers a lot of examples as to this point. One such example was the recent strike at Eastern Airlines. It is well settled law that under the Railway Labor Act (hereinafter "R.L.A.") which governs the airlines, sympathy strikes are legal. See Burlington Northern R.R. v. Bd. of Maintenance Employees, 481 U.S. 429 (1987). However, this weapon could not be used effectively by the striking I.A.M. union because of the hostility of the American public toward sympathy strikes and the threat of the Administration that it would change the law to prohibit sympathy strikes even under R.L.A.. Thus, the labor movement could not use a right which exists in the books.
247. See, e.g., Bellace & Gospel, supra note 195, at 73 (stating that "[l]egal rights alone are of little use in the absence of favourable attitudes and institutions."). This comment was made after comparing the information disclosure requirements in the U.S., the U.K. and Sweden.
ken enemy of organized labor, laws passed by the Parliament in favor of labor are seriously limited in the courtrooms. Thus, one must read an English law, and see its interpretation by the courts before drawing any conclusions about the position of the workers and the unions in that country.

Even more important is the fact that in periods of economic recession, workers' rights created in prosperous years are seriously damaged because of the constant threat of unemployment. The unions lose their effectiveness and the governments (even the left-wing ones) are forced to implement policies which take back what was previously “given.” France’s experience is very characteristic: the pressures of the eighties’ economic crisis forced both the government and the unions to adopt the policy of “flexibilité” in industrial relations, which allows individual companies to make collective agreements with lesser protection for the workers than that provided by central agreements. This policy overturned a long standing principle of industrial relations in France that was established under more conservative governments. Adverse economic conditions forced even Japan, a country where attitudes do not change easily, to reconsider the notion of lifetime employment and the general concept that workers should be laid off only in extreme circumstances.

Furthermore, public opinion towards workers’ rights plays a vital role in how the statutes are implemented. For example, British unions have a very broad right to strike to support their collective bargaining efforts. However, anyone familiar with the public’s attitude towards unions in the late seventies knows that the effectiveness of the strike weapon can be seriously hampered by the public’s indifference or even hostility towards strikes. British unions paid very

249. For the moderation of the labor policies of social-democratic governments, see Clark & Wedderburn, supra note 248, at 194-95 (regarding the U.K.); Hooks, supra note 37, at 256 (regarding France); Peterson, supra note 49, at 41 (regarding Sweden).
251. This principle is still valid in most western European countries.
dearly for their neglect of their people’s feelings \(^{254}\) when during the stormy strikes of the winter of 1979 the voters decidedly turned against the Labour Party and the national trade union, T.U.C., at that time.

Most of these limitations on the workers’ rights often do not appear in the statutes and are difficult for a foreign observer to detect. However, they must be taken account when considering the collective rights of the workers over layoffs.

The differences between the workers’ rights in the U.S. and the rest of the Western world are clear. All the above mentioned negative factors for unions are also present in the United States. Courts are increasingly turning hostile towards labor, the adverse economic circumstances of the eighties hit the labor movement in America\(^{255}\) (to a greater extent than in the other countries), and as for public opinion, it is hard to find any country with less antiunion feelings than the U.S.\(^{256}\)

The minimal role offered to the American workers and unions over layoff decisions is due in part to the role of law itself. Law is, of course, but only one of the factors that determine the balance of powers between various social groups, but it is certainly an important one. Every choice made on a legislative level has its impact upon the relative power of the groups in a given society and, in a society where there is an obvious imbalance of social power between employers and labor, abstention is a choice reproducing this inequality.\(^{257}\) If the social struggle between groups with differing interests looks like a race, the law determines the points from which each party will start the race. While the strength of the parties does much to determine the outcome of the race, the initiating points also play a considerable role.

Some of the most commonly held misperceptions in the United States about other countries’ labor systems and the extensive protection they offer to the workers are a serious obstacle to any attempt to suggest that the American labor system should look for alternatives

\(^{254}\) Crouch, Conservative Industrial Relations Policy: Towards Labour Exclusion?, in Economic Crisis, supra note 170, at 148.

\(^{255}\) See generally Hooks, supra note 37, at 244.

\(^{256}\) See supra note 69 and accompanying text.

\(^{257}\) In any case, American labor law can hardly be characterized as abstentionist. The severe restrictions on the right to strike and to bargain over certain issues demonstrate the one-sided interventionist approach of the law, at least as interpreted by the courts. See Summers, The Usefulness of Unions, supra note 125, at 1440 (stating that “[t]he law is nominally neutral but effectively hostile to developing a comprehensive system such as exists in other countries.”).
to provide satisfactory solutions to the problems that it presently faces. It is inaccurate to attribute the broad role that organized labor enjoys in other Western countries, regarding managerial decisions involving work force reductions, to the cooperatorational attitudes of the two parties in these countries and thus say that such a role would not work in the U.S.. If cooperation is indeed prevalent in the F.R.G. and Japan, this is not the case in France, the U.K., nor to some extent, in Sweden\(^{258}\) (at least during the last fifteen years). Although unions in most European countries are quite aggressive and have deep convictions against the capitalist system and the capital owners,\(^{259}\) this did not prevent legislation from granting them several property rights in their jobs. To the contrary, the unions' aggressiveness might have been one of the primary reasons for such legislation.

