Book Review

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BOOK REVIEW

LABOR UNIONS: NOT WELL BUT ALIVE

*Can Unions Survive?:
The Rejuvenation of the American Labor Movement,*
by Charles B. Craver*

WILLARD WIRTZ**

The title of Charles Craver's book, *Can Unions Survive?,*¹ is both apt and mildly misleading. The straight-forward label is characteristic of the contents. In 157 pages of disciplined text, the author covers the entire terrain, past and present and prospective, of the labor-management relationship in the United States.

Professor Craver's response, however, to his titular question is less forthright than it appears to promise. His answer seems to be yes, that the unions can make it—if, that is, they revise their organizing tactics drastically, "enhance their economic and political power,"² and persuade Congress, the federal courts and the National Labor Relations Board to strengthen unionization and collective bargaining, including strikes, with more enthusiasm than has been their recent habit. Wasting no bedside manner in identifying these conditions of survival, the author is reserved about prognosis.

Part of the value of a presentation as concise as this is that bringing a complex picture into clear focus invites, even incites, sharp responsive thought and comment. Craver's bluntness licenses three reactions. First, this is an expertly balanced presentation of a classically controversial subject. Second, the author's terseness leaves some of his prescriptions swinging in the wind—as, for example, when it is suggested in a single sentence that organized labor should consider increasing its political effectiveness by forming a new political party.³ Third, and conversely, Craver's directness is invaluable in helping his

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2. Id. at 89.
3. Id. at 117.
readers identify for themselves the prospects for revitalizing trade
unionism and collective bargaining in this country.

Instead of devoting these comments to personal views regarding
Professor Craver's analysis, I want to fit it into the broader pattern of
labor-relations reform proposals which is currently emerging from
lawyer critics (all academics). We have received, even since the Craver
publication date, *Agenda for Reform: The Future of Employment Re-
lationships and the Law* by William B. Gould IV, Stanford Law
School faculty member and Chairman-Designate of the National La-
bor Relations Board. Both the Craver and the Gould volumes are in
a pattern that invites cross reference to Harvard Professor Paul C.
Weiler's 1990 *Governing the Workplace: The Future of Labor and Em-
ployment Law*. There have been in turn several illuminating and con-
structive reviews of Weiler's book. The present Symposium becomes
an integral and important part of this widening commentary on labor-
relations policy.

There will also be a report soon from President Clinton's Com-
mission on the Future of Worker-Management Relations (the "Com-
mission") (chaired by Harvard's John T. Dunlop, with William Gould
a member and Paul Weiler legal counsel). The inevitably critical bear-
ing of that report on what commentators Craver, Gould, and Weiler
have proposed warrants risking presumptuous, impertinent, and erro-
neous conjecture about some directions the Commission may be ex-
pected to pursue. These risks can be lessened by referring to several
recent publications by Commission members.

4. WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELA-

5. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EM-

6. One penetrating review of Weiler's book suggests that the reference to "a major over-
haul of our labor laws," id. at 226, is not backed up by "a single new idea." Matthew W. Finkin,
*Back to the Future of Labor Law*, 32 WM. & MARY L. REV. 1005 (1991); cf. Alan Hyde, Endan-
gered Species, 91 COLUM. L. REV. 456 (1991). Different and equally thoughtful assessments are
(1990). Professor Craver commented briefly on Weiler's book in Charles B. Craver, Book Re-

7. I have looked particularly at Professor John T. Dunlop's 1987 comments in *The Legal
Framework of Industrial Relations and the Economic Future of the United States*, in AMERICAN
LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT 1 (Charles
Relations Revisited*, in ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND
PRACTICE 26 (Gladys W. Gruenberg ed., 1991); and *To Form a More Perfect Union*, 9 LAB. LAW.
1 (1993) [hereinafter Dunlop, *More Perfect Union*]. Two papers by Commission member
Thomas A. Kochan, Sloan School of Management, Massachusetts Institute of Technology, are
also illuminating and relevant: *Principles for a Post New Deal Employment Policy*, in LABOR
It could be said with substantial justification that the Craver, Gould, and Weiler analyses follow parallel lines; or, with equal basis, that they diverge sharply. All three observers appear at first to be writing in a framework of traditional labor-relations theory. Their comparable identifications of the reasons for the recent hemorrhaging in labor-union membership are followed by almost identical proposals for stanching the flow of institutional lifeblood. The apparent shared major premise is that labor unions and collective bargaining are indispensable instruments for governing the marketplace. Similar proposals for making collective bargaining less militant but for sharpening the sword of the strike at the same time are brought by all three commentators into delicate juxtaposition.

