

Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model

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In this Article, Professor Dau-Schmidt provides a comparative analysis of the labor laws of the United States, the United Kingdom, Germany, and Japan for the purpose of identifying which characteristics of a country's labor laws are likely to reduce strike incidence and intensity and promote industrial peace. To identify which characteristics of a country's law are likely to encourage industrial peace, Professor Dau-Schmidt presents game theory arguments based on his analysis of unions and collective bargaining. Dau-Schmidt then provides a simple empirical test as to the relative success of different countries' laws in advancing industrial peace by comparing data on the number of days lost per thousand organized workers for each of the examined countries.

Dau-Schmidt finds that countries, such as Germany and Japan, that encourage the sharing of information between employers and employees and effectively prohibit certain strategic behaviors by the parties, enjoy the most success in promoting industrial peace. In contrast, the United Kingdom, which has historically left collective bargaining unregulated even to the point of not enforcing voluntary agreements to arbitrate, suffers by far the worst record of encouraging industrial peace. Somewhere in between these two extremes lies the United States with requirements for limited exchanges of information and less effective prohibitions on strategic behavior, and intermediate success in encouraging industrial peace.

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Comparative studies of labor law and industrial relations can be useful for a variety of reasons. First, they allow a person to learn more about his or her own country. This permits one to identify what is unique or unusual about the labor law or industrial relations of a particular country, and perhaps why that country's institutions developed in that way. The change in perspective from one country's system of industrial relations to another allows a person to see that institutions or principles that one once took for granted as universal and inevitable are sometimes the outcome of specific social, cultural, and historical conditions in the country.¹ Second, comparative studies can be useful in discovering commonality among the examined countries to identify whatever "universal" strictures exist among different societies and cultures in governing industrial relations.² In this regard, comparative studies act as the laboratory for empirical testing of grand theories of industrial relations, for example, that certain legal doctrines tend to promote productivity, high wages, or industrial peace.³ Finally, the optimists among us might hope that comparative studies can be useful as a basis for recommending reforms of a particular country's labor law in order to enhance the functioning of the country's industrial relations system. Thus, keeping in mind the influence of unique social, cultural, and historical characteristics on each country's system of industrial relations that makes comparative studies interesting in the first place, it is hoped

1. See generally SIR OTTO KAHN-FREUND, *LABOR RELATIONS: HERITAGE AND ADJUSTMENT* 3 (1979).

2. Indeed, one prominent school of thought in comparative industrial relations argues that global technological and market forces associated with industrialization are pushing national industrialization systems toward uniformity or convergence. See generally C. KERR ET AL., *INDUSTRIALISM AND INDUSTRIAL MAN: THE PROBLEMS OF LABOR AND MANAGEMENT IN ECONOMIC GROWTH* (2d ed. 1973). However, others have argued that these technological and market forces are developing in different ways in different industrialized countries and that, in fact, industrialization systems are diverging. See generally MICHAEL POOLE, *INDUSTRIAL RELATIONS, ORIGINS AND PATTERNS OF NATIONAL DIVERSITY* (1986); W. Streeck, *Change in Industrial Relations: Strategy and Structure*, in *PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM ON NEW SYSTEMS IN INDUSTRIAL RELATIONS* (Japan Institute of Labour 1988).

3. See Greg J. Bamber & Russell D. Lansbury, *An Introduction to International and Comparative Employment Relations*, in *INTERNATIONAL AND COMPARATIVE EMPLOYMENT RELATIONS* (G. Bamber & R. Lansbury eds., 3d ed. 1998).

that there is enough commonality of experience among these divergent systems to reasonably test hypotheses about how to promote a more productive or equitable system of industrial relations and make meaningful recommendations as to how individual countries might amend their labor laws or industrial relations practices so as to improve their performance.⁴

In this Article, I examine the labor laws and industrial relations systems of the United States, the United Kingdom, Germany, and Japan within the context of the “bargaining model” of unions and collective bargaining.⁵ I argue that the bargaining model provides a useful framework for analyzing the labor laws of these various countries and, in particular, that it allows us to understand why the United States and the United Kingdom have historically enjoyed much less peaceful industrial relations than Germany and Japan. On the basis of my analysis, I also argue that, at least in part, it is the way that the labor laws of the United States and the United Kingdom have structured their industrial relations that has contributed to the relatively poor functioning of the industrial relations systems in these countries. Thus, mindful of unique social, cultural, and historical qualities of these four diverse countries, I undertake this analysis for the purposes of providing some empirical validation of the bargaining model based on the industrial relations experiences of these four countries. Additionally, I propose some ways in which the United States and the United Kingdom might amend their labor laws in order to improve the functioning of their industrial relations systems.

The Article is organized in three parts. The first provides a brief review of the bargaining model and its implications for legal doctrine. The second provides the comparative analysis of the Article consisting of a report on some statistics concerning the relative frequency and duration of work stoppages in each of the examined countries, followed by a section analyzing the industrial relations law and system of each country in light of the bargaining model. For purposes of exposition, I begin with the United States and proceed with my analysis to the United Kingdom, Germany, and Japan. The final part of the Article presents my conclusions.

4. See Bamber & Lansbury, *supra* note 3, at 3.

5. See generally Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992).

I. THE BARGAINING MODEL

The “bargaining model” is an economic model of unions and collective bargaining that I have recently proposed⁶ as an alternative to the traditional monopoly model of unions and collective bargaining which has been used by Richard Epstein and others to analyze American labor law.⁷ The traditional monopoly model of unions and collective bargaining provides a very restrictive and dark view of these institutions. Under the monopoly model, it is assumed that the source of union wage increases is the establishment of a labor cartel in the relevant market, and that employers respond to the wage demands of this labor cartel by merely retreating up their labor demand curves, raising the price of their goods to consumers, and laying off workers who then enter other labor markets with lower wages.⁸ Accordingly, unions are both inefficient and inequitable in that they cause the misallocation of resources away from the unionized sector and redistribute wealth from consumers to organized workers through price increases on organized goods, and from unorganized workers to organized workers through the displacement of unorganized workers to less desirable labor markets. Moreover, the characterization of collective bargaining contained in the monopoly model is very one-sided and simple. By organizing into a union, workers elevate themselves to a superior bargaining position to that of their employers and dictate the market wage, to which the employers simply respond by cutting employment. Thus, the model provides no support for public policies that allow or encourage the formation of unions and no basis for evaluating public policies governing the conduct of collective bargaining to promote “equity” or “industrial peace” among the parties to collective negotiations.

