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Individualism and Communitarianism at Work

*Thomas C. Kohler**

Our Reporters have given us four remarkably rich, complex and thought-provoking contributions. Such wonderful work resists any attempt at quick summarization, and an effort at offering a brief commentary on the many and nuanced insights contained in these papers is likely to produce but a set of scattered and superficial observations. Fortunately, I largely have been spared such a bootless enterprise. For although I appear in the role of the "Commentator," I have been asked instead to make a short report on the work-life sphere in the United States. I will proceed on my assignment in the following manner. In the first part of my remarks, I briefly will address a theme common to all four Reports, and to the Colloquium as a whole—how we can be both one and many. I then will discuss the U.S. work-life situation directly, and conclude with a short evaluation of the position in which we find ourselves.

I. ON BEING BOTH ONE AND MANY

To begin with, the composition of this panel seems deeply symbolic in light of the theme of these meetings. Thus, the U.S. stands as the apogee of an individualistic order, Japan depicts the paradigm of a communitarian society, while the other nations represented appear to fall at various points along the spectrum. This observation takes us to the heart of the subject of our Colloquium.

Broadly speaking, our topic deals with the question of how we can be both one and many—or, to phrase the point just slightly differently, how each of us can be a distinct and unique individual, yet remain related to all other distinct and unique

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individuals. This presents a problem common to every sort of human community, from the state, to the relationship of employment, to the family itself. The character of our associations may differ, but our character as humans is a constant. Consequently, institutional orders inconsistent with our human character will not survive.

How we can be both one and many is a comprehensive question, since engaging it forces us to inquire into the character and meaning of our personhood. As Professor Blanc-Jouvan points out, it is also an ancient question, one that is as old as political and legal philosophy themselves.¹ Indeed, the chief reason that the individualist-communitarian debate presently has such an interminable quality about it stems from the impoverished set of resources in which it is now conducted.

Succinctly stated, we have only the language of individualism in which to pursue our questions and carry on our discussion. The paucity of meanings that this language carries with it leaves us with an enormous conceptual blind-spot: we can only comprehend individuals. We almost cannot conceive of groups or communities. This fact pushes us to posit a tremendously restricted set of possibilities. We are left to regard groups as representing affiliations among discrete, monadic and otherwise unassociated individuals, or to reify the group as the single, sole individual. Either way, we end up by denying something crucial about ourselves. We implicitly reject our character as social beings, or we submerge our particular and distinct individuality in the mass.

Considered from the first perspective, human community of whatever description comes to be understood as artificial and instrumental alliances that are formed for the limited purpose of satisfying the self-directed wants of their otherwise unrelated members. These desires commonly are reduced to two categories: the desire for companionship (to enable self-fulfillment and self-expression) and the desire for economic or political power. This view imports with it a sort of reductionism. It suggests that human community of whatever sort derives its existence solely from the individuals who form it. Simply put, this perspective teaches us to view groups as limited partnerships.² They come into existence to secure some

1. See Xavier Blanc-Jouvan, *Individualisme et "communautarisme" en droit français: le cas des relations de travail*, 1993 B.Y.U. L. REV. 693, 693.

2. See WILSON C. MCWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* 89

end and fall apart once the goal is achieved, their *raison d'être* having been exhausted. This viewpoint thereby reduces human solidarity to being a transient and instrumental thing that lasts only so long as some immediate and self-interested need remains unmet. In Chesterton's evocative imagery, it implies that humans in community merely are "physically stuck together like dates in a grocer's shop,"³ and as easily and harmlessly peeled apart. Professors Blanc-Jouvan and Teubner well describe the effect such patterns of thought have on our habits and on the health of our institutions.⁴

The lone alternative our language supplies to understanding association as a coincidental aggregation of individuals is the characterization of the group as the single individual. Professor Inoue's paper chillingly describes the sorts of problems and pathological conditions that stem from this perspective.⁵ This understanding of association represents a peculiar strain of individualism, one which, to adapt slightly an observation made by Wilson Carey McWilliams, is so rigid, friable and "sensitive that it cannot tolerate rule by others."⁶ As a result, this viewpoint insists on uniformity and conformity. Individuals exist only in and through the group; they have no separate being outside it. Association represents a sort of inward turning that rests on identity;⁷ the self and the group simply mirror and affirm one another.