Yet behind this superficial resemblance, basic differences emerge. Craver is cautiously confident that with diligent repairs the present system will work as well as it ever did. Weiler expresses sympathy but concludes that it will not. Gould stands between these two positions. In the eyes of labor economists, Weiler will be welcomed as accepting the full implications of two decades of change at the workplace; Gould's Agenda will be considered perceptive but timid; Craver's prescription for "rejuvenating the labor movement" will be dismissed as a lawyer's brief for resurrecting a collective bargaining process for which some economists claim paternity and which they have now interred.\footnote{Cf. Kochan, Principles, supra note 7, at 1: "The field of industrial relations was born out of the efforts of an early generation of institutional labor economists ... [whose] work eventually provided the intellectual foundation for the New Deal labor policies and industrial relations system." This will surprise a little those present day labor relations veterans who remember, with comparable admiration, economists Edwin Witte and George Taylor and noneconomists William Davis and Lloyd Garrison sitting together on the National War Labor Board working out answers to "cases of first impression."}
Craver's book, however, invites and warrants review in more specific terms. It will suffice to note his treatment of three sets of developments or problems, in a context that includes reference to the Gould, Weiler, and conceivable Commission positions. Craver deals first (chapter four) with the matter of union organizing difficulties and potentials. There are references throughout the book to the strike. Finally, he remarks on the tidal wave of current discussion of "increased employee participation" in workplace decision making.9

I. UNION ORGANIZING

In his introductory analysis of the reasons for the recent free fall in union membership, Craver makes the statement that if the unions "modify their conventional organizing techniques and develop innovative concepts . . ., there is no reason why they cannot increase the . . . union participation rate to the 35 to 40 percent range" where it used to be.10 This must be a deliberate oversimplification, a "first hit the mule over the head" kind of statement. Craver places himself squarely on the side, however, of those who count it a mistake to blame the unions' organizing vicissitudes entirely on National Labor Relations Board (NLRB) and court collaboration with employer union busters. Gould stakes out roughly the same position.11 Although Weiler attributes large responsibility "to the increasingly no-holds-barred resistance exhibited by American business toward unions, a level of employer opposition that tends to be facilitated rather than foiled by the present NLRA framework for the representation contest,"12 he, too, concludes that the more basic factors explaining the union membership decline are "changes in industrial structure, worker demography, and the inability of union organizers to tap latent employee demand for what [unions] have to offer."13

Craver's listing of the various forms of self-help he commends to the unions parallels to some extent the course marked out in the 1985 report of the AFL-CIO Committee on the Evolution of Work ("The Changing Situation of Workers and Their Unions"). He emphasizes

Wagner, Felix Frankfurter, Frances Perkins and Harry Shulman appear on clear hindsight to have been rendered either less seminal or less intellectual by virtue of these giants' front-line service.

10. Id. at 37.
12. Weiler, supra note 5, at 114.
13. Id. at 275.
“establishing a positive public image,” finding “new ways to entice white-collar, southern, female, minority, and elderly individuals,” becoming stronger advocates of health care and anti-drug-testing legislation and agents of not-always-adversarial collective bargaining. Recommending the employment of “energetic and charismatic individuals” as organizers, Craver proposes developing an “associational approach” which will permit union representation of employees in situations in which no official bargaining agency has been established.

Gould emphasizes more than Craver does the impact on organizing efforts of the iceberg fact of a proliferating “peripheral” or “non-traditional” work force—temporary, part-time, at home, independently contracted workers. This may well prove the single most intransigent obstacle to the development of any effective system of either employee organization or employee participation in the workplace decision-making process.

Whatever divergence there may be among the three observers regarding the causes of the union membership decline doesn’t, in the end, make much difference. There is close parallelism among their proposals with respect to the amendments they think should be made in the National Labor Relations Act (NLRA) and in the NLRB decisional pattern: simplifying and speeding up the recognition-representation process, imposing meaningful penalties on malevolent employers, trying to assure the completion of initial collective bargaining agreements, strengthening the duty-to-bargain concept, and increasing unions’ economic leverage.

