

# Northwestern Journal of International Law & Business

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Volume 5  
Issue 3 *Fall*

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Fall 1983

## Japanese Labor Relations and Legal Implications of Their Possible Use in the United States

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### Recommended Citation

Marcia J. Cavens, Japanese Labor Relations and Legal Implications of Their Possible Use in the United States, 5 Nw. J. Int'l L. & Bus. 585 (1983-1984)

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## COMMENTS

### Japanese Labor Relations and Legal Implications of Their Possible Use in the United States

#### I. INTRODUCTION

Current economic conditions have led many United States companies to search for ways of regaining competitive positions in international markets.<sup>1</sup> Japan's enviable success in international trade suggests several possible remedies,<sup>2</sup> one of which is development of more harmonious labor-management relations.<sup>3</sup> Some commentators have opposed the application of these cooperative labor practices in the United States, claiming that cultural differences are insurmountable.<sup>4</sup> Japanese-style labor relations, however, have been implemented in the United States, either by conscious imitation,<sup>5</sup> or through similar, domestically developed systems termed quality of worklife<sup>6</sup> and partici-

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<sup>1</sup> Burck, *Working Smarter*, FORTUNE, June 15, 1981, at 79 (see other articles in this series concluding in the Aug. 24, 1981, issue).

<sup>2</sup> One proposal suggests establishing closer government-business ties to facilitate long term planning, provide incentives for growth industries, and formulate solutions for the dying manufacturing sector. Bendix, *Interaction of Business and Government in Japan: Lessons for the United States?* 15 INT'L LAW. 571 (1981). Another recommends creation of U.S. foreign trading companies. Inoue, *Structural Changes and Labour Market Policies in Japan*, 118 INT'L LAB. REV. 223 (1979). But cf. C. JOHNSON, MITI AND THE JAPANESE MIRACLE 11-13 (1982) (stressing that Japanese economic success is attributable to their economic system as a whole, not to any isolated institution which can be imported by other countries).

<sup>3</sup> See, e.g., MANAGEMENT BY JAPANESE SYSTEMS (S. Lee & G. Schwendiman ed. 1982); R. PASCALE & A. ATHOS, THE ART OF JAPANESE MANAGEMENT (1981) (analysis of Japanese labor management principles and their use in U.S. companies) [hereinafter cited as PASCALE & ATHOS].

<sup>4</sup> E.g., Takeuchi, *Productivity: Learning from the Japanese*, 23 CAL. MGMT. REV. 5, 13 (1981).

<sup>5</sup> See, e.g., MANAGEMENT BY JAPANESE SYSTEMS, *supra* note 3.

<sup>6</sup> Davis, *Enhancing the Quality of Work Life: Developments in the U.S.*, 116 INT'L LAB. REV. 53, 61 (1977).

pative management programs.<sup>7</sup> Speculations about and experiments with Japanese labor relations have become popular,<sup>8</sup> and the potential legal consequences of the trend deserve attention. Japanese labor practices may not be compatible with the adversary nature of United States labor law, which does not lend itself to labor-management cooperation.<sup>9</sup>

Japanese cultural history substantially influences that nation's labor relations practices, mitigating the actual effect of post-war Western statutes and leftist labor federations.<sup>10</sup> Japanese society expects harmony between workers and their employers which contrasts with the expectations of conflict evident in the United States.<sup>11</sup> Even so, a review of a few United States attempts to apply Japanese practices shows some success even in trade union organized shops.<sup>12</sup> United States programs stress labor-management cooperation to improve morale, solve production problems, or deal with employee grievances.<sup>13</sup> Joint employee-employer committees which concern themselves with subjects typically reserved for collective bargaining may violate the National Labor Relations Act.<sup>14</sup>

The history of the United States labor movement involved consistent management attempts to destroy unions.<sup>15</sup> Consequently, the National Labor Relations Board<sup>16</sup> and the courts assume that employers dominate joint committees and prevent employees from exercising the

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<sup>7</sup> See Cordova, *Workers' Participation in Decisions Within Enterprises: Recent Trends and Problems*, 121 INT'L LAB. REV. 125 (1982); Halal & Brown, *Participative Management: Myth and Reality*, 23 CAL. MGMT. REV. 20 (1981).

<sup>8</sup> See Guest, *Quality of Work Life—Learning from Tarrytown*, HARV. BUS. REV. July-Aug. 1979, at 76 (counts 450 articles about participation management published between 1975 and 1979).

<sup>9</sup> See *infra* notes 202-231 and accompanying text.

<sup>10</sup> See *infra* notes 23-168 and accompanying text.

<sup>11</sup> See *infra* notes 202-204 and accompanying text.

<sup>12</sup> See *supra* notes 5-7. See *infra* notes 175-189, 279-286 and accompanying text.

<sup>13</sup> *Id.*

<sup>14</sup> National Labor Relations Act of 1935 (Wagner Act), Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-197) (1976)), as amended by Labor Management Relations Act of 1947 (Taft-Hartley Act) Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.); Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C. (1976)). 29 U.S.C. § 158(a)(2) (1976) provides: "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . . ." The statutes cited above will hereinafter be referred to collectively as the National Labor Relations Act, the NLRA, or the Act.

<sup>15</sup> See *infra* notes 202-208 and accompanying text.

<sup>16</sup> Created by the NLRA, Pub. L. No. 198, § 3(a), 49 Stat. 449 (1935) as amended by the Labor Management Relations Act, *supra* note 9, 29 U.S.C. § 153(a) (1976). The National Labor Relations Board will hereinafter be referred to as the Board.

free choice which the NLRA protects.<sup>17</sup> Thus, the law favors traditional trade union organization. Recent decisions, though, have not applied this per se assumption, but instead have approved employer-employee cooperative organization when there was no evidence of actual employer dominance.<sup>18</sup> This evolving standard is promising for the further development of Japanese-style labor relations in the United States.

The United States' pervasive legal philosophy, emphasizing individual rights and duties, will limit labor-management cooperation because those values add an element of conflict to the relationship. Unlike the Japanese, United States employees and employers depend on their legal rights to protect their respective positions and to resolve disputes.<sup>19</sup> From a Japanese perspective, this focus on individual legal entitlements as enforced by adjudication erodes group harmony because it makes the individual's welfare more important than that of the group.<sup>20</sup> It determines winners and losers rather than encouraging compromise.<sup>21</sup> A recent case involving Honda of America's attempt to ward off an United Auto Workers organizing effort illustrates this tension between cooperative labor relations and adversarial United States labor law.<sup>22</sup> United States law does not present an absolute barrier to the use of Japanese style labor relations, but implementation will require modification of both United States legal interpretation and of Japanese management models to protect workers' rights.

## II. JAPANESE LAW AND LABOR RELATIONS

### A. The Role of Law in Japanese Thought and History

Law in Japan, as in all other cultures, exists in symbiotic relationship with the society of which it is a part, mirroring some elements and, through its institutions, shaping others.<sup>23</sup> Japan's attitudes toward law have been formed by its peculiar geography, history and culture.<sup>24</sup> Japan remained isolated from the rest of the world for long periods and developed a cohesive society that was not subject to innovations

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<sup>17</sup> See *infra* notes 204-31 and accompanying text.

<sup>18</sup> See *infra* notes 240-52 and accompanying text.

<sup>19</sup> See *infra* notes 142-168, 289-91 and accompanying text.

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* notes 287-301 and accompanying text.

<sup>22</sup> See *infra* notes 302-16 and accompanying text.

<sup>23</sup> Henderson & Anderson, *Japanese Law: A Profile*, in AN INTRODUCTION TO JAPANESE CIVILIZATION 569 (A. Tiedemann ed. 1974).

<sup>24</sup> Noda, *The Far Eastern Conception of Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 120, 129 (1971).

brought by traders and immigrants.<sup>25</sup> Traditional Japan<sup>26</sup> was an agriculturally based, feudal society in which social status regulated relationships between individuals.<sup>27</sup> Although civil wars disrupted this structure at several points in its history, the Tokugawa Shogunate,<sup>28</sup> established in the early seventeenth century, governed 250 years of peaceful, stable feudal life.<sup>29</sup> Change was infrequent,<sup>30</sup> and family ties to the land created long-term personal relationships within the social hierarchy:

For the successive generations of Tokugawa bureaucrats and "judges" then, Japan was almost everything; other vague lands furnished curiosities, but really did not matter much. The whole country was one big rice estate, with daimyō sub-estates. Every bag of rice was precisely allotted before it was planted; each person was classified before he was born and registered soon thereafter. After the chaos and strife of times past, peace and security seemed quite enough to give one's retainers. All was new administration; there was no political activity worth noticing, just a bit of graft and intrigue to be rooted out by an occasional confiscation or by diligent application of ancestral moral precepts. Movement was slow, change imperceptible; efficacy of human effort to refashion their world was negligible. Such a caricature of the Shogunate structure and thinking is of course oversimplified, but we suggest that it does nevertheless capture . . . thought in Edo.<sup>31</sup>

Japanese religion and philosophy complemented this social struc-

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<sup>25</sup> *Id.* at 130. Despite its general isolation, Japanese culture is increasingly eclectic, adopting elements of Chinese culture, *see infra* note 29 and accompanying text, as well as European and U.S. influences. Jansen, *On Foreign Borrowing*, in JAPAN: A COMPARATIVE VIEW 18 (A. Craig ed. 1979).

<sup>26</sup> This term refers to Japan before the Meiji Restoration of 1868. After a coup restored political power to the emperor, trade with Western nations expanded and Japan began adopting Western law and other elements of foreign cultures. E. REISCHAUER, JAPAN: THE STORY OF A NATION 114-121 (1974). *See also* R. MASON & J. CAIGER, A HISTORY OF JAPAN 214-19 (1972).

<sup>27</sup> E. REISCHAUER, *supra* note 26, at 1-120. In the Tokugawa era there were four hierarchical social classes: the samurai warrior bureaucrats, peasants, artisans and merchants. *Id.* at 90. *See also infra* notes 28-30 and accompanying text.

<sup>28</sup> Tokugawa Ieyasu assumed the title of shogun (supreme military leader) in 1603 after a series of military victories which brought all of Japan under his control. *Id.* at 80-81. This era in Japanese history is also known as the Edo Period, named for the government's capital city which has since been renamed Tokyo. R. MASON & J. CAIGER, *supra* note 26, at 157, 216.

<sup>29</sup> R. MASON & J. CAIGER, *supra* note 26, at 126-71. *See also* REISCHAUER, *supra* note 26, at 80-112. *See generally* STUDIES IN THE INSTITUTIONAL HISTORY OF EARLY MODERN JAPAN (J. Hall & M. Jansen ed. 1968); Totman, *Tokugawa Japan*, in AN INTRODUCTION TO JAPANESE CIVILIZATION 97 (A. Tiedemann, ed. 1974); Mayo, *Late Tokugawa and Early Meiji Japan*, in *id.* at 131.

<sup>30</sup> By 1639 the Tokugawa bureaucracy had closed Japan's ports to foreign trade, fearing the growing power of Dutch, English, Portuguese and Chinese merchants and missionaries. This "closed country" policy endured for more than 200 years. R. MASON & J. CAIGER, *supra* note 26, at 169. *See also infra* note 45 and accompanying text.

<sup>31</sup> D. HENDERSON, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 47-48 (1965).

ture. Japan's indigenous religion, Shinto, taught that man was an integral part of nature and wholly subject to its dictates.<sup>32</sup> Buddhism, which came from India and China in the sixth century,<sup>33</sup> required that man submit to ultimate spiritual law or dharma.<sup>34</sup> If one adjusted one's mind to Buddhist precepts, worldly problems would dissolve.<sup>35</sup> Both of these religions encouraged people to accept life's circumstances.<sup>36</sup> Japan also adopted Confucianism along with many other elements of Chinese culture in the early sixth century.<sup>37</sup> By comparison to Shinto and Buddhism, Confucianism appears to be more practical than ascetic, focusing on social truths by which interpersonal relationships could be preserved and nurtured. Respect for tradition and for one's family, elders and social superiors were central principles as was reciprocal regard for one's inferiors.<sup>38</sup> One who preserved social harmony was a moral man, and justice came from his intuitive leadership, not from a code of laws.<sup>39</sup>

The Japanese language contains words which express these standards of ethical conduct. *On* describes the intangible, incalculable debts which one owes to one's close benefactors (parents, occasionally employers, or the nation);<sup>40</sup> *giri* refers to obligations owed to more distant persons, and to one's equals or inferiors.<sup>41</sup> Observance of both *on*

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<sup>32</sup> See Shunzō, *Shintō: Japanese Ethnocentrism*, in THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE 24 (C. Moore ed. 1967) [hereinafter cited as THE JAPANESE MIND]. The emperor's divinity, another Shintō doctrine, fed the ethnocentricity already present in Japan's closed society. See *id.* at 27-31.

<sup>33</sup> Hideo, *Some Japanese Cultural Traits and Religions*, in THE JAPANESE MIND, *supra* note 32, at 113.

<sup>34</sup> Shinshō, *Buddhism of the One Great Vehicle (Mahāyāna)*, in THE JAPANESE MIND, *supra* note 32, at 33.

<sup>35</sup> Hideo, *supra* note 33, at 115.

<sup>36</sup> *Id.*

<sup>37</sup> E. REISCHAUER, *supra* note 26, at 19. Confucian and Buddhist principles dominated Prince Shotoku's written constitution in 604 A.D. *Id.* at 20. Their overt influence persisted until the central government weakened in the tenth and eleventh centuries. *Id.* at 44-45. The Tokugawa regime revived Confucian ideals because they provided a spiritual rationale for obedience, loyalty and political stability. *Id.* at 89-91. Accord R. MASON & J. CAIGER, *supra* note 26, at 24-25, 171-77.

<sup>38</sup> H. SMITH, THE RELIGIONS OF MAN 179-87 (1958) (discussing Confucian concepts of deliberate tradition and the well-conducted life).

<sup>39</sup> *Id.* at 185. See also Jansen, *On Foreign Borrowing*, in JAPAN: A COMPARATIVE VIEW 18, 44 (A. Craig ed. 1979).

<sup>40</sup> R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE 98-113 (1946). See also Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L COMP. L.Q. 491, 499 (1979).

<sup>41</sup> Azumi, *Japanese Society: A Sociological View*, in AN INTRODUCTION TO JAPANESE CIVILIZATION, *supra* note 23, at 525-26. Unlike *on*, *giri* is measurable and can be discharged, Benedict, *supra* note 40, at 116, by loyal, helpful conduct, Azumi, *supra*, at 526.

and *giri* promotes *wa*, harmony or concord, thereby preserving family and social order.<sup>42</sup> Further, the emotionally rich concept of *wa* can be attained only if one's obligations are performed voluntarily and suffused with *ninjo*, sensitivity.<sup>43</sup> A sense of duty motivates personal actions, enforced by an implicit sense of honor and the fear of losing face if one fails to uphold *giri*.<sup>44</sup>

The Tokugawa period ended in 1867-68 with increasing foreign trade and influence.<sup>45</sup> In the century or so since then, Japan has rapidly evolved into an urban, relatively Westernized nation which bears little superficial resemblance to its historic antecedents. Two scholars have asserted, however, that "[c]ontemporary Japan is Tokugawa Japan transformed, but not rejected . . . . Every foreign adaptation, every modernization, has been embraced by Japan, without fundamentally altering her national character."<sup>46</sup>

Though one should be aware of the potential for inaccuracy inherent in any generalized statement about national character,<sup>47</sup> certain elements typify Japanese thought and culture.<sup>48</sup> First, Japan's homoge-

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<sup>42</sup> Kim & Lawson, *supra* note 40, at 499-500. See also Takeyoshi, *The Status of the Individual in the Notion of Law, Right and Social Order in Japan*, in THE JAPANESE MIND, *supra* note 32, at 262, 264; Hajime, *Basic Features of the Legal, Political, and Economic Thought of Japan*, in THE JAPANESE MIND, *supra* note 32, at 145-46; T. ROHLEN, *infra* note 50, at 34-46.