Under the bargaining model, I attempt to provide a broader and more realistic depiction of these institutions by relaxing some of the restrictive assumptions of the traditional monopoly model. First, I argue that it is unrealistic to assume that labor cartel rents are the sole or even dominant source of union wage increases.⁹ Other possible

6. See generally *id.*

7. See generally Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); see also Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991 (1986); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

8. See generally RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 360 (1982); BARRY T. HIRSCH & JOHN T. ADDISON, *THE ECONOMIC ANALYSIS OF UNIONS* 21-22, 181 (1986).

9. See Dau-Schmidt, *supra* note 5, at 468-73.

sources include, employer product market rents,¹⁰ Ricardian rents,¹¹ quasi-rents from long-term capital investments,¹² and productivity increases associated with employee organization.¹³ Logical arguments and empirical evidence suggest that these alternative sources are important, and perhaps the dominant, sources of union wage increases in the American economy.¹⁴ For example, if the requisite barriers to entry for the establishment of a labor cartel exist in a product market, it is hard to see why these barriers to entry would not first be exploited by an employer product market cartel, since the employers are more concentrated than the workers in the market and may have economies of scale which compel them toward greater market concentration. The fact that employer product market

10. By "employer product market rents," I refer to rents that the employer earns because he enjoys a monopoly or participates in an explicit or implicit cartel in the product market. See F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 11 (2d ed. 1980).

11. A "Ricardian rent" is a return earned on a resource in excess of the competitive rate of return because that resource has unusually productive qualities. For example, an unusually rich vein of coal or acre of soil may yield returns in excess of the competitive rate of return. See DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 91-108 (R.M. Hartwell ed., 1971) (1817).

12. A "quasi-rent" is the return earned on a capital investment that is appropriable because it exceeds the return on that investment in the next best use to which that capital could be transferred. This "rent" is referred to as a quasi-rent because it is not actually a rent but part of the competitive return on that capital investment, and it is appropriable only because transaction costs or the non-malleable nature of the investment prevent its ready transfer to alternative use. See BARRY T. HIRSCH, *LABOR UNIONS AND THE ECONOMIC PERFORMANCE OF FIRMS* 7 (1991).

13. A variety of arguments have been raised as to how employee organization may increase a firm's productivity. One of these arguments is that unions allow employees to solve problems posed by information costs and the public good nature of many employment terms thereby allowing employees to collectively negotiate efficient contract terms that individual bargaining would fail to provide. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984). It is also argued that the "collective voice" of unions provides a superior method for addressing problems in the workplace, better than the traditional method of "exit," and therefore decreases employee turnover with its associated search and retraining costs. *Id.* Finally, it is also argued that unions increase a firm's productivity by allowing for the enforcement of long-term implicit contracts thereby promoting provisions for deferred wages that achieve efficient monitoring and allow efficient worker investment in firm-specific human capital. See generally Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988). With respect to all these theories, please see Dau-Schmidt, *supra* note 5, at 431-34.

14. See Dau-Schmidt, *supra* note 5, at 468-73. See generally Kim B. Clark, *Unionization and Firm Performance: The Impact on Profits, Growth, and Productivity*, 74 AM. ECON. REV. 893 (1984) (finding that, consistent with the argument that union wage increases come from employer rents or quasi-rents, unionization of firms decreased profits, but had little effect on price, output, or capital labor mix); Paula B. Voos & Lawrence R. Mishel, *The Union Impact on Profits: Evidence from Industry Price-Cost Margin Data*, 4 J. LAB. ECON. 105 (1986) (finding that, on average, 80% of union wage increases were paid out of company profits and only 20% paid out of price increases to consumers).

cartelization has been illegal in this country¹⁵ is notwithstanding this argument since historically the enforcement of this prohibition has suffered from slack prosecution and low penalties.¹⁶ Similarly, there are compelling logical arguments that employee organization can sometimes raise the productivity of workers by allowing the enforcement of long-term implicit contracts and providing a collective voice for the negotiation of efficient contract terms where there are substantial information costs or the contract term is a public good.¹⁷ Empirical work supports the existence of such productivity increases.¹⁸

Second, I argue that employers do not respond to union wage demands by merely moving up their demand curves. Instead, the employers bargain in a Coasean fashion to negotiate optimal contracts for wages and employment at a level of employment that is higher than that given by the traditional demand curve analysis.¹⁹ Although this proposition can be demonstrated more generally,²⁰ it is perhaps easiest to see when considering contract negotiations between a union and an employer with rents from a product market monopoly. Assuming that, prior to the formation of the union, the employer was optimally pricing his product and mixing capital and labor in the production of the product in order to maximize the value of his monopoly rent, when the employees form a union and ask for a share of that rent, any inefficient substitution of capital for labor and any change in product price will serve only to decrease the total size of the rent to be divided between the employer and the employees. Accordingly, assuming the employer and the union negotiate in a Coasean fashion to maximize the monetary value of their agreement, they will negotiate to increase wages but maintain employment at the current level, which will be higher than that dictated by the employer's demand curve. Empirical work commonly rejects the

15. See Sherman Act, 15 U.S.C. §§ 1-2 (1988).

16. See Richard A. Posner & Frank H. Easterbrook, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 320-22 (2d ed. 1981).

17. See Dau-Schmidt, *supra* note 5, at 431-34, 470-71; HIRSCH & ADDISON, *supra* note 8, at 188. See generally Sherwin Rosen, *Implicit Contracts: A Survey*, 23 J. ECON. LITERATURE 1144 (1985); FREEMAN & MEDOFF, *supra* note 13, at 7-11.

18. See generally Kim B. Clark, *The Impact of Unionization on Productivity: A Case Study*, 33 INDUS. & LAB. REL. REV. 451 (1980); Kim B. Clark, *Unionization and Productivity: Microeconomic Evidence*, 95 Q.J. ECON. 613 (1980) (finding productivity increases in the cement industry from organization that ranged from 6% to 10%).