Craver, like Gould and Weiler, refers only incidentally to one peculiarly legalistic aspect of increasing difficulty at the workplace. This involves the “preemption” maze, the confusion that has developed about the relationships among various federal labor and employment laws, as between federal and state laws, and as among the arbitral, judicial, and administrative processes. Professor Michael H. Gottesman has pointed insistently at the need for reexamination of this area with the purpose of assuring maximum opportunity for state experimentation in integrating various alternative forms of resolution of disputes affecting unionization, as well as other labor and employment issues. He also seeks to prevent the result that employers who are

14. CRAVER, supra note 1, at 60-73.
15. Id. at 73-79.
16. Id. at 75.
17. Id. at 86-88.
18. GOULD, supra note 4, at 2.
covered by arbitration clauses in collective-bargaining agreements receive less favorable treatment than do employers who are not.19

It is unlikely that the Commission will get very far, if at all, into the matter of amending present laws to facilitate union organizing. Various Commission members are on record as feeling strongly that such amendments are desirable and important.20 Other members, however, including the chairman, have been critical of the extent of the NLRB's regulation of labor relations processes.21 Weiler has noted recently: "The principal focus of the forthcoming policy debate will be upon major changes in the way this country educates, trains, deploys, and motivates labor—a resource that is crucial to the nation's competitive standing. Legal change is a second-order priority."22

Many of the suggested legislative amendments were included in one form or another in the Labor Reform Act of 1978, which went up in the heat and smoke of acrimonious Congressional debate. The Commission's report will appear at a time when the Congress will be considering a health care bill. Given the already manifest evidence of a spinal deficiency on Capitol Hill, the current administration would not welcome from its Worker-Management Relations Committee a recommendation that employers be required to stop beating their workers.

II. THE RIGHT TO STRIKE

Craver refers at one point to "such antediluvian economic weapons as strikes and lockouts . . . ."23 In Gould's more measured bluntness: "Strikes are now declining because they are no longer credible weapons,"24 and are "more often an irritant . . . , rather than a lubricant for dialogue."25

Put in context, these should probably be taken as statements that the right to strike has been emasculated by such decisions of the

20. See Freeman & Rogers, supra note 7; Kochan, Mutual Gain, supra note 7; Kochan, Principles, supra note 7.
21. E.g., Gould, supra note 4, at 152.
23. Craver, supra note 1, at 93.
25. Id. at 184.
Supreme Court as those in \textit{NLRB v. Mackay Radio & Telegraph Co.}\textsuperscript{26} (permitting employers to hire permanent replacements for strikers) and \textit{Pattern Makers' League v. NLRB}\textsuperscript{27} (prohibiting a union from penalizing members who cross its picket line). All three commentators urge reversal of these decisions and the substitution of modified rules about striker replacement. Craver suggests barring the hiring of any replacement workers during the first one, two, or three months of a strike, or at least a statutory requirement that strikers get their jobs back when the strike is over.\textsuperscript{28} Gould supports the Packwood-Metzzenbaum amendment to the Workplace Fairness Act proposal; this would require formal fact-finding when a strike is imminent, conditioning the employer and employee rights regarding striker replacement on the parties' acceptance or rejection of the fact-finder's recommendations.\textsuperscript{29}

Craver and Weiler would also amend section 8(b)(4) of the NLRA to permit some forms of secondary activity, especially appeals to customers of secondary retail stores.\textsuperscript{30} Gould takes no clear-cut position about this.

It seems unlikely that the Commission will consider increasing union bargaining power by strengthening the right to strike or by permitting secondary economic action. This will be partly because of the political reality, which has become obvious as this review is being completed, that Congress is not going to pass the Workplace Fairness Act. The broader consideration is a widening recognition of increasing questions about the role of the strike in contemporary and future labor relations in this country.

Those who entered the labor-relations field as "neutrals" in the 1940s and 1950s built their philosophies and policies around George W. Taylor's often repeated dictum that "strikes and lockouts are the essential motive force of collective bargaining."\textsuperscript{31} One alumnus of that group appeared repeatedly before Congressional committees during the 1960s, as Secretary of Labor, to plead that Congress, irritated by some painful pending national emergency dispute, do nothing (as

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} 304 U.S. 333 (1938).
\item \textsuperscript{27} 473 U.S. 95 (1985).
\item \textsuperscript{28} \textbf{Craver}, supra note 1, at 144-45.
\item \textsuperscript{29} \textbf{Gould}, supra note 4, at 194-96.
\item \textsuperscript{30} \textbf{Craver}, supra note 1, at 145-46; \textbf{Weiler}, supra note 5, at 269-73.
\item \textsuperscript{31} \textit{Compare} Matthew W. Finkin, Labor Policy and the Enervation of the Economic Strike, 1990 U. ILL. L. REV. 547. "The strike (and the credible threat of a strike) is an essential component of the collective bargaining system." \textit{Id.} at 547. "[T]o the extent the prospect of a strike... is the engine that drives the process of collective bargaining, the evisceration of the strike renders the whole statutory structure of collective bargaining substanceless, a facade." \textit{Id.} at 569.
\end{enumerate}
\end{footnotesize}
the Secretary remembers putting it) "to violate the fundamental right to strike and the priceless tradition of free collective bargaining." Twenty-five years later, in 1991 and 1992, this same ex-secretary would be an active and committed member of the public citizens Committee for Workplace Fairness, set up to support legislation entitling strikers to have their jobs back when the strike is over.