<sup>43</sup> See Doi, *Giri-Ninjo: An Interpretation*, in ASPECTS OF SOCIAL CHANGE IN MODERN JAPAN 327 (R. Dore ed. 1967).

<sup>44</sup> Kim & Lawson, *supra* note 40, at 501.

<sup>45</sup> U.S. Admiral Matthew Perry's intrusion in 1853 not only opened Japan's long closed door, but caused a domestic political crisis which split the nation into two factions: the shogunate's followers, who were resigned to accepting foreign trade because Japan's military strength had declined, and xenophobic imperial loyalists who eventually took power. E. REISCHAUER, *supra* note 26, at 114-21. Despite its original attitude, the Meiji Empire also yielded to foreign pressure to open Japan to trade. R. MASON & J. CAIGER, *supra* note 26, at 217-19.

<sup>46</sup> Kim & Lawson, *supra* note 40, at 495.

<sup>47</sup> Noda, *supra* note 24, at 120-21, 129.

<sup>48</sup> Representing various opinions are: R. BENEDICT, *supra* note 40, at 98-117, 300 (Japanese dominated by sense of unpayable indebtedness to parents, teachers, emperor and others, causing feelings of resentment and shame), *but cf.* Azumi, *supra* note 41, at 526-27 (Benedict's thesis is criticized as overexaggeration. Similarities between Japanese and Western peoples overshadow their differences); Noda, *supra* note 24, at 129-30 (sentimental, nervous and choleric); M. MARUYAMA, *THOUGHT AND BEHAVIOR IN MODERN JAPANESE POLITICS* 13-19, 275-80 (1963) (maintaining face and powerful social status central); DeVos, *Achievement Orientation, Social Self-Identity and Japanese Economic Growth*, in MODERN JAPAN: AN INTERPRETIVE ANTHOLOGY 151 (I. Scheiner ed. 1974) (filial obligations motivate strong desire for achievement); Doi, *supra* note 43, at 327-29 (*amae* or dependence as primary psychological characteristic); W. PRICE, *THE JAPANESE MIRACLE AND PERIL* 1-23, 311-14, 321-37 (1971) (Japanese people as racially conceited, duplicitous and psychologically driven to achieve economic superiority). See generally E. TOMLIN, *JAPAN 137-56* (1973); *JAPANESE CULTURE, ITS DEVELOPMENT AND CHARACTERISTICS* (R. Smith & R. Beardsley ed. 1971); R. HALLORAN, *JAPAN: IMAGES AND REALITIES* (1969); THE JAPANESE MIND, *supra* note 32.

nous population shares common, traditional values.<sup>49</sup> The family is the center of society and other social relationships are modeled to imitate it.<sup>50</sup> Thus, the group's interest, not the individual's, must prevail to ensure social harmony.<sup>51</sup> This group consciousness makes social approval critically important for one's status and self-respect.<sup>52</sup> Secondly, life for the Japanese is an indeterminant "given" rather than something which the individual constructs and controls.<sup>53</sup> Emotion is important because it integrates man with nature and helps one understand the subtle interdependence of life as an organic whole.<sup>54</sup> Finally, Japanese thought is hostile or indifferent to logic because such analysis separates

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<sup>49</sup> N. SASAKI, *MANAGEMENT AND INDUSTRIAL STRUCTURE IN JAPAN* 1-2 (1981). See also von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1492 (1958).

<sup>50</sup> See, e.g., T. ROHLEN, *FOR HARMONY AND STRENGTH* 14 (1974) (bank employees think of themselves as a household and use the same words when referring to their bank as they do when referring to their individual, private family groups); von Mehren, *supra* note 49, at 1493 (business firm regarded as family); R. MINEAR, *JAPANESE TRADITION AND WESTERN LAW* 94 (1970) (state as family); Moore, *Editor's Supplement: The Enigmatic Japanese Mind*, in *THE JAPANESE MIND*, *supra* note 32, at 288, 300 (emperor as head of national family). See also Masaaki, *The Status and the Role of the Individual in Japanese Society*, in *THE JAPANESE MIND*, *id.* at 245, 252. But cf. *Who's Happy Now*, *infra* note 262 (more U.S. workers consider their companies as family than do Japanese workers).

<sup>51</sup> Takeyoshi, *supra* note 42, at 264. The status of the individual in modern Japanese society is, however, a complicated paradox. Moore, *supra* note 50, at 300. Traditional thought emphasized submission to all the "irrational elements of the universe," Hideki, *Modern Trend of Western Civilization and Cultural Peculiarities in Japan*, in *THE JAPANESE MIND*, *supra* note 32, at 58, yet also encouraged individual achievement, Tesshi, *The Individual in Japanese Ethics*, in *THE JAPANESE MIND*, *id.* at 234, 236-37, 241 (discussing *bushidō*, the way of the samurai warrior). See also Masaaki, *supra* note 50, at 253. Japan's post-war industrialization may have strengthened the role of the individual while weakening group ties, a tendency which leads some commentators to predict that Japanese attitudes will eventually converge with those of the West. Karsh & Levine, *The Concept of a National Industrial Relations System*, in *WORKERS AND EMPLOYERS IN JAPAN* 7-13 (K. Okochi, B. Karsh & S. Levine ed. 1974). See also Azumi, *supra* note 41, at 531; N. SASAKI, *supra* note 49, at 136; Kawashima, *infra* note 58, at 57-59. But see, e.g., Dore, *Industrial Relations in Japan and Elsewhere* in *JAPAN: A COMPARATIVE VIEW*, *supra* note 39, at 324, 325 (Japan's cultural traits will persist as her economy matures); Doi, *supra* note 43, at 333 (views the Japanese as caught in a frustrating psychological trap between Western individualism on one hand and a desire for traditional dependent relationships on the other). T. ROHLEN, *supra* note 50, at 51-52, sees no contradiction between the traditional Japanese concept of self and modern industrial life. From his study of a large Japanese bank he concluded that workers were very competitive yet saw personal achievement as enhancing the welfare of the company. Also, by accepting their superiors' authority, employees gained a disciplined freedom from the distractions of personal ambition and could concentrate on doing their best for the entire firm's benefit. *Id.*

<sup>52</sup> M. MARUYAMA, *supra* note 48.

<sup>53</sup> Hideki, *supra* note 51, at 54, stating that the Western mind confronts its environment while the Eastern mind adapts to its surroundings. See also Shunzō, *supra* note 32, at 24 (regarding human empathy with nature).

<sup>54</sup> Hajime, *supra* note 42, at 145. See also Shōson, *The Relation of Philosophical Theory to Practical Affairs in Japan*, in *THE JAPANESE MIND*, *supra* note 32, at 4; Shunzō, *supra* note 32, at 28; Hideki, *supra* note 51, at 59; Moore, *supra* note 50, at 296.



inherently inseparable elements of life.<sup>55</sup> Abstract reasoning is of little value because it strips thought of feeling.<sup>56</sup>

These characteristics also include a traditional aversion toward law as it is known in the West. Rules based on objective, fixed standards do not fit nuances of customary Japanese social patterns.<sup>57</sup> Recognizing this, Tokugawa rulers restricted access to their central courts and required disputants to resolve conflicts through conciliation because this procedure healed the parties' relationship, restoring harmony to the village.<sup>58</sup> Involvement in adjudicatory legal proceedings is considered dishonorable, even abhorrent,<sup>59</sup> because to demand the performance of *giri* as an individual right contributes nothing to social harmony, but instead increases conflict, further eroding *wa*.<sup>60</sup> Final

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<sup>55</sup> Kim & Lawson, *supra* note 40, at 496.

<sup>56</sup> Noda, *supra* note 24, at 132-33. Noda describes the Japanese as "emotional anarchists," too sensitive to think logically. This means they are also incapable of Western legal reasoning because they look for flexible, conciliatory solutions and do not understand the necessity of choosing between two contradictory alternatives. *Id.* at 133. "[Western] legal thought is based upon extreme abstraction, considering man without taking his individuality into account . . ." Radbruch, *Il diritto nella visione goethiana del mondo*: Riv. int. fil. dir. 1940, 202-03 quoted in *id.* at 132. See also Kim & Lawson, *supra* note 40, at 497-498; Hideki, *supra* note 51, at 56-57.

<sup>57</sup> "[Indeterminate] social obligations of this sort do not fit the lawsuit, which will inevitably bring about a breach of the close personal relationships based on a spirit of 'wa.'" Takeyoshi, *supra* note 42, at 263. Quoting Pascal, Noda contrasts Western "geometrical" legal thought with Eastern law of the "subtle" mind. Noda, *supra* note 24, at 135.

<sup>58</sup> Henderson & Anderson, *supra* note 23, at 577-79. See also Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 45 (A. von Mehren ed. 1963) (discussing the social vacuum in which inter-group disputes arose in Tokugawa Japan) [hereinafter cited as LAW IN JAPAN]; D. HENDERSON, VILLAGE "CONTRACTS" IN TOKUGAWA JAPAN 12, 14, 17 (1975). Limiting access to the Edo courts not only encouraged conciliation but also was the least expensive way to administer justice. See generally J. WIGMORE, LAW AND JUSTICE IN TOKUGAWA JAPAN (1941); N. SMITH, TOKUGAWA JAPAN (1937); Henderson, *Japanese Legal History of the Tokugawa Period: Scholars and Sources*, in FIVE STUDIES IN JAPANESE POLITICS (R. Ward ed. 1957) (annotated bibliography). For a theoretical analysis of similar dispute resolution characteristics in another traditional society, a Tanzanian tribe, see Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). Eisenberg contrasts the binary nature of Western fact finding and adjudication with a highly personal settlement conducted by tribal elders. *Id.*

In modern Japanese legal thought, conflict may still be considered the result of a wayward individual who has strayed from the proper community of thought. In resolving the dispute, a conciliator "re-awakens the spirit of cooperation" in the contestants. Noda, *supra* note 24, at 133. Arguably, conciliation remains the most frequently used solution in modern Japan. See *infra* note 161. For statistics regarding personal injury settlements, see Kawashima, *supra* at 42. But cf. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUDIES 359 (1978) (criticizing Kawashima's conclusion that the Japanese are any more averse to litigation than Western societies, and attributing any statistical variance to the institutional incapacity of the Japanese judicial system). See also Henderson & Anderson, *supra* note 23, at 589 (trend toward litigation).

<sup>59</sup> Kawashima, *supra* note 58, at 45. See also Noda, *supra* note 24, at 132.

<sup>60</sup> Takeyoshi, *supra* note 42, at 266-67.

judgment only perpetuates the division by assigning fault.<sup>61</sup> Historically, the Japanese admired law as a repository of wisdom, but not as a means of compulsion.<sup>62</sup> As a consequence, the Japanese have relatively little consciousness of individual legal rights as compared to people in Western societies.<sup>63</sup> Although post-war Japan adopted a characteristically Western constitution and statutory scheme, these function differently than their foreign counterparts.<sup>64</sup> Japanese law, in contrast to the American legal goals of objectivity and precision, is emotional and indeterminant.<sup>65</sup> Typical Japanese business contracts, for example, are highly relational,<sup>66</sup> and constitute brief, formal representations of friendship and trust between parties, rather than clause after clause of specific performance obligations.<sup>67</sup> If problems arise, parties expect to resolve them by ad hoc negotiations.<sup>68</sup>

Although the Japanese may use Western legal formalities, they rarely intend to rely on law for enforcement. There is a definite "separation of law on the books from law in reality."<sup>69</sup> This difference is largely attributable to the persistent influence of Japan's heritage.<sup>70</sup> The characteristic Japanese view of law is evident in the nation's labor relations as well. The legal environment complements the manage-

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<sup>61</sup> Kawashima, *supra* note 58, at 43. Cf. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U.L. REV. 270, 278, 284-86 (reasoning that the desire to win arbitration contests harms the long term relationship between union and management).

<sup>62</sup> Kim & Lawson, *supra* note 40, at 506.

<sup>63</sup> Henderson & Anderson, *supra* note 23, at 571. Although feudal obligations were mutual, no concept of enforceable rights developed as a parallel to duty. Beer, *The Public Welfare Standard and Freedom of Expression in Japan*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS* 205, 212-14 (D. Henderson ed. 1968). See also Takeyoshi, *supra* note 42, at 263-67. The idea of individual legal rights was first introduced in the Meiji Era and has yet to be fully accepted. For the Japanese, there is no logical contradiction in basing part of one's conduct on political equality and another part on obedience to familial authority. T. ROHLEN, *supra* note 50, at 59-60 n.12. See also von Mehren, *supra* note 49, at 1495-96; von Mehren, *Commentary: Part I*, in *LAW IN JAPAN*, *supra* note 58, at 190-92.

<sup>64</sup> D. HENDERSON, *FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES* 169-72 (1973). This author observes that Japanese law is sui generis, a product of its own unique development which has incorporated European civil and common law into traditional Japanese ethics. *Id.* at 164.

<sup>65</sup> Kim & Lawson, *supra* note 40, at 508.

<sup>66</sup> I. MACNEIL, *CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS* 12-16 (1978) (discussing discrete and relational aspects of contracts).

<sup>67</sup> Hahn, *Negotiating with the Japanese*, 2 CAL. LAW. 20 (1982).

<sup>68</sup> *Id.* See also Takeyoshi, *supra* note 42, at 266; Kawashima, *supra* note 58, at 46-47.

<sup>69</sup> von Mehren, *supra* note 49, at 1494. See also *Nippon v. United States*, 285 F.2d 766 (Ct. Cl. 1961) (suit by Japanese corporations on contract claims against the U.S. government): "[W]e are dealing here not only with a different legal system but a different culture as well. Formal legal standards play a far less pervasive role in Japan in the creation and adjusting of principles regulating conduct than they play in the West." *Id.* at 768.

