

Review

Solidarity Forever

Stephen B. Goldberg†

Labor and the Legal Process. By Harry H. Wellington. New Haven: Yale University Press, 1968. Pp. xi, 407. \$10.00.

Harry Wellington's new book, *Labor and the Legal Process*,¹ is surely one of the most significant works published in the labor law field in recent years. Professor Wellington avoids a comprehensive, horn-book treatment of the field; instead, he examines the role of law and legal institutions in the development of national labor policy, emphasizing their limitations. With a commendably easy style and a refreshing directness, Professor Wellington deals in depth with the major problems confronting collective bargaining today—the tension between governmental regulation of collective bargaining and freedom of contract, the relationship between the individual employee and the collective bargaining representative, the role of labor in politics, and the effects of union power on the economy. In analyzing these intricate problems, Wellington presents clear choices between alternative solutions—some of which, as might be expected, I found more appealing than others.

The book breaks down into two major segments, one dealing with the relationship of collective bargaining to the government, whether as a regulator of the bargain or protector of the economy, and the other with the position of the individual employee in the collective structure. I found the former somewhat more stimulating and shall devote the major portion of my comments to it, although this probably reflects my own interests rather than a difference in the quality of the two portions. But before passing to his analysis of the relationship between the collective entities, a brief description of Professor Wellington's

† Professor of Law, University of Illinois College of Law. A.B. 1954, LL.B. 1959, Harvard University.

1. H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* (1968) [hereinafter cited as WELLINGTON].

treatment of the role of the individual employee in the collective structure seems in order.

Without a system of collective bargaining, there can be no effective representation of the mass of employees. With such a system, however, negligent or corrupt representation may leave some employees worse off than they would have been without collective representation. In addition, any effort to protect against unsatisfactory representation inevitably entails the risk that the protector, whether court or administrative agency, will cut deeply into the union strength that is necessary for satisfactory representation of the mass.

Professor Wellington has no quarrel with the Supreme Court's resolution of this problem, the duty of fair representation created in *Steele v. Louisville & N.R.R.*² Indeed, he describes the court's decision as "a brilliant . . . display [of] the creative art of statutory interpretation."³ He is understandably less pleased, however, with the Court's reluctance in later cases to extend the substantive protection beyond that required by the equal protection analogy employed in *Steele*. Even as subsequently modified by the requirement of good faith and honesty on the union's part,⁴ the content of the duty may, outside of the area of racial discrimination, be inadequate.⁵ As Professor Wellington notes, "[t]he absence of good faith or honesty is difficult to prove, and their presence in no way insures that the union's decision is substantively what it ought to be."⁶

Admittedly, close judicial review of a union's collective bargaining policies raises the danger that an inexpert judiciary will not fully understand the impact of its decisions. But, in Professor Wellington's opinion, this risk could be reduced by developing adequate standards for review and assigning the task to an expert body. The proposed standard for review, "the expectation of the employee community," could be derived from contract terms and industrial practices. The NLRB, Wellington submits, could administer this standard with very little risk to the collective bargaining process—assuming, of course, that a breach of the duty of fair representation constitutes an unfair labor practice. Thus Professor Wellington criticizes the Court's holding, in *Vaca v. Sipes*,⁷ that NLRB jurisdiction over fair representation

2. 323 U.S. 192 (1944).

3. WELLINGTON 145.

4. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Vaca v. Sipes*, 386 U.S. 171 (1967).

5. See, e.g., *Union News Co. v. Hildreth*, 295 F.2d 658 (6th Cir. 1961).

6. WELLINGTON 162.

7. 386 U.S. 171 (1967).

claims is not exclusive. "Exclusive jurisdiction in the Board would have ensured the experience that the several district courts (judge and *jury*) and their state court counterparts cannot hope to obtain. And it would have ensured that the duty on the union to represent fairly was uniform throughout the fifty states."⁸ This criticism seems well taken.

Professor Wellington's final criticism of the Court's elaboration of the duty of fair representation in the context of grievance administration relates to the sanction attached to its breach. The Court in *Vaca v. Sipes* rejected the principle that the union is fully liable for the monetary harm suffered by the employee who has been wrongfully discharged and whose grievance the union, for impermissible reasons, has declined to process. It may be that the union is not responsible for all the employee's damages; as Professor Wellington states, "If the union is liable in, say a discharge case, for back pay from the time it broke its duty [of fair representation] until judicial or agency decision, the law's delay may make the remedy substantial."⁹ Yet the union, as *Vaca* suggests, may escape liability even for damages not attributable to the law's delay. In *Vaca*, the Court concluded that, assuming the union had breached its duty some three years before the jury trial and six years before final appeal, "all or almost all of [the employees'] damages would still be attributable to his allegedly wrongful discharge by the employer."¹⁰ The court did not explain how it reached this conclusion, and one can only hope it did not represent a final and considered judgment by the court as to the apportionment of damages in such a case. If it did, Professor Wellington would be wholly accurate in concluding that "the Court's approach may have undermined the duty of fair representation [I]f [the union's] liability is minor, breach will not be sufficiently deterred by law and this will be ironic indeed."¹¹

If the duty of fair representation does not provide effective protection for the union member, perhaps the guarantee of internal union democracy will, though Professor Wellington notes that "regulation of internal affairs cannot be thought of as an alternative to governmental review of union collective bargaining decisions."¹² Recognizing that there exist substantial objections to governmental regulation of internal union affairs, Professor Wellington nonetheless justifies regulation,

8. WELLINGTON 183.

9. *Id.*

10. 386 U.S. at 198.

