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Remade in Japan

Jennifer Friesen
Loyola Law School, Los Angeles

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*Jennifer Friesen**

JAPAN'S RESHAPING OF AMERICAN LABOR LAW. By *William B. Gould.* Cambridge, Mass.: The MIT Press. 1984. Pp. xvii, 193. $19.95.

INTRODUCTION

Japan — in particular, Japan as a force in the international business community — is probably in the news and on the minds of more Americans these days than at any time since World War II. Japan's fabled productivity and efficiency are viewed with admiration, with envy, and with hostility by the American business and labor communities. Japan's increasing share of the world market contributes to a perceived rise in tensions between our two nations. Into the mélange of myth and mystery through which many of us still view Japan's business success drops a timely and enlightening volume, Stanford Law School Professor William Gould's *Japan's Reshaping of American Labor Law.* The first major contribution on comparative aspects of Japanese and American labor practices outside of the legal and trade literature, the book goes a long way toward sorting out some of the answers to the question, "How do they do it?," as well as that question's inevitable follow-up: "What can we (or should we) learn from them?"

Japan's Reshaping of American Labor Law is accessible to both law-trained and lay readers with an interest in labor relations, although many of the references to labor statutes and rulings will be best understood by those with a grounding in labor law. Coverage of labor issues is selective, but broad. After a chapter devoted to an overview of Japan's legal and industrial relations system, Professor Gould undertakes a comparative study of American and Japanese labor law in six areas: history of the enactment of the labor laws, the administrative process, remedies for labor law violations, job security, unfair labor practices, and treatment of labor in the public sector.

In many regards, the Japanese legal framework for labor relations closely resembles our own. *Japan's Reshaping* is about more than the *law* of labor relations, however; it introduces not only two statutes but

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* Associate Professor of Law, Loyola Law School, Los Angeles. B.A. 1972, University of Kansas; J.D. 1978, University of Oregon. — Ed.

two cultures. It is the author's detailing of the two nations' profoundly different historical experiences and cultural attitudes, with their effect on the real practice of labor relations, that makes his work so intelligible and so fascinating.

True to their social patterns in general, Gould explains, the Japanese are the prime exponents of the cooperation model of labor relations. Americans, on the other hand, expect labor relations to be adversarial, and are suspicious when they are not (p. 163).[1] This fundamental difference in orientation between cooperation and confrontation colors every chapter of the book.

Thus, among the threads that run through Japanese industrial relations are commitment of management and labor to moderation and group-oriented compromise, relative egalitarianism across worker-supervisor lines, and mutual loyalty between the employee and the company.[2] These are the values which often seem most to distinguish Japanese labor practices from our own — somewhat ironically, since at least egalitarianism and loyalty are also held to be highly prized American social ideals.

The translation of the value of cooperation into the Japanese workplace means, for example, that management has largely given up resistance to unions and in fact shares company information and decision making with workers to a degree unknown in this country (pp. 12-13, 56, 95). Egalitarianism means that the gap between corporate executive salaries and workers' wages remains much smaller than it is here, and that Japanese corporate boards commonly include former union members (pp. 5, 166). Loyalty means low mobility of the work force, both labor and management, and employer avoidance of unemployment; strikes, quits and layoffs are all much less common (pp. 9-11, 13-14).[3] In exchange for advancing these values, the Japanese sacrifice other values which are perhaps dearer to many Americans: the single-minded pursuit of individual and corporate economic self-interest, the institutionalization of confrontation and adversarial tactics on both sides, the fierce independence of labor unions and workers from management influence, and the worker mobility and management flexibility which characterize our "at-will" employment system.

I can hear union sympathizers drumming their fingers at this point, as if to say, "Cooperation is all very fine for management, but what does it do for the workers? Aren't Japanese unions under this system little more than ineffectual company lackeys?" Unfortunately,

1. *See also* p. 94 (citing the landmark opinion of Justice Brennan for the Court in NLRB v. Insurance Agents' Intl. Union, 361 U.S. 477, 488-89 (1960)).

2. *See, e.g.*, pp. 4-5, 9-16, 142-43.

3. Loyalty does not necessarily mean worker docility. Bitter words and, by our standards, outrageous "acts of protest" against management are not uncommon in Japan. *See, e.g.*, pp. 124-26, 136-41.

the efficacy of the Japanese model of representation, from a worker's point of view, is a subject about which Professor Gould has comparatively little to say. He does note that the Japanese style of local enterprise unionism (one plant, one union) lends itself both to the strengths of easy mobilization and plant solidarity and to the weaknesses of union dependence and susceptibility to company manipulation (p. 9). Japanese wages are often believed to be depressed, but some writers disagree,[4] and, as Gould suggests, transportation and housing allowances commonly contribute to the compensation package (p. 12). Interestingly, "concession bargaining," so much a part of the American bargaining picture in the 1980's, has long been built into Japanese bargaining; bonuses, varying according to a particular firm's financial well-being, constitute as much as thirty percent of a year's wages (p. 7). Unions and workers, then, have a powerful incentive to ensure the employer's productivity and competitiveness. In good times, a fairly structured bonus system also prevents management from passing on record profits disproportionately to its executives and its shareholders, a practice which sometimes corrodes union-management relations here at home. Whether Japan's system represents a net gain to employees over the American system, however, is left to the reader's judgment.