<sup>70</sup> D. HENDERSON, *supra* note 64, at 163.

ment style so often praised in United States publications.<sup>71</sup>

### B. Attitudes About Work

Japanese labor relations are woven from the elements described in the previous section. The successes and failures of Japanese labor management exemplify the nation's homogeneous culture, the importance of the group over the individual, appreciation for life as an indivisible, complex whole, relationships based on trust and other emotional ties, and the necessity of retaining society's respect.<sup>72</sup>

Guaranteed lifetime employment for permanent workers distinguishes Japanese labor practices from those of the United States, where workers are highly mobile.<sup>73</sup> Lifetime employment in Japan is made possible by a cadre of temporary workers who are employed or laid off as prosperous or slack economic conditions require.<sup>74</sup> Company-sponsored training and retraining programs, together with frequent job rotation, give firms further flexibility to cope with market fluctuations.<sup>75</sup> Also, permanent employees may be assigned to completely different tasks if their usual work is rendered unnecessary by production cut-backs.<sup>76</sup> During the 1973 oil crisis, surplus steel workers became tree

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<sup>71</sup> See, e.g., N. SASAKI, *supra* note 49, at 115; Dore, *supra* note 51, at 327-29; J. SIMMONS, *infra* note 97; Drucker, *What We Can Learn From Japanese Management*, HARV. BUS. REV., Mar.-Apr. 1971, at 110.

<sup>72</sup> See *supra* notes 47-56 and accompanying text.

<sup>73</sup> J. ABEGGLEN, *MANAGEMENT AND WORKER: THE JAPANESE SOLUTION* 62-74 (1973).

<sup>74</sup> K. TAIRA, *ECONOMIC DEVELOPMENT AND THE LABOR MARKET IN JAPAN* 183-87 (1970). See also T. HANAMI, *LABOR RELATIONS IN JAPAN TODAY* 26 (1979). Approximately 20% of all Japanese workers are temporary. *Id.* at 25. U.S. employers respond to market demands differently. For most, there is no differentiation between permanent and temporary workers, so all are subject to lay-off, though usually according to seniority. See B. MELTZER, *APPENDIX TO LABOR LAW* 164-66 (2d ed.) (seniority provisions in an "Illustrative Collective Bargaining Agreement"). Seniority may create a de facto line between workers who are sure to stay and those, more recently hired, who will probably be laid off when work slows. Cf. Drucker, *supra* note 71, at 113-14 (discussing benefits of Japanese seniority system and problems with the U.S. version).

<sup>75</sup> T. HANAMI, *supra* note 74, at 28-29. See PASCALE & ATHOS, *supra* note 3, at 78 (discussing the success of Matsushita Electric Co., which is one of the world's 50 largest companies and markets its products under the Panasonic, Quasar, Technics and National brand names. *Id.* at 37.) Though this job rotation occurs in both union and non-union enterprises, it would be impossible under most U.S. union contracts. See B. MELTZER, *supra* note 74. U.S. unions are organized according to trade rather than by enterprise as in Japan. See *infra* notes 130-38 and accompanying text. Since any given U.S. business may employ workers belonging to a variety of trade unions, typically each contract strictly defines appropriate tasks. This guarantees work for each union's members and prevents inter-union wage competition. Cross training or job rotation ignores trade boundaries and may violate work preservation clauses of most U.S. labor agreements. See B. MELTZER, *supra* note 74.

<sup>76</sup> N. SASAKI, *supra* note 49, at 32-37. See also Drucker, *supra* note 71, at 116-17 (regarding undefined job responsibilities and cross-training of Japanese managers).

planters, landscaping company grounds until the market improved.<sup>77</sup>

Lifetime employment manifests the culture's emphasis on emotional, long-term group membership and the employer often assumes what in the United States are solely family functions.<sup>78</sup> The company may help arrange marriages,<sup>79</sup> use its influence to get employees desirable housing,<sup>80</sup> and to secure good schooling for employees' children.<sup>81</sup> Companies sponsor social events, recreation programs<sup>82</sup> and holiday celebrations,<sup>83</sup> and assist similar, union organized events.<sup>84</sup> This aspect of corporate paternalism fits the Japanese character<sup>85</sup> and helps maintain a business as a cohesive social group.<sup>86</sup>

Western business management practices which focus on efficiency contrast with the Japanese attitude toward labor.<sup>87</sup> During the industrial revolution, many United States businesses regarded labor as simply one factor of production, like machinery or capital.<sup>88</sup> This concept

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<sup>77</sup> T. HANAMI, *supra* note 74, at 31.

<sup>78</sup> N. SASAKI, *supra* note 49, at 7.

<sup>79</sup> T. ROHLEN, *supra* note 50, at 240-42.

<sup>80</sup> *Id.* at 14-15, 212.

<sup>81</sup> T. HANAMI, *supra* note 74, at 29.

<sup>82</sup> *Id.*

<sup>83</sup> T. ROHLEN, *supra* note 50, at 41.

<sup>84</sup> *Id.* at 186-87.

<sup>85</sup> Dore, *supra* note 51, at 327. The term "paternalism" is in some ways misleading. In Japanese corporations it is a bureaucratic, institutional concern for employee welfare to which all employees are entitled and is distinct, therefore, from the benevolence of a family patriarch or feudal-overlord. *Id.* at 325-27. Cf. S. LEVINE, *INDUSTRIAL RELATIONS IN POSTWAR JAPAN* 35-41, 153-58 (1958) (comparing patriarchal to despotic types of management); Takeuchi, *supra* note 4, at 12 (distinction between paternal and maternal characteristics of Japanese management style).

<sup>86</sup> N. SASAKI, *supra* note 49, at 2. See also ABEGGLEN, *supra* note 73, at 111.

<sup>87</sup> J. ABEGGLEN, *supra* note 73, at 111-15. Efficiency-oriented or scientific management is the most "obvious routine, orthodox, and traditional managerial practice," according to C. GEORGE, *THE HISTORY OF MANAGEMENT THOUGHT* 96 (1972).

<sup>88</sup> S. MORISON, H. COMMAGER & W. LEUCHTENBERG, *A CONCISE HISTORY OF THE AMERICAN REPUBLIC* 373-75 (1983) [hereinafter cited as MORISON]. Since equipment represented a company's largest capital investment, workers were expected to mold themselves to fit a machine's most cost efficient operation, even if it meant working long shifts, seven days a week, under hazardous conditions. *Id.* Jobs were subdivided into the simplest possible tasks, further dehumanizing labor. M. NORTON, D. KATZMAN, P. ESCOTT, H. CHUDACOFF, T. PATERSON & W. TUTTLE, *A PEOPLE AND A NATION* 481-82 (1982) [hereinafter cited as NORTON]. See also Kochan, *Empirical Research and Labor Law: Lessons From Dispute Resolution in the Public Sector* 1981 U. ILL. L.F. 161, 163 (1981). Large corporations became more numerous during this period, leading to impersonal employer-employee relationships. MORISON, *supra*, at 373-74. Most scientific management ideas came from Frederick Taylor's studies, which recommended efficiency, controlled production, time-motion studies, and separating labor and management duties. C. GEORGE, *supra* note 87, at 92. Although his theories also included a recognition that labor and management have a common interest in business success, Taylor's followers neglected his advice to provide a friendly, motivating work environment. *Id.* Later researchers, reacting to scientific management as applied, focused on the human character of the business enterprise. E. FLIPPO & B. MUNSINGER,

serves to encourage both labor and management to deliberately separate work from personal life. This division is foreign to the Japanese.<sup>89</sup> For them, various aspects of life are more intermingled; one's work and family life blend.<sup>90</sup> The archetypal American worker is regarded more like a tool of production, tied to his employer solely by a job and a paycheck.<sup>91</sup> Hence, the basic philosophic differences between Japanese and Western thought mentioned earlier<sup>92</sup> are manifested in the workplace.

Another complementary feature of work life in Japan is a closer relationship between labor and management than that which commonly exists in the United States.<sup>93</sup> This is, in part, a consequence of Japan's feudal heritage and results in familial relationships in the workplace.<sup>94</sup> Management encourages workers to contribute their ideas for improving company operations, a policy which appears to accomplish two things: (1) increased participation motivates workers to take initiative and do the best job possible because they have a fuller personal investment in the company's success, and (2) both efficiency and the product quality improve through suggestions made by all levels of employees.<sup>95</sup> Although workers are not viewed as participating in management,<sup>96</sup> their ideas are sought through "quality control circles", (QC circles),<sup>97</sup> suggestion boxes, and, in Matsushita Electric Company,

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MANAGEMENT 19-20 (1978). Both schools of thought continue to influence management education in the United States. See W. HAYNES, J. MASSIE & M. WALLACE, *MANAGEMENT: ANALYSIS, CONCEPTS AND CASES* 26 (1975).

<sup>89</sup> See *supra* notes 78-86 and accompanying text.

<sup>90</sup> *Id.*

<sup>91</sup> T. ROHLEN, *supra* note 50, at 60.

<sup>92</sup> See *supra* notes 23-71 and accompanying text.

<sup>93</sup> D. HENDERSON, *supra* note 64, at 117-18.

<sup>94</sup> T. ROHLEN, *supra* note 50, at 44, 59.

<sup>95</sup> Takeuchi, *supra* note 4, at 8-13. "Make Every Worker a Manager" and "Make Every Worker an Engineer" are slogans used which encourage personal investment." *Id.* at 9.

<sup>96</sup> PASCALE & ATHOS, *supra* note 3, at 83 (regarding Matsushita practices). Ninety percent of Japanese firms employing more than 5,000 people and 70% of all companies have enterprise level labor-management consultation schemes, according to a 1977 survey by the Ministry of Labor of 5,000 Japanese firms. Seventy-four percent also used workshop level suggestion systems. Both employees and employers reported satisfaction with worker participation of this sort because it enhanced understanding and cooperation. Ingami & Nakamura, paper submitted to the International Labour Organization's Symposium on Workers' Participation in Decisions Within Undertakings on Workers' Participation Within the Enterprise in Japan 1-2, (The Hague, May 1981) (published by the International Labour Office, Geneva, Switzerland). See also N. SASAKI, *supra* note 49, at 52-53; Cordova, *Workers' Participation Within Enterprises: Recent Trends and Problems* 121 INT'L LAB. REV. 125 (1982). Cf. ODAKA, TOWARD INDUSTRIAL DEMOCRACY 15-17, 155-211 (1975) (arguing for more worker participation as a matter of right).

<sup>97</sup> QC circles were pioneered as a formal program in Japan in 1962 through a coordinating agency, the Japan Union of Scientists and Engineers. QC circles are small groups of volunteers

by consulting with the union during development of six-month operating plans.<sup>98</sup>

Labor and management in the United States, however, are historical adversaries.<sup>99</sup> Factory workers suffered harsh working conditions in the late nineteenth and early twentieth centuries.<sup>100</sup> Their plight was due in some degree to the influence of classical economic free market theory,<sup>101</sup> social Darwinism,<sup>102</sup> and Frederick Taylor's scientific management system.<sup>103</sup> Resultant union organizing efforts met violent opposition and frequent defeat at managements' hands.<sup>104</sup> Although the National Labor Relations Act<sup>105</sup> and later legislation ended the general warfare, the bitter legacy lingers in rhetoric, strikes and adversarial contract negotiations.

Japanese managers also try to minimize the social distinctions between employees and management.<sup>106</sup> They routinely visit the production site and often work alongside blue collar laborers to learn production-line jobs and to maintain a thorough knowledge of the total business operation.<sup>107</sup> In the United States, this practice in a union

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from both labor and management who meet regularly on company time to identify production problems, and propose and study possible solutions. To work effectively, these groups often require technical training and the time and technology necessary to develop and test objects or systems. Since their establishment in Japan, QC circles have become very popular and their numbers continue to expand. There were 5,000 circles in 1965 and more than 100,000 in 1979. Takeuchi, *supra* note 4, at 9-11. See also J. SIMMONS, *WORKING TOGETHER: PARTICIPATION FROM SHOPFLOOR TO BOARDROOM* (1982); Ohmae, *Quality Control Circles: They Work and Don't Work*, Wall St. J., Mar. 29, 1982, at 18, col. 3.

<sup>98</sup> PASCALE & ATHOS, *supra* note 3, at 83. Matsushita, however, is the only firm allowing this degree of employee participation. T. PEMPEL, *POLICY AND POLITICS IN JAPAN* 108 (1982).

<sup>99</sup> See *infra* notes 100-16, 202 and accompanying text.

<sup>100</sup> NORTON, *supra* note 88, at 484-86. "In no other industrial nation were the hazards of industry so great." MORISON, *supra* note 88, at 383.

<sup>101</sup> The "iron law of wages" meant that the larger the labor supply, the lower the wages. Employers reasoned that workers were free to quit if working conditions displeased them. NORTON, *supra* note 88, at 483.

<sup>102</sup> "Survival of the fittest" rationalized the extreme wealth of successful industrialists in the face of their employees' poverty. This "natural law" also justified no government regulation and sanctified private property as a sign of divine favor. MORISON, *supra* note 88, at 372.

<sup>103</sup> See *supra* note 88 and accompanying text.

<sup>104</sup> See *infra* note 202 and accompanying text.

<sup>105</sup> See *supra* note 14.

<sup>106</sup> Despite its traditionally hierarchical structure, the reciprocal nature of social obligations kept Japanese culture from being a stratified, class conscious society. Society is viewed as a conglomerate of vertically organized groups with no horizontal links between persons of the same status who are members of different groups. T. ROHLEN, *supra* note 50, at 190-91; see also Pempel, *supra* note 98, at 96. In feudal Japan, the central courts adjudicated only diversity suits because conciliation was not possible where there was no social pressure to restore "wa." See Henderson & Anderson, *supra* note 23, at 577-78.

<sup>107</sup> See PASCALE & ATHOS, *supra* note 3, at 308-09.

shop may violate contractual job descriptions<sup>108</sup> or may be grounds for a grievance for taking work which belongs to a union employee.<sup>109</sup> The smaller differential between executive and worker salaries within most Japanese companies may also contribute to a feeling of unity.<sup>110</sup> Moreover, promotion of former union leaders into management positions is not unusual in Japan, but is rare in the United States.<sup>111</sup>

Labor-management polarization is also avoided by management's central conviction that people are the company's most important resource.<sup>112</sup> Corporate officers recognize the threat posed by change and accordingly make major decisions by consensus.<sup>113</sup> Lower echelon staff draft policy suggestions which are gradually passed upward for review and amendment.<sup>114</sup> When they are finally implemented, affected employees have been consulted and have long since adjusted to the change.<sup>115</sup> Similarly, Japanese companies rarely discharge incompetent employees, but instead assign them to unimportant jobs without promotion opportunities.<sup>116</sup>

Japanese management may also promote a corporate ideology to

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<sup>108</sup> See B. MELTZER, *supra* note 74, at 164 (temporary transfer provision of an "Illustrative Collective Bargaining Agreement").

<sup>109</sup> See *id.* at 168 (work by non-bargaining unit employees permitted only in emergencies and in other special circumstances).

<sup>110</sup> Krishner, *How the Japanese Manage in the U.S.*, FORTUNE, June 15, 1981, at 97, 103 (statement of Hajima Nakai, executive managing director of Sanyo Electric Company and president of its U.S. subsidiary). Kazuo Iwama, Sony chief executive officer, expressed shock that American executives were paid as well as movie actors. *Id.*

<sup>111</sup> Kanabayashi, *Getting to the Top Means a Union Stint in Japanese Industry*, Wall St. J., Oct. 14, 1981, at 33, col. 4. A survey reported here showed 74.1% of 313 major Japanese firms have at least one executive director who once served as a labor leader. In at least one firm, however, this can be explained by the method of selecting union leaders. There, potential candidates for top management positions held union office as part of their career training. Although these people were nominally elected, they ran unopposed. T. ROHLEN, *supra* note 50, at 186. This crossover is generally much more likely to occur in Japan than in the United States because lower echelon management employees are eligible to be union members until they advance to positions which have direct supervisory authority. See 6 DOING BUSINESS IN JAPAN pt. XII § 1.02[1][a][i] (Z. Kitagawa ed. 1981).