19. See Dau-Schmidt, *supra* note 5, at 435-40.

20. See *id.*; see, e.g., Robert E. Hall & David M. Lilien, *Efficient Wage Bargains Under Uncertain Supply and Demand*, 69 AM. ECON. REV. 868 (1979); Ian M. McDonald & Robert M. Solow, *Wage Bargaining and Employment*, 71 AM. ECON. REV. 896 (1981).

demand curve analysis in favor of such an optimal contract response.²¹

Finally, I argue that many of the costs of collective bargaining are properly characterized as positional externalities rather than ordinary time and information transaction costs.²² Such positional externalities occur when each side, on the basis of individual incentives, undertakes costly strategic behavior in order to gain a relative advantage in the division of the cooperative surplus²³ between the parties. In this situation, the behaviors tend to cancel each other out with respect to the division of the surplus with the ultimate result being merely the waste of the cooperative surplus. Indeed, it is probably the most damning shortcoming of the traditional monopoly model of unions and collective bargaining that the characterization of the union as a labor cartel, and the assumption that employers respond to wage demands by moving up their demand curve, logically precludes the consideration of strategic behavior in industrial relations.²⁴ Although some of the costs of collective bargaining are ordinary time and information costs, it is evident that many activities of collective bargaining are strategic in nature and result in costs that are positional externalities. Organizational picketing, discriminatory discharges, recalcitrant bargaining, and resort to costly litigation in contract enforcement are all undertaken for the purpose of gaining a larger share of the joint benefits of production for the active party. Moreover, the reward of each party based on relative performance and the tendency for conflicts in collective bargaining to escalate into costly affairs are also evident. For example, “hard bargaining” can have its rewards in collective negotiations. However, if both sides follow this individually rational strategy, the result may be the waste of resources in a strike or lockout that reduces the total value of the contract to the parties. Similar examples of strategic behavior that

21. See generally John M. Abowd, *The Effects of Wage Bargains on the Stock Market Value of the Firm*, 79 AM. ECON. REV. 774 (1989); see David Card, *Efficient Contracts with Costly Adjustment: Short-Run Employment Determination for Airline Mechanics*, 76 AM. ECON. REV. 1045 (1986); see also Dau-Schmidt, *supra* note 5, at 474-75.

22. See Dau-Schmidt, *supra* note 5, at 474-78.

23. By the “cooperative surplus” I refer to any surplus value from the joint production of the employer and the employees that is in excess of the parties’ reservation wage and reservation return on capital. The reservation wage and reservation return on capital are of course the competitive wage and competitive rate of return the parties could earn by selling their services elsewhere in the market. See Dau-Schmidt, *supra* note 5, at 484.

24. I define “strategic behavior” as any act by a party to the agreement to better itself at the expense of the other party to the agreement. See Dau-Schmidt, *supra* note 5, at 475-76.

result in costs that are positional externalities also occur in organizing campaigns and contract enforcement.²⁵

If one accepts the assumptions of the bargaining model, that there are a variety of sources of union wage increases and that employers and unions bargain in a Coasean fashion over contract terms subject to strategic behavior in the division of the cooperative surplus, one obtains a very different set of conclusions concerning unions and collective bargaining than that obtained from the monopoly model. First, under the bargaining model, unions can have both positive and negative effects on efficiency. Although unions that establish a labor cartel or vie for a share of employer quasi-rents may cause inefficiencies by displacing resources or discouraging investment, unions can also increase efficiency by enforcing long-term implicit contracts and allowing the negotiation of efficient contract terms with respect to public goods. Second, to the extent that unions allow employees to gain a share of employer rents or quasi-rents, unions redistribute wealth from employers to employees. Thus, a country's decision to undertake a policy promoting a strong labor movement may reflect a normative decision in favor of such redistribution. Third, the formation of unions can be thought of as engendering "equity" in bargaining power between employers and employees. Under the bargaining model, employees cannot hope to gain a share of employer rents or contribute productively in the enforcement of long-term implicit contracts or the negotiation of workplace public goods unless they bind together in a union. Finally, many of the costs of collective bargaining are positional externalities that can escalate and consume the entire cooperative surplus of the agreement if the parties are left to act on their own individual incentives. Accordingly, there is a role for government regulation of industrial relations to prohibit or discourage costly strategic behavior and promote the cooperative division of the benefits or production.

These conclusions from the bargaining model can be demonstrated with two simple figures. For purposes of exposition, I will examine an example in which there are both positive productivity and redistributive effects from employee organization. Suppose that there is an employer who enjoys a product market rent of \$9 who is confronted by a newly formed union of his employees who would like a share of that rent. As previously discussed, assuming the parties bargain in a Coasean fashion to maximize the value of their agreement, the parties will negotiate efficient terms for the contract

25. See Dau-Schmidt, *supra* note 5, at 449-50.

with no diminution in the level of employment. There will also be no incentive for the employer to increase the product price since that would only decrease the product market rent earned by the firm. Thus, the formation of the union causes no inefficiency in production techniques or consumption. Indeed, due to the formation of the union, the productivity of the firm may even increase because the union allows the enforcement of long-term implicit contracts and provides a collective voice for the negotiation of contract terms that are public goods. Assuming that these productivity increases equal \$1, the total cooperative surplus to be divided by the parties equals \$10.

The problem is how to divide the cooperative surplus that is enjoyed by these parties with a minimum of strategic behavior. This problem can be represented in a simple bargaining game in which there are two negotiating strategies each side can undertake, cooperation or intransigence. Assume that intransigence in bargaining is a positional externality in that, if only one side is intransigent, they will do better in bargaining relative to the other side. However, if both sides are intransigent, their efforts cancel each other and their strategic behavior serves only to waste a portion of the cooperative surplus in a strike.

These assumptions concerning strategic behavior in the negotiations between the employer and the union are represented in Figure 1 and Matrix 1. In Figure 1, the outermost diagonal line represents all possible divisions of the cooperative surplus of \$10 between the employees and employer, from \$10 for the employees and none for the employer, to \$5 for each, to none for the employees and \$10 for the employer. If both sides bargain cooperatively, it is assumed that they will split the surplus, and, accordingly, the relevant point on the outermost diagonal is (5,5). Consistent with my assumptions, if one side bargains intransigently while the other is cooperative, the intransigent side will do better. Accordingly, the point (2,8) describes the ultimate bargain when the union is intransigent but the employer is cooperative. Point (8,2) describes the ultimate bargain when the employer is intransigent but the union is cooperative. Finally, if both sides are intransigent, the result is a costly strike that consumes a portion of the cooperative surplus and the ultimate bargain is struck at (3,3) to the left of the diagonal. The parties' payoffs for each combination of strategies in the negotiation game are recorded in Matrix 1.