In the final analysis, this understanding of association rests on a distortion of human existence that can be termed a group bias.⁸ The products of this way of thinking have a depressing familiarity to those who live in the twilight years of this century. Its poisonous fruits include cults of the state (the aftermath of which Professor Wyrzykowski details),⁹ cults of

(1973).

3. Quoted in MATTHEW L. LAMB, *SOLIDARITY WITH VICTIMS* ix (1982).

4. See Blanc-Jouvan, *supra* note 1, *passim*; Gunther Teubner, *The "State" of Private Networks: The Emerging Legal Regime of Polycorporatism in Germany*, 1993 B.Y.U. L. REV. 553 *passim*.

5. See Tatsuo Inoue, *The Poverty of Rights-Blind Communitarity: Looking Through the Window of Japan*, 1993 B.Y.U. L. REV. 517, 520, 532-38.

6. MCWILLIAMS, *supra* note 2, at 40.

7. See *id.* (discussing identity in customary society and the erotic notion of the self that grounds the idea of the *gemeinschaft*).

8. On the idea of the group bias, see BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 247-50 (Frederic E. Crowe & Robert M. Doran eds., Univ. of Toronto 1992) (1958).

9. See Miroslaw Wyrzykowski, *Individualism and Communitarianism in a Contemporary Polish Legal System: Tensions and Accommodations*, 1993 B.Y.U. L.

the people, and cults of other corporate bodies, however defined. These latter include morbidities as diverse as religious triumphalism and the "companyism" that seems part of many participative management schemes.

That our language of individualism is not the only way to think and speak about the character of association and personhood is suggested by Professor Inoue's discussion of self-abnegation and symbolic death.¹⁰ Thus, for example, the *kenosis* or death to the self of the Pauline Gospels is not at all the same thing as the pathological self-annihilation that Inoue so tellingly describes.¹¹ Likewise, the self-denial that classical political philosophy insists is requisite to an individual's ascent to knowing and authentic liberty stems from a different understanding of human character than the one assumed by our predominant individualistic discourse.

Missing from the way we typically speak are points so well understood by, among others, Aristotle and Tocqueville. As they point out, humans are conditioned beings by virtue of the fact that we live and act only in communities. Indeed, most of our operating as individuals takes the form of cooperating with others.¹² The communities in which we live and perform our tasks give us an orientation and an identity. They suggest to us not only who we are, but what our lives and our work mean. Consequently, communities have a normative function, and well-functioning communities represent an irreducible human good. In this perspective, communities and associations of every sort exist *only for* the individual. Yet, the social good is prior to—stands at a more prominent level than—the individual good, because without it, the good for discrete, individual persons could not exist.

The primary function of community is to assist the full development and proper unfolding of human personality which in turn finds its complete expression in the activity of authentic self-rule. Thus, Aristotle, in the *Politics*, emphasizes the role of community as the place where the citizen learns "both to be ruled and to rule."¹³ Tocqueville likewise stresses the

REV. 577, 577-80.

10. See Inoue, *supra* note 5, at 532-38.

11. *Id.*

12. See BERNARD J.F. LONERGAN, *METHOD IN THEOLOGY* 48 (Univ. of Toronto 1990) (2d ed. 1972) (human intersubjectivity and structure of the human good). On the spontaneous character of human sociality, see also 1 FRIEDRICH A. VON HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 35-54 (Univ. of Chicago 1973).