<sup>112</sup> Cf. PASCALE & ATHOS, *supra* note 3, at 45 (referring to Matsushita); see also Moore, *supra* note 50, at 298.

<sup>113</sup> D. HENDERSON, *supra* note 64, at 114-15. Shop floor decisions may also be made by consensus. See J. ABEGGLEN, *supra* note 73, at 128-30. This *ringi* system is often criticized as too slow to suit the pace of modern markets. ODAKA, *supra* note 96, at 184-85. Other commentators, however, suggest that the time consumed by reaching a decision is more than recompensed by efficient implementation. Drucker, *supra* note 71, at 112. Accord Inagami & Nakamura, *supra* note 96, at 8.

<sup>114</sup> Inagami & Nakamura, *supra* note 46, at 8.

<sup>115</sup> *Id.*

<sup>116</sup> T. HANAMI, *supra* note 74, at 31. "Who would fire his children?" asked one past company president. N. SASAKI, *supra* note 49, at 7.

maintain employee morale and foster loyalty to the organization. These philosophies emphasize product excellence, customer service, teamwork, and the company's responsibility to society as a whole.<sup>117</sup> Management hopes that workers will closely identify their personal interests with those of the company.<sup>118</sup> Employees who exhibit the desired qualities are given merit pay and promotions,<sup>119</sup> and non-financial awards as well, such as certificates, mention in bulletin board or newsletter announcements, and trips to national QC contests.<sup>120</sup>

In summary, the Japanese workplace reflects traditional Japanese values. Work is not a separable, discrete activity but is bound up with family, social relationships and moral worth. Ethical conduct, *on* and *giri*, are motivated by the firm's philosophy and by its commitment to employee welfare. Even efficient decision making is secondary to maintaining *wa*. Further evidence of these cultural norms appears in Japanese union organization and labor law function.

### C. Unions and the Legal Environment

On its face, Japanese law gives supreme status to the workers' right to organize. The Japanese Constitution guarantees the "right of workers to organize and to bargain and act collectively"<sup>121</sup> as a "fundamental human right" which is "eternal and inviolate."<sup>122</sup> This is a stronger statement than analogous provisions in almost any other industrialized country.<sup>123</sup> Later labor legislation regulates union-management relationships—the Labor Relations Adjustment Act of 1946<sup>124</sup> and the Trade Union Law of 1949<sup>125</sup>—and protects the welfare of individual

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<sup>117</sup> T. ROHLEN, *supra* note 50, at 34-46. A company may use ceremonies, *id.* at 34-40, daily recitations, PASCALE & ATHOS, *supra* note 3, at 73, or songs, H. KAHN, THE EMERGING JAPANESE SUPERSTATE 110 (1970), to indoctrinate employees. For example, the Matsushita Employees Creed, states:

Progress and development can be realized only through the combined efforts and cooperation of each member of our Company. Each of us, therefore, shall keep this idea constantly in mind as we devote ourselves to the continuous improvement of our Company.

PASCALE & ATHOS, *supra* note 3, at 75.

<sup>118</sup> See T. HANAMI, *supra* note 74, at 28.

<sup>119</sup> PASCALE & ATHOS, *supra* note 3, at 81, 83 (regarding Matsushita).

<sup>120</sup> Takeuchi, *supra* note 4, at 11. Praise, in various forms, seems to be the most effective reward in Japan, perhaps because it implicitly honors those who have fulfilled *giri* or *on*. *Id.*

<sup>121</sup> KENPO (CONSTITUTION), ART. XXVIII (JAPAN), reprinted in DOING BUSINESS IN JAPAN, *supra* note 111, at app. 2A-9.

<sup>122</sup> *Id.* art. XI, at app. 2A-4.

<sup>123</sup> T. HANAMI, *supra* note 74, at 73.

<sup>124</sup> Law No. 25 of Sept. 27, 1946 (Japan) (amended), reprinted in MINISTRY OF LABOR, JAPAN LABOUR LAWS 29-37 (1968).

<sup>125</sup> Law No. 174 of June 1, 1949 (Japan) (amended), reprinted in *id.* at 15-28. This legislation together with the Labor Relations Adjustment Law, regulate union formation, bargaining proce-



employees—the Labor Standards Act.<sup>126</sup> Although the Japanese have a Labor Relations Commission somewhat akin to the National Labor Relations Board, it is staffed by appointed part-time commissioners representing the public, labor, and employers in equal numbers.<sup>127</sup> Rather than adjudicate as the Board does, the Commission's job is to conciliate, mediate and arbitrate, in descending order of importance.<sup>128</sup> One might expect this legal framework to support strong, independent Japanese trade unions. In reality, however, Japanese unions are weak compared to American counterparts, and Japanese law, though modeled after United States law, is interpreted very differently.<sup>129</sup>

More than ninety-one percent of all Japanese union members belonged to enterprise unions in 1975,<sup>130</sup> whereas most United States

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dure, unfair labor practices and disputes. *Id.* They are the Japanese equivalent of the U.S. National Labor Relations Act. Unlike the NLRA, the Japanese statutes contain no provisions which hold unions to a standard of fair labor practice. 6 *DOING BUSINESS IN JAPAN*, *supra* note 111, at pt. XII § 1.02[2].

<sup>126</sup> Law No. 49 of Apr. 7, 1947 (Japan) (*amended*), reprinted in JAPAN LABOUR LAWS, *supra* note 124, at 61-106. This statute has four major features: 1) guarantees minimal working conditions—hours, vacations, accident compensation, safety and hygiene (chs. I, III-X); 2) regulates the terms of individual employment contracts, i.e. causes for discharge (ch. II); 3) eliminates exploitative labor practices by intermediary labor brokers (ch. I, art. 6); and 4) provides administrative enforcement (chs. XI-XIII). This statute is a critical piece of legislation in this area and is supplemented by several other statutes, administrative orders and judicial decisions, which protect labor. 6 *DOING BUSINESS IN JAPAN*, *supra* note 111, pt. XII § 1.01[3][a].

<sup>127</sup> See T. HANAMI, LABOUR LAW AND INDUSTRIAL RELATIONS IN JAPAN 142 (1979).

<sup>128</sup> See T. HANAMI, *supra* note 74, at 205.

<sup>129</sup> The Trade Union Law's purpose was "to elevate the status of workers . . . , [to] equalize standing with their employer [sic]." Law No. 174, *supra* note 125, art. 1. This goal, however, has not yet been achieved. 6 *DOING BUSINESS IN JAPAN*, *supra* note 111, at pt. XII, § 1.01[1]. Japanese Marxist labor law scholars put a great deal of emphasis on this principle and on Article 28 of the Japanese Constitution. Although some courts have adopted a literal interpretation, others refuse and instead balance labors' rights against other constitutional rights, notably an employer's private property rights. D. HENDERSON, *supra* note 64, at 120-21. See also *supra* note 69 and accompanying text.

<sup>130</sup> See T. HANAMI, *supra* note 74, at 89. An enterprise union is composed of blue and white collar employees below the level of full supervisory status at a single work location. D. HENDERSON, *supra* note 64, at 117. Although enterprise unions in large companies may have branch organizations at each of the company's several work sites, each branch acts independently and so should be considered as a separate union. T. ROHLEN, *supra* note 50, at 88. Approximately 36% of the Japanese work force belongs to enterprise unions, whereas craft and industrial unions represent only 6.9%. *Id.*

union members are affiliated with trade unions.<sup>131</sup> Loose nationwide federations of enterprise unions exist in Japan, but they have only advisory functions.<sup>132</sup> Japan's major labor legislation, enacted during the post-war American occupation,<sup>133</sup> caused considerable union growth

Number of Unions and Union Members According to the Type of Union Organization

Type of Union Organization	No. of Unions	%	No. of Union Members	%
Enterprise	65,337	94.2	11,361,378	91.1
Craft	720	1.0	169,569	1.4
Industrial	1,775	2.6	682,728	5.5
Others	1,501	2.2	259,299	2.0
Totals	69,333	100.0	12,472,974	100.0

Source: Ministry of Labor, *Basic Survey of Trade Unions (1977)*, reprinted in T. HANAMI, *supra* note 74, at 8.

Unionism is concentrated in larger companies because smaller ones have such tenuous finances that a union would result in the employers' bankruptcy. D. HENDERSON, *supra* note 64, at 117.

Number of Unions and Members According to the Size of the Enterprise in Private Sector  
(1977)

No. of employees	% of firms organized
1000+	57.2
300-999	15.7
100-299	11.9
30-99	5.4
1-29	0.8

Source: Ministry of Labor, *Basic Survey of Trade Unions (1977)*, reprinted in T. HANAMI, *supra* note 74, at 90.

<sup>131</sup> Table 7, *Membership of Four Largest Unions in 1974 and of Four Unions with Largest Increase in Membership 1964-1974*, DAILY LAB. REP. (BNA) B-5 (Aug. 12, 1975), as cited in B. MELTZER, *LABOR LAW* 51 (1977).

<sup>132</sup> The three major national federations, Sōhyo, Dōmei and Chūritsu Rōren, perform two functions. They coordinate annual tactical labor activity, the "spring offensive," to pressure employers to agree to standard wage increases. Their other principle concern is national politics. D. HENDERSON, *supra* note 64, at 119. See also K. YAKABE, *LABOR RELATIONS IN JAPAN* 31-33 (1974). Sōhyo espouses Marxist philosophy, which affects enterprise union practices to some extent when dispute activity is used as a bargaining tactic. Levine, *Postwar Trade Unionism, Collective Bargaining, and Japanese Social Structure*, in *ASPECTS OF SOCIAL CHANGE IN MODERN JAPAN* 267-70 (R. Dore ed. 1967). The federations, however, are considered "outsiders" by both enterprise unions and management; consequently, they are not welcome at the bargaining table. *Id.* at 263. See also *supra* note 106 and *infra* notes 153-59 and accompanying text. Thus, there is a split in the Japanese labor movement between business unionism at the local level and predominantly political unionism at the national level. R. EVANS, *THE LABOR ECONOMIES OF JAPAN AND THE UNITED STATES* 256 (1971). See also Ishikawa, *The Regulation of the Employer-Employee Relationship: Japanese Labor-Relations Law*, in *LAW IN JAPAN*, *supra* note 58, at 439, 442-44.

<sup>133</sup> S. LEVINE, *INDUSTRIAL RELATIONS IN POSTWAR JAPAN* 21-30 (1958).

from 1945-49.<sup>134</sup> Workers were then urgently concerned with basic survival and so labor organization proceeded as expediently as possible, on an enterprise rather than a national basis.<sup>135</sup> This pattern also accommodated traditional Japanese social structure.<sup>136</sup> The lifetime employment system also developed in response to post-war economic instability.<sup>137</sup> It reinforces enterprise-based labor organization because a worker's concern centers on his own company rather than on his trade's position in the industry at large.<sup>138</sup>

Enterprise unionism also encourages worker dependence. Although the Japanese law forbids employer interference and domination,<sup>139</sup> companies routinely provide their unions with office space, furniture, secretarial help and paid release time for union leaders, all of which would be considered unlawful support under the NLRA.<sup>140</sup> Corporate paternalism is thereby extended to unions as well as to individual employees.<sup>141</sup> Unions consequently have an ambiguous role to play, cooperating with management on the one hand, yet maintaining enough independence to serve members' interests when those interests differ from management's.<sup>142</sup> Although labor and management enjoy cooperative relations and share equivalent fringe benefits, as well as the same lunchrooms, washrooms, uniforms and parking facilities, both workers and management remain aware of their respective status.<sup>143</sup> Workers rarely express grievances openly, but instead assume that management will intuitively perceive their discontent and solve the

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<sup>134</sup> Ishikawa, *supra* note 132, at 440-41.

<sup>135</sup> D. HENDERSON, *supra* note 64, at 117.

<sup>136</sup> *Id.* at 117-19.

<sup>137</sup> K. OKOCHI, B. KARSH & S. LEVINE, *WORKERS AND EMPLOYERS IN JAPAN* 57, 63 (1974). The postwar Japanese labor movement was primarily concerned with protecting workers from the economic confusion which followed Japan's defeat. Unions supported the lifetime employment system as one means to this end. Unless postwar employers were under extreme economic pressure, they would not dismiss employees because of the fierce union opposition which would inevitably follow.

<sup>138</sup> T. HANAMI, *supra* note 74, at 89. *See also* SASAKI, *supra* note 49, at 31-32.

<sup>139</sup> Law No. 174, *supra* note 125, at art. 7(3).

<sup>140</sup> Compare *id.*, which expressly allows employers to provide office space, with Wagner Act, *supra* note 14, at § 8(a)(2) and *infra* notes 211-30 and accompanying text (illegal support under § 8(a)(2)). Additional kinds of employer assistance do not violate the Trade Unions Law as interpreted. *See* T. ROHLEN, *supra* note 50, at 184. In fact, once a company provides office space, it cannot withhold it without cause. 6 *DOING BUSINESS IN JAPAN*, *supra* note 111, at pt. XII § 1.02[3][a].

<sup>141</sup> *See supra* note 85 and accompanying text.

<sup>142</sup> T. ROHLEN, *supra* note 50, at 176, 186. A union leader's speech to new employees reveals the divided loyalty of enterprise unions. *Id.* at 179-81. *See also* T. HANAMI, *supra* note 74, at 61.

<sup>143</sup> T. HANAMI, *supra* note 74, at 46.

problem.<sup>144</sup> A direct complaint would be a rude assertion that the supervisor was not living up to his moral *giri* obligation, thereby causing both him and the grievant to lose face.<sup>145</sup>

In addition, negotiated labor agreements, like other Japanese business contracts, are vague and usually have no terms specific enough to form the basis for complaint.<sup>146</sup> Written contracts, if they exist, are general, often just repeating legislative requirements.<sup>147</sup> Planning for potential problems is embodied in a consultation provision rather than in a detailed, adjudicatory grievance procedure common to United States labor agreements.<sup>148</sup> Even in the bargaining process itself, demands regarding wage increases or working conditions are considered unethical because they are tactless and indelicate.<sup>149</sup> Unions do confront management with wage demands, but both parties understand that this is a ritual, face-saving device to demonstrate the union's independence from management.<sup>150</sup> Actual negotiations on a contested issue would be very uncomfortable, because the parties are accustomed to warm, cooperative relations.<sup>151</sup> In sum, Japanese labor unions do not conduct true bargaining sessions in the American sense. Employers and employees rely on bonds of trust and interdependence, not on definitive contract terms.<sup>152</sup>

Labor-management issues are handled by daily liason between union and firm officials on all levels of plant and office.<sup>153</sup> It is only after this process breaks down, that the legal inadequacies of the Japanese system become painfully apparent in a hostile confrontation.<sup>154</sup> This potential for slowdowns, demonstrations, strikes and violence surprises most Americans, who have rosy preconceptions about Japanese

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<sup>144</sup> *Id.*

<sup>145</sup> See *supra* note 44 and accompanying text.