FIGURE 1: POSSIBLE DIVISIONS OF THE COOPERATIVE
SURPLUS BETWEEN THE EMPLOYER AND THE EMPLOYEES

MATRIX 1: EMPLOYER AND EMPLOYEE PAYOFFS
FROM THE NEGOTIATION GAME

Although very simple, this example demonstrates the basic conclusions of the bargaining model that were previously outlined. There are no decreases in efficiency due to misallocation in

production or consumption. Indeed, the parties enjoy a modest increase in efficiency due to the enforcement of long-term implicit contracts and the negotiation of employment terms that are public goods. The ultimate effect of the union on the efficiency of the firm depends on whether the increases in efficiency due to employee organization are outweighed by any increases in bargaining costs due to strategic behavior in collective bargaining. The union in this example causes a redistribution of wealth from the employer to the employees by moving the bargain from the pre-union point of (9,0) in Figure I to one of the four possible post-union divisions depicted in that figure. Any division of the cooperative surplus between the parties along the outermost diagonal in Figure 1 is Pareto optimal from the parties' perspective. The organization of the union also allows the employees to obtain a position of equity with their employer in negotiating over the division of the cooperative surplus and in contributing to the productivity of their firm in enforcing long-term implicit contracts and negotiating efficient terms with respect to public goods. In the absence of the union, the workers receive no portion of the product market rent and cannot achieve the efficiencies associated with organization.

Finally, the example demonstrates the potential for conflicts in industrial relations to escalate into costly affairs if the parties act only according to their own individual best interests. As represented in Matrix 1, the parties' problem as to whether to bargain cooperatively or intransigently displays a classic prisoners' dilemma quality. Based on individual incentives, the dominant strategy for each party is to bargain intransigently. However, if both parties follow this strategy, the result is a strike that wastes a portion of the cooperative surplus. This causes the parties to do worse than if they had followed their collective interest and cooperatively divided the surplus. Thus, the example suggests the need for government regulation to prohibit or discourage intransigent bargaining and the wasting of the cooperative surplus.

What policies can the government use to promote cooperative relations and discourage the escalation of the costs of collective bargaining? First, where it is easy for the government to identify and prosecute costly strategic behavior, the government can simply prohibit the behavior and enforce its prohibition with suitable fines. For example, in the simple bargaining game presented above, if the government punished intransigent bargaining with a \$4 fine, the expected payoffs of the game would be such that the parties would find it in their collective *and* individual interest to cooperatively

divide the cooperative surplus. Although it is not always possible to distinguish when a party is negotiating intransigently and when they truly cannot afford the other side's demands, certain deleterious bargaining strategies such as lying, committing to third parties, and cutting off negotiations are more easily identifiable and should be prohibited and punished. Other forms of strategic behavior are also identifiable and should be prohibited and punished, for example, discriminatory discharges or striking in violation of a no strike clause.

Second, even where the government cannot readily identify and prosecute costly strategic behavior, the government can formulate the laws governing industrial relations in such a way as to promote the parties' ability to act on their collective interest to avoid costly strategic behavior rather than on their individual interests in escalating the conflict. Theoretical and empirical work in game theory suggests that there are a number of ways in which this can be done. The government might promote homogeneity among the constituents of the participants to collective bargaining and limit the number of parties to negotiations in order to simplify the bargaining problem and prevent free-riding on cooperation.²⁶ The government might require exchanges of information among the parties to promote their ability to determine the cooperative solution and engender trust.²⁷ Promoting repeat play among the participants to dilemma games, such as collective bargaining, has been found to encourage cooperation by raising the specter of future retaliation for current intransigence.²⁸

26. See DENNIS C. MUELLER, PUBLIC CHOICE II 13 (1989); HENRY HAMBURGER, GAMES AS MODELS OF SOCIAL PHENOMENA 173, 190, 242-43 (1979); Henry Hamburger, *Dynamics of Cooperation in Take-Some Games*, in MATHEMATICAL MODELS FOR SOCIAL PSYCHOLOGY (Wilhelm F. Kempf & Bruno H. Repp eds., 1997) (finding that homogeneity and reducing the number of players to dilemma games improves cooperation).

27. See Hamburger, *supra* note 26, at 116, 126, 173, 241; ANATOL RAPAPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA 87-102 (1965); John Fox & Melvin Guyer, "Public" Choice and Cooperation in *n*-Person Prisoner's Dilemma, 22 J. CONFLICT RESOL. 469 (1978) (finding that perfect information improves cooperation in dilemma games).

28. See HAMBURGER, *supra* note 26, at 114-15, 126, 233. Actually, by the logic of backward induction, if each party acts only according to its individual rationality, finite repeat play should not help solve dilemma games because it pays to be uncooperative in the last play of the game when there are no future games for revenge, and, accordingly, it pays to be uncooperative in the next-to-last game, and so forth; any incentives to be cooperative based on future plays of the game "unravel." See generally MICHAEL TAYLOR, ANARCHY AND COOPERATION 29 (1976). See Alexander J. Field, *Microeconomics, Norms, and Rationality*, 32 ECON. REV. & CULTURAL CHANGE 684, 698 (1984). This argument breaks down, however, if the end of the relationship is uncertain or if the parties are willing to settle for a strategy that is only slightly short of the self-interested maximum. See Roy Radner, *Monitoring Cooperative Agreements in a Repeated Principal-Agent Relationship*, 49 ECONOMETRICA 1127-28 (1981). See generally Drew Fudenberg & Eric Maskin, *The Folk Theorem in Repeated Games with Discounting or with Incomplete Information*, 54 ECONOMETRICA 533 (1986). Moreover,

Government enforcement of private armistices to refrain from costly strategic behavior also, of course, encourages the formation of such armistices, leading to cooperation.²⁹ Finally, where the government or some neutral party can determine the cooperative solution, the government can reduce strategic behavior by requiring the parties to adopt that cooperative solution or by mediating the dispute to encourage the cooperative agreement. Which of these policies the government should adopt in addressing the problem of promoting cooperation between the parties depends on the costs of implementing the policy and the efficacy of the policy in promoting cooperation.