Today these experiences sober, but no longer restrain, several realizations regarding the increasingly ambiguous or uncertain role of strikes in American labor relations. First, regardless of logic or fairness, and still fully convinced that Mackay and Patternmakers violate a basic premise of the NLRA, I recognize that these decisions are not going to be reversed by the presently constituted Supreme Court or in the current and prospective context of Congressional ambivalence. Arguing, as Craver, Gould and Weiler all do, that rejuvenating unionism and collective bargaining hinges on changing these rules regarding strikers seems to me to slam the door on that hope. The argument is becoming an empty incantation.

More broadly, I suspect that no changes strengthening trade unionism and collective bargaining are going to be made in the law as long as unions continue to be identified in the public and the political mind primarily with strikes. It became the widespread reaction during the 1960s that strikes invariably reflect more union than employer unreasonableness and intransigence. Although recent public opinion polls suggest a change in attitude, this is probably because the sharp drop in strikes, especially in the transportation industries, has reduced the level of strike-related public inconvenience. The same kind of scare tactics that were used to defeat the moderate Labor Reform Act of 1978, which actually had little to do with strikes, will probably be mustered to block almost any kind of pro-labor legislation.

Craver includes in his listing of reasons for the weakening of union organizing efforts the "sociological consideration" that employers and the media have effectively inculcated in workers' minds the idea that union membership has a "lower class" connotation.32 He makes an incriminating case. He could well have gone on to note the related and perhaps more critical fact that more and more employees turn their backs on union organizers today because they don't want to assume the risk of losing their jobs, or even having them interrupted, by a strike.

32. Craver, supra note 1, at 51-55.
The strike issue goes still deeper. It is unclear, given changing rates and levels of unemployment, technological development, job exportation, "peripheral employment," and international competition, how many situations there are going to be in which a strike will conceivably do anybody involved any good. It remains in some cases, to be sure, a viable force, but in fewer and fewer. The continuing habit or form of speech that couples strikes and lockouts as having comparable force has come to suggest Anatole France's sardonic observation on the majesty with which the law treats equally the interests of the rich and poor alike in sleeping under the bridge at night.

Where, then, do these conclusions, with whatever overtones they may have of heresy and apostasy, lead? All the way, I think, to the question of what the dynamics of the labor relationship are going to be as the motive force of strikes and lockouts diminishes. Or put differently, whether traditional collective bargaining and unionism are viable concepts if strikes lose their virility.33 Professor Craver appears to accept the ominous implications of these questions. They press his colleagues, however, along an arguably alternative route identified in the suddenly common phrase, "increased employee participation."

III. "INCREASED EMPLOYEE PARTICIPATION"

Weiler's central recommendation, which has evoked extensive, penetrating, divided reaction, is that it be mandated by federal law that Employee Participation Committees (EPCs) be established in all enterprises with more than 25 employees. Modeled on the German works councils, these EPCs, to be elected by all employees, would be empowered to work with management in a variety of areas. Weiler would amend section 8(a)(2) of the NLRA—the "company union" prohibition—to accommodate the establishment of the EPCs.34

33. Compare Dunlop, The Legal Framework, supra note 7, at 9-10: "The emphasis upon strikes and other forms of industrial strife...is a very limited and inadequate focus for policy in the 1990s..." Professor Gottesman is more outspoken in this Symposium: "[T]he traditional weapon that the NLRA offers to extract better terms from the employer—the strike—is, even apart from the fear of permanent replacement, an anachronism in this competitive world." Michael H. Gottesman, In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers, 69 CHI.-KENT L. REV. 59, 66 (1993).