<sup>146</sup> T. HANAMI, *supra* note 74, at 52.

<sup>147</sup> Levine, *supra* note 132, at 274. See also J. ABEGGLEN, *supra* note 73, at 148.

<sup>148</sup> Levine, *supra* note 132, at 274.

<sup>149</sup> T. HANAMI, *supra* note 74, at 45.

<sup>150</sup> Levine, *supra* note 132, at 265-66. See also T. ROHLEN, *supra* note 50, at 176, 186; J. ABEGGLEN, *supra* note 73, at 34.

<sup>151</sup> D. HENDERSON, *supra* note 64, at 126.

<sup>152</sup> T. ROHLEN, *supra* note 50, at 178. Law No. 49, *supra* note 126, at arts. 89-93, requires employers to establish rules of work and these rules, together with subjects of other protective legislation, take the place of what would be provisions in U.S. collective bargaining agreements. Further, there are no mandatory bargaining matters in Japan as there are in the United States. 6 DOING BUSINESS IN JAPAN, *supra* note 111, at pt. XII, § 1.02[4][B][iii].

<sup>153</sup> D. HENDERSON, *supra* note 64, at 125. See also *supra* note 96 and accompanying text. Within business circles, a strike is blamed on management for they have evidently failed to run a "good house." T. ROHLEN, *supra* note 50, at 189.

<sup>154</sup> D. HENDERSON, *supra* note 64, at 125.

labor relations.<sup>155</sup> In 1975, there were 8,860 strikes in Japan, compared to 5,031 in the United States.<sup>156</sup> Their frequency is a product of their function. Most often they are ritual posturing in the "bargaining" process itself, but if agreement cannot be reached through the services of go-betweens working behind the scenes, the confrontation may escalate.<sup>157</sup> Disputes may also erupt if the usual labor-management consultation process fails to remedy serious worker discontent.<sup>158</sup> A strike in the United States, on the other hand, usually serves as a calculated technique to hasten an end. For the Japanese, strikes, albeit short ones, are a tool of first rather than last resort.<sup>159</sup>

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<sup>155</sup> T. HANAMI, *supra* note 74, at 130.

<sup>156</sup> *Trend of Labor Disputes in Six Major Countries*, SEISANSEI HONBU (Japan Productivity Center), KATSUJO RODO TOKEI (Practical Labor Statistics) (table, 1977), at 159; *Number of Strikes in Japan*, MINISTRY OF LABOR, RODO SOGI TOKEI CHOSA NEN HOKOKU [Annual Report of Statistics and Survey of Labor Disputes] (table 1976), reprinted in T. HANAMI, *supra* note 74, at 148-49. The average union member who struck during 1968, however, lost 2.4 work days in Japan and 18.5 days in the United States. R. EVANS, *supra* note 132, at 28, 30. The low liquidity, high leverage financial structure which is characteristic of Japanese businesses would not be possible if unions were prone to extended strikes. R. CAVES & M. UEKUSA, *INDUSTRIAL ORGANIZATION IN JAPAN* 39-40 (1976). See also J. ABEGGLEN, *supra* note 73, at 36-37.

<sup>157</sup> They include short strikes by designated employees or by all employees at planned intervals, withholding company proceeds, picketing which physically barricades company premises, sitdown strikes, mutinous factory takeovers, Ishikawa, *supra* note 132, at 448-53, and covering a company building with crude, name-calling posters, T. HANAMI, *supra* note 74, at 128. Although violence is statutorily proscribed, courts have been reluctant to rule against unions when violence occurs. See Ishikawa, *supra* note 132, at 452, 453. See also T. HANAMI, *supra* note 74, at 73-79. The Japanese Constitution guarantees employees the right to engage in concerted activity. See *supra* note 121. The Trade Union Law forbids employers from penalizing participants and also exempts "appropriate" union actions from civil and criminal liability. Law No. 174, *supra* note 125, arts. 1, 7, & 8. Much of Japanese labor law concerns the legality of various union dispute tactics. See 6 DOING BUSINESS IN JAPAN, *supra* note 111, at pt. XII § 1.02[6].

Japanese dispute techniques have serious practical and legal disadvantages from a union's point of view. Long strikes rarely occur because enterprise unions, which typically charge only nominal dues since their employers pay for most expenses, have no funds to compensate their members for lost wages. T. HANAMI, *supra* note 74, at 158. Management can easily find strike breakers from Japan's reservoir of temporary workers because, unlike in the United States, substitute workers have no union loyalties before becoming employees of a company. Ishikawa, *supra* note 132, at 455. Management may also undermine union activity by supporting dissident members in the formation of a break-away union or by firing militant union leaders despite laws which forbid this. *Id.* at 455. See *infra* notes 164-65 and accompanying text.

<sup>158</sup> See T. ROHLEN, *supra* note 50. Rohlen's study of a Japanese bank disclosed that workers there complained about many of the same problems one would expect of employees anywhere: incompetent supervisors, inadequate appreciation and low pay. *Id.* at 178-79. Rarely do disputes arise over contract interpretation. See Levine, *supra* note 132, at 275. See also *supra* note 147 and accompanying text.

<sup>159</sup> Evans explains that although U.S. strikes are tactical maneuvers rather than ultimate solutions, the Japanese resort to them much more quickly. R. EVANS, *supra* note 132, at 30. *But cf.* T. HANAMI, *supra* note 74, at 149-50 (the difference between the use of strikes in Japan and the United States is more than a matter of degree).

Problems which are not settled by employer appeals for union cooperation or by punitive retaliation are usually resolved by a Labor Relations Commissioner acting as a conciliator.<sup>160</sup> Agreement is reached by "let[ting] the dispute flow to the water,"<sup>161</sup> by allowing hostility to naturally dissipate and accepting the third party's suggestions.<sup>162</sup> Pushing the responsibility onto an authority allows both sides to compromise without losing face. Parties may also bring their case to the Commission as a whole or to the civil courts, instead of submitting it to negotiation.<sup>163</sup> Judgments there are based on intuitive assessments of what result both sides will accept rather than on objective legal standards. These decisions, however, are largely ineffective.<sup>164</sup>

Ineffectiveness comes in large part from delay.<sup>165</sup> If, for example, a dismissed union leader is reinstated pursuant to a long-delayed court order, he will probably face hostility from most fellow workers who prefer to forget past labor-management contention.<sup>166</sup> The union leader, as a symbol of conflict, is unwelcome, because the Japanese preference for harmonious relationships is so strong.<sup>167</sup> Viewed as a heretic, social pressure typically forces the former leader to resign his job.<sup>168</sup> Thus, unions resort to the Commission or to the courts only as a final effort when dispute action, negotiations and conciliation have failed.

Although Japanese labor law was adopted from the West, in practice the Japanese labor relations system still relies on traditional social mores to ensure harmony.<sup>169</sup> Cultural norms, however, are ill-suited to accommodate authentic differences between labor and management interests, so disputes become emotional, uncontrolled struggles. This contrasts with the United States' system, which assumes from the be-

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<sup>160</sup> See T. HANAMI, *supra* note 74, at 204-06.

<sup>161</sup> *Id.* at 203.

<sup>162</sup> *Id.* In 1976, 96% of the Commission's 1,528 cases were settled by conciliation, three percent by mediation, and one percent by arbitration, indicating a strong preference for the least adjudicatory means available. *Id.* at 206. See also *supra* notes 57-62 and accompanying text.

<sup>163</sup> See 6 DOING BUSINESS IN JAPAN, *supra* note 111, at pt. XII § 1.02[2][e]. See also T. HANAMI, *supra* note 74, at 205-22 (especially his interpretation of union use of the courtroom as a stage for further dispute activity).

<sup>164</sup> Kōichirō Yamaguchi, *Rōjō Saiban no Kyakkan Sei (The Objectiveness of Legal Judgment on Labor Cases)*, 487 Jurist 29 (1971), quoted in T. HANAMI, *supra* note 74, at 220-21. See also *supra* note 56 and accompanying text.

<sup>165</sup> The average length of time required to process an unfair labor practice case was 635 days in 1976. T. HANAMI, *supra* note 74, at 215.

<sup>166</sup> See *id.* at 215-16.

<sup>167</sup> See *id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* note 69 and accompanying text.

ginning that labor and management are adversaries. Consequently, most United States labor law focuses on controlling and rationalizing labor disputes through collective bargaining, contractual grievance procedures, arbitration, the Board and the courts. Thus, a central difficulty of implementing Japanese-style labor relations in the United States is to reconcile its major feature, labor-management cooperation, with a system premised on labor-management antagonism.

### III. JAPANESE INFLUENCE AND UNITED STATES LABOR LAW

#### A. Theory Z, Quality of Worklife and Participative Management

The major features of traditional United States business management—scientific or efficiency management—developed when the industrial work force was largely unskilled, uneducated immigrant labor.<sup>170</sup> In the last decade, however, a number of people from academic and business circles have begun to question its appropriateness<sup>171</sup> in light of the United States work force's increased level of education,<sup>172</sup> growing white collar employment, declining blue collar employment,<sup>173</sup> worker discontent,<sup>174</sup> and declining productivity.<sup>175</sup>

Management reform experiments have been launched in several predominantly blue collar industries in attempts to enhance the quality of work life, encourage participative management, or consciously adopt elements of Japanese management.<sup>176</sup> More than 200 United States companies had implemented QC circles by mid-1981,<sup>177</sup> including Lockheed, General Electric, Hewlett-Packard, IBM, TRW, 3M Com-

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<sup>170</sup> NORTON, *supra* note 88, at 483. See also *supra* notes 87-91 and accompanying text.

<sup>171</sup> Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 388-405 (1982).

<sup>172</sup> BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 136 (table no. 216, Years of School Completed, by Race: 1940 to 1976 (1977)). In 1940, 61.9% of persons aged 25-29 had not completed high school; in 1976, only 15.3% of the population in that age group had not graduated.

<sup>173</sup> Leon, *Occupation Winners and Losers: Who They Were During 1972-80*, MONTHLY LAB. REV., June 1982, at 18. Analysis of the Current Population Survey found that a majority of the 20 fastest growing occupations were in professional or clerical fields. *Id.* at 19. The blue collar category contained seven of the 10 biggest losers. *Id.* at 26.

<sup>174</sup> Ingrassia, *Union Rank and File Talk Bitterly of Their Bosses*, Wall St. J., Sept. 12, 1982, at 22, col. 3. See also Cooper, Morgan, Foley & Kaplan, *Changing Employee Values: Deepening Discontent?*, HARV. BUS. REV., Jan.-Feb. 1979, at 117 [hereinafter cited as Cooper].

<sup>175</sup> *Manufacturing and Industry Productivity*, LAB. REL. REP. (BNA) No. 111, at 55 (Sept. 20, 1982).

<sup>176</sup> See generally MANAGEMENT BY JAPANESE SYSTEMS, *supra* note 3 (38 readings about Japanese management practices used in the United States). See also Landrum, *Experiments with Worker Participation in the United States*, paper submitted to the International Labour Organization's Symposium on Workers' Participation Within Undertakings (The Hague, May 1981) (published by the International Labour Office, Geneva, Switzerland).

<sup>177</sup> See *supra* note 97.

pany and Lincoln National Life Insurance Company.<sup>178</sup> American subsidiaries of Japanese companies—Hitachi, Sanyo—have also imported the technique.<sup>179</sup> Motorola instituted a Participative Management Program which emphasizes employee participation, communication and trust as means of improving product quality and plant productivity.<sup>180</sup> Westinghouse Corporation hired a consultant to counsel them on adoption of Theory Z management methods, which stress employee suggestions, quality control and consensus rather than autocratic decisionmaking.<sup>181</sup> Delta Airlines' largely non-union staff, numbering 37,000, has been treated like family since the company's founding in the 1920s.<sup>182</sup> Delta's slogan, "All airlines are the same; only people make the difference," is put into practice by a policy of lifetime job security, promotion from within, open door management, help for employees who encounter personal problems, active solicitation of employee opinions, and an emphasis on high quality customer service.<sup>183</sup> Quality of worklife programs, centered on joint management-labor problem solving groups, have been established by contract provision at Harmon Industries International in Bolivar, Tennessee,<sup>184</sup> and General Motor's Tarrytown, Pennsylvania, and Livonia, Michigan, plants.<sup>185</sup> Other United Auto Worker (UAW) contracts with General Motors and Ford include provisions for experimental lifetime employment systems at six plants.<sup>186</sup> Local labor-management committees and a national council to study and recommend ideas for industry development and

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<sup>178</sup> Takeuchi, *supra* note 4, at 14-17.

<sup>179</sup> *Id.*

<sup>180</sup> Motorola Inc., *The Participative Management Program* (1983) (pamphlet available from Motorola, Communications Sector, Schaumburg, Ill.). See also *Motorola's Lessons for Industry*, Chicago Sun-Times, Sept. 28, 1982, at 37, col. 1.

<sup>181</sup> Burck, *Westinghouse's Cultural Revolution*, FORTUNE, June 15, 1981, at 74.

<sup>182</sup> See *Delta Soars to Top in Sky by Keeping Employees Happy*, THE ARIZONA REPUBLIC, Oct. 14, 1981 [hereinafter cited as *Delta Soars*]; *Delta Airlines Today*, at 3, 6 (unpublished paper supplied by public relations department of Delta Airlines, Inc., Atlanta, Ga.); Rock, *Company Sweet Company*, BUSINESS ATLANTA, Nov. 1980, at 40-41. "W. Thomas Beeke, Delta's board chairman, carefully cultivates worker loyalty by taking care of employees through company policy as if they were his own treasured offspring." *Id.*

<sup>183</sup> See *Delta Soars*, *supra* note 182; Rock, *supra* note 182, at 41; *Personnel: Delta's People Division*, DELTA DIGEST, July 1971, at 15; *Delta Airlines Today*, *supra* note 182. See also PASCALE & ATHOS, *supra* note 3, at 287-89.

<sup>184</sup> Macy, *The Quality of Worklife Project at Bolivar: An Assessment*, MONTHLY LAB. REV., July 1980, at 41. See also Bluestone, *Creating a New World of Work*, 115 INT'L LAB. REV. 1 (1977).

<sup>185</sup> Guest, *supra* note 8 (reports a virtual turn-around by what had been one of GM's most troublesome, least efficient plants).

<sup>186</sup> *General Motors-UAW Contract Settlement*, LAB. REL. REP. (BNA) No. 109, at 264 (Mar. 29, 1982).



worker training will be established.<sup>187</sup> According to a UAW spokesperson, these committees, foreshadowed by a 1973 UAW-GM contract provision,<sup>188</sup> were "created out of recognition that areas once thought the responsibility of one party are actually of mutual concern."<sup>189</sup> At Ford's Mount Clemens, Michigan, plant, management and workers have begun a year-long job training project in an effort to improve communications between the two groups.<sup>190</sup>

Labor-management cooperation presents legal problems for both union and non-union shops. In union shops the existing contract will probably prevent cross training, unencumbered employee transfers,<sup>191</sup> merit increases,<sup>192</sup> and resolution of grievances outside the formal process delineated.<sup>193</sup> Furthermore, the NLRA decrees that a certified union<sup>194</sup> is the exclusive bargaining representative for all employees.<sup>195</sup> It is unlawful for any other group to "deal . . . with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>196</sup> If labor-management cooperation circumvents usual union channels, a contract violation or an unfair labor practice may result.<sup>197</sup> This explains why labor-management committees, blue collar-white collar experiments, or other attempts to build

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<sup>187</sup> *Id.*; *Nationwide Impact of Ford-UAW Agreement*, LAB. REL. REP. (BNA) No. 110, at 145 (1982); *Historic New Ford-UAW Contract*, LAB. REL. REP. (BNA) No. 109, at 141 (1982).