II. A COMPARATIVE ANALYSIS UNDER THE BARGAINING MODEL

A. *Implications of the Bargaining Model for the Analysis of Labor Laws and Some Comparative Statistics Concerning Work Stoppages in the United States, the United Kingdom, Germany, and Japan*

The bargaining model provides a useful theoretical framework for analyzing a country's labor laws in a variety of ways. The model suggests that unions can have both positive and negative effects on firms' productivity. A country might formulate its labor laws to promote the productivity enhancing collective voice qualities of unions, for example, by encouraging employer and union communication and exchanges of information, while discouraging the productivity decreasing "labor cartel" qualities of unions, for example by limiting industry-wide or nation-wide bargaining. The model also suggests that unions can be successful in redistributing wealth from employers to employees. A country's decision to promote collective bargaining and strong labor unions may reflect the prevailing normative values in that country as to the desirability of redistribution of wealth from employers to employees. Finally, the model suggests that there are a variety of means by which a country can seek to promote cooperative relations between labor and management and minimize the costs incurred in a system of collective bargaining. For example, among other things,³⁰ a country may attempt to promote cooperative labor relations by requiring exchanges of information,

empirical studies of dilemma games show higher levels of cooperation in finite repeated games than nonrepeated games, although cooperation rates are lower in the beginning of play while people are learning to cooperate and also lower toward the end of play when they begin to act opportunistically. See generally Lester B. Lave, *An Empirical Approach to the Prisoner's Dilemma Game*, 76 Q.J. ECON. 424 (1962).

29. See ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* 11 (1984).

30. See *id.* at 15-16.

prohibiting intransigent bargaining strategies, and making voluntary armistices to arbitrate, rather than strike, enforceable. A country may adopt or emphasize different means of promoting cooperative labor relations than those adopted or emphasized by other countries, with different results. The bargaining model provides a useful theoretical structure for analyzing the impact of unions on productivity in various countries, the normative values underlying the labor laws of various countries, and the success of the various means employed by different countries to promote cooperative labor relations.

The bargaining model holds implications for the effect of a country's labor laws and industrial relations system on its productivity, distribution of wealth, and level of industrial conflict. It seems doubtful, however, that we can undertake a meaningful empirical analysis of all of these implications based on simple aggregate data. The impact of the efficiency of a country's labor relations laws and industrial relations system on aggregate productivity are swamped by a variety of other factors including differences in the rates of savings and investment in capital, differences in expenditures on training and education, and the ability of less technologically advanced countries to increase productivity rapidly by mimicking more advanced countries.³¹ Similarly, one cannot draw definitive conclusions regarding the effect of regulation of the industrial relations system on the distribution of wealth in a country on the basis of aggregate data since many other factors come into play. For example, a country's distribution of property or investment in job training will undoubtedly have effects on these statistics.³² Although important, the effects of a country's labor laws

31. Examining the period 1961-1994, we see that Japan has enjoyed the greatest growth in productivity during the examined period (6.42%), followed by Germany (3.91%), the United Kingdom (3.50%), and finally the United States (2.59%). N. Oulton, *Supply Side Reform and UK Growth: What Happened to the Miracle?*, 1995 NAT'L INST. ECON. REV. 53-73. All of the countries, except the United States, have undoubtedly benefited from "catch-up" productivity growth during at least part of this time if for no other reason than that they were still rebuilding economies ravaged by World War II. Japan and the European countries also enjoyed a higher savings and investment rate over much of the examined period, and Germany has undertaken significantly larger investments in worker training than any of the other countries. Peter Ross et al., *Employment Economics and Industrial Relations: Comparative Statistics in International and Comparative Employment Relations* 328, 352 (G. Bamber & R. Lansbury eds., 3d ed. 1998). Nevertheless, Japan maintained higher rates of growth in productivity into the 1990s, probably well after they had caught up to the United States in technologies of production. Germany maintained a higher overall average rate of productivity growth than the United States and the United Kingdom, despite the adverse effect of the reunification of Germany on their aggregate productivity statistics. *See generally* Oulton, *supra*.

32. Nevertheless, to give Germany its due, reported statistics for 1989 suggest that Germany enjoys a lower ratio of the earnings of people in the ninth decile of earnings to median

and industrial relations system on the country's productivity and distribution of wealth can probably only be directly examined by carefully teasing subtle and ephemeral results from micro-data.

Like the productivity and distribution of wealth statistics, aggregate statistics on work stoppages reflect differences between the examined countries beyond the effects of variations in their labor laws on the success of their industrial relations systems. For example, it may be that people of a particular country and culture are socialized to be more cooperative than people of another country and culture. Nevertheless, I would argue that, aggregate data on work stoppages is the aggregate data most directly indicative of the efficacy of the operation of a country's industrial relations system. As a result, such data is the most relevant aggregate data to consider in examining the possible influences of variations in legal doctrine between the countries on the relative success of their systems of industrial relations. Thus, although I might refer to the countries' relative performances with respect to productivity and the distribution of earnings in evaluating and analyzing their legal doctrines and industrial relations systems within the context of the bargaining model, I will rely most heavily on their relative performances with respect to promoting industrial peace in undertaking my evaluation.

Table I reports data on the annual number of working days lost due to strikes or lock outs, per thousand organized workers, in each of the examined countries, as a measure of each country's success in achieving industrial peace.

Examining Table I, we see marked differences in the performances of the various countries' industrial relations systems in producing industrial peace over the examined period. In terms of the average annual number of working days lost per thousand organized employees over the examined period, Japan (13) and Germany (22) enjoy a distinct advantages over the United States (110) and the United Kingdom (252). Although some of this difference may be due to a more cooperative, complacent nature among the Japanese and

earnings (1.64) and is, thus, more egalitarian in its distribution of earnings than any of the other countries. Somewhat surprisingly, the reported statistics suggest that the United Kingdom ranks second in terms of the equality of its distribution of labor earnings (1.83), while Japan is next (1.85), and the United States ranks last (1.97). See J.R. Schackleton, *Industrial Relations Reform in Britain Since 1979*, 19 J. OF LABOR RES. 581, 599 (1998). This result is consistent with Germany's reputation as a high wage country for blue collar workers and probably due, in no small part, to Germany's higher commitment to investment in job training. The statistics also suggest a general trend towards greater inequality in the distribution of earnings in all of the examined countries, except Germany. See *id.*

Germans,³³ differences of the observed magnitudes suggest that, at least in terms of promoting cooperative labor management relations, the industrial relations systems and underlying labor laws of the Japanese and Germans are doing something right. The British and American statistics show a trend in recent years of narrowing the disparity between their days lost and those of the Germans and Japanese. However, given recent strikes in the transportation sector in Britain,³⁴ it is not clear how durable these recent gains will be.