34. Weiler makes a number of other proposals, related in some respects to the EPC recommendation, which are not discussed here. He places strong emphasis on a concept of "enterprise unionism," characterized by increasing the degree of bargaining autonomy vested in union locals. Weiler, supra note 5, at 218-24. Clyde W. Summers has gone deeply into the issue of the transferability of the German system to the United States: E.g., Codetermination in the United States: A Projection of Problems and Potentials, 4 J. COMP. CORP. L. & SEC. REG. 155 (1982); An American Perspective of the German Model of Worker Participation, 8 COMP. LAB. L.J. 333 (1987). See also Estreicher, supra note 7.
While subscribing to the idea of increasing employee participation in the enterprise decision-making process, Craver and Gould have reservations about the Weiler proposal. Gould finds it "improbable that works councils will be dictated by legislation."\textsuperscript{35} Although Craver notes with apparent interest the European and Japanese precedents for "shop level cooperation"\textsuperscript{36} and seems attracted by "legislated worker participation programs,"\textsuperscript{37} he doesn't mention the Weiler proposal and seems to stop short of it deliberately.

Gould recommends strongly, at the same time, narrowing by legislative amendment the section 8(a)(2) strictures. He would permit voluntary "discussions with employee committees over a wide variety of subject matter and financial assistance to such organizations unless an inference of antiunion intent can be evidenced in the formation or administration of these committees."\textsuperscript{38}

Craver finds sufficient flexibility in earlier NLRB and judicial applications of section 8(a)(2), which he would not eliminate or amend. He sees more propitious extensions of employee influence on workplace decision-making in the adoption of employee stock ownership plans\textsuperscript{39} and the use of "pension fund leverage."\textsuperscript{40} Referring particularly to union representation on corporate boards, Craver expresses apparently broader concerns about going too far along lines that "may alter the conventional role performed by labor organizations" and "blur[ ] the sharp distinction between labor and management."\textsuperscript{41}

Entitling his chapter four \textit{The Variety and Vagaries of Workers' Participation}, Gould seems to reflect a feeling, shared with Craver, that this newly emphasized concept is still sufficiently protean that any certainty about it will advisedly await the instruction of further analysis and experience. The NLRB has now dealt with it in the recent \textit{Electromation, Inc.}\textsuperscript{42} and \textit{E.I. du Pont de Nemours & Co.}\textsuperscript{43} rulings.

It seems unlikely that the Commission will endorse either the mandating of EPCs or any broad amending of section 8(a)(2). Members Thomas Kochan and Richard Freeman are on public record as

\begin{itemize}
  \item \textsuperscript{35} \textit{GOULD}, \textit{supra} note 4, at 147.
  \item \textsuperscript{36} \textit{CRAVER}, \textit{supra} note 1, at 96-98.
  \item \textsuperscript{37} \textit{Id.} at 91, 101.
  \item \textsuperscript{38} \textit{GOULD}, \textit{supra} note 4, at 141.
  \item \textsuperscript{39} \textit{CRAVER}, \textit{supra} note 1, at 112-15.
  \item \textsuperscript{40} \textit{Id.} at 109-12.
  \item \textsuperscript{41} \textit{Id.} at 100.
  \item \textsuperscript{42} 309 N.L.R.B. 990 (1992).
  \item \textsuperscript{43} 311 N.L.R.B. No. 88 (May 28, 1993).
\end{itemize}
going almost, if not quite, as far as Weiler does. But Kochan empha-
sizes the need for further empirical evidence to support such propos-
as, and in less honorable professions Freeman’s suggestions would risk being taken as trial balloons.

The Commission might well question the reports of widespread employee desires to participate more fully in the enterprise decision-making process, as well as the claims of potential increases here in both job satisfaction and productivity. Reasonable skepticism suggests that there is probably broader employee interest today in job security and the restoration of previous purchasing power than in deci-
sional participation as such. None of the advocates of these joint councils meets Craver’s implicit premise that traditional unions are superior agencies for employee participation. Indeed a false assump-
tion seems to creep in: that there is an inherent dichotomy between unionism and “employee participation.” Although Weiler suggests that representation through something like works councils will stimu-
late employees’ interests in full-fledged unions, this is a judgment call. Mine would be contrary.

The Commission may consider legislation permitting, or possibly even mandating, employer-employee committees for such limited pur-
poses as helping to enforce the Occupational Health and Safety Act or other regulatory programs. But here again, broad political consid-
erations, including the fact that more critical issues are pending, make unlikely any action that would fuel controversy’s flames as much as would an attempt to change section 8(a)(2) substantially.

None of the three commentators marks sharply a distinction be-
tween two sets of situations which find a common denominator in “in-
creased employee participation” but which are critically different. Whatever disagreement there may be about various forms of collab-
orative arrangements in non-union establishments disappears as far as most, though not all, observers are concerned when the employee par-
ticipation in workplace decision-making develops as part of a tradi-
tional collective bargaining relationship.