13. ARISTOTLE, *POLITICS* 92 (Bk. III, ch. 4 (1277b15)) (Carnes Lord trans.,

importance of associations and mediating groups and their potential to act as "schools for democracy."¹⁴ As both so clearly understood, individuals and societies alike become and remain self-governing only by repeatedly and regularly engaging in acts of self-government. The habit sustains the condition.

In short, it is in community with others that we literally learn the political habits necessary to sustain life together. Hence, it is the small associations and mediating bodies in which community actually exists that act as "seedbeds" for the civic virtues. These bodies set the conditions for the sort of civic friendships that hold a society together and that facilitate the civil conversations that ground self-rule. As Edmund Burke observes, "To be attached to the subdivision, to love the little platoon we belong to in society is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed toward a love of our country and to mankind."¹⁵ Bluntly put, we cannot learn toleration and respect for others in a vacuum. Nor can we learn or practice self-rule in isolation. Humans are not self-sufficient beings. We only learn who we are, and gain some sense of the fullness of our human potencies, through acting with others. This fact leads Aristotle to observe that the person without community "is either a beast or a god."¹⁶ The mention of a vacuum and the want of community turns us to consider the current state of the work-life sphere in the United States.

II. WORK-LIFE IN THE UNITED STATES

Since at least the time of Tocqueville, foreign scholars have shown a great interest in various attributes of the American legal system. One of the things for which the United States has become best known is its home-grown institution of "free" collective bargaining. In this regime, the state establishes and sanctions a voluntary ordering system, but leaves the outcomes achieved through the process to be determined by the parties themselves, free of governmental influence. The legal framework for American-style collective bargaining stands as

1984).

14. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 63 (J.P. Meyer ed. & George Lawrence trans., 1969).

15. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 110 (Thomas Mahoney ed., 1955).

16. ARISTOTLE, *supra* note 13, at 37 (Bk. I, ch. 2 (1253a25)).

an example of what Gunther Tuebner terms a "reflexive" legal scheme.¹⁷ The goal of reflexive law, Tuebner suggests, is "regulated autonomy," or controlled self-regulation.¹⁸ Reflexive legal schemes entail minimal state intervention in the ordering of relationships since they rely on market mechanisms to shape their results. The fact that the traits of this system may now be better known outside the United States than within its borders gives some hint of the state of our domestic situation.

In the United States, the term collective bargaining virtually is synonymous with the Wagner Act.¹⁹ The core goal of the statute is to protect and enhance individuals' status through the defense and maintenance of freely formed and autonomous employee groups. This feature defines the statute and characterizes the unique position the Act holds in American law. It represents the only place in our otherwise highly individualistically-oriented jurisprudence where the law has encouraged the formation of mediating bodies through which to promote individual empowerment and to foster self-determination. In the final analysis, the Wagner Act rests on a distinctly different idea of the character of our personhood than that which typically informs American law.²⁰ The transformations that have occurred in our culture and mores since the time of the Act's passage, however, appear to have left the statute's basic purpose and meanings increasingly opaque to us.

Congress enacted the Wagner Act in 1935. In so doing, and in sharp contrast to the course taken by the rest of the industrialized world, Congress deliberately opted for a system that would involve minimal state intervention in the employment relationship. In the United States context, collective bargaining can be best and most thoroughly understood as a private law-making system. Thus, the United States Supreme Court has described the collective bargaining agreement as not just a contract, but "a generalized code"²¹

17. Gunther Tuebner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 254-55 (1983).

18. *Id.*

19. 29 U.S.C. §§ 151-69 (1988).

20. See generally Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149.

21. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 580 (1964).

that represents "an effort to erect a system of industrial self-government" through which the employment relationship can be "governed by an agreed-upon rule of law."²²

The promulgation and administration of this law largely is the responsibility of the affected parties alone. Consequently, American collective bargaining agreements typically erect a private dispute resolution system—the grievance arbitration process—that the employer and union jointly administer. These systems generally have jurisdiction over nearly every sort of dispute that might arise concerning the employment relationship. The presence of an arbitration system normally precludes the courts or other arms of the state from adjudicating matters that come within the parties' dispute resolution scheme.