A predisposition toward cooperation rather than confrontation is, naturally enough, reflected in sometimes subtle but significant differences in legal doctrine and practice under Japan's labor law as well as in the cultural substratum of labor relations behavior. That point may be demonstrated by an overview of Japanese labor legislation.

I. JAPANESE LABOR LAW: STATUTES AND OTHER SOURCES OF LAW

The title of this book— *Japan's Reshaping of American Labor Law* — can be misleading. Actually, the title is a double entendre, but only one of the meanings is intended. The book is *not* about any changes the United States has made in its labor relations due to emulation of, or competition with, Japanese rivals. Rather, it is about the ways in which Japan has dramatically reworked her American-type labor laws — laws imposed upon Japan, it turns out, by Americans during the postwar occupation. Gould rightly claims that the pronounced similarity in the two countries' labor legislation which came about because of this historical fortuity provides students of comparative law with an unusually fine opportunity to see how dissimilar cultures produce dif-

4. *See, e.g.*, Ross, *What is Japan, and What is Not Japan?*, 37 BUS. & SOCY. REV. 31, 34 (1980). The same author, addressing the myth of low cost Japanese labor, says: "The real reason for lower labor costs in Japan: Toyota estimates thirteen man-hours needed to build one of its cars; it estimates thirty man-hours for a comparable GM model." *Id.* at 34-35.

ferent answers to the same legal questions (pp. 16, 19). That, indeed, is the chief theme of *Japan's Reshaping of American Labor Law.*

A. *History of Japan's Modern Labor Legislation*

A fascinating history surrounds the enactment of Japan's Trade Union Law (TUL), first effective in 1946. In August of 1945, immediately after the Japanese surrender, the United States announced a post-surrender policy for Japan which would require the promotion of "social reforms" and "democratic forces," including the promotion of labor unions (pp. 17-18). The statutes which were eventually passed during the occupation under the careful supervision of the Allied forces bore a striking resemblance to American labor law of that era.

Before 1946, Japanese labor law did not, apparently, exist in any meaningful form (p. 23). The United States, on the other hand, had had a long history of labor agitation and some ten years of experience with the New Deal era National Labor Relations Act.[5] The imposition of the NLRA model upon Japan in the 1940's was historically odd, because in Japan the law would serve as the generator, rather than the consequence, of grass-roots organized labor activity (p. 23). Professor Gould, exhibiting an appreciation for historical irony, points out the further oddity that American policy thus placed General Douglas MacArthur — a right-wing Republican opposed to union influence in big business at home — in charge of promoting unions abroad. While the official stuff of MacArthur's Tokyo press releases consisted of lofty statements praising the "unionism of labor — that it may be clothed with such dignity as will permit it an influential voice in safeguarding the working man from exploitation and abuse and raising his living standard to a higher level," MacArthur was probably more in sympathy with the idea that labor unions would counterbalance the power of the large industries which had supplied the Japanese war machine (pp. 17-18).

The modern Trade Union Law, after major amendments in 1949 appeased American critics who felt that it wasn't enough like our home product, borrows almost intact most of the key features of the American NLRA. Thus, the TUL's stated purposes are to promote equalization of employee bargaining power and to protect self-organization for collective action, including selection of representatives for negotiations (pp. 34-35). Both statutory schemes exclude "supervisors" from the definition of protected "employees."[6] For the American core concept of employee "concerted activities" protected by section 7 of the NLRA,[7] Japanese drafters substituted immunity for

5. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1982)).

6. *See* p. 4; 29 U.S.C. § 152(11) (1982).

7. 29 U.S.C. § 158 (1982).

"appropriate or proper acts" by trade unions or their members.[8] As in the NLRA, the "unfair labor practice," adjudicated before a government agency, is the legal means of enforcing employer obligations and worker rights under the TUL (pp. 40-42). In both systems, such obligations and rights include the employer's obligation to bargain collectively with the workers' representative, a prohibition against employer retaliation or discrimination because of protected union activity, and a prohibition against financial assistance by employers to labor organizations (though this prohibition is weakened in Japan by permitting employers to furnish office space to unions) (pp. 34-39). Unlike the amended NLRA,[9] the TUL does not proscribe union unfair labor practices, although Gould explains that a similar effect is achieved by imposing criminal or civil penalties on "inappropriate" union behavior, and by a kind of "clean hands" prerequisite to full relief for unions levying charges against employers (pp. 40, 89).