Table I: Industrial Peace—Working Days Lost to Strikes and Lockouts Per Year Per Thousands Organized Workers

	1978-82	1985-89	1990-94	Average
United States	200	86	43	110
United Kingdom	540	180	37	252
Germany	40	2	23	22
Japan	20	5	n/a	13

Sources: William Brown and Sushil Wadhvani, *The Economic Effects of Industrial Relations Legislation Since 1979*, 199 NAT'L INST. ECON. REV. 57-70; Kate Sweeney and Jackie Davies, *International Comparisons of Labour Disputes in 1994*, 1996 LABOUR MARKET TRENDS 153-59.

What are the possible contributions of legal doctrine in shaping the industrial relations systems of the examined countries that produced the reported statistics? I turn now to examine this question with respect to each country by analyzing the likely effects of their legal doctrines in light of the bargaining model.

B. Labor Law in the United States: "Bread and Butter Unionism" vs. "Unfettered Capitalism"

The United States would seem infertile ground for any movement based on employee collective action. Americans have a very weak class consciousness and tend to shy away from collectivization of any kind, favoring "self-reliance" and a legal system based on individual rights to solve problems. Moreover, the

33. *But see* MICHAEL J. LYONS, *WORLD WAR II: A SHORT HISTORY* (1989).

34. *See* Schackleton, *supra* note 32, at 591.

United States is the birthplace of modern capitalism³⁵ and has many large powerful private corporations that are important not only in the American economy and polity, but increasingly in world economics and affairs. Nevertheless, despite America's commitment to individualism and the existence of powerful corporate employers, or perhaps because of excesses on both these counts, the United States has developed a modest, but resilient, labor movement. In comparison with labor movements in other industrialized countries, the American labor movement is modest both in terms of the percent of the workforce it has organized and the goals to which it has aspired. Historically, the percentage of workers organized in the United States has been less than half that of most other industrialized nations.³⁶ While the European and Australian labor movements were organizing labor parties and electing prime ministers, their American counterparts focused primarily on the "bread and butter" issues of higher wages and better working conditions in organized work places.³⁷ On the other hand, the American terrain has produced captains of industry who are highly committed to operating unfettered by the constraints of collective bargaining. In comparison with their counterparts in other industrialized countries, American managers are more resistant to collective bargaining and will aggressively undertake strategies to avoid employee organization.³⁸

Despite its commitment to self-reliance and individualism, the United States has a fairly complex and well developed system of legal rules to govern collective bargaining. In its statement of findings and purpose, the National Labor Relations Act identifies "equality of bargaining power" and "industrial peace" as the defining purposes

35. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (1991).

36. See Ross, *supra* note 31, at 359.

37. See Hoyt N. Wheeler & John A. McClendon, *Employment Relations in the United States*, in *INTERNATIONAL AND COMPARATIVE EMPLOYMENT RELATIONS* 63, 73-77 (G. Bamber & R. Lansbury eds., 3d ed. 1998). This is not to say that American unions have shown no interest in politics or abstained from all efforts to influence the outcome of elections and legislation. Indeed, they have shown some interest and mixed success on both of these counts. See FREEMAN & MEDOFF, *supra* note 13, at 191-206. However, it does seem fair to say that in comparison with most labor movements in the industrialized world, the American labor movement has been more modest in its political aspirations, choosing instead to focus on the "bread and butter" issues of collective bargaining. The American labor movement may have adopted this more modest agenda because it was the most likely to succeed, or even survive in the American environment, see FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* chs. 8, 9 (3d ed. 1966), or because labor's political activities have been consistently frustrated by a hostile judiciary, see WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 37-42 (1991).

38. See Wheeler & McClendon, *supra* note 37, at 68-69, 73, 85; FREEMAN & MEDOFF, *supra* note 13, at 230-47; PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 105-18 (1990).

behind the statute.³⁹ The American statutory scheme is somewhat unique in the world in its prescription of a formal election procedure as the preferred means of determining questions of representation⁴⁰ and its strong adherence to the doctrine of exclusive representation.⁴¹ Questions of representation are determined over “appropriate bargaining units,”⁴² which are determined according to the workers’ “community of interest.”⁴³ Once a union has been determined to be the majority representative of an appropriate unit, it enjoys a continuing presumption of majority status that is irrebuttable for a reasonable period of “good faith” bargaining⁴⁴ and a period of up to three years during enforcement of the collective agreement.⁴⁵ The parties are required to bargain in “good faith,”⁴⁶ which has been interpreted to mean that there is an obligation to exchange “wage” and other information necessary for the conduct of negotiations and enforcement of the agreement.⁴⁷ Additionally, the parties must abstain from certain deleterious bargaining strategies⁴⁸ and bargain with the intent to reach an agreement.⁴⁹ Collective bargaining agreements are fully enforceable by the parties,⁵⁰ including no strike clauses and agreements to arbitrate.⁵¹ American courts have developed a strong doctrine of deference to arbitrators in the interpretation of collective agreements, both with respect to determinations of arbitrability and the underlying dispute.⁵² One persistent criticism of the American legislative scheme is that penalties for violations of the National Labor Relations Act are relatively light since the act has been interpreted to be purely remedial in nature.⁵³

39. See 29 U.S.C. § 151 (1998).

40. See 29 U.S.C. § 159 (1988).

41. See *id.*

42. See 29 U.S.C. § 159(b) (1988).

43. See generally *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570 (1st Cir. 1983).

44. The Board will not entertain evidence of loss of majority status by the union within one year after certifying the union as the exclusive bargaining representative in the valid election, or within a “reasonable time,” voluntary employer recognition. See JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS* 29-34 (1988).

45. See generally *General Cable Corp.*, 139 NLRB 1123 (1962).

46. See 29 U.S.C. § 158(a)(5).

47. See generally *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

48. See generally *NLRB v. Gen. Elec. Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

49. See 29 U.S.C. § 158(d) (1988).

50. See 29 U.S.C. § 185 (1988).

51. See generally *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

52. See generally *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

53. See WEILER, *supra* note 38, at 247-49, 251-52; William B. Gould IV, *Some Reflections on Fifty Years of National Reform*, 38 *STAN. L. REV.* 937, 939 (1986).