11. WELLINGTON 193.

12. *Id.* 186.

both legislative and common law, by what he calls "the morality of promise-keeping and the obligation of government through law to protect the reliance and expectational interests generated by the making of certain types of promises."¹³ In essence, because the labor movement has always professed a commitment to the democratic ideal, in seeking support for its collective bargaining effort at the workplace (industrial democracy) and within the union itself (union democracy), it has created a general public expectation that it behaves in a democratic fashion. Having held forth this promise of democracy, and having gained mightily in the process, the labor movement must now redeem it. And, if it will not do so, it is both to be expected and justified that the legal process—both judicial and legislative—will compel it to do so. Indeed, the very rhetoric of the union movement has provided the judiciary with the justification for striking down undemocratic union practices; and Congress, with the rationale for enacting the Labor Management Reporting and Disclosure Act in 1959.¹⁴

The remainder of the book is devoted to an examination of the principle of freedom of contract and the extent to which current labor policy impinges upon that freedom, whether for good or bad. Freedom of contract, of course, is a slippery term under which many a sin has been perpetrated.¹⁵ To Professor Wellington, however, it is synonymous with free collective bargaining and means that the administrators of labor policy should interfere as little as possible with the negotiation and administration of collective bargaining contracts. As Professor Wellington notes, national labor policy today has as one of its important goals the maximization of freedom of collective contract. "[T]he goal is enshrined in legislation; and it is what is meant by 'free collective bargaining,' a concept to which labor, management, and government regularly proclaim fidelity . . ."¹⁶ And much can be said, as Professor Wellington points out, in favor of freedom of contract.

The parties generally are wiser about their own affairs than others, including government acting through its legal institutions, can hope to be. This surely is an operating assumption of all democratic societies. Second, the cost of substituting governmental for private decision-making is very great. Indeed, as a practical matter, it cannot be done across-the-board. . . . Moreover, to the extent

13. *Id.* 189.

14. Act of September 14, 1959, Pub. L. No. 86-257, 73 Stat. 519, amending 29 U.S.C. §§ 159 *et seq.* (1964) (codified at 29 U.S.C. §§ 159 *et seq.* (1964)).

15. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

16. WELLINGTON 52.

that government tries, power to make a variety of different types of decisions shifts away from private parties and toward government. This is a shift to be avoided, if one believes that it is important for a democracy to have power spread about.¹⁷

Professor Wellington examines the various aspects of federal labor law to see if the Board and the courts have indeed striven to maintain the maximum freedom of collective contract consistent with the other goals of federal labor policy. As for the administration of Section 8(a)(5) of the Labor Management Relations Act,¹⁸ Professor Wellington awards high marks to the Board and the courts for the interpretation given the duty to bargain in "good faith." Since a good faith state of mind, or the lack of it, must be inferred from the acts of the parties, the Board or court might have required that the parties make objectively reasonable proposals and employ objectively reasonable practices and procedures to satisfy the "good faith" test. This policy would quite likely have made it impossible for an employer to insist on including within a collective agreement those seemingly unreasonable views that the employer considers not only reasonable but vital to the economic health of his enterprise. This limitation, of course, would constitute a substantial infringement on freedom of collective contract without any compensating gains. That it has not been imposed, Professor Wellington attributes to generally wise judicial review, which has established the principle that by and large only the party bargaining with a desire not to reach agreement has violated the statute, an "approach surely . . . gentle to freedom of contract."¹⁹

Professor Wellington is far less happy, however, with the scope which has been given the duty to bargain. "Freedom of contract values are no less importantly at stake. Administrative and judicial sensitivity, however, will here be found blunted. The result is far from happy and is urgently in need of repair."²⁰ His primary target of attack is the body of law which has developed respecting mandatory and non-mandatory bargaining subjects. The villain of the piece, as in so many commentaries, is *Borg-Warner*,²¹ in which the Supreme Court established the proposition that a party's insistence on bargaining as to a matter outside the statutory phrase "terms and conditions of employment"²²

17. *Id.* 29.

18. 29 U.S.C. § 158(a)(5) (1964).

19. WELLINGTON 59.

20. *Id.* 63.

21. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

22. 29 U.S.C. § 158(d) (1964).

constitutes a violation of the duty to bargain. Professor Wellington's criticism of *Borg-Warner* is three-fold: First, the majority opinion offers no general guidance for distinguishing between those subjects as to which bargaining may be insisted upon ("mandatory" subjects of bargaining) and those as to which it may not be ("non-mandatory" subjects of bargaining). Second, once a subject is deemed non-mandatory, it is kept from collective bargaining and out of the contract unless its inclusion would be advantageous to both labor and management. "To this extent, the institution of collective bargaining develops by governmental fiat; the terms of collective contracts through governmental intervention."²³ Third, the statutory goal of industrial peace is hardly served by precluding bargaining on a subject which one of the parties feels so strongly about as to insist upon its inclusion as the price of agreement. The neglected issue will not disappear but will emerge later in a different yet equally disturbing guise.