Perhaps the Commission, interested only in prospects that re-
quire no legislative change, will stay away from the collective bargain-
ing area entirely. Secretary of Labor Robert Reich and several

44. See Freeman & Rogers, supra note 7; Kochan, Mutual Gains, supra note 7; Kochan, Principles, supra note 7.
Commission members have emphasized most prominently increasing the quality and skills of the American labor force. If, however, the Commission enters the labor union and collective bargaining area at all, as most observers hope strongly it will, considerable attention will almost certainly be given to what may be called, although some better phrase will emerge, "constructive bargaining." The model has already been established in precedent-setting agreements in the automobile, steel, and communications industries, and in a number of other establishments. These settlements have been widely reported as involving certain "concessions" made by the unions. Less notice has been given to the fact that these agreements are characterized by at least equal concessions on the part of management: in the form of deep-reaching commitments to shared decision-making, involving corporate and union representatives and a substantial degree of individual employee participation, at various levels of the operation. Some of these agreements include employee stock ownership or profit-sharing plans, as well as employee representation on the corporate boards.

These developments are described and illuminated in another invaluable 1993 publication: the National Planning Association’s *The Future of Labor-Management Innovation in the United States*. Among the contributors are two of the architects of this form of agreement, President Lynn R. Williams of the Steelworkers and former Vice President Donald F. Ephlin of the Automobile Workers.

Craver and Weiler barely mention this development and appear reticent about it. Gould discusses the automobile agreements with seeming approval, but he too concludes that "the cooperative model . . . cannot serve as a complete substitute for a more adversarial framework in which the strike and arbitration remain integral."

This cautionary note is sounded strongly in another just-published (1993) and important book, *Organized Labor and the Church*,


50. *Id.* at 5-6.
written by the admired and beloved Monsignor George G. Higgins, with William Bole. They quote from the U.S. Catholic Bishops’ 1986 Pastoral Letter on Catholic Social Teaching and the U.S. Economy: “Workers rightly reject calls for less adversarial relationships when they are a smokescreen for demands that labor make all the concessions. For a partnership to be genuine, it must be a two-way street, with creative initiative and a willingness to cooperate on all sides.”51 The Higgins-Boles conclusion is that “the two-way street . . . has yet to materialize in the United States” and they are emphatic that “[i]t is idle, if not fatuous, to talk theoretically about new forms of labor-management cooperation unless and until a consensus is reached that effective unions are not only legitimate but . . . truly indispensable.”52 The authors go on to quote from an address made in 1985 by Thomas R. Donahue, widely respected secretary-treasurer of the AFL-CIO: “While it may seem appropriate for academics and journalists to lecture the trade union movement on the need to abandon a confrontational approach, our very real problem is finding employers, public or private, who wish to deal cooperatively with us.”53

There will be strong disposition among the members of the Commission to explore thoroughly the less adversarial model of collective bargaining. Member William Usery, Jr., was the mediator-architect in the precedent-setting negotiations between NUMMI (New United Motors Manufacturing, Inc.: a joint undertaking by General Motors and Toyota, at Fremont, California) and the UAW (United Automobile Workers).54 Commission member Douglas Fraser is the former president of the UAW. Chairman Dunlop represented Harvard University in working out another comparable settlement (following a sharply contested representation campaign and election) with the Harvard Union of Clerical and Technical Workers (HUCTW); that agreement provided for the establishment and operation, under university and union auspices, of twenty-six joint councils and nineteen local problem-solving teams.55

52. Id. at 174.
53. Id.
54. The depth of Usery’s conviction about the promise of NUMMI-type agreements is reflected in his speech at the 1991 meeting of the National Academy of Arbitrators. See Usery, supra note 7.
55. Dunlop’s role and the importance of the partnership concept in the Harvard story are made clear in John Hoerr, Solidaritas at Harvard: Organizing in a Different Voice, 14 Am. Prospect 67 (1993).
Commission member Kochan has recently set out thoughtfully and in considerable detail the elements of a "mutual gains paradigm for labor-management relations" which places strong emphasis on larger investment in human resources policy and includes specific references to "human resource councils" and other cooperative procedures. Member Ray Marshall distinguishes clearly in his 1993 article, with Julius Getman, *Industrial Relations in Transition*, between "increased employee participation" in the union and non-union context. Commission member Paul Allaire, Xerox Chairman and Chief Executive Officer, is an active and strongly supportive member of the Collective Bargain Forum, which has been looking intently into these new bargaining arrangements.