Up to this point, the Japanese law seems familiar enough — but now comes a startling departure. The Japanese have never institutionalized what is for Americans the centerpiece of modern union organizational struggles: the union election. Under the NLRA, the process of selecting a union representative has been consciously modeled upon our democratic method for selecting our political representatives. That is, the American union's potential constituency (the bargaining unit) is ordinarily designated by government officials; thereafter an election is conducted by secret ballot among the eligible voters within the unit.[10] The ballot will list the union that has petitioned for an election as well as any other labor organization vying for the job of "exclusive representative."[11] The union which receives more than fifty percent of the valid votes cast assumes, as in political races, both the right and the obligation to represent in good faith the employment interests of *all* members of the unit — including those who may oppose this union, or who may, indeed, oppose all unions. This potentially substantial minority is not permitted to act through another representative nor to refrain from being represented. Further, unless prohibited by local "right to work" laws, the union in power is permitted to negotiate with the employer for a contract requiring even nonconsenting unit members to pay union dues.[12]

As Gould points out, virtually none of these features exists in Japanese labor law (pp. 37-38). The TUL contains no provision for selec-

8. The phrase seems peculiarly "appropriate" to a culture dominated by unspoken rules of propriety in its social conduct. Yet the phrase has been criticized, Gould notes, for its extreme vagueness, a serious defect when one considers that the practices of labor relations, and thus a conception of what was "proper," were so undeveloped in Japan at this early date. Pp. 23-24.

9. 29 U.S.C. § 158(b) (1982).

10. 29 U.S.C. § 159(c)(1) (1982).

11. 29 U.S.C. § 159(a) (1982).

12. 29 U.S.C. § 158(a)(3).(1982).

tion of a union or designation of an "appropriate unit," and no concepts of majority rule and exclusivity as we know them. Initially, the union has the right to represent, without election or further formalities, those workers who want to be represented by it. Union security agreements can be negotiated if the union already represents a majority in the plant, and its collective bargaining agreements with the employer will extend to all workers in the plant when three-fourths are already bound (p. 26). But apart from these two instances, majority rule and exclusivity have no place in Japanese labor relations. Gould explains that Japanese management opposed the American system as giving too much power and authority to a single union, while the divided Japanese union movement opposed it as potentially decimating the power of those unions shut out of the process by the dictates of exclusivity (pp. 37-38). As a result, Japanese employers may find themselves obligated to bargain with two or more unions representing the same types of workers in the same plant.[13]

There are other differences in the Japanese statutory law. Among the most interesting are the subtle linguistic differences in those portions of the TUL that adopt the form of the NLRA but with a twist that is peculiarly Japanese. One of them, highlighted by Professor Gould, is in the expression of the "unfair labor practice" concept. The Japanese statute uses the phrase *futo rodo koi* — "improper" labor practices — although a literal translation of the English words — *fukosei rodo koi* — was possible (p. 39). It appears that the concept of "unfairness" is awkward or unnatural in Japan in describing *personal* relations; "unfairness" is a criticism more appropriately addressed to government action (p. 40). "Impropriety" is thus the TUL's standard both for employer treatment of employees, or for protected employee acts. This subtle distinction may reflect the Japanese bias toward resolution of private societal problems by reference to group interests or culturally encouraged consensus, in contrast to the American insistence on protection of rights-based, individual interests, whether asserted against the government or against a private party. Professor Gould seems to agree when he characterizes the Japanese focus in unfair labor practices as "not public rights or wrongs, but rather problems that need third-party assistance so that harmony and compatibility may be facilitated (p. 43)."

B. *Statutes in the Extralegal Context — Japanese Cultural Expectations and Industrial Relations in Practice*

Comparative scholars stress that true comparativism must tran-

13. Part of the explanation for the lack of exclusive, majority rule lies in the modern Japanese constitution, which guarantees the right of all workers to bargain. This provision is held by some to protect the right of Japanese workers to act individually or through a minority union, p. 38, although that interpretation is hardly compelling.

scend a merely descriptive approach to foreign labor institutions and concentrate instead on the functions those institutions perform within the foreign society. It is not enough to know how the text of legislation compares to ours without also knowing how (and whether) it works in practice.[14] How it works, it seems, will depend on such things as whether the law is truly needed or is instead superfluous to social rules and agreements that do the real work of governing; whether the law gives power or rights to a segment of society with either incentive or power enough to make use of them; and whether the country itself has made compliance with the law such a public priority that its officials have devoted adequate resources and firmness to its adjudication and enforcement.

By this measure, Professor Gould's functional approach to his subject shows him to be a good comparative scholar. His book, although short on explanations of comparative theory or methodology, generously documents instances in which Japan's different cultural attitudes and expectations, general legal system, and industrial relations norms — interacting with the statutes governing the trade unions — lead to results under those statutes that depart from our own. These illustrations of Japan's system (for the author admits his treatment is only illustrative) make fascinating introductory reading for the reader with even a passing interest in Japanese society or business. Beyond that, the illustrations of comparative methodology in practice should capture the imagination of legal thinkers for whom comparativism, far from being merely a diverting excursion to foreign shores, is a tool for generalization, for theory, and even for reform at home. The reformer who likes what a foreign system has achieved will also be concerned with the foreign law's "transplantability" (as comparative scholars refer to it), an issue discussed further below.

A selected inventory of illustrations support Professor Gould's claim that different cultural contexts produce different results even under nearly identical statutory language. Thus, for example, because in Japan the supervisor-worker relationship is regarded as familial and fiduciary rather than adversarial and arms-length, and because the supervisor-worker roles tend to blur more, Japanese law as actually practiced does not require unions rigidly to exclude supervisors from their ranks (pp. 4-5). Because of the custom of enterprise unionism, the words "company union" describe for the Japanese the normal close relationship between the plant and the union, while to American ears and courts they denote a union that is corrupt, ineffectual, or management-infiltrated (pp. 3, 83). Both countries formally condemn company domination or assistance to unions, but the United States practice is much more rigorous (pp. 35-36).