But overruling *Borg-Warner*, as Professor Wellington suggests, and allowing a party to insist on negotiations as to any subject it wishes, as well as to use economic force in support of any demand it deems sufficiently important, only goes part of the way in maintaining freedom of collective contract. Even without the power to ban insistence on bargaining as to non-mandatory subjects, under current law the Board and the courts retain the power to compel bargaining, although not agreement, as to those subjects determined by them to be mandatory, *i.e.* to fall within the statutory phrase, "terms and conditions of employment." In Professor Wellington's opinion, neither *Borg-Warner* nor *Fibreboard*,²⁴ the Supreme Court's most recent effort, provides a satisfactory definition of that phrase. The Court in *Fibreboard* presented three reasons for its holding that an employer's decision to contract out plant maintenance work was a mandatory subject of bargaining. First, the issue was "well within the literal meaning of the phrase 'terms and conditions of employment.'"²⁵ Second, "to hold . . . that contracting out is a mandatory subject of bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."²⁶ Third, the "conclusion that 'contracting out' is a statutory subject of collective

23. WELLINGTON 77.

24. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

25. *Id.* 210.

26. *Id.* 211.

bargaining is further reinforced by industrial practices in this country,"²⁷ an appropriate source of guidance in determining whether a particular subject should be included within the scope of mandatory bargaining. As Professor Wellington notes, "Most subjects that are likely to be raised during collective bargaining can be brought within the literal language of the statute; and the industrial peace rationale applies across the board."²⁸ Only the industrial practices test limits subjects for bargaining. Professor Wellington regards an industrial practices standard, however, as wholly unsatisfactory. "Subjects that in one industry or firm are appropriately handled through collective bargaining may be inappropriate subjects for collective bargaining in another industry or firm."²⁹

Dissatisfaction with existing standards for determining which subjects must be bargained about accounts for only part of Professor Wellington's unhappiness with current law relating to mandatory subjects of bargaining. A more fundamental criticism is that once law designates a subject as one which the parties must bargain about if either wishes to do so, it will channel the parties to bargain over that subject regardless of its importance. "It is difficult," he observes, "for anyone freely to give away something of value that the law has bestowed."³⁰ There might be fewer private pension plans today, he asserts, if the Board and the courts had not held that pensions were a mandatory bargaining subject. The legal rules thus condition the substantive content of agreements, plainly intruding on freedom of contract.

To eliminate this channeling effect Professor Wellington recommends what appears on the surface the precise opposite of his recommendation as to *Borg-Warner*. Instead of leaving the parties wholly free to negotiate or not on any given subject, Professor Wellington suggests, in essence, that the force of the law be placed behind all bargaining demands. More precisely, Professor Wellington's recommendation is that all subjects arguably within the statutory language, "terms and conditions of employment," should be mandatory subjects of bargaining. In view of the breadth of the statutory terms, however, it is plain that this would include all subjects about which either party wished to bargain and in effect remove from the Board and the courts the task of distinguishing mandatory from non-mandatory subjects of bargaining.

27. *Id.*

28. WELLINGTON 70.

29. *Id.* 79.

30. *Id.*

Indeed, he suggests only one class of subjects that would fall outside the statutory duty to bargain—clauses that, if accepted, would violate Section 8(e) of the Labor Management Relations Act.³¹

The primary gain claimed for this extension of the subjects to which the legal duty to bargain would attach is, paradoxically enough, that the law would become less important in determining what was actually bargained about. Instead of focusing on a comparatively limited list of bargaining subjects, the parties would presumably tend to determine on the basis of their own interests without government guidance the subjects as to which they deem important enough to bargain about. The proposed expansion of the scope of mandatory bargaining might also further the goal of industrial peace, at least in the long run, by bringing all subjects as to which the parties were concerned within the collective bargaining framework.

Subject to one minor caveat, I agree with Professor Wellington's conclusions that *Borg-Warner* should be overruled and that the duty to bargain should extend to all subjects arguably within the phrase, "terms and conditions of employment." Under Professor Wellington's approach, the law could require bargaining on union security clauses violating Sections 8(a)(3) and 8(b)(2)³² or a no-solicitation rule contrary to 8(a)(1).³³ These demands arguably relate to a "term or condition of employment." But it would be wholly incongruous if the force of the law were to support a demand that a party discuss a clause which, if accepted, would violate the law. As noted earlier, Professor Wellington makes this point as to clauses violating Section 8(e); I would expand it to include all clauses violating a specific provision or policy of the LMRA. Similarly, I would retain *Borg-Warner*, as Professor Wellington intimates, to the extent of precluding insistence on bargaining about such a clause.