The agenda for the Conference on the Future of the American Workplace, convened by the Departments of Labor and Commerce in Chicago in July, 1993, was built largely around reports on the successes of this kind of bargaining. Secretary of Labor Reich announced, just before that conference, the establishment of an Office of the American Workplace to develop "concrete initiatives for promoting innovative workplace practices and cooperative labor-management relations." This new office will pick up where the DOL Bureau of Labor Management Relations and Cooperative Programs left off when its innovative work was interrupted several years ago by partisan political rain.

In early September, 1993, the Nation's largest employer announced the imminent establishment by Presidential Executive Order of a National Partnership Council which will include in its membership federal-agency heads and representatives of the three biggest federal employee unions and the AFL-CIO. Satellite panels, similarly constituted, will be set up in each federal agency, "giving workers a voice on which facilities to close, how to increase productivity, and how to better handle the work." Top union officials, consulted mean-

56. See Kochan, *Mutual Gains*, supra note 7; Kochan, *Principles*, supra note 7. It won't matter, in the final reckoning, that this rationale was mustered to support a "works council" type of employee participation—in nonunion settings—which the Commission will be less likely to adopt.


58. Receiving less notice than might have been expected in most newspapers (in which "labor" is hardly news anymore), this conference found front-page and approving coverage in Rex Hardesty, *Unions help spotlight ideal workplaces*, AFL-CIO News, Aug. 9, 1993, at 1.


ingfully in developing the new federal program, greeted its announce-
ment enthusiastically, counting the importance of establishing the
partnership model sufficient to outweigh even the indicated elimina-
tion (probably by attrition or buy out) of some 250,000 federal jobs.

The obvious possibility develops of extending this partnership
concept through collective bargaining to state and local government;
total employment in the public sector in this country approximates 18
million. Consideration will also probably be given, advisedly with
considerable caution, to pressing this partnership concept on federal
contractors, suppliers, and grantees. It is in any event a different time
in American labor relations from 1981, when private and public em-
ployers alike took their lead from a President’s callous over-penaliza-
tion of striking (illegally to be sure) air traffic controllers.

For almost ten years now, the twenty or so members of the Col-
lective Bargaining Forum, all top union and corporate officers, have
met twice a year, with National Planning Association President Mal-
colm Lovell acting as moderator. In 1988, they set their agenda as
being to identify “new directions for labor and management.” In
1991, the Forum members drew up and agreed to a Labor-Manage-
ment Commitment: A Compact for Change. It is a remarkable
document.

The first commitment in the 1991 Compact is to “The Economic
Success of the Enterprise.” The second, to “The Institutional Integrity
of the Union,” embodies precisely the principle Monsignor Higgins
and William Bole identify as the essential condition of cooperative
bargaining, the recognition that unions are not only legitimate but in-
dispensable: “The Forum [recognizes] both the legitimacy of unions
as parties to their employment relationship and . . . a broader role for
worker and union . . . within the enterprise and throughout the society
as a whole.” The provision in the Compact for “Worker Partici-
pation and Empowerment” embodies much of what has been included in
the automobile, steel and communications agreements; the presidents
of the three unions and top corporate officers from two of those indus-
tries are members of the Forum.

John Dunlop has been working with an equally prestigious “La-
bor-Management Group” for twenty years. It has reached compara-

61. Founding members of the Forum, in addition to Lovell, were Howard Samuel, Presi-
dent, Industrial Union Department, AFL-CIO; Glenn Watts, President, Communication Work-
er of America; John Ong, Chairman and Chief Executive Officer, The B.F. Goodrich Company.
62. U.S. DEP’T OF LABOR, BUREAU OF LABOR AND MANAGEMENT, No. 141, LABOR-MAN-
ble accord on issues lying outside the collective bargaining relationship itself.

The Commission members may be expected to ask and assess what these labor-management groups have actually accomplished and to look critically at the history of innovative bargaining in this country. There is sobering evidence that these bargaining models are not readily diffused and that agreements of this kind often last for only a contract period or two between the parties who developed them. It is one thing to work out an enlightened compact within a group of twenty or so top corporate and union leaders; it is a different question how much success there will be so far as the tens of thousands of smaller enterprise members of the National Federation of Independent Business are concerned.

This assessment will lead almost inevitably, as it has in comparable countries, to increased emphasis on a third dimension of cooperation: among representatives of management, labor, and government. The international experience is that one critical role of labor unions is as essential partners in an interlocking economic and political pluralism forged by necessity, especially by the imperatives of planetary competition.