The so-called exclusivity principle bottoms the American model of collective bargaining. It also marks one of the starkest differences between the American and Continental industrial-relations systems. The exclusivity principle rests on the idea of majority rule. The principle establishes the association formed by a majority of employees in the affected workplace unit as the exclusive representative of them all. The principle prohibits an employer from attempting to bypass the majority-designated representative by unilaterally changing the terms or conditions of employment, or by dealing with individuals or groups of employees independently of the union. The preferred status the majority-representative enjoys in this scheme carries with it the legally enforceable obligation to represent all employees fairly and even-handedly, regardless of their support for or membership in the union.

The exclusivity doctrine prevents the fragmentation and dissolution of the strength employees achieve through collective action. It thereby acts to protect the principles of majoritarianism that underpin the Act's scheme. The exclusivity principle reflects the fact that American workers generally organize and bargain on a workplace or employer basis, and not at an industry-wide or national level. To a substantial degree, the principle is a function of the emphasis in American-style collective bargaining on local, "bottoms-up" law-making. The centrality of exclusivity to the Act's scheme reveals the statute's preoccupation with the removal of

22. *Id.* at 580.

impediments to the free formation of autonomous, self-organized employee associations.

In considering the statute, it is important to note that Congress did not "invent" collective bargaining. Rather, Congress through the Wagner Act adopted a scheme whose characteristics and practices jointly had been developed over time by workers and employers. Congress in passing the Act intended to institute a comprehensive uniform and flexible system through which the employment relationship could be ordered. Hence, rather than attempting to adjust specific problems legislatively, the Act left it to the parties themselves to identify and resolve matters of mutual concern. The chief significance of the American collective bargaining scheme lies in the opportunity it provides to involve people in making and administering the law that most directly determines the details of their daily lives. The process both permits and requires people to decide for themselves the kind of people they will be, and to explain and justify those choices to one another.

The Wagner Act was amended in 1947 and again in 1959. The latter date is significant because it marks the last time the United States as a nation gave anything like comprehensive consideration to the question of how to order the employment relationship. To be certain, many changes have occurred in the past three decades. The legal responses, however, have been on a piecemeal basis, and typically without full regard for all their implications.

The decline in private-sector unionization constitutes one of the most pronounced changes that has occurred in the United States work-life sphere during the past thirty years. In his report, Professor Blanc-Jouvan describes France as having reached a "critical threshold," with union membership in the private-sector at 5-6%.²³ The U.S. is not far behind. Right around 1960, approximately 34% of the U.S. private-sector workforce was organized.²⁴ Today, that figure is under 12%²⁵

23. See Blanc-Jouvan, *supra* note 1, at 720.

24. Leo Troy, *Convergence in International Unionism, etc. The Case of Canada and the U.S.A.*, 30 BRIT. J. INDUS. REL. 1, 39, Table A-2 (1992) (compiling data); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 953 n.1 (1991) (explaining difficulties in compiling data on union membership rates).

25. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1992*, at 422, No. 672 (112th ed. 1992) (union members, by selected characteristics, 1983 and 1991).

and some expect it to fall to 7% by the end of this decade.²⁶

Significantly, the decline of unions began at roughly the same time that families, neighborhoods, religious congregations, service and fraternal groups, local political clubs, and the other institutions that characterized American democracy began to unravel. This is no mere coincidence. No single "mediating body," whether in the form of families, churches, civic, political and service organizations, or unions, is likely to survive in the absence of the others. All of them require and can instill the same sorts of habits: decision, commitment, self-rule and direct responsibility. No single institution on its own can inculcate or sustain these characteristics. The existence and decline of all these bodies is mutually conditioning; the collapse or deformation of any of them affects the rest.