Aside from the foregoing qualification, I am persuaded that Professor Wellington's conclusion as to the need for reversing *Borg-Warner* is sound. The existing doctrine that precludes insistence on any subject found outside terms and conditions of employment, however keen the insisting party's interest in the subject, serves no salutary function. Nor, as Justice Harlan's opinion in *Borg-Warner* so convincingly noted,³⁴ is this doctrine compelled by the statute.

31. 29 U.S.C. § 158(e) (1964).

32. 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1964).

33. 29 U.S.C. § 158(a)(1) (1964).

34. 356 U.S. at 354 (Harlan J., concurring in part and dissenting in part).

As for the advisability of expanding the list of bargainable subjects, I am nowhere near as concerned as Professor Wellington about the tendency of existing law to encourage negotiations on those subjects found to fall within the class of bargainable subjects. Unions are under no compulsion to press a subject deemed bargainable, nor are employers required to accept whatever demands may be made. Under these circumstances, the pressure on freedom of collective contract is, in a phrase used by Professor Wellington in another context, "surely gentle." Additionally, such pressure because of the "industrial practices" test limits bargaining to those subjects found by experience to be amenable to the collective bargaining process. Nonetheless, I agree with Professor Wellington that the "industrial practices" test should not be imposed as a limitation on the subjects as to which the law will compel bargaining. If a particular union has special concerns, the statute's goal of industrial peace will be furthered by giving the union an opportunity to present them at the bargaining table and to press for their recognition in the collective agreement. Another union may have problems common to a number of unions but propose unique solutions to them. Here, too, industrial peace will be served by compelling the unwilling employer to discuss those solutions. It may be that the discussion will not alter existing practices or change a decision once made, but one cannot know this for a certainty before negotiations begin. Furthermore, even those negotiations which are unsuccessful in altering existing practices may be worthwhile to the extent that the union and management come to understand more fully the opposing positions and views. In this respect, too, a broadened definition of mandatory bargaining subjects would serve the goal of industrial peace. In sum, then, I reach the same conclusion as does Professor Wellington—that mandatory subjects of bargaining should be expanded to include all those arguably within the statutory phrase, "terms and conditions of employment"—but primarily for the reason that such an expansion would serve the statutory goal of industrial peace rather than that it would relieve significant pressure on freedom of contract (though any accomplishment of the latter goal would be all to the good).

The objections to the proposed expansion of mandatory bargaining subjects, for all the vigor with which they have been and will be made, are not significant. Initially, Mr. Justice Stewart's suggestion in *Fibre-board* that Congress, in 1947, directed the Board and the courts to impose a narrow construction upon the phrase, "terms and conditions of employment," simply is not supported by the legislative history. Professor Wellington makes this point convincingly. Nor, as Professor

Wellington also demonstrates, is it sufficient to argue that expanding the scope of bargainable subjects will severely hamper the efficiency with which business is conducted by impinging on managerial prerogatives. Unions certainly have no intention of destroying the capitalist system and, in fact, are often its prime defenders. In addition, a decline in efficiency is often a trade-off for another more important managerial interest. More fundamentally, any loss in efficiency as might result from the necessity for management to discuss an expanded list of issues with the representatives of its employees would appear an expected and worthwhile price to pay for a system that contributes as much to industrial peace and democracy as does collective bargaining.

On the other hand, expansion in mandatory bargaining subjects may be needlessly detrimental to the efficiency with which business is conducted if the law is unclear, as it presently is, as to how much discussion an employer must engage in to satisfy his bargaining obligation, and under what circumstances he may terminate discussion if he believes action to be necessary. Present law is also unclear as to what contract language will suffice to relieve an employer of his bargaining obligation as to particular subjects during the contract term. As Professor Wellington notes, "[This] lack of clarity in the law . . . exerts on employers pressure to bargain and to postpone making business decisions that is plainly improper under the statute."³⁵ Nor does this pressure serve any legitimate employee interest. "It is pressure resulting from the poor administration of difficult problems, not from the theoretical purposes of the legislation."³⁶ The Board should thus clarify the law both as to the extent of discussion required to comply with the bargaining obligation and the contract language with which an employer can suspend that duty during the contract term.

The duty to bargain does not, of course, include a duty to agree to the other party's demands; but expanding the subjects of bargaining requires that the parties be protected from pressures to agree which result from unwarranted governmental limitations on their economic strength and weapons. On this latter point, Professor Wellington appears curiously insensitive. He acquiesces in the Board's current practice of regulating the techniques of collective bargaining, despite the fact that such regulation is likely to have a significant effect on the terms of the agreement, a result inconsistent with the goal of freedom of contract. The point was made explicitly by the Supreme Court in

35. WELLINGTON 75.

36. *Id.*

Insurance Agents.³⁷ In that case, the NLRB held that a union which utilized slowdown tactics while bargaining had violated its duty to bargain in good faith. The Board reasoned that the union's "reliance upon harassing tactics during the course of negotiations for the avowed purpose of compelling the Company to capitulate to its terms is the antithesis of reasoned discussion it was duty bound to follow."³⁸ The Supreme Court reversed, pointing out that the Board's approach involved an intrusion into the substantive aspects of the bargaining process. "If the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract."³⁹ This, the Court concluded, was contrary to the principle of free collective bargaining embodied in the Labor Management Relations Act.