14. Blanpain, *Comparativism in Labour Law and Industrial Relations*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 17, 22-24 (R. Blanpain ed. 1982).

Other examples fill the pages of Professor Gould's book, but perhaps two more, relating to litigation practice, will especially surprise American readers familiar with labor practice here. In Japan, individual grievance arbitration, so much a part of American rights-based expectations, is almost unknown (pp. 11-12). Devotion of major political and economic resources to pursuit of individual claims is inconsistent with the Japanese penchant for group consensus and nonconfrontation. Moreover, in the unusual cases in which labor disputes are litigated as unfair labor practices, Japanese law stipulates that neutral "public" labor commissioners, who do not come from the ranks of labor or management, have exclusive jurisdiction to decide such cases (pp. 40-42). American practice has no parallel. Our five-member National Labor Relations Board has no places reserved by law for neutrals.[15] Indeed, it has come to be expected that its membership will be dominated by persons who share the political biases of the appointing administration. The criticism of President Reagan's new managment-oriented Board, for its rapid reversal of comparatively pro-employee doctrines of long standing[16] is only a more dramatic example of the unsettling effects of building our deep-seated adversarial expectations into our policy-making and adjudicating bodies.

C. *Beyond Statutes: Problem-Solving Without Law*

These are some of the ways in which the Japanese have "reshaped" rather than rejected the American transplant. However, the Japanese, unlike Americans, prefer to solve major societal problems by private arrangements rather than by law. Indeed, it has been said that the Japanese hate law:

> With the exception of lawyers and persons with some knowledge of law, Japanese generally conceive of law as an instrument of constraint that the state uses when it wishes to impose its will. Law is thus synonomous with pain or penalty. To an honorable Japanese, the law is something that is undesirable, even detestable, something to keep as far away from as possible. To never use the law, or be involved with the law, is the normal hope of honorable people. To take someone to court to guarantee the protection of one's own interests, or to be mentioned in court is a shameful thing . . . . In a word, the Japanese do not like the law.[17]

This attitude explains much about Japanese labor relations in gen-

15. *See* 29 U.S.C. § 153(a) (1982) (creating National Labor Relations Board and providing for presidential appointment of members).

16. *See, e.g.*, Apcar, *NLRB's New Majority Uproots Principles Set Under Carter, Angering Many Unions,* Wall St. J., Jan. 25, 1984, at 35, col. 4; Greenhouse, *The N.L.R.B. Has a New Lineup and Line,* N.Y. Times, Apr. 15, 1984, at E5, col. 1; Middleton, *NLRB: An Agency in Turmoil,* Natl. L.J., July 2, 1984, at 1, col. 2 (reporting perceived pro-management about-face in new Board's policies).

17. Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences,* 9 EMPLOYEE REL. L.J. 629, 637 (1984) (quoting Y. NODA, INTRODUCTION TO JAPANESE LAW 159-60 (1976)).

eral. In particular, it would lead an observer to expect that solutions to major labor issues in Japan are not confined to litigation under the statutes just discussed, but should be sought in the extra-legal context of custom. And this is where a good comparative scholar finds them.

Of the many customary labor practices touched upon in the book, perhaps two best illustrate the Japanese way. These are also two topics which I think will most readily seize the attention of the American reader: job security and worker access to company financial information. Both are topics much in the news in contemporary legal and business America.[18] Both are areas in which Japan offers solutions which may be profoundly admired by Americans — or profoundly mistrusted. And in neither case is the Japanese solution reached as a result of any American collective bargaining law.

1. *Permanent Employment*

"Job security" in Japan means, in part, the institution of so-called permanent employment *(shushin koyo)*. Most Americans' conceptions of this institution are more myth than reality. Professor Gould reports that only about twenty percent of Japanese wage earners — generally those in the larger industrial companies — have such guaranteed lifetime employment. This privileged sector is the beneficiary of extraordinary corporate measures to avoid layoffs, even in times of economic stress.[19] But there is a negative aspect to this picture. Women (about forty percent of the work force) are rarely afforded permanent status.[20] And, to a degree unknown to General Motors or United States Steel, Japanese companies rely heavily on subcontractors. In hard times, these generally unorganized, relatively underpaid workers are the first ones to be laid off, and they can even be "bumped," or displaced, by permanent employees (pp. 2-3, 10, 105). Finally, even the permanent worker, unlike his counterpart in the United States, becomes vulnerable when he is older. No Japanese legislation or custom prohibits age discrimination in employment; layoffs or management pressure to retire[21] may begin at age forty-five and retirement

18. *See, e.g.*, Gordon, *To Get Workers Working*, N.Y. Times, July 11, 1984, at A25, col. 1 (advocating increased job security and worker participation in management, rather than threats of layoffs, to boost efficiency); Greenhouse, *High Court Rules in Labor's Favor*, N.Y. Times, Dec. 3, 1981, at A24, col. 1 (Supreme Court holds employees do not lose protections of NLRA simply because their jobs give them access to employer confidential information).