So, what's become of what Tocqueville called "the nation of joiners"? Recent survey data indicates that Americans remain eager participants in the activities of voluntary associations. Yet, the same data suggests that during the past thirty years, much of that participation has been limited to clipping a coupon in a magazine and returning it with a small financial contribution to an association like the Sierra Club, Common Cause, or the American Association of Retired Persons (which is now the largest voluntary association in the U.S.). The smaller, local bodies that directly mediate the relationship between individuals and the large institutions of public life—and which involve people in the often messy business of actually associating with each other—are faring less well.

The American work-life sphere has not been insulated from the trends toward fragmentation that have affected the other institutions of civil life. Commentators as diverse as Emile Durkheim, John Dewey, Elton Mayo and Frank Tannenbaum all predicted that the workplace would become a primary source of common life in modern society. Consequently, they

26. *Causes of Loss of Union Membership Debated at New York University Conference on Labor*, Daily Lab. Rep. (BNA), June 8, 1992, at A-3 (Leo Troy) (projecting from present trends). Significantly, in their 1985 article, *Accounting for the Decline in Union Membership, 1950-80*, 38 INDUS. & LAB. REL. REV. 325 (1985), William T. Dickens and Jonathan S. Leonard stated that if the number of private sector nonconstruction union members remained roughly constant, and if "employment continues to expand at about 2.5% per year, the unionized share of the workforce will not fall below 15% before 1995." By 1989, private sector diversity had reached 12% and has continued to decline.

urged that special attention be paid to the employment relationship and to occupational groups that could assist in grounding individuals in the conditions created by modern markets and mass democracies. That attention has not been forthcoming. Instead, along with the decline of unions and other mediating bodies has come a significant loosening in the employment bond itself. So-called contingent employment arrangements (part-time, temporary and contract-based) are on the rise, and are expected to double over the next few years. One well-known observer of labor market trends characterized these arrangements as "just-in-time" employment.²⁷ As American industry seeks to become more competitive, she predicted, "all employment relationships are going to become more fluid."²⁸ It may be that instability increasingly characterizes many of the significant relationships among Americans: employment relationships in the U.S. now last an average of 4.5 years,²⁹ while the average marriage lasts but seven.³⁰ Trends are not wholly clear, but the average length of both may be on the way down.

Consistent with these developments is the fact that increasingly the workplace itself is less one "place." Thus, for example, ten percent of the Chicago area employees of American Telephone and Telegraph now work at locations other than company facilities—many of them at home. Despite concerns about the impact of employee isolation, such "telecommuter" arrangements are on the rise.

Our legal culture also has influenced our prevailing views about the desirability of a system that promotes private ordering through groups. In short, it has taught us to apply what Paul Ricoeur calls the "hermeneutic of suspicion"³¹ towards groups, and to see in them an ever-present threat to personal liberties and the unfettered exercise of individual

27. *Rising Use of Part-Time and Temporary Workers: Who Benefits and Who Loses?: Hearing Before the Subcomm. on Employment and Housing of the House Comm. on Government Operations, 100th Cong., 2d Sess.* 37 (1988) (statement of Audrey Freeman, Executive Director, Human Resources Program Group, The Conference Board).

28. *Id.* at 36.

29. Bureau of Labor Statistics, U.S. Dep't of Labor, *News*, June 26, 1992 (USDL 92-386) (includes tables compiling data).

30. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1992*, at 92, No. 132 (112th ed. 1992) (median duration of marriage, 1970-88).