Professor Wellington, as might be expected, agrees with *Insurance Agents*, referring to it as "perhaps the high-water mark for freedom of contract in modern labor management relations."⁴⁰ He goes on, however, to indicate his acquiescence in both *General Electric*⁴¹ and *Truitt*,⁴² each of which I believe to be inconsistent with *Insurance Agents*. *General Electric* involved the celebrated bargaining tactic known as Boulwarism, which the Board condemned with this pronouncement: "Respondent's 'bargaining' position is akin to that of a party who enters into negotiations with a pre-determined resolve not to budge from an initial position, 'an attitude inconsistent with good faith bargaining.'"⁴³ Professor Wellington agrees that this should be a violation of the duty to bargain because "very little damage to freedom of contract is worked by incorporating into the statute that portion of the . . . duty to bargain which insists that the art of persuasion, when given a chance, may lead to an accommodation of seemingly irreconcilable views."⁴⁴ Similarly, he agrees with *Truitt*, which held unlawful an employer's refusal to substantiate a plea of poverty as a reason for declining to increase wages. Yet in both of these cases, just as in *Insurance Agents*, the Board's decision deprived a party of a bargaining

37. NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960).

38. Insurance Agents International Union, 119 N.L.R.B. 768, 770 (1957).

39. 361 U.S. at 490.

40. WELLINGTON 63.

41. General Electric Co., 150 N.L.R.B. 192 (1964), enforced, 72 L.R.R.M. 2530 (2nd Cir. Oct. 23, 1969).

42. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

43. 150 N.L.R.B. at 196, quoting from *Truitt*, supra note 42, at 154 (Frankfurter, J., concurring in part and dissenting in part).

44. WELLINGTON 61.

tactic solely because that tactic was inconsistent with a process of reasoned discussion. The Court pointed out in *Insurance Agents* that this approach had an impermissible effect on the terms of the bargain; if the employer cannot use a particular tactic, the outcome of the negotiations might well be different than it would be otherwise. The same argument would appear applicable when the tactic is an announcement of an unwillingness to yield or a plea of poverty which the pleader is unwilling to substantiate. In each case, "good," *i.e.* rational, bargaining practices can be furthered only at the cost of interfering with free collective bargaining. As long as such freedom is central to national labor policy, the gain is not, I think, worth the price.

More specifically, I think that the Board should make no effort to regulate the bargaining tactics used by the parties, as long as those tactics are used for the purpose of obtaining an agreement. This general rule, like all general rules, is, unfortunately, subject to exceptions. In this case, there would be three: (1) when the tactic is severely destructive of employee self-organization; (2) when the tactic has such an overwhelming impact as to destroy the rough balance of power that the LMRA seeks to create; (3) when the tactic is not productive of agreement, even on terms desired by the party who utilizes it.⁴⁵ Subject to these exceptions, however, I would argue for governmental non-interference with the techniques of collective bargaining. This approach, combined with Professor Wellington's suggestion for minimizing the governmental role in determining the issues for collective bargaining would, one hopes, lead to a system in which the terms of collective agreements would be truly a product of free collective bargaining. That this approach might increase the number of cases in which the terms of the agreement would be resolved by economic warfare rather than peaceful negotiations I do not find excessively troubling. To the contrary, this would be a small price to pay for a system under which terms and conditions of employment in the private sector of the economy were largely free of governmental direction or influence.

Even if governmental influence over the terms of the collective agreement and its administration⁴⁶ were minimized, Professor Wellington's

45. See Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 CORNELL L. REV. 897, 902-03 (1969).

46. Professor Wellington's major criticism of current law in the administration of the collective bargaining agreement is that there is no serious judicial review of whether the parties agreed to arbitrate the issue involved after arbitration proceedings have been completed. WELLINGTON 106-12, 122-23. I strongly disagree with this as a general rule, primarily for the reasons stated in Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969). For a particular situation in which such review might be ap-

ton recognizes that a particular settlement, while perhaps fair to both union and management, might be unfair to the general public. The cost associated with major strikes and the inflationary pressures thought to be generated by certain collective bargaining settlements may be intolerable. As to both major strikes and excessive settlements, Professor Wellington's basic yet imaginative approach is the same. The quest must be for a legal response that preserves as much as possible the present system of free collective bargaining.

Treating the major work stoppage first, he correctly points out that the political, economic, and national security effects of such stoppages make governmental intervention inevitable. Thus, the central question is not whether government should intervene but rather what form its intervention should take. Existing methods of intervention—the cooling-off period and fact-finding procedures of the Labor Management Relations Act⁴⁷ and the Railway Labor Act⁴⁸—are analyzed and found unsatisfactory, primarily because the predictability of their use and impact encourages the party with the weaker bargaining position to delay serious collective bargaining with the hope that governmental intervention will buttress his position. Ad hoc intervention by the executive, though more flexible and less predictable than statutory procedures, Professor Wellington also regards as unsatisfactory. First, without the sanction of enacted law, it imposes demands upon labor and management officials which they may justly believe are inconsistent with their obligations to their members or stockholders. Second, executive intervention rests upon a wasting asset, the prestige of the executive, incapable of frequent use.