Emphasizing the increasing difficulties unions encounter as more and more large U.S. companies become multinational,63 Craver makes only passing reference to the implications of American manufacturers having to face off in international trade against competitors who have government partners. The author’s terseness would permit misunderstanding his suggestion that there will be “continued export of manufacturing jobs from the United States . . . if American labor organizations are unwilling to accept significant compensation reductions and more stressful production schedules . . . .”64 The context makes clear Craver’s desire to avoid these outcomes and suggests strongly that he would welcome the development of some form of strategic policy that would involve the cooperation of corporate, labor, and public representatives in responding to the new requirements of international trade.

On the domestic front, it is recognized now that organized labor representation is essential in formulating federal health care, job training, and more sensible unemployment compensation programs. Additional needs for public-private cooperation emerge when a com-

63. Craver, supra note 1, at 118-25.
64. Id. at 45.
pany which is planning to build a new plant seeks tax concessions from local and state authorities, or when a large manufacturer needs a loan in order to save both a business and tens of thousands of jobs, and can’t get it from private sources.

These needs for “alliances,” “negotiated rule making,” and “consensus building” have dominated Commission Chairman Dunlop’s recent public statements. Criticizing sharply the legalistic evolution of the federal labor law (“We have inherited a legal framework of industrial relations that is destructive to our economic future.”65), Dunlop has written bluntly: “I find it incongruous that recent U.S. presidents or their designated cabinet officers have not met regularly with leaders of management and labor together or with other disparate organizations to help fashion a consensus on issues of national significance.”66

Perhaps the Commission members will look back, if only for a moment, at the intriguing chapter in labor relations history which opened in Sweden in the early 1930s, after a long period of increasingly debilitating strikes and lockouts. With the Swedish government’s delicate and unobtrusive, but critical, prodding, the leaders of Sweden’s corporate and union forces convened for what became a month’s “retreat,” at Saltsjöbaden, on an inlet of the Baltic. They drew up, reducing it to a few paragraphs, a statement of agreed upon principles of accord which came to be known as The Spirit of Saltsjöbaden. There were no strikes or lockouts in Sweden in the next thirty years, during which union, corporate and government leaders kept in close touch.

President Kennedy set up in 1961 a Joint Labor-Management Committee, including twenty-one top labor, management, and public representatives, with whom he met personally every few months until his death. Critical policy issues were discussed openly, frankly, and constructively. Most of those who participated in these meetings felt that they were on their way toward implementing a new dynamic of democracy.

The realization that highly influential leaders of American labor and management are prepared to go as far as they did in the Collective Bargaining Forum’s 1991 Compact puts squarely up to government the ways and means of harnessing this potentially dynamic force. It cannot be presumptuous to anticipate the recommended establish-

65. Dunlop, The Legal Framework, supra note 7, at 8.
66. Dunlop, More Perfect Union, supra note 7, at 17.
ment by executive order of a joint public-private body including union and corporate executives willing to find in their consensus what neither law nor economic theory can produce, and able to help achieve by persuasion and example what legislators and administrative agencies and courts cannot effectively command.

If, finally, it should appear quixotic to suggest that in the field of labor relations persuasion may be found in something other than economic force and accord some place else than in confrontation, it won't hurt to glance for reassurance at another area in which reason must occasionally call on faith. Labor-management and international relations have many parallels. In world affairs, it has happened in a matter of months, incredibly, that a cold war ended, a wall came down, a continent became a community and disarmament a reality, and the possibility of peace in the Middle East emerged suddenly from a previously inconceivable handshake. This all some way mocks any small thinking about finding ways to unlock the potential of collective bargaining in the United States.

The impropriety of a book review being longer than the book dictates closure here with no more than a semblance of summary. Craver's prescription for union survival includes not only spartan self-discipline but radical legislative surgery. This review is premised on the persuasion that there will be no relevant legislative changes of significant magnitude in the foreseeable future. If author and reviewer are both right, the indicated response to the author's titular question is to call the coroner.

I don't believe this, though, and I doubt whether Professor Craver does either. What remains to be determined is whether answers to current discontent and malaise can be found beyond the reach of the law. It is not unreasonable, I think, to look for such answers in constructive bargaining that includes large elements of the partnership and employee participation concepts, placed in a context of cooperation among employers, unions, and government. This may or may not prove realistic. The stakes are so high that the inquiry is imperative.

The measure of superior teaching is the stimulation of thought. By taking the time to write a short book, sharply focussed, Charles Craver has contributed significantly to both his subject and his profession.