<sup>188</sup> *Quality of Worklife Programs at General Motors*, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) No. 16, at 921 (Feb. 7, 1980).

<sup>189</sup> *General Motors-UAW Contract Settlement*, *supra* note 185. *Cf.* Frederick Taylor's scientific management theory which recommended strict separation of labor and management responsibilities. C. GEORGE, *supra* note 87, at 92. *But see Participative Management*, WHAT'S NEW IN COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) No. 974, at 4 (Sept. 30, 1982) (labeling these new management approaches as superficial publicity campaigns, or marriages of convenience, to which auto and steel unions must agree because of their industries' abysmal performance. The authors also observe that these unions acquiesce to maintain "statesman-like images" because they have no hope of making any real gains at the bargaining table. "To the extent that meaningful influence, authority, and a share of ensuing profits are withheld in participative management schemes, such experiments may be rightly viewed by labor as shams.").

<sup>190</sup> *In Brief*, WHAT'S NEW IN COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) No. 973, at 3 (Sept. 16, 1982).

<sup>191</sup> *See supra* note 108.

<sup>192</sup> B. MELTZER, *supra* note 74, at 163.

<sup>193</sup> *See id.* at 161 (grievances and arbitration provision).

<sup>194</sup> NLRA, *supra* note 14, at § 9(e), 29 U.S.C. § 159(e) (1976) (a certified labor union is one which wins a majority of employee votes in a Board-supervised and -approved election).

<sup>195</sup> *Id.* at § 9(a), 29 U.S.C. § 159(a) (1976). Japanese labor law does not confer exclusive status on any employee organization, 6 DOING BUSINESS IN JAPAN, *supra* note 111, at pt. XII § 1.02[4][a], so unions do not have a monopoly on employee-employer communication.

<sup>196</sup> NLRA, *supra* note 14, at § 2(5), 29 U.S.C. § 152(5) (1976).

<sup>197</sup> *Id.* at § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), which provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

more Japanese-like work relationships in union shops must be written into negotiated agreements.<sup>198</sup> Although some unions have adopted this trend, others view it as a threatening employer tactic designed to weaken unions by fostering a closer relationship directly between labor and management without union intermediaries.<sup>199</sup> The legal consequences of implementing Japanese-style, cooperative labor relations in union shops will vary depending on the attitudes of union leaders, as reflected in the terms of each bargaining contract.

Although no contract barriers to Japanese-style labor relations exist in non-union shops, a provision of the NLRA may still prevent employers from forming labor-management committees if those committees discuss wages, hours or working conditions. A group which engages in these activities is defined as a labor organization under the statute,<sup>200</sup> and the law requires labor organizations to be free of employer domination, interference and financial support.<sup>201</sup> Thus, the Board and the courts have consistently declared employee organizations that resemble Japanese enterprise unions unlawful.<sup>202</sup> The reasons for this depend on the history of the United States labor movement and on the assumptions about employer-employee relations which persist in United States labor law.

## B. United States Labor Policy

### 1. *History and the NLRA*

Decades of violent strife between workers and management<sup>203</sup> motivated Congress to pass the National Labor Relations (Wagner) Act of

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<sup>198</sup> See *supra* notes 183-89 and accompanying text.

<sup>199</sup> *What's In It For Unions?*, FORTUNE, Aug. 24, 1981, at 88 (reporting that the United Steelworker's 1980 contract required department-level labor-management participation teams to avoid discussing bargaining and grievance issues). But see *Workplace Democracy and Industrial Policy*, LAB. REL. REP. (BNA) No. 110, at 171 (June 28, 1982) (regarding failure of USW program). AFL-CIO Secretary-Treasurer Thomas R. Donahue expressed distrust of quality of worklife programs saying that they may be another employer attempt to bypass or supplant the union. *Quality of Worklife Programs*, LAB. REL. REP. (BNA) No. 109, at 94 (Feb. 1982). Employers, he stated, may try "101 ways to make cosmetic changes that try to fool the worker into believing that it's a great place to work and that management really cares, despite the lousy pay and rotten conditions." *Id.* Conceding some benefits, he advised that such employer proposals should be "watched very carefully" because they are often just devices, promoted by management's bargaining consultants, designed to break unions. *Id.*

<sup>200</sup> See *supra* note 195.

<sup>201</sup> See *supra* note 14.

<sup>202</sup> See *infra* notes 220-31 and accompanying text.

<sup>203</sup> Norton, *supra* note 88, at 486-90, 581, 726 & 737-40. See also MORISON, *supra* note 88, at 376-83; D. MILTON, THE POLITICS OF U.S. LABOR HISTORY (1982).

1935 (NLRA),<sup>204</sup> labor's bill of rights.<sup>205</sup> Its primary purpose was to give employees an effective voice in the work place through collective bargaining.<sup>206</sup> Because collective bargaining was recognized by the National Industrial Recovery Act of 1934, many employers sponsored formation of single-firm employee organizations in an attempt to subvert independent trade unions' organizing efforts.<sup>207</sup> By 1935, 2.5 million employees belonged to so-called company unions.<sup>208</sup> Because these unaffiliated groups had inadequate financial support and depended on management's good opinion for their existence, their role in collective bargaining was described as a "colloquy between one side [of the employer's] mouth and the other."<sup>209</sup> "Company union" became a pejorative term in the labor movement<sup>210</sup> and that viewpoint is reflected in the legislative history of the NLRA. The bill's sponsor, Senator Wagner, intended to outlaw these sham unions, but did not intend to make other forms of independent, enterprise-based labor organizations illegal.<sup>211</sup>

Despite Senator Wagner's intent, protection of employee free choice became synonymous with selection of trade union representation.<sup>212</sup> The NLRA and its interpretations embody an assumption that only trade unions can be trusted to vigorously pursue employee interests without employer coercion. That conclusion almost automatically

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<sup>204</sup> NLRA, *supra* note 14.

<sup>205</sup> B. MELTZER, *supra* note 131, at 1-11, 31-32.

<sup>206</sup> Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 34 (1979).

<sup>207</sup> Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809, 820 (1977).

<sup>208</sup> Summers, *supra* note 206, at 33.

<sup>209</sup> R. BROOKS, UNIONS OF THEIR OWN CHOOSING 68-69 (1939).

<sup>210</sup> *See id.* at 69, 135.

<sup>211</sup> The erroneous impression that the bill expresses a bias for some particular form of union organization probably arises because it outlaws the company dominated union. Let me emphasize that nothing in the measure discourages employees from uniting on an independent- or company-union basis, if by these terms we mean simply an organization confined to the limits of one plant or one employer. Nothing in the bill prevents employers from maintaining free and direct relations with their workers . . . . The only prohibition is against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules and regulations without his consent, and which cannot live except by the grace of the employer's whims.

79 CONG. REC. 2371-72 (Feb. 21, 1935). Although the employer respondent in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), and later scholarly analysis of the Taft-Hartley Act's legislative history supported a more tolerant treatment of atypical employer-employee committees, the Supreme Court rejected this interpretation and continued to construe the Act against such forms of employee representation. Feldman & Steinberg, *Employee-Management Committees and the Labor Management Act of 1947*, 35 TUL. L. REV. 365, 385 (1961).

<sup>212</sup> Feldman & Steinberg, *supra* note 211. *See also* *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938) (disapproving company unions).

posits an adversary relationship. Because Japanese-style labor relations depend on cooperation, rather than antagonism, implementation of Japanese methods in the United States is legally suspect.<sup>213</sup>

## 2. *Domination, Cooperation and NLRA Section 8(a)(2)*

Section 8(a)(2) of the National Labor Relations Act prohibits employers from interfering with, dominating or supporting any labor organization.<sup>214</sup> The National Labor Relations Board has construed this provision very broadly and ordered disestablishment of most non-traditional employee organizations which exist for the purpose of "dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work"<sup>215</sup> if there is any suggestion of employee support.<sup>216</sup> These organizations, typically called employee committees, are usually formed at the suggestion of the employer, who may be motivated either by fear of possible trade union organizing or by a desire for a cooperative mechanism through which the work environment can be improved.<sup>217</sup> Such committees are loosely organized groups of employee representatives which discuss wages, hours, safety, grievances, recreation and other conditions of employment with their respective employers.<sup>218</sup> Usually, management participates in these committees to a much greater extent than they would if employees were represented by a trade union.<sup>219</sup> Management may appoint members to the committee itself, meet with the committee frequently and informally to hear its concerns, or may directly assist its operations.<sup>220</sup> Because employee committees are the closest United States parallel to Japanese enterprise unions, their legal record may predict the consequences of implementing some aspects of Japanese labor relations in the United States.

The Board and the courts have treated employee committees harshly, construing seemingly innocent forms of support to be illegal employer domination or interference. Detrimental support is presumed whether an employer offers secretarial assistance,<sup>221</sup> provides re-

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<sup>213</sup> Ross, *Labor Organizations and the Labor Movement in Advanced Industrial Society*, 50 VA. L. REV. 1359 (1964).

<sup>214</sup> NLRA, *supra* note 14.

<sup>215</sup> NLRA, *supra* note 14, at § 2(5), 29 U.S.C. § 152(5) (1976).

<sup>216</sup> See *infra* notes 220-31 and accompanying text.

<sup>217</sup> Jackson, *supra* note 207, at 810-11.

<sup>218</sup> Note, *New Standards for Domination and Support under Section 8(a)(2)*, 82 YALE L.J. 510, 513 n.29 (1973).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> NLRB v. Dennison Mfg. Co., 419 F.2d 1080 (1st Cir. 1969), *cert. denied*, 397 U.S. 1023

freshments<sup>222</sup> or a mimeograph machine,<sup>223</sup> suggests the idea of an employee committee,<sup>224</sup> participates as a member,<sup>225</sup> or grants office space or pay to facilitate meetings.<sup>226</sup> Although the Board ostensibly evaluates the facts of each situation,<sup>227</sup> two commentators have concluded that it actually applies a per se rule that automatically assumes coercion of employees' free choice whenever the requisite degree of employer support is evidenced.<sup>228</sup> The Supreme Court upheld this per se approach in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*,<sup>229</sup> and ordered dissolution of an employer-facilitated employee committee which had been in existence for ten years and which the employees clearly preferred to union representations:

In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force. We think the statute plainly evinces a contrary purpose, and that the Board's conclusions are in accord with that purpose.<sup>230</sup>

Since *Newport News*, the circuit courts and the Board have, with few exceptions,<sup>231</sup> applied the Section 8(a)(2) per se rule to employer-supported unions whether or not actual employer domination, interference or coercive financial support was evident.<sup>232</sup>

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(1970) (employer-employee committee ordered to be disestablished after 46 years because company supplied operating funds, space, secretarial assistance and supplies). See also *NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803 (1st Cir. 1964) (employee committee membership election unlawfully assisted by employer who printed, distributed and tabulated ballots, though no unfairness evidenced).

<sup>222</sup> *Standard Transformer Co.*, 97 N.L.R.B. 669, 671 (1951).

<sup>223</sup> *Nutone, Inc.*, 112 N.L.R.B. 1153, 1170 (1955).

<sup>224</sup> *Hertzka & Knowles*, 206 N.L.R.B. 191, 196 (1973), *enfmn't denied in part*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975).

<sup>225</sup> *Id.* See also *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979). Cf. *supra* note 140 and accompanying text (legality of analogous situations in Japan).

<sup>226</sup> *Dennison Mfg.*, 419 F.2d at 1080.

<sup>227</sup> "It is an oversimplification to assert that the examples enumerated in the text outline the parameters of section 8(a)(2). In fact, the parameters are unknown, because the Board declines to make clear the precise type or amount of assistance needed to trigger a violation. [T]he Board maintains that it does not view individual actions, but instead considers the 'totality' of a situation . . . . The Board's long record with § 8(a)(2) cases, however, indicates a low level of tolerance for such assistance." Note, *supra* note 217, at 512-13, n.25.

<sup>228</sup> Jackson, *supra* note 207, at 814-18.

<sup>229</sup> 308 U.S. 241 (1939).

<sup>230</sup> *Id.* at 251.

<sup>231</sup> See *infra* notes 246-52 and accompanying text.

<sup>232</sup> Actual employer domination or interference evident: *Classic Industries, Inc. v. NLRB*, 667 F.2d 205 (1st Cir. 1981); *Pacemaker Corp. v. NLRB*, 260 F.2d 880 (7th Cir. 1958); *Randall A.*

Analysis of recent cases suggest two legal distinctions by which an employee committee need not fall within the broad definition of a labor organization and thereby can avoid Section 8(a)(2) problems.<sup>233</sup> First, although a non-union employee group is formed to deal with the employer concerning wages, hours and working conditions, its members must also be representatives of other employees in order to come within the NLRA definition.<sup>234</sup> Thus, ad hoc committees composed of volunteers,<sup>235</sup> labor-management work teams,<sup>236</sup> and all employee meetings<sup>237</sup> were lawful because the employees involved represented no one but themselves. The second exception applies to groups to which management delegated complete authority over a given task. Since such a group did not have to consult with management, the Board reasoned that it was not "dealing with [an] employer" and therefore was not acting as a labor organization under the NLRA definition.<sup>238</sup> If an employer carefully tiptoes along the margins of the NLRA and correctly structures a labor-management team, the group can avoid legal condemnation regardless of its purpose or the amount of employer support it receives.

These non-representational or complete delegation approaches are constrained and unsatisfactory ways of legalizing Japanese-style labor management practices for several reasons. First, employees may prefer to elect representatives to cooperative committees, fellow workers in whom they have confidence, rather than have to attend themselves. Thus, the exception for non-representative employee committees still denies employees the free choice which was supposedly assured by the NLRA.<sup>239</sup> Second, in a delegated problem solving group, consultation between labor and management could likely be a desirable means of ensuring that the group's decision was fully informed and useful.<sup>240</sup> Finally, both of these distinctions avoid the increasingly tough question

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Wheeler, 260 N.L.R.B. 867 (1981); K & E Bus Lines, Inc., 255 N.L.R.B. 1022 (1981); Walker Die Casting, Inc. 255 N.L.R.B. 212 (1981). No actual employer domination or interference evident: NLRB v. Reed Rolled Thread Die Co., 432 F.2d 70 (1st Cir. 1970); NLRB v. Dennison Mfg. Co., 168 N.L.R.B. 1012 (1967), *enfd.*, 419 F.2d 1080 (1st Cir. 1969), *cert. denied*, 397 U.S. 1023 (1970); NLRB v. Prince Macaroni Mfg. Co., 329 F.2d 803, 809-12 (1st Cir. 1964); Wyman-Gordon Co. v. NLRB, 153 F.2d 480, 482 (7th Cir. 1946).