19. Pp. 9-10. Gould states, without elaboration however, that *shushin koyo* "affects the thinking and the policies of most employers in Japan." P. 11.

20. P. 11. Indeed, Japan lacks any legislative equivalent to our familiar Title VII, forbidding job discrimination on the basis of race, color, sex, religion, or national origin. *See* 42 U.S.C. § 2000e-2 (1982). Constitutional prohibitions against sex discrimination are routinely ignored by Japanese employers and the lack of any *stare decisis* doctrine in Japan's basically civil-law tradition makes constitutional litigation an ineffective means of achieving lasting justice for female workers. Pp. 105, 108.

21. *Katatataki* (tap on the shoulder) is the term for such pressure. P. 10.

age is generally between fifty-five and sixty.

According to Gould, permanent employment in Japan is not the product of law or collective bargaining (p. 11).[22] It is a paternalistic, "unilateral" act of the employer, but one which has become so engrained in workers' expectations that it may be a kind of law-in-custom. No similar job protection from economically motivated dismissal exists in this country. On the contrary, the deeply engrained cultural expectations in the United States (at least those of management) seem to be that a company should have absolute freedom to dismiss unwanted labor whenever it is profitable to do so. Absent management benevolence, American workers' interests in continued employment in layoff situations are left to whatever their union (if they have one) can squeeze out of management, and even the right to bargain about management decisions to close a business or relocate a plant is rapidly shrinking under recent court decisions and the rulings of the present appointees to the National Labor Relations Board.[23]

Thus, in Japan, the preservation of large-industry jobs from the ravages of economic downturn has been accomplished largely without the aid of the collective bargaining law. In the United States the effort at preservation has generally failed in spite of the law.

Where custom or collective bargaining fails to protect job security, workers may turn to courts. Interestingly, the much talked about recent movement by some American courts to protect workers from unjust dismissal through modification of common law tort and contract doctrine[24] does have a counterpart in Japan. Gould reports that Japa-

22. However, he later states that the courts in Japan have, despite the absence of statutory or constitutional authority, imposed strict "just-cause" limitations on employers' ability to dismiss workers for economic reasons. The courts require proof that the economic crisis is real and that there is no reasonable alternative (including transfer or voluntary resignation) to dismissal of the particular employee. Pp. 106-09.

23. *See, e.g.*, First Natl. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Otis Elevator Co., 269 N.L.R.B. No. 162, 115 L.R.R.M. (BNA) 1281 (1984). Nevertheless, recent collective bargaining agreements in the automobile industry may signal a significant movement toward institutionalizing some kinds of protection from job loss in economic downturns. *See Approval of New Contract by UAW Local Leaders*, 117 LAB. REL. REP. (BNA) 103 (Oct. 8, 1984) (General Motors workers who lose their jobs due to new technology or transfer of work to receive full pay and retraining or reassignment).

24. *See* Pp. 109-11. A thorough and helpful review of this development up to 1982 can be found in *The Employment-At-Will Issue*, Lab. Spec. Proj. Unit (BNA) (Dec. 2, 1982). *See also* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980). There has been growing interest in the United States in institutionalizing this concept through comprehensive unfair-dismissal legislation. Such statutes have been put before legislatures in California, Maryland, Michigan, New Mexico, and Ohio. *See* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 495 (1976). Gould states that the American labor movement has been indifferent to such legislation essentially because unions would lose an effective inducement for unionization of those workers already protected by the law. P. 112. Since the book was published, however, the AFL-CIO has gone on record in support of pending unfair-dismissal legislation in California, a law which could be of great historical importance if enacted. Bernstein, *AFL-CIO Supports Legislation to Protect Non-Union Workers From Unjust Firing*, L.A. Times, Sept. 13, 1984, § 1, at 22, col. 1. Professor Gould does not indicate whether Japanese unions experience difficulty in or-

nese lower courts have imposed a stringent "just cause" limitation on all dismissals, whether for economic or disciplinary motives (pp. 106-09). Apparently the judicially implied good-faith obligation in Japanese employment relations has written into court-made law for all what is the customary "law" for the few (p. 109).

2. *Sharing of Company Financial Information*

Rational company decisions whether to close a business or institute massive layoffs are based on financial information concerning profitability and productivity. All over the world, unions and workers are vitally interested in having advance notice of major business dislocations affecting job security and in knowing the financial information upon which these decisions are based. Access to financial and business planning information ordinarily permits unions to bargain more intelligently and may lead to suggestions or concessions that would prevent job losses (p. 99). The responses of industrialized countries to workers' demands for otherwise confidential company data are various. But no two countries are further apart in their responses than the United States and Japan.