Cooperatorational attitudes may account for the existence of institutionalized forms of labor participation, such as works councils and representation on the corporate boards, but not for the process of collective bargaining where the lines are clearly drawn between the two parties.\(^{260}\) From a political point of view, American unions are much more integrated into the capitalist system than any other unions in the Western world.\(^{261}\) Rather than justifying the limited protection offered to American workers by the alleged aggressiveness of the unions, it would be more accurate to attribute this lack of protection to the integration of the labor movement. One is tempted to assume that the less threatening the latter is, the less need there is to give some rights to the workers to appease the unions.

Also inaccurate is the belief that the role provided for the workers in these countries is a mere reflection of a general interventionist approach on the part of their governments. This approach has political overtones not shared by the mainstream of American politics. Even though most of the legislation was passed by social democratic governments, it did survive the arrival of Conservative parties into

\(^{258}\) See supra notes 89-111, and accompanying text.

\(^{259}\) See T. DeVos, supra note 124, at 189 (stating that "a considerable segment of British unionists have a lot [more] in common with their French and Italian peers than with their northern European peers. . . British workers feel a far greater degree of alienation from and distrust for management than is found in most other northern European countries.").

As for the French unions, it is characteristic that two of the three major national unions, C.F.D.T. and C.G.T., have strong political and ideological ties with the socialist and the communist parties respectively. A. Carew, supra note 44, at 24-25.

\(^{260}\) See supra notes 79-81 and accompanying text.

\(^{261}\) See St. Antoine, Prevention of Antionion Discrimination in The United States, 9 Comp. Lab. L.J. 384, 398 (1988) (stating that "[o]urs is the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system.").
power,\textsuperscript{262} and this is a strong indication that it is not partisan politics that an attempt is involved in such legislation.\textsuperscript{263} It is also the realization that to bring some balance between the two parties in labor relations by assisting the weaker one, while not threatening the whole political system that conservatives are eager to preserve, presents many socioeconomic advantages.

Finally, the traditional hostility that employers in the U.S. display towards unions,\textsuperscript{264} and their certain reaction to any future legislative attempt towards an increase of the workers' role in collective dismissals, should not discourage such an attempt, to the extent that it will be found beneficial. It would be wrong to assume that legislation of workers' collective rights in Europe was easy to pass. The employers' reactions were enormous and it required high pressure from the unions and strong political will by several governments to pass the laws.\textsuperscript{265}

Thus, we see that there is nothing unique in the American system which isolates it from any idea of increasing the workers' rights in their jobs. Rather, the uniqueness lies in the adamant refusal of the employers' political allies in Congress and the White House to even discuss similar legislative reforms and in the inability of unions to effectively press them to this direction. Realizing that this adamant refusal exists will be the first step in the direction of reconsidering the duty to bargain over layoffs, as it has developed in this country, and finding solutions that will promote the interests of the

\textsuperscript{262} Thus, the conservative government, which took power in 1982 in F.R.G., did not change the labor legislation of the social-democrats. See Mueckenberger, supra note 170, at 240.

In Britain, the situation was different since the Thatcher government made several steps in the direction of limiting the effectiveness of previous labor legislation. See Resistance, supra note 113, at 446 (1989). However, after 10 years of such attack on labor legislation by a government whose popularity remains largely strong, the fact that British legislation still offers more protection regarding the duty to bargain over massive dismissals than American law, serves to underline the differences between the position in Europe and the United States on labor.

\textsuperscript{263} Cf. Klare, Workplace Democracy, supra note 10, at 38 (stating that "[s]ince the World War II, many of our trade rivals have viewed social welfare policy as, at least to some extent, an investment in protecting and upgrading human capital."); Raday, supra note 66, at 134 (regarding "political pragmatism").

\textsuperscript{264} Summers, Comparative Perspectives, supra note 11, at 142.

\textsuperscript{265} See Bok, supra note 8, at 1419.

There has been sharp opposition in almost every country at some stage in the evolution of social legislation - and this opposition has been expressed by the same groups using much the same arguments as in the United States. As a result, the critical question is why these attitudes still persist so strongly in America and why they have not been countered as effectively as in most other countries.

\textit{Id.} (emphasis in the text).
workers in their jobs, and the quality of the job done in the American workplace.