In searching for a more satisfactory legal response to the major strike, Professor Wellington considers briefly a number of devices—mediation, fact-finding, injunction, seizure, compulsory arbitration, the non-stoppage strike—and concludes that the executive should have a choice of procedures. This conclusion, with which I believe most knowledgeable observers would agree,⁴⁹ possesses a number of advantages. Initially, as Professor Wellington points out,⁵⁰ a choice of procedures enables the executive to tailor the type of governmental intervention to the nature of the dispute. Second, by eliminating predictability from

appropriate, however, see Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 *Nw. U.L. REV.* 735, 787-89 (1969).

47. 29 U.S.C. §§ 176-180 (1964).

48. 45 U.S.C. §§ 155-160 (1964).

49. See Report of the American Bar Association Special Committee on National Strikes in the Transportation Industries, 71 *L.R.R.* 355 (1969).

50. WELLINGTON 294-96.

executive action, it discourages the parties from relying on that action as a tactical factor in their dispute and encourages them to get on with the business of collective bargaining. Indeed, Professor Wellington suggests that the choice of procedures approach may actually improve the chances for dispute resolution by presenting each party with the possibility that a failure to achieve prompt settlement will result in a form of intervention exceedingly damaging to its negotiating position. "[T]he range of alternatives available to the government is numerous enough, and the effects sufficiently diverse, to make it too chancy for the parties to allow intervention. Prudence dictates that they negotiate an agreement for the alternative may be costly."⁵¹

It is in this context—the impetus to settlement flowing from the possibility of a form of governmental intervention tactically disastrous to one party or the other—that Professor Wellington suggests enactment of a choice of procedures statute accompanied by a provision exempting those employers and unions who successfully negotiate a non-stoppage strike agreement. The non-stoppage strike, under which employees who would otherwise go out on strike continue working but receive only a fraction of their wages, while management receives only a fraction of its ordinary return, has generally not been accepted as a substitute for the ordinary strike. Despite its obvious advantages, a number of difficult questions are involved in its implementation. First, how much should be deducted from employees' wages and employer's revenue? The actual cost to each party of a work stoppage is not easy to fix, and weighting the scales unduly toward one side or the other may amount to preordaining the result of the strike. Second, where should the money—employees' wages, employer's revenue—go? To impose an arbitrarily fixed governmental solution to the division or disposition of the money would be an unwarranted intrusion into free collective bargaining. But as Professor Wellington notes, the parties might be sufficiently motivated freely to negotiate a non-stoppage strike agreement if exempted from the application of a choice-of-procedures statute.

For all the ingenuity of this suggestion, one must be skeptical as to whether it would lead to any perceptible increase in the number of non-stoppage strike agreements. Even absent the existence of a choice-of-procedures statute, the costs of a strike to both employer and union are frequently both great and unpredictable. Not only may both employer and employees be wholly without income during the course of

51. *Id.* 296.

the strike, but the competitive position of the employer may be so affected that it is many months, if not years, before employer revenues and total employee earnings return to pre-strike levels. Indeed, it is not unknown for an employer to be forced out of business because of a strike. Yet, for all of this, there has been absolutely no movement toward voluntary acceptance of the non-stoppage strike.⁵² Whether applying the choice-of-procedures statute to parties who failed to negotiate such an agreement would make any perceptible difference, I tend to doubt. I suspect that the sensitivity of the question of how much each party should be penalized during the non-stoppage strike would make agreement impossible. Each party would probably prefer taking its chances with a choice-of-procedures statute to risking giving away victory in the next round of negotiations through an unfavorable agreement as to penalties in a non-stoppage strike. This is not, of course, an argument against the adoption of Professor Wellington's suggestion. There is nothing lost, and some possibility of gain, in giving it a trial. Yet the possibility of gain is doubtful—unless the prospect of being subject to a choice-of-procedures statute is far more frightening to employers and unions than I presently conceive it to be.

In his concluding chapter, Professor Wellington examines the problem of maintaining free collective bargaining in the face of increasing public clamor over its allegedly inflationary effects. He concludes that if government is to concern itself with the allegedly inflationary aspects of collective agreements, and it certainly will, regardless of the uncertain validity of a cost-push theory of inflation, a more satisfactory method than the Kennedy-Johnson wage-price guideposts formulated by the Council of Economic Advisors must be found. Initially, Professor Wellington criticizes the Council for abandoning the "flexible and sensitive" approach of its 1962 *Report*, which contemplated modifying the general guideposts to take account of the circumstances of particular industries, in favor of a rigid adherence to the trend rate of overall productivity increase, the notorious 3.2 per cent. In addition, he is critical of the ad hoc efforts of the Kennedy and Johnson Administrations to enforce the guideposts, pointing out that ad hoc enforcement raises a number of serious questions, including doubts as to its legality, over-extension of Presidential prestige, and lack of even-handed administration. Finally, he notes that it is not at all clear that the guideposts have been successful, quoting John Dunlop's statement that:

52. Professor Wellington was able to turn up only one such agreement, negotiated in 1964 between the Upholsterer's Union and the Dunbar Furniture Company of Berne, Indiana. *Id.* 297 n.51.