In a previous article, I discuss at length the application of the bargaining model to American labor law.⁵⁴ In particular, I argued that the bargaining model provides insight into the announced legislative purposes behind the National Labor Relations Act of promoting “equality” in bargaining power and promoting “industrial peace.”⁵⁵ Under the bargaining model, the formation of unions allows employees to obtain a more equitable bargaining position, relative to their employer, in bargaining for a share of the rents of the firm and in contributing to the productivity of the firm by enforcing long-term implicit contracts and expressing the workers’ collective views.⁵⁶ Similarly, within the context of the bargaining model, the concept of “promoting industrial peace” can be understood as regulatory efforts that prohibit or discourage costly strategic behavior and attempt to promote cooperative relations between the parties.

Indeed, it can be argued that the contours of American labor law described above include doctrines that correspond to each of the possible means of promoting cooperation in dilemma games identified in the bargaining model.⁵⁷ For example, the doctrines of exclusive representation and organizing the employees in “appropriate units” correspond to the ideas of limiting the numbers of players to the game and promoting homogeneity among the constituencies of the players. The statutory scheme of promoting elections as the preferred method of determining representational questions can be interpreted as an effort to avoid the high cost strategies of recognition strikes and discriminatory discharges in resolving such disputes.⁵⁸ The “good faith” requirement of limited exchanges of information in collective bargaining and contract enforcement would seem to encourage cooperative labor relations by engendering trust and allowing the parties to learn and act on their collective interest in cooperation. Prohibitions on bargaining in bad faith, lying, and Boulwareism, would tend to deter costly strategies of intransigence in collective negotiations. The presumption of continuing majority status in American labor law promotes repeated play of the bargaining game, which encourages the parties to act on their collective interests in cooperation, rather than their individual interest in intransigence.

54. See Dau-Schmidt, *supra* note 5, at 494-512.

55. See *id.* at 492-94.

56. See *id.* at 431-34.

57. See *id.* at 494-505.

58. Although, in practice, the American election system has proven more burdensome to unions than other countries’ systems of recognition based on employee signatures. See WEILER, *supra* note 38, at 229-30, 255-61.

Finally, American labor law enforces private agreements to arbitrate, rather than engage in costly strategic behavior, such as strikes and lockouts, to enforce collective bargaining agreements. The National Labor Relations Board and courts have correctly identified all of these doctrines as encouraging "industrial peace."⁵⁹

Under the bargaining model, how is one to evaluate American labor law in light of the national statistics reported in Table I? The United States finishes in the middle of the examined countries with respect to the number of days lost to strikes and lock outs. On average, the United States performs significantly better than the United Kingdom, but is a large step behind Germany and Japan. As will be discussed more fully in the next section, the United States enjoys some definite advantages over the United Kingdom in terms of producing industrial peace. First, under American labor law, collective bargaining agreements, including agreements to arbitrate contract disputes rather than strike, are readily enforceable. Moreover, the United States has well developed legal doctrine on the conduct of collective bargaining, which requires at least minimal exchanges of information and prohibits certain deleterious bargaining strategies. During the time period covered by Table I, the United Kingdom had no well-developed regulatory scheme for encouraging cooperative solutions in collective bargaining. Accordingly, it is not surprising, within the context of the bargaining model, that the United States did better than the United Kingdom in producing industrial peace. Where the United States probably falls behind Germany and Japan in terms of its record on avoiding work stoppages, is in the extent of the information that employers are required to divulge to their unions and the penalties the parties suffer for labor law violations. As will be discussed below, either by law or practice, German and Japanese workers have much more information on the financial health and operations of their employers and are regularly consulted on a much broader array of questions than their American counterparts. Enforcement measures in Germany and Japan are not limited to mere remedial measures enforced by a government agency, but can include punitive measures and individual suits. From the perspective of the bargaining model, the United States enjoys advantages in producing industrial peace over Germany and Japan, in that it uses a system of exclusive representation and has a richer legal doctrine for determining appropriate bargaining units and questions of representation. These advantages, however, are offset by the

59. See Dau-Schmidt, *supra* note 5, at 494-505.

disadvantages in terms of providing necessary information for cooperative negotiations.

C. *Labor Law in the United Kingdom: "Collective Laissez Faire"*

The United Kingdom poses an interesting example to study from the perspective of the bargaining model because, although it has a strong commitment to collective bargaining, at least among its working people, until recently it has been remarkably devoid of any regulation of the conduct of industrial relations. Both the working people's commitment to organization and the lack of regulation in industrial relations seem to derive from the strong social hierarchy that exists in the United Kingdom. Unlike in America, where it is commonly believed that people can attain wealth and social stature through personal achievement, in Britain, wealth and social stature are attained through birth to a high-ranking class without any need for personal achievement.⁶⁰ Because of this social hierarchy, there is strong solidarity within the working class, and British workers naturally identify with, and are very loyal to, their unions. Also, because of this strong social hierarchy, there is little identity of interest between the members of the working class and those of the higher social classes. As a result, the working class has not felt that it could entrust the governance of industrial relations to institutions such as Parliament and the courts, which are viewed as the tools of higher classes. Therefore, the working class has historically resisted any form of regulation of industrial relations.