During the last decade or so, Japanese unions in the larger companies have routinely received company information about sales, profits, mergers, plant closures, automation and the like, through "joint consultations" independent of, but preceding, collective bargaining (pp. 99-100). Again, this practice is dictated by a Japanese knack for consensus, not by law or union compulsion. Professor Solomon Levine, in a recent article which recounts the history of Japanese union-management cooperation, describes the relation of joint consultation to collective bargaining as complementary rather than competitive. According to Levine, this intense communication does indeed produce rational and flexible wage bargaining, typically a lowered wage demand from the union in exchange for management's promise to refrain from layoffs.[25]

The Japanese consensus model does not exist in the European Economic Community, but unions have access to confidential information as the result of recent law making (p. 99). It is the American practice which seems starkly out of step. Although Gould notes some exceptions, chiefly in the automobile industry, American industry leaders have failed to develop informal consensus mechanisms to assist intelligent bargaining about wages and layoffs (p. 101). And again, when

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ganizing job-protected workers. In any event, it is at least plausible that unions could actually derive an organizing benefit from such a law, since employees will need advice and advocacy in pursuing their new rights, much as the United Mine Workers and other unions monitor safety rights guaranteed by the Occupational Safety and Health Act (OSHA).

25. Levine, *Japanese Industrial Relations: What Can We Import?*, in N.Y.U. THIRTY-SIXTH ANNUAL CONFERENCE ON LABOR 2-1, 2-29, 2-34 (1983).

consensus has failed, the law has not filled the gap. The NLRA makes no express provision for information-sharing to assist bargaining; the sole exception in the case law is that the union may demand disclosure of management's books when management pleads "inability to pay" wage demands made at the bargaining table (pp. 101-02),[26] a duty easily circumvented by rephrasing management's position as unwillingness rather than inability. And, of course, there is no duty to supply information justifying a decision to close a factory (at least not if motivated chiefly by entrepreneurial concerns other than labor costs) for the simple reason that such a decision itself falls outside the scope of the duty to bargain (p. 102).[27]

This issue forms the basis for one of Gould's strongest criticisms of American labor practice:

> Real problem solving is avoided by employers who view the firm simply as their own property and characterize its internal affairs as none of the concern of the union and the workers. Such antediluvian thinking hardly comports with what should constitute corporate responsibility to workers and the public [P. 102.]

Professor Levine agrees that joint consultation is one of the most important lessons we can "import" from the Japanese.[28] A mature approach to labor relations requires much more devotion than we presently show to problem-solving and mutual trust. The hide-the-ball psychology of American companies instead displays a regrettable attitude that employees are uncooperative and irresponsible adversaries in a company's struggle to remain profitable. Unions that are kept in the dark and then criticized by press and public for not being loyal to employers or reasonable in their bargaining demands surely cannot be blamed for a certain amount of bitterness and mistrust in return.

II. Transplantability of Japanese Labor Law

Both management and labor in the United States have reason to look around, perhaps even to look abroad, for solutions to the declining fortunes of some sectors of American big business and the escalating divisiveness, and even hostility, which mars our labor relations. Comparative scholars, however, caution us against assuming that any pattern of law can be transplanted outside the environment of its origin. Labor law is obviously part of a system, and the consequences of changing even one element of the system depend on the relationships among all elements of the system. Some aspects of labor relations laws relate to the distribution of power in the society: these are laws which allocate to the collective the power to organize, to strike, to participate

26. The leading case is still NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

27. *See* Otis Elevator Co., 269 N.L.R.B. No. 162, 115 L.R.R.M. (BNA) 1281 (1984).

28. Levine, *supra* note 25, at 2-34.

in management decision making, and to obtain binding third-party intervention (arbitration) in disputes over what portion of the profits and other privileges should belong to labor. Decisions about allocations of power are likely to involve entrenched political and economic structures and values. A leading scholar thus has concluded that such *collective* labor law is resistant to transplantation, while *individual* labor-related laws — protection from discrimination, wage and hour laws, provisions for job security — are much more easily transferred outside the country of origin.[29]

Professor Gould is cautious about transplantability, whether of collective or individual rights. He concludes his book with some brief suggestions about how the United States might emulate Japanese labor practice, although he does not use or formulate any particular theoretical model to explain his choices. Most of Japan's system, he says, is simply too far outside of the American cultural tradition to survive here (p. 162). He points in particular to the importance of the Japanese concept of worker dependency *(amae)* in building attitudes of group cooperation and employer responsibility. American workers, he states, could not tolerate such formal subordination (p. 162). I agree, but I would perhaps emphasize more the profound difference between American and Japanese attitudes toward subordinating individual to group interests.

We are a nation steeped in the primacy of individual "rights." We assert these rights in court at an astonishing rate, not just against government, but against whoever limits our liberty to pursue our sense of individual justice. In the employment arena, tensions between collective and individual interests surface in so-called "Right to Work" movements, in reverse discrimination complaints, in fair representation suits, and in Landrum-Griffin suits against unions. Japanese culture, for whatever reasons — Japan's long history as a nation, its relative isolation, its racial homogeneity — prizes group solidarity and the transcendence of cooperation over the advancement of individual self-interest, an attitude that must contribute much to a sense of community within the union. As one scholar of Japan has written:

> Children are taught the virtue of cooperation for everyone's benefit, and, however annoying they may find group pressures, adults remain responsive to group attitudes for they are convinced that everyone gains from restraining egoism.[30]

Confrontation is to be avoided; the pursuit of abstract justice through litigation is the behavior of millionaires or psychopathic personalities (p. 58).