On the wage side, it is my considered judgment that the guideposts probably have had no independent restraining influence on wage changes in private industry. . . . I know of no person actually involved in wage setting on the side of industry, labor organization, or as a government or private mediator or arbitrator who thinks that the guideposts have had on balance a constrictive influence; and I have discussed the issue in detail with scores of such persons in the past six months.⁵³

Professor Wellington's remedy is both simple and novel. He suggests that the law should compel the parties, as part of the duty to bargain, to discuss in good faith the application of the flexible guideposts contained in the 1962 *Report* to their particular situation. The claimed advantages of this change are manifold:

Discussion would force the particular union involved to take a position on the appropriate relation of wages to productivity and to other factors deemed relevant in the Council's Report, and thus it would channel the negotiations into courses directly concerned with national economic goals. It would create pressures tending to make union wage demands more consistent with economic policy. . . .

. . . [T]he sanction of public opinion behind national policy should itself be strengthened, for it will now be endowed with the prestige associated with law.

. . . [T]he guideposts' educational role will, if anything be strengthened under the duty to bargain approach.⁵⁴

Finally, integrating the flexible guideposts into the collective bargaining process will permit the bargaining power and peculiar problems of the parties to be reflected in the settlement. Thus, the complaint that the guideposts impose upon the parties a settlement which takes no account of their particular circumstances would be avoided.

In short, the proposal to integrate the guideposts into collective bargaining through the legal duty to bargain seeks, on the one hand, to mold guidepost policy in a fashion which takes into account the nature of the collective bargaining system and, on the other hand, to change the system so as to effect a viable accommodation between the parties' responsibilities to their respective constituencies and to the public.⁵⁵

53. Dunlop, *Guideposts, Wages and Collective Bargaining*, in *GUIDELINES, INFORMAL CONTROLS, AND THE MARKET PLACE* 81, at 83-84 (G. Schultz & R. Aliber eds. 1966), quoted in *WELLINGTON* 318-319.

54. *Id.* 324-26.

55. *Id.* 326.

While one cannot be overly sanguine as to the prospects for success of Professor Wellington's suggestion, it should not be dismissed out of hand. There are undoubtedly some unions, which, if subject to a duty to discuss the application of the guideposts to their wage demands, would first formulate their demands, then do what they could to construct a post hoc rationalization of those demands in terms of the guideposts. Nor, given the multitude of factors that enter into the acceptability of wage demands under the 1962 *Report*, would such an approach be difficult. Furthermore, since a union's duty to discuss the applicability of the guideposts to its demands would not include a duty to limit those demands to what the guideposts might suggest, a union that believed itself to be in a sufficiently strong bargaining position could, to the extent that its demands were not consistent with the guideposts, simply state that the guideposts were insufficient to provide its membership with the wage increases they deserved. On the other hand, a union that flouted or attempted more subtle evasion of the guideposts might provide the employer with a strong bargaining counter by turning public opinion against it and undercutting the effectiveness of its strike threat. Thus, the existence of a duty to discuss the applicability of the guideposts to wage demands would create *some* pressure to bring those demands in line with the guideposts. Secondly, though the establishment of a duty to discuss guideposts could be used primarily for tactical purposes, with employers seeking to draw unions into technical violations of this duty rather than entering into serious discussions, the unions could protect themselves by complying as a matter of course with the duty to discuss guideposts, a result that would be all to the good.

A final criticism of Professor Wellington's suggestion might be that there is little likelihood of its educating union leadership to the long-range disadvantages of overly large wage demands. The existing guideline approach was supposed to serve the same function; indeed Professor Wellington quotes Gardner Ackley, then Chairman of the Council of Economic Advisors, as stating that to some extent the guidelines were successful in this respect.⁵⁶ Yet, as has already been noted, Professor Dunlop's conclusion was that the guideposts had had no restraining influence whatever on union wage demands. On the other hand, even if previous guideposts failed in their goal of "educating" labor leaders

56. "As a result of this educational effort, the labor unions, at least in many cases, are bringing a different attitude to the bargaining table." Ackley, *The Contribution of Guidelines*, in *GUIDELINES, INFORMAL CONTROLS, AND THE MARKET PLACE* 67 at 72-73 (G. Schultz & R. Aliber eds. 1966), quoted in WELLINGTON 327.

as to the virtue of limiting their wage demands, the proposed flexible and individually tailored approach makes more attractive the case for self-limitation. Furthermore, imposing a legally enforceable duty to justify wage demands in terms of the guideposts might make it easier for union leaders who would limit their demands but fear a hostile union electorate to transfer some of the blame for reduced settlements to the new law. In sum, for all the uncertain prospects of success in Professor Wellington's suggestion, it may well result in wage demands consistent with overall economic policy with minimum disruption of the institutions of free collective bargaining.