31. PAUL RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES* 34, 63-64 (John B. Thompson ed. & trans., 1981).

choice. Thus, it is not without significance that since the mid-1960s, the First Amendment freedom to associate has received its greatest development at the hands of the United States Supreme Court as the freedom *not* to associate. In similar fashion, the judicially-created union duty of fair representation has been developed during the past twenty-five years in a way that has deeply intruded the courts into the internal affairs of unions.³² The courts thus have breached the public-private distinction which they so scrupulously observed in the early cases that first announced this duty nearly fifty years ago.³³ To the extent they have done so, the courts have made unions public institutions. Indeed, it was fear that government intervention would eventually result in the regulation of unions that led the noted scholar and social commentator, Mary van Kleek, to oppose passage of the Wagner Act.³⁴

So, what has replaced collective bargaining? Like nature, law abhors a vacuum. Thus, the piecemeal and *ad hoc* regulation of the employment relationship markedly has increased as the practice of collective bargaining has declined. Common law courts have entered the area by developing various contract, tort and public policy-based restrictions of an employer's ability to discharge or discipline employees. Congress and state legislatures also have become very active in enacting a wide variety of legislation addressed to specific workplace problems. This thrust away from private ordering has left parties with a contracting boundary within which to regulate the terms of their relationship through collective bargaining. Moreover, some of this legislation, like the landmark Americans with Disabilities Act,³⁵ conflicts at several places with the law under the National Labor Relations Act.³⁶ In short, Congress itself seems to have forgotten about collective bargaining and to have abandoned it as a means for adjusting work-life issues.

Collective bargaining provides a powerful means for

32. For one spectacular example, see *Smith v. Hussman Refrigerator Co.*, 619 F.2d 1229 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980).

33. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

34. See IRVING BERSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 67 (1950).

35. 42 U.S.C. §§ 12101-213 (Supp. 1992).

36. 29 U.S.C. §§ 151-69 (1988). The National Labor Relations Act is the Wagner Act as amended.

employees to participate in workplace decisions. As unionization has declined, management has responded with participation schemes of its own. In contrast to the collective bargaining model, however, which is founded on the formation of autonomous employee groups and assumes that workers and management have mutual as well as divergent interests, the managerially sponsored schemes have little room for unions and are based on convincing employees to see corporate goals as being identical with their own. There is nothing new about such schemes. Their use long-predated passage of the Wagner Act, and they represent a competing scheme of participation to that sanctioned by the statute.³⁷ While the legality of such unilaterally implemented schemes under the Act is highly questionable, their use appears widespread.

Considering the United States situation in light of Continental developments raises the question of whether something like a transference—instead of convergence—of orders is at least potentially underway. The employment relationship in the U.S. is ever-increasingly being subjected to direct and pervasive state regulation. In the meantime, the stated desire of the Social Charter seems to be to nudge the European Community states in the opposite direction.³⁸ Thus, consistent with the subsidiarity principle that suffuses its terms, the Social Charter expressly endorses collective bargaining as a means to implement the Charter's goals.³⁹ It also provides that collective bargaining agreements can act as a source of Community law. Likewise, France's continuing efforts under its "Auroux" laws to institute greater private ordering through a "social dialogue" stands in sharp contrast to the trends seen in the United States.

Prospects for any sort of comprehensive legal reform aimed at revivifying and restoring the practice of private ordering through collective bargaining appear very poor indeed. Unions have slight political influence—as the 1992 presidential campaign demonstrated. "Jobs" was the mantra of both the

37. For a description of participation schemes and their premises, see Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 500-34 (1986).

38. The Community Charter of Fundamental Social Rights for Workers, COM(89)471 final.

39. On this point, see Thomas C. Kohler, *Lessons From the Social Charter: State, Corporation and the Meaning of Subsidiarity*, 43 U. TORONTO L.J. (forthcoming Summer 1993).

parties. Yet, not one authentic representative of working men and women was invited to speak at either the Democratic or the Republican conventions. To both parties, unions have become "special interest groups," and the once-celebrated practice of industrial self-government has come to be regarded as a danger to "competitiveness."