<sup>233</sup> Schurgin, *The Limits of Organized Employer-Employee Relations in Non-Union Facilities: Some New Evidence of Flexibility*, 57 CHI. [-] KENT L. REV. 615 (1981).

<sup>234</sup> See *supra* note 196.

<sup>235</sup> *Fiber Materials, Inc.*, 228 N.L.R.B. 933 (1977).

<sup>236</sup> *General Foods Corp.*, 231 N.L.R.B. 1232 (1977).

<sup>237</sup> *Avildson Tools & Machine, Inc.*, 112 N.L.R.B. 1021 (1955).

<sup>238</sup> *St. Vincent Hospital*, 244 N.L.R.B. 84 (1979).

<sup>239</sup> See *supra* notes 210-11 and accompanying text.

<sup>240</sup> See Ingami & Nakamura, *supra* note 96, at 2.

of why, given the maturity of the American labor movement and supposed statutory neutrality, traditional collective bargaining must be the only means under the NLRA through which labor may deal with management.

Another line of cases using an "actual domination" test<sup>241</sup> gives both labor and management more flexibility in structuring their relationship as they choose. This test irregularly appears in three circuits and attempts to distinguish detrimental support from cooperation, thereby allowing some non-union employee committees. In *Chicago Rawhide v. NLRB* the Seventh Circuit stated:

Support, even though innocent, can be identified because it constitutes at least some degree of control or influence . . . . The test of whether an organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees . . . . [T]he Board may not infer conduct that is violative of the Act from conduct that is not . . . . We are not going to permit the destruction of a happy and cooperative employer-employee relationship when there is absolutely no evidence to support a finding of an unfair labor practice.<sup>242</sup>

*Chicago Rawhide's* cooperation standard significantly expanded the permissible extent of employer involvement. The employer assisted in forming an employee's committee, allowed it to meet during working hours on company premises, and contributed money to a related employee recreation fund.<sup>243</sup> The complaint was filed by a union which had badly lost a recent bargaining election.<sup>244</sup> In allowing the employee committee, however, the court formulated no principles by which the line between illegal support and acceptable cooperation could be identified. The standard remained vague, an issue of fact and intuition. The First Circuit, nonetheless, adopted it in *Coppus Engineering Corporation v. NLRB*,<sup>245</sup> finding that the employer-initiated employee grievance committee was not a "creature of management . . . which functioned in subservience . . . contrary to sec. 8(a)(1) and (2)."<sup>246</sup>

Two recent decisions which cite the *Chicago Rawhide* actual domination test go even further in approving cooperative employer-employee organizations by explicitly protecting employees' right to choose between a traditional labor union and a less formal, unaffiliated com-

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<sup>241</sup> *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 168 (7th Cir. 1955).

<sup>242</sup> *Id.* at 167-68, 170.

<sup>243</sup> *Id.* at 166-67.

<sup>244</sup> *Id.* at 167.

<sup>245</sup> 240 F.2d 564 (1st Cir. 1957).

<sup>246</sup> *Id.* at 572.

mittee which the employer expressly prefers. In *Hertzka & Knowles*,<sup>247</sup> the Ninth Circuit was confronted with an employer-initiated plan of five topical labor-management committees which had been formed amidst a union organizing effort.<sup>248</sup> Denying the union's Section 8(a)(2) suit, the majority opinion stated:

[F]or us to condemn this organization would mark approval of a purely adversarial model of labor relations. Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act.<sup>249</sup>

More recently, in *Northeastern University*<sup>250</sup> the First Circuit upheld an organization of non-professional university staff, which provided for employer involvement, because there was no evidence of actual domination or interference.<sup>251</sup> The opinion characterized the organization as part of a trend. "[C]hanging conditions in the labor-management field seem to have strengthened the case for providing room for cooperative employee-employee arrangements as alternatives to the traditional adversary model."<sup>252</sup>

Since the *Hertzka & Knowles* and *Northeastern University* rulings, it is clear that while the Board favors the traditional methods of protecting workers, the First, Seventh, and Ninth circuits have at least begun to forego this paternalism in favor of allowing employees the freedom to choose less adversarial types of organization.<sup>253</sup> At this point, it is difficult to tell from Section 8(a)(2) decisions whether future interpretations will protect employee free choice or favor traditional adversary labor unions. Social factors, legislative history, and the potential advantages of Japanese style labor relations support a need for change in the Board's interpretation of Section 8(a)(2).

### 3. *Rationale for Change*

John Simmons of the University of Massachusetts has called for a "radical shift from adversarial relations," citing a United States worker grievance rate seventeen times higher than that in European countries and the lowest rate of productivity increases of all industrialized na-

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<sup>247</sup> *Hertzka & Knowles*, 503 F.2d at 626.

<sup>248</sup> *Id.* at 626, n.2.

<sup>249</sup> 503 F.2d at 631.

<sup>250</sup> 601 F.2d at 1208.

<sup>251</sup> *Id.* at 1216.

<sup>252</sup> *Id.* at 1214. See also Angel, *supra* note 171.

<sup>253</sup> See Summers, *supra* note 206 (tracing the historical debate between those who favor policies which affirmatively protect trade unions and those who favor a policy of neutrality).



tions.<sup>254</sup> Concurring, Edward L. Cushman, a professor at Wayne State University and former American Motors executive, commented that "[l]ike marital relations, success in labor relations is not found in seeking victory over the other party."<sup>255</sup> According to a United Auto Workers Union leader, labor management relationships have vastly improved since the 1940s and good faith is now the predominant characteristic of UAW-GM contract talks:<sup>256</sup>

Today substantial numbers of workers no longer have an interest in class struggle politics. There is a decline in union membership; strikes are more difficult to maintain; organized labor has made little headway with white collar employees; the moral fervor that once drove the movement seems to have died . . . . To the extent that workers identify more with management than with traditional unions, and that employers are not interested in subverting the interests of their employees, there is a need to relax the stringent standard of separation that has developed under section 8(a)(2).<sup>257</sup>

Statistical studies support this impression. According to a recent survey, workers saw union representation as a last resort for solving problems with management.<sup>258</sup> This feeling, plus management's use of "positive personnel strategy" (unilaterally providing attractive pay and benefits)<sup>259</sup> are two factors contributing to the declining rate of union

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<sup>254</sup> *Workplace Democracy and Industrial Policy*, LAB. REL. REP. (BNA) No. 110, at 171 (June 28, 1982). See also J. SIMMONS, *supra* note 97.

<sup>255</sup> *Labor Relations and Call for Radical Change*, 1981 LAB. REL. Y.B. 19, 21.

<sup>256</sup> See *Quality of Worklife Programs at General Motors*, *supra* note 188, at 9.

<sup>257</sup> Note, *supra* note 217, at 516-17, 519. Although this author restricts his recommendation to professional or quasi-professional employees—draftsmen, university staff, nurses—in light of the Japanese experience, there is no reason for this limit if the guiding principle is worker free choice.

<sup>258</sup> Leftwich, *Organizing in the Eighties: A Human Perspective*, 32 LAB. L.J. 484, 486 (1981). See also Krislov & Silver, *Current Challenges in Industrial Relations*, 32 LAB. L.J. 480 (1981).

<sup>259</sup> Leftwich, *supra* note 258. See also Seligman, *Who Needs Unions?*, FORTUNE, July 12, 1982, at 54, 66 (stating that U.S. government regulation of the workplace through the Occupational Safety and Health Administration [OSHA], Employee Retirement Income Security Act of 1974 [ERISA], and the Equal Employment Opportunity Commission [EEOC] is an effective competitor with trade unions). Cf. Law No. 49, *supra* note 126 and accompanying text, as indicative of the effect statutory protections have on collective bargaining agreements in Japan.

Regarding personnel strategies, Seligman observes:

Big business takes employee morale seriously these days. Personnel departments are increasingly responding to a "human-relations ideology" that labors to take the rough edges off the company's dealings with workers. In 30% of all non-union companies, some kind of formal grievance procedure is now in place. Professor Fred K. Foulkes of the Boston University School of Management, who has studied the personnel policies of 26 large non-union companies (20 of which were on the Fortune 500 in 1975), concluded that these companies were in many ways offering blue-collar workers the best of both worlds. In dealing with pay and benefit issues, and also in setting the rules by which plants were run, many of the companies were to a remarkable degree limiting the freedom of their managers "beyond anything that a union would be able to negotiate." Foulkes observed that the companies had employees whose attitudes retained "some undefined intangibles that . . . relate to morale, trust, confidence, spirit, good faith, an identification with management, and a consequent avoidance of

membership.<sup>260</sup> In 1954, nearly thirty-five percent of the American work force were union members; by 1978 the number had diminished to less than twenty-four percent.<sup>261</sup> The decline can also be attributed to the decreasing blue collar industrial sector of the economy, unions' traditional stronghold, and to the corresponding increase in white collar, clerical and service employees, whom unions have had less success attracting.<sup>262</sup> This evidence suggests that if employees were given a truly free choice among various forms of representation, a large proportion of the American work force would welcome the introduction of Japanese-style labor relations. Another American study of 175,000 hourly employees in 159 companies found that these employees were increasingly dissatisfied with their work.<sup>263</sup> Many complaints focused on "esteem related factors" rather than on pay or other tangible benefits.<sup>264</sup> These employees consistently stated that they were not treated

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the we-they adversary relationship that can so frequently characterize the union-management relationship.

Seligman, *supra*, at 66.

<sup>260</sup> Participants in a panel discussion on the declining role of U.S. labor unions posited several other reasons: effective management opposition, ineffective legal deterrents for discriminatory discharges, shrinking markets for U.S. goods, and the growing popularity of anti-union sentiment. *Are the Unions Dead, or Just Sleeping?* FORTUNE, Sept. 20, 1982, at 98, 99-100.

<sup>261</sup>

Year	Union Membership (thousands)	Non-Agricultural Employees (thousands)	Percent Non-Union Members
1954	17,022	49,022	34.7
1955	16,802	50,675	33.2
1960	17,049	54,234	31.4
1965	17,299	60,815	28.4
1970	19,381	70,593	27.5
1975	19,564	76,945	25.4
1978	20,238	85,763	23.6

Source: U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS, BULL. NO. 1865, at 389 (1975) (for years 1954 through 1970); Gov't EMPL. REL. REP. (BNA), No. 827, at 35 (Sept. 10, 1979) (for years 1975 and 1978).

(Sept. 10, 1979) (for years 1975 and 1978). *But see* Seligman, *supra* note 259, at 64 (notes that these statistics are based on unaudited membership reports from unions to the Department of Labor, and thus are probably inflated).

<sup>262</sup> Angel, *supra* note 171, at 385.

<sup>263</sup> Cooper, *supra* note 174. *But cf. Who's Happy Now*, FORBES, Apr. 25, 1983, at 8 (reports results from an Indiana University study comparing United States and Japanese worker satisfaction). Contrary to "conventional wisdom," more American than Japanese workers were willing to work harder (68%, 44%) and even more surprisingly, more Americans than Japanese had family feelings toward their companies (85%, 36%). *Id.* Although access to the study itself might negate this speculation, an explanation for these results may be the facts that Japanese workers are already working very hard, and that their cultural expectations demand much more of employer-employee relations than Americans and hence are more readily disappointed. Conversely, these statistics might be evidence that the traditional elements of Japanese culture are diminishing.

<sup>264</sup> Cooper, *supra* note 174, at 123.

with respect as individuals, that they perceived little opportunity for advancement or for enrichment of the content of their job assignment, that the companies did not listen or respond to workers, and that they were not treated fairly.<sup>265</sup> A parallel survey of managers in the same companies produced opposite results, showing a definite "hierarchy gap" between management and labor perceptions of their job satisfaction.<sup>266</sup> The authors concluded that companies must face these problems and find solutions, other than the usual pay raises, to make their work force as effective as possible.<sup>267</sup>

Although the Board and most courts interpret the NLRA in ways which favor traditional, adversary unions over "weaker" employee organizations,<sup>268</sup> one scholar views this interpretation as unjustified after passage of the Taft-Hartley Act, which extensively amended the NLRA.<sup>269</sup>

The Taft-Hartley Act reaffirmed the NLRA's endorsement of freely chosen employee representatives and collective bargaining, but for the first time it restrained union activities, proscribing coercion of employees and secondary boycotts as unfair labor practices.<sup>270</sup> "[A] new balance was achieved by imposing corresponding obligations on labor organizations. The government, instead of aiding one side, now stands in the center."<sup>271</sup> This interpretation of the Taft-Hartley Act gives new meaning to the NLRA's Findings and Policy Statement that "the policy of the United States [is] to . . . encourag[e] the practice and procedure of collective bargaining and . . . protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."<sup>272</sup> Together the legislative history of the two acts<sup>273</sup> provides additional support for the *Chicago Rawhide*, *Hertzka & Knowles*, and *Northeastern University* rulings and also provides a basis for a statutory argument by which

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 121. The data showed a 29% difference between management and hourly employees in overall job satisfaction. *Id.* This pattern appeared in response to most of the other survey items as well. *Id.*

<sup>267</sup> *Id.* at 124-25.

<sup>268</sup> See *supra* notes 214-31 and accompanying text.

<sup>269</sup> Labor Management Relations Act (Taft-Hartley Act), Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1976)).

<sup>270</sup> B. MELTZER, *supra* note 131, at 42-44.

<sup>271</sup> A. COX, D. BOK & R. GORMAN, CASES ON LABOR LAW 93-94 (1977), *quoted in* Jackson, *supra* note 207, at 835.

<sup>272</sup> NLRA, *supra* note 14, at § 1, 29 U.S.C. § 151 (1976).

<sup>273</sup> See *supra* notes 210-12 and accompanying text.

United States companies may adopt Japanese labor relations within the existing legal framework.

Protection for employee free choice and appropriate judicial standards for review are explored in detail by one commentator who recommends adoption of an actual interference or domination test.<sup>274</sup> This standard would afford legal protection against employers who promise to work cooperatively with a non-union employee committee and then renege. In addition, the worker's right to free choice itself, together with NLRA provisions covering bargaining elections, would allow workers to select a different form of representation, including joint committees formed on employer initiative.<sup>275</sup> "Today, unlike the early years of the NLRA, if the employer is a liar, the labor organization market assures he will pay for it."<sup>276</sup> Adoption of an actual domination standard would permit Japanese-style alternatives under United States law. Further, the Board would retain corollary unfair labor practice rules which would ensure fair elections, protect union activists from discriminatory discharge, require employers to bargain, and regulate and protect the right to strike. These assurances, plus the power of the courts to review grievance dispositions and to enforce negotiated agreements, would prevent the disadvantages of Japanese labor relations—relatively frequent dispute actions, employer intimidation, campaign interference—from also taking hold.<sup>277</sup>

Thus far, United States experience with Japanese-style labor relations has been positive when programs are supported by long-term management commitment, adequate funds and careful training.<sup>278</sup> These requirements are substantial, but business management counsel-

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<sup>274</sup> Jackson, *supra* note 207.