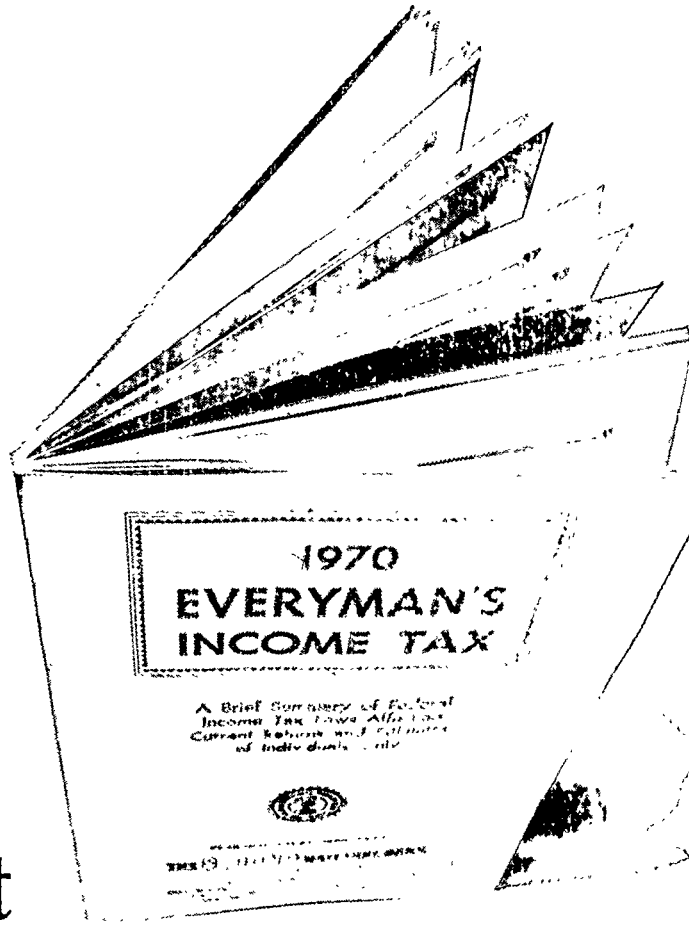
The very strength of Professor Wellington's proposal—that it seeks to minimize alterations in existing institutions—may, however, prove to be its political weakness. I am not at all certain that the changes it would bring about are sufficiently dramatic to generate the degree of public support necessary for its enactment, especially if the labor movement were to oppose it. Professor Wellington's additional proposal in the event that the proposed alteration in the duty to bargain is deemed too weak does not suffer from such a political deficiency. The amended duty to bargain should, he suggests, be accompanied by the establishment of a national tribunal, composed of labor, management and public members, with responsibility to define, in conjunction with the Council of Economic Advisors, standards of public fairness that relate national economic policy to collective bargaining.⁵⁷ Additionally, permanent commissions of public members might be created on geographical or industry lines, with power to intervene in selected negotiations which were thought to be especially important to the economy. A commission would relate the national tribunal's guides to the collective bargaining relationships within its jurisdiction, give notice of the government's general position in particular negotiations, and, where necessary, recommend alternative settlement terms within the developed standards of public fairness.

The primary advantage of this approach over former guidepost efforts is, as Professor Wellington notes, that it would make possible, in a way that ad hoc executive intervention does not, informed governmental intervention in local bargaining relationships. Additionally, it would intrude government into the collective bargaining process no more than is now true in many cases of ad hoc intervention while cumulatively having a much more substantial impact on the economy. Of necessity though, the total number of cases of governmental inter-

57. *Id.* 327-330.

vention would undoubtedly rise rather substantially. Thus while recognizing the virtues of this proposal to accommodate national economic policy to the collective bargaining process, one must hope that responsible union leadership will make its enactment unnecessary. There can be little doubt that if governmental intrusion into the collective bargaining process were to take place, even on the limited scale suggested by Professor Wellington, it would represent a substantial shift from private to public ordering of terms and conditions of employment, surely an unhappy development in a society which has long taken pride in the success and vitality of free collective bargaining.

Even if this degree of governmental intervention into the bargaining process seems warranted because of national economic needs, high priority must be placed on achieving a similar limitation on price rises. The guideposts do, of course, suggest standards for price behavior, and there have been a few conspicuous instances of governmental pressure to enforce those standards—most notably the April 1962 attack on the Big Steel price increases. On the whole, however, labor leaders have been convinced that the price guideposts are ineffectual, and neither they nor their membership have seen any equity in a call for self-restraint in wage demands. Professor Wellington discusses this point only briefly, stating that the amended duty to bargain should also require an employer to bargain over the relationship between projected pricing policies, the guideposts' criteria for pricing behavior, and his proposals as to wages. He suggests that this requirement might affect subsequent price behavior, but he does not explain how this would happen. Presumably an employer resisting a wage increase would point to a low level of profits and a low rate of productivity increase. But, since those same factors would warrant price increases, it is not at all clear how discussion of these factors would constitute a restraining influence on the employer's subsequent price behavior. In any event, I do wish Professor Wellington had devoted more attention to the price side of the wage-price spiral, since self-restraint on wage demands would be far more likely if organized labor were persuaded that prices were similarly restrained.



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