An undertaking as controversial and as sweeping in impact as comprehensive labor law reform requires real political discipline to achieve. Such discipline is a function of methodical organization and a structure that can hold potential wanderers to positions settled on by the parties. Such structure and ability to impose discipline presently are lacking among Republicans and Democrats alike. Hence, although they parade under the banner of one or the other of the parties, those in the legislative branch more and more act as independent contractors. Indeed, the parties themselves currently exist chiefly as fund-raising organizations which ask little more of their "members" than regular financial contributions. The parties' once vibrant connections to the grass-roots, which existed in the form of precinct, ward and county organizations and neighborhood political clubs, now largely have disappeared. Their demise has been helped along, incidentally, by various United States Supreme Court opinions that, in the name of the First Amendment freedom of association, dissolved the institutions supporting local political activity.⁴⁰

In short, we will have and presently are undertaking labor law reform. But, it is coming about through a series of unconnected half-steps that amount to a *de facto* repeal of the National Labor Relations Act rather than through any fully considered and comprehensive course of action. The ultimate results likely will be a much different workplace and social order than any we envisioned—or intended.

III. EVALUATION: DEPENDENCY AND THE QUESTION OF PERSONHOOD

It is appropriate here to make a quick evaluation of our common situation. We began with the image of a spectrum and the suggestion that the nations represented on this panel covered the range of the individualist-communitarian legal and

40. See, e.g., *Rutan v. Republican Party*, 497 U.S. 62 (1990); *Elrod v. Burns*, 427 U.S. 347 (1976).

social models. But, it may turn out that no spectrum exists. Instead, as we consider each Report, we find the same result, with our Reporters describing what are actually variations on a theme.

To summarize briefly: In the United States, we have what might be called a condition of "formal individualism." There are relatively few self-organized mediating structures in the work-life sphere, and those that exist represent a dwindling membership. Ever less constrained by collectively set determinations, Americans are free to bargain and select the terms and conditions of their employment individually. In reality, this means that individuals have become increasingly dependent on their employers and the state to regulate the order of the employment relationship. Few actually participate directly in making and administering the law that governs their lives in the workplace.

This state of dependency appears ubiquitous. Thus, in France we find plenty of mediating structures—but no members. In Germany, we discover the emergence of what Professor Teubner calls "polycorporatist" structures that mediate horizontally among specialized sectors of society which are rooted in different horizons of meanings.⁴¹ In Germany, as in France and the United States, the continuing fragmentation of common understandings, and the relentless spread of instrumental reason, has left these structures with highly attenuated links to their "base." Lastly, we find in Japan a situation in which individuals are highly dependent on corporate structures. In short, across the board, we see the same thing: dependent individuals possessed of little ability to determine the day-to-day conditions of their lives. Wherever we look, we find individuals not as self-determining agents, but as objects of administration.

All of this returns us to the fundamental theme of our Colloquium and invites us to consider the extent to which our present approaches successfully have resolved the question of how we can be both many and one. The results of our comparative inquiry also press us to ask whether modern liberalism, with its limited conception of community, ends up by undermining the social conditions necessary to sustain its noble project of enhancing individual status and personal

41. See Teubner, *supra* note 4.

liberty. Raising this question prompts us to consider again what a human is. It may well be that the notions of personhood that typically inform our thoughts are deeply inadequate, and that we are far more than we think ourselves to be. To put the point briefly: Was Tocqueville correct in insisting that in the modern era, self interest "provides the only stable point in the human heart,"⁴² and hence, the sole basis for grounding a democracy?

This point raises the most fundamental of questions and requires us to ask whether we are sovereign beings invested with rights or conditional beings, situated by mutual obligations. These matters turn us to inquire about what humans properly can claim to know, and whether there are limits to intelligibility. As the French Reporter points out, we cannot long stay on this terrain without confronting the philosophers and the moralists.⁴³ But, neither can we avoid these questions if we are to take our own work and its implications seriously. There is a natural desire to pursue such issues, which can be suppressed only by deforming ourselves and distorting the order that we bequeath to subsequent generations.

42. TOCQUEVILLE, *supra* note 14, at 239.

43. Blanc-Jouvan, *supra* note 1, at 694.