Such restraint of ego, except ego in its most antisocial manifestations, is hardly a dominant American ethic. It would be surprising if

29. Blanpain, *supra* note 14, at 29-30.

30. P. 1 (quoting E. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 98 (1979)).

our strong sense of individualism did not surface in a group-oriented experience like unionism. American workers who are represented by a union might choose to view the union experience as an opportunity for self-government, for involvement in a group process with solidarity as its major premise, or merely as a means to buy greater levels of comfort and security for themselves. Some say the latter has become the dominant ethic of the American union worker. In this view, union representation is a service one pays for, much as one would pay an agent to protect one's financial interests in a business deal.[31]

If this is the view of most American workers, then American democratic unionism is as threatened by the attitudes of the workers it wants to represent as by those employers who seem bent on digging for the union movement an early grave. Professor Gould does not comment at any length on the role of group consciousness in American unionism, although he suggests in his conclusion that "American society and American workers need to develop a greater sense of the group and a consequent sense of solidarity." (p. 164).

Despite his conclusion that comparatively little of the Japanese system can be transplanted because most of it is culturally, rather than legally, dictated, Professor Gould does make positive suggestions for reform in this country based on his comparative study (p. 162). He advocates relatively modest legal changes to permit American companies to cooperate more with unions and nonunion employee groups by allowing them greater use of company facilities and by fostering worker participation programs (p. 164). He also urges amendment of the NLRA to protect all workers from unfair dismissal, which would bring the United States in line with other industrialized countries in legislating job security (p. 165).

I believe there may be more that we can learn from the Japanese experience, short of "transplanting" any of her particular practices. We will perhaps never become "Japanese" in our attitudes toward, say, union-management cooperation or paternalistic protections granted by employers. But that does not mean that Japanese behavior is unaffected by the law, or that we might not find such a behavioral link that would enlighten our own efforts at law reform. At least one area of labor practice in which Japan's system is so different from our own — our election-based method for choice of a union representative — is ripe for such reform. The Japanese experience in this area, while probably not "transplantable," can provide empirical evidence about the extent to which different legal rules might help produce, in Japan, results or behavior that we want to produce at home. The particular results desired here are the protection of the worker's legal right to

31. *See, e.g.*, Kuttner, *Can Labor Lead?*, THE NEW REPUBLIC, Mar. 12, 1984, at 19, 25 (quoting an American union organizer critical of this attitude).

organize and the fostering of employer behavior which respects that legal right, results we are presently far from achieving.

Even where deep-seated cultural biases are involved, laws can change behavior either by levying sanctions on specific undesirable acts or by removing existing incentives to the pursuit of antisocial conduct. In either case, the law changes the legal environment, which causes a reassessment in the rational actor's self-interest. Indeed, in imposing sanctions on undesirable conduct, idealists hope for more: they hope that at a subtler level legal condemnation of certain practices will perform an educative function that will inspire a morally based change of behavior. Our laws prohibiting sex and race discrimination in employment, for example, have without doubt done much to raise the national consciousness about egalitarian justice. Many hope that there is now at least some greater notion among the citizenry of the legitimacy of these claims than there was in 1964, and that at least some persons have concluded, as a result of the laws, that discrimination is wrong and unacceptable as well as simply illegal.

Apparently this educative aspect of law, if it works at all in civil rights, has been a miserable failure for labor rights. The NLRA, like the Japanese TUL, prohibits employers from discharging workers for engaging in union activity. Nevertheless, nearly fifty years after the passage of the Act, employer violations of this law are at an all-time high.[32] Since the late 1950's, the number of wrongfully fired workers ordered reinstated by the NLRB has increased tenfold, to over 10,000 per year.[33] Professor Weiler of Harvard Law School has surmised from figures provided by the NLRB that a majority of these workers were fired during union election campaigns, and that "the current odds are about one in twenty that a union supporter will be fired for exercising rights supposedly guaranteed by federal law a half-century ago."[34] Nor does the NLRA seem to have served an educative function with the American public, which has hardly exhibited a heightened respect for workers' exercise of their legal rights to organize. By contrast, one would surely expect to witness serious public outrage if even one woman or one black worker out of twenty were fired for protesting on-the-job discrimination.

Since the rights guaranteed by the NLRA evidently carry little moral weight with violating employers, something obviously must be done to alter the violators' assessment of their self-interests. Here the evidence from Japan may be enlightening. What are the comparable statistics for illegal discharges in Japan? Professor Gould reports, generally, a dramatically lower incidence of all employer unfair labor

32. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769, 1778-81 (1983).

33. *Id.* at 1780.

34. *Id.* at 1781.

practices in Japan. Though Japan has one-half the population of the United States (p. xv), the number of unfair labor practices filed with the various labor commissions against Japanese employers in 1980[35] amounted to fewer than three percent of those filed with the NLRB against employers.[36] Even allowing that the Japanese figures are in some part underreported because Japanese courts, unlike ours, may also entertain unfair labor practice complaints (p. 45), this disparity is astonishing.[37]

Such a startling difference deserves explanation. The figures seem to point inescapably to the conclusion that Japanese employers are more law-abiding than American ones. Is it that they are inherently disposed to "propriety," or could it relate in part to the fact that Japanese law gives employers less to gain by breaking the law? I want to speculate that, even allowing for a cultural dislike of confrontation, part of the explanation for the low incidence of anti-union dismissals must lie in the absence from the Japanese system of both the union election and the accompanying principles of exclusivity and majority rule. These differences mean that an employer has less reason and less opportunity to suppress unionization by firing the organizers. As Professor Gould states:

> Straightforward union organizational struggles, so prominent on the American litigation landscape, simply do not occur with frequency in Japan. As in Europe, employer resistance to unions is less severe, for without the doctrines of exclusivity and majority rule it becomes virtually impossible to avoid unions altogether.[38]

Gould's figures do not show how many of the 862 Japanese complaints lodged in 1980 were for discriminatory (anti-union) discharges nor how many were adjudged meritorious. Figures from the NLRB indicate that two-thirds of its 1980 charges alleged discrimination against union activity, of which forty percent were found to be meritorious, resulting in the 10,000 reinstatements mentioned earlier. Recall that most of these 10,000 were workers fired during representation campaigns. Since there is no union election in Japan, where workers choose their union by private agreement, the employer is afforded no opportunity to "test" worker preferences by employing coercive tactics during a representation campaign. Of course, Japanese union organizers can still be fired, but such firings will more likely come after a

35. *See* p. 48 (Table 3.1).

36. Weiler, *supra* note 32, at 1780 (Table II) (citing 45 NLRB ANN. REP. 243 (1980)). Gould's comparative figures for United States unfair labor practices, p. 48, are not helpful for this particular comparison because they include charges filed against unions. Japan has no provision for union unfair labor practices.

37. The extent to which discriminatory discharges in Japan are litigated in court rather than before the labor commission is unclear, but it appears to be relatively small. *See* pp. 45-48.

38. P. 56. On the other hand, Gould reports, instances of illegal employer discrimination favoring one union over another are on the rise in Japan. *Id.*

selection has been made and cannot have the effect, as in the United States, of inducing a no-union election vote which will bar another union election for at least a year.[39]

The evidence from Japan lends additional plausibility to the major thesis of Professor Weiler's definitive article: the elimination of the election and the representation campaign as we know them is essential to any serious reform program for stemming the skyrocketing rate of employer intimidation of employees seeking to organize unions.[40]

Professor Weiler reaches this conclusion only after reviewing in great depth the ineffectiveness of the current American system of remedies for employer coercion, particularly campaign-related discharges. Remedies for discriminatory discharge — normally reinstatement and back pay — involve extreme delay and almost trivial financial liability for the employer, since the wronged worker has any interim wages actually earned (or unreasonably foregone) deducted from the back pay award.[41] Yet by firing union organizers, the employer stands to break the back of a movement which could end in a costly labor contract. From the employer's point of view, Weiler concludes, the financial incentives for employers to break the law "are too great to be blunted by the prospect of monetary sanctions at any feasible level, and . . . unfair labor practices have now reached proportions that no procedure for immediate injunctive relief could possibly handle."[42] Elimination of the representation campaign, he suggests, eliminates the employer's most potent opportunity for illegitimate interference with employees' choice, an opportunity which arises when the union movement at the workplace has begun, but is still comparatively small and weak.

Professor Weiler does not suggest complete deregulation akin to the Japanese model. Rather, his proposal would allow rapid certification of a majority union by the appropriate labor agency, based either on the union's presentation of signed authorization cards from a majority of the unit, or on the results of an "instant election" held immediately upon presentation of such cards.[43] Weiler explains that this is precisely the approach of the Canadian labor law, which otherwise emulates the American law by making the union, once selected by the majority, the exclusive bargaining agent of the unit.[44]

Professor Weiler's suggested reform is well taken and should be adopted. Instant elections or certifications apparently work in Canada, a society so like our own that cultural considerations should pose

39. 29 U.S.C. § 159(c)(3) (1982).

40. Weiler, *supra* note 32, at 1770.

41. *Id.* at 1787-93, 1795-97.

42. *Id.* at 1804 (footnote omitted).

43. *Id.* at 1805.

44. *Id.*

no serious barrier to transplantability. And Professor Gould's work uncovers no serious problem in Japan with eliminating the union election or accompanying campaign. The point of the suggested reform is simply to maximize employees' uncoerced opportunities to choose their representative, which is, after all, their business, not the employer's. Reforming the election process to better effectuate the employees' choice implies nothing about an employer's legitimate right to resist collective bargains that it finds unacceptable. The choice of a bargaining representative — on either side — is but the barest beginning of the collective bargaining process.

CONCLUSION

Japan's Reshaping of American Labor Law collects such a wealth of research that I cannot claim to have touched upon all of its (or even all of its major) themes in this review. Any reader who is the least bit thoughtful about the state of labor relations in this country ought to accept Professor Gould's invitation to pursue her questions beyond the shores of California and Hawaii. His book is not without its frustrations — in any introductory book, some questions go unanswered — but the reward is well worth the reading. Certainly the book delivers one of the chief benefits of comparative study, which is to place the reader's own national experience into a healthy perspective.

Americans, who have so frequently been guilty of displaying arrogance and ethnocentricity toward the global community, have as much to learn about themselves as about their neighbors by engaging in comparativism. At the very least, it is impossible to walk away from reading a book like *Japan's Reshaping of American Labor Law* with the feeling that the American way is cast in stone, or even in steel.