<sup>275</sup> NLRA, *supra* note 14, at § 9, 29 U.S.C. § 159 (1976). A certified bargaining representative may be challenged by a decertification election after one year's tenure. *Id.*

<sup>276</sup> Jackson, *supra* note 207, at 845. The author of an earlier article proposes a compromise standard. Note, *supra* note 218. In his opinion, employee committees should not have the full legal status accorded traditional unions, evidently because he considers any employer assistance suspect or at least slightly coercive. He also recommends that employer coercion be judged by examining the employer's motive. This standard would be difficult to apply and further, for the reasons stated in Jackson's article, the Board need not prefer traditional unions to protect employee free choice.

<sup>277</sup> Cf. GETMAN, GOLDBERG & HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) (empirical study suggests that the Board should be less concerned with preserving laboratory conditions in bargaining elections and should permit freer, more informed employee choice by tolerating a broader range of employer propaganda but penalizing discriminatory discharges more effectively).

<sup>278</sup> See *infra* notes 236-42 and accompanying text.

ors deem them necessary.<sup>279</sup> Despite the high investment required, some companies have adopted the principle feature of Japanese labor relations—cooperation between workers and management.<sup>280</sup> Delta Airlines has not laid off any workers in almost two decades, despite fuel shortages, the air traffic controllers' strike and the recent recession.<sup>281</sup> While flying shorter, more costly routes and paying generous employee benefits, Delta's 1980 profits led the industry at more than double those of the second most profitable carrier.<sup>282</sup> Another example is the Harmon Industries quality of worklife project. Since its inception, employee grievances have declined by fifty-one percent, job security and productivity have improved, and management estimates that the project has resulted in a no-cost savings of \$3,000 per hourly employee over a fifty-five month period.<sup>283</sup> As these cases illustrate, Japanese-style labor relations can be successfully used with or without traditional labor union organizations.<sup>284</sup> The success of Japanese subsidiaries in the United States—among them YKK Company's version of industrial democracy,<sup>285</sup> Honda's Marysville, Ohio, plants, and Nissan's new Tennessee facility<sup>286</sup>—also argue for a less protective legal approach.

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<sup>279</sup> See generally *Workplace Democracy and Industrial Policy*, LAB. REL. REP. (BNA) No. 110, at 171 (June 28, 1982); PASCALE & ATHOS, *supra* note 3; Takeuchi, *supra* note 4.

<sup>280</sup> See *supra* note 3. See also *Chicago Rawhide*, 221 F.2d at 165; *Coppus Engineering*, 240 F.2d at 564; *Hertzka & Knowles*, 503 F.2d at 625, *supra* notes 175-89 and accompanying text.

<sup>281</sup> *Delta Soars*, *supra* note 182.

<sup>282</sup> *Id.*

<sup>283</sup> Macy, *supra* note 184, at 42. The author implies that the lower grievance rate is due to fewer complaints rather than to any change in the definition or processing of grievances. *Id.* Job security was measured by a combination of factors. *Id.* More jobs were created, increasing the hourly employment level 55%; 70 existing jobs were saved; the rates of attrition declined 72 and 95% (for involuntary turnover, i.e. discharges, retirement). *Id.* "Daily output per hourly employee, adjusted for inflation, rose twenty-three percent . . . [N]et product reject cost rates declined 39 percent, while the rate of customer returns decreased by 47 percent . . . Some of the gains are attributable to technological and capital inputs; however, many can be attributed to the cooperative labor-management change." *Id.* at 41-42. The \$3,000 savings per employee, a net discounted figure, is attributed to labor-management cooperation under the project and to other unstated reasons. *Id.* at 42. While behavioral and performance results were positive, attitudinal measurements were mixed. *Id.* Macy speculates that the explanation for these equivocal findings may be increasingly higher critical worker aspirations, which the quality of worklife project itself enhances. *Id.* Macy's article summarizes data from a 55 month period from 1972-1976. *Id.* For more detailed information see B. MACY, G. LEDFORD JR. & E. LAWLER III, AN ASSESSMENT OF THE BOLIVAR QUALITY OF WORK LIFE EXPERIMENT: 1972-1979 (1980).

<sup>284</sup> Employees at Harmon Industries are members of the United Auto Workers. MACY, *supra* note 184, at 41. All 37,000 Delta Airlines employees, except pilots and dispatchers, are non-union. *Delta Soars*, *supra* note 182.

<sup>285</sup> N. SASAKI, *supra* note 49, at 114-15.

<sup>286</sup> See Buss, *Japanese-Owned Auto Plants in the U.S. Present a Tough Challenge for the UAW*, Wall St. J., Mar. 23, 1983, § 2, at 33, col. 4. See also *Honda's Accord—How a Japanese Firm is Faring in its Dealings with Workers in the U.S.*, Wall St. J., Oct. 2, 1981, at 1, col. 6; *Nissan's*

"One trend seems very clear. The time is ripe for the United States industrial relations system to seriously consider cooperative union-management programs along with their traditional contractual and collective bargaining structures and processes."<sup>287</sup>

#### 4. *Other Obstacles to Cooperation*

##### a. Labor conflict resolution

Formal adjudication plays a large role in settling United States labor disputes. The NLRA encourages arbitration,<sup>288</sup> which is the final step in the grievance process in ninety-six percent of United States collective bargaining contracts.<sup>289</sup> A United States arbitrator sits as a judge and, although not bound by legal precedents, the arbitrator's decision must rest on an interpretation of the rights and duties contained in the contract under dispute.<sup>290</sup> By contrast, in Japan many disputes are settled before reaching an adjudicatory stage.<sup>291</sup> A Japanese arbitrator or conciliator does not make a clear-cut decision about who is right and wrong or examine the respective rights of the parties.<sup>292</sup> The arbitrator's chief function is to dispell bad feelings and re-establish harmony by "‘maruku osameru’ (to settle in a circle), [which] means to settle things in a way that satisfies both parties equally."<sup>293</sup>

United States dispute resolution procedures reflect and contribute to the adversarial nature of traditional labor-management relations. Rational, objective determinations of legal rights and consequent winners and losers inevitably separate the parties psychologically, curtailing any established cooperation.<sup>294</sup> Thus, implementation of Japanese-style dispute settlement may be a necessary complement to effective use of Japanese-style labor-management relations. One possibility is to augment grievance procedures, which typically involve two stages of labor-management conference before arbitration,<sup>295</sup> with a provision for conciliation.<sup>296</sup> Although conciliation could simply pro-

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*Tennessee Workers Adopt Japanese Way to Happy Days*, Chicago Tribune, Jan. 9, 1983, § 1, at 10, col. 1.

<sup>287</sup> Macy, *supra* note 184, at 43.

<sup>288</sup> NLRA, *supra* note 14, § 201(b), 29 U.S.C. § 171(b) (1976).

<sup>289</sup> COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) No. 51, at 5 (1979).

<sup>290</sup> B. MELTZER, *supra* note 131, at 32-34.

<sup>291</sup> See *supra* note 161.

<sup>292</sup> See T. HANAMI, *supra* note 74, at 58, 203-04.

<sup>293</sup> *Id.* at 58.

<sup>294</sup> Goldberg, *supra* note 61, at 277-78 (discussing arbitration).

<sup>295</sup> B. MELTZER, *supra* note 74, at 161-62 (grievance and arbitration procedure of an illustrative collection bargaining agreement).

<sup>296</sup> In 1979 only three percent of this nation's collective bargaining agreements contained medi-

long a dispute if the parties refused the conciliator's advisory solution, if the ethic of cooperation were sufficiently strong and the conciliator was respected by both sides, settlement short of formal adjudicatory process would be more likely to salvage worker-management harmony.<sup>297</sup>

This suggestion is not new to United States labor relations. The Taft-Hartley Act established the Federal Mediation and Conciliation Service, but its activity is sharply confined.<sup>298</sup> In the 1930s and 1940s labor arbitrators were divided into two factions. One group felt that arbitrators should act as neutral assistants to help parties solve their problems and restore their relationship.<sup>299</sup> The other group thought that an arbitrator should restrict his considerations to legal contract interpretation.<sup>300</sup> The latter group prevailed.<sup>301</sup> Professor Stephen Goldberg, an experienced labor arbitrator, recently wrote that "[t]he focus on winning the particular grievance tends . . . , to distract the parties from their long term relational interests."<sup>302</sup> Although the degree to which adversarial dispute resolution has affected labor-management cooperation in the United States is difficult to assess, dispute resolution techniques will have a significant influence on the form which Japanese-style labor relations assume in the United States.

#### b. Democracy in the work place

While true employee freedom of choice may allow more cooperative, less adversarial forms of labor organization, it will also allow employees who are dissatisfied with Japanese-style arrangements to join trade unions. When Honda hired workers for its new Marysville, Ohio motorcycle plant, it hired few experienced auto workers with past UAW membership, ostensibly because it wanted fresh people, willing to accept job rotations to avoid layoffs, and ready to absorb Honda's quality credo.<sup>303</sup> Most employees attended extensive training sessions

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ation provisions. COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) No. 51, at 5 (1979).

<sup>297</sup> Goldberg, *supra* note 61, at 283. Widespread use of mediation rather than arbitration also would substantially reduce the costs and time involved. *Id.* at 282-84.

<sup>298</sup> "The Service is directed to make its conciliation and mediation services available . . . only as a last resort and in exceptional cases." Taft-Hartley Act, *supra* note 269, at § 203(d), 29 U.S.C. sec. 173(d) (1976).

<sup>299</sup> Goldberg, *supra* note 61, at 272-73.

<sup>300</sup> *Id.* at 273.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 278. See also Stepp, Baker & Barrett, *Helping Labor and Management See and Solve Problems*, 105 MONTHLY LAB. REV. 15, 20 (1982).

<sup>303</sup> *Honda's Accord*, *supra* note 285.

in Ohio or Japan which emphasized quality, productivity, and the link between these factors and job security.<sup>304</sup> In its first few months of operation, employees reported that management informed them of future plans and solicited their suggestions, which engendered high morale and a desire to do well.<sup>305</sup> Honda also minimized the distinction between workers and management by providing a common parking lot and cafeteria and requiring both groups to wear identical white uniforms.<sup>306</sup> The uniforms became the focus of a labor dispute, however, when a few workers wore hats with UAW insignias on the job.<sup>307</sup> Management ordered these hats removed, the employees refused, and the UAW filed a complaint with the Board alleging that Honda had committed an unfair labor practice by interfering with the employee's rights to organize, form, join, or assist labor organizations.<sup>308</sup>

Honda argued that its uniform policy promoted team work, maintained product quality (i.e. by eliminating buckles or buttons which could scratch painted surfaces), and encouraged cleanliness.<sup>309</sup> The last argument appears entirely disingenuous since the UAW patches and caps in dispute would rarely if ever threaten cleanliness. Further, the teamwork and quality arguments seemed to be euphemisms for an anti-union animus. Honda stated that identical attire would encourage employees to look upon one another as members of the Honda team whose common goal was to produce the best possible product; any variation in apparel would tend to weaken this commitment.<sup>310</sup> This cause-effect reasoning is tenuous and invites the assumption that it was a transparent attempt to keep the union out. Honda's unspoken argument must have been that the insignia threatened to encourage unionization which, in turn, would threaten not only product quality, but Honda's system of personnel management.

The Supreme Court previously had ruled that wearing union insignia on the job was a protected activity unless special circumstances existed which outweighed the employee's democratic rights in the workplace.<sup>311</sup> In Japan, the right of employees to wear union ribbons is an open question. Most recent decisions have favored employers, holding that employees had violated their obligation to devote close

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Honda of America Mfg., Inc.*, 260 N.L.R.B. 725 (1982).

<sup>308</sup> See NLRA, *supra* note 14, at § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976).

<sup>309</sup> *Honda of America*, 260 N.L.R.B. at 726.

<sup>310</sup> *Id.*

<sup>311</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).



attention to their work.<sup>312</sup> In the Honda insignia situation, the Board decided that special circumstances were absent because Honda had failed to produce any evidence which showed that their uniform rule actually produced the results claimed.<sup>313</sup> Intuitive suppositions were insufficient.<sup>314</sup>

This decision indicates another legal constraint on Japanese-style labor relations in the United States. The American emphasis on parties' legal rights tends to force a psychological wedge between employers and employees.<sup>315</sup> It seems there will and always should be a tension in the work place between cooperation and assertions of rights,<sup>316</sup> because protected legal rights and individual freedom of choice are values central to United States labor policy as well as to society at large. If both employers and employees viewed their relationship as one in which common interests in the company's success overshadowed differences, they could reduce this stress between cooperation and assertion of rights. United States labor law should at least permit, if not endorse, freely chosen forms of labor organization which embody this less stressful attitude.

#### IV. CONCLUSION

Japanese cultural history emphasizes the importance of harmonious social relationships based on emotional ties, an attitude which is reflected in Japanese labor relations practices where cooperation between labor and management is the norm. Cultural heritage also governs the Japanese attitude toward law and labor dispute resolution. Due to this influence, conflict between workers and management is most often resolved through consultation or, less frequently, through emotional confrontation and mediated compromise. United States labor policy and law, however, emerged from a completely different setting which expected labor-management conflict rather than cooperation. Unlike Japan, since disputes are expected, controls exist

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<sup>312</sup> 6 DOING BUSINESS IN JAPAN, *supra* note 111, at pt. XII, § 1.02[3][e].

<sup>313</sup> *Honda of America*, 260 N.L.R.B. at 729.

<sup>314</sup> *Id.*

<sup>315</sup> See *supra* note 301 and accompanying text. Accord *supra* notes 57-67 (resort to legal proceedings disrupts Japanese social harmony), 138 (conciliation rather than adjudication resolves most Japanese labor disputes) and accompanying text.

<sup>316</sup> Honda's experience may soon be repeated in Smyrna, Tennessee, site of a new Nissan light truck plant due to open in 1983. *Nissan's Tennessee Workers Adopt Japanese Way to Happy Days*, *supra* note 286. Nissan desperately wants to keep its workers satisfied and fears that the union will destroy the cooperative, family atmosphere Nissan is working to instill in its 950 American employees. *Id.* Local UAW organizers, though, predict that once the assembly line begins to roll, tensions will rise and workers will turn to traditional U.S. labor organization for help. *Id.*

to ensure settlement through relatively elaborate contract and statutory procedures, premised on rational, adjudicatory application of parties' legal rights. Consequently, implementation of Japanese-style labor relations in the United States presents some legal obstacles. In a unionized shop, employers must be careful that no labor-management committee deals with matters which are reserved by law to the exclusive union bargaining agent. Joint committees in a non-union setting, while free to set their own agendas, are suspect under the prevailing assumption that the more powerful employer will dominate any common endeavor and prevent employees from freely choosing their own representatives. Nonetheless, some courts have approved employer-employee committees as a more cooperative alternative to traditional trade union representation when there is no evidence of actual employer coercion.<sup>317</sup> This line of decisions corresponds with a call by both labor and management leaders for a new, more cooperative approach to United States labor relations. The extent of employer influence over cooperative labor management groups, however, will always be mitigated by the enforceable legal rights of the parties and by legal rules designed to protect workers' free choice, as shown by the recent Honda case. Thus, while United States legal constraints on union organization are not absolute barriers, they do create limits for United States implementation of Japanese-style labor relations, and they will inevitably affect the impact of such methods on American industry.

*Marcia J. Cavens*

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<sup>317</sup> See *supra* notes 240-52 and accompanying text.