For a modern industrialized country, the United Kingdom's dearth of regulation of labor relations is truly astonishing. Until 1971, British legislation concerning collective bargaining was largely confined to acts that prevented judicial intrusion into the parties' affairs. For example, acts of Parliament overturned the courts' common law characterization of unions as criminal conspiracies and sought to protect the freedom to strike against injunction.⁶¹ In 1971, the Conservative British government, under Prime Minister Heath, enacted a number of measures designed to address "the labor problem." These included the Industrial Relations Act, modeled on the American Taft-Hartley Act, which, among other things, made collective bargaining agreements legally enforceable.⁶² However, these reforms proved unpopular and were quickly repealed by the

60. See HENRY BROWN, *THE ORIGINS OF TRADE UNION POWER* 208-09 (1983).

61. See Schackleton, *supra* note 32, at 583.

62. See *id.* at 583-84.

next Labour Government in 1974.⁶³ More recently, from 1980 to 1993, the conservative governments of Margaret Thatcher and John Major undertook a long list of incremental "reforms," removing government support for collective bargaining, outlawing the closed shop, requiring pre-strike ballots, making unions liable for unauthorized strikes, and limiting mass picketing and secondary actions.⁶⁴ However, these measures seem primarily aimed at undermining union power and raising the costs of strikes to unions, rather than systematically governing the relationship between the parties in recognition disputes, collective bargaining, and the enforcement of collective agreements. The recent signing of the Social Charter of the Maastricht Treaty by Prime Minister Blair portends great potential change with its requirement of employee representation in most business enterprises, according to the German model.⁶⁵ Moreover, the Blair government recently enacted a new law on the recognition of collective representatives which draws on the American Taft-Hartley Model and its Canadian cousins.⁶⁶ However, despite the recent legislative efforts and the future promise of the Social Charter, I believe it is fair to say, British labor relations have been and remain remarkably unregulated for a modern industrialized country.

From the American perspective, British law governing representation disputes and collective bargaining appears to be a threadbare, patchwork quilt. With respect to conflicts that occur during organizing campaigns, British workers have statutory protection against employer discrimination on the basis of union affiliation,⁶⁷ but there is no formal election or card signing procedure to resolve disputes over representation.⁶⁸ With respect to conflicts in collective bargaining, the principal regulations are merely that the employer has an obligation to provide information that is necessary for collective bargaining,⁶⁹ and employers must consult with unions over "redundancies" and "business transfers."⁷⁰ However, there are

63. *See id.*

64. *See id.* at 585-88.

65. *See id.* at 600-01; *see also* Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. OF INT'L LAW 987, 1000-06 (1995).

66. The Employment Relations Act of 1999, 1999 Chapter c.26. The precise impact of this act is not yet apparent since important enabling regulations have still not been enacted.

67. *See* Employment Protection (Consolidation) Act, 1978, § 58(1).

68. *See* EDWARD BENSON, *THE LAW OF INDUSTRIAL CONFLICT* 41-46 (1988).

69. *See* Employment Protection (Consolidation) Act 1978, § 17.

70. *See* Employment Protection (Consolidation) Act 1978, § 99.

no effective penalties for employers who refuse to supply requested information.⁷¹ As a result, few unions make requests for information in the United Kingdom.⁷² There are no restrictions on recalcitrant bargaining strategies, nor any affirmative obligation to bargain in good faith. Finally, with respect to conflicts in the enforcement of collective agreements, as a general rule, collective bargaining agreements, including agreements to arbitrate and not strike during the life of an agreement, are not legally enforceable in the United Kingdom.⁷³ There is limited informal grievance arbitration in the United Kingdom, and individual workers may sue in court to enforce collectively negotiated terms to the extent that they are expressly incorporated into their individual labor contracts.⁷⁴ However, few individual labor contracts expressly incorporate the terms of relevant collective bargaining agreements.⁷⁵ In practice, collective agreements are largely enforced only through the “honor” of the parties, which is guarded by the workers’ constant threat to strike if management deviates in any significant way from the terms of the agreement.⁷⁶

Within the context of the bargaining model, it is not surprising that the United Kingdom has suffered from what is perhaps the least productive and most wasteful industrial relations system employed by any of the examined nations. The class structure and lack of community of interest that is perceived by the parties to collective bargaining in Britain make it very hard for the parties to act in their collective interest to avoid costly strategic behavior and solve the dilemma game of industrial relations in ways that further the interests of both parties. Because collective bargaining is viewed more as a form of class warfare,⁷⁷ it is difficult for the parties to take advantage of the productivity-enhancing aspects of unionism or to resolve disputes in an amicable fashion. Indeed, the social hierarchy of Britain is so strong that it seems the country cannot even solve the

71. See BENSON, *supra* note 68, at 122-26.

72. See *id.*

73. See *id.* at 146. Prior to 1971, collective agreements were clearly unenforceable in the United Kingdom. In 1971, the Industrial Relations Act established the legal presumption that collective agreements were enforceable unless they expressly stated otherwise. Most parties responded to this development by expressly stating in their collective agreements that they were not enforceable. After the repeal of the Industrial Relations Act in 1974, the government established the presumption that collective agreements were not enforceable unless they expressly stated that they were. To date in Britain, few collective agreements state that they are enforceable. See SIMON DEAKIN & GILLIAN S. MORRIS, *LABOUR LAW* 75 (1995).

74. See *id.* at 75.

75. See *id.*

76. See *id.*

77. See BROWN, *supra* note 60, at 24.

dilemma game posed by industrial relations at the larger societal level of agreeing to a system of regulation that will prohibit or discourage costly strategic behavior and provide an efficient means for the enforcement of private collective bargaining agreements. This lack of regulation results, predictably under the bargaining model, in the highest rate of workdays lost to industrial conflict among the examined nations. Although the British strike rate has fallen in recent years, as it has in almost all other industrialized nations, my analysis suggests that the British should not be so sanguine about their success in this regard, since it seems more due to a recent international trend than due to any underlying change in their laws. Indeed, given my analysis of Germany under the bargaining model, perhaps the best hope for long-term industrial peace in the United Kingdom is the future adoption of German representation methods under the Social Charter of the Maastricht Treaty.

D. Labor Law in Germany: "Co-determination"

In stark contrast to the very limited regulation of industrial relations in the United Kingdom, the German system of industrial relations is dominated by legal rules and guarantees.⁷⁸ An extensive safety net of social services covering such workplace risks as injury, layoff and retirement provides the backdrop to a labor law that requires workers' input at various levels of firm decision making and can involve no fewer than six levels of legal rules on any given question.⁷⁹ Moreover, in contrast to the United Kingdom, it seems that European efforts at unification portend little change for the German system of industrial relations, since most European Union directives and règlements concerning collective bargaining are consistent with, or based on, the German system.⁸⁰

The heart of the German system of regulation is the idea of "co-determination."⁸¹ The idea of co-determination is that both capital

78. See Wolfgang Conrad, *Federal Republic of Germany*, in INTERNATIONAL HANDBOOK OF INDUSTRIAL RELATIONS: CONTEMPORARY DEVELOPMENTS AND RESEARCH (Alfred A. Blum ed., 1981).

79. These six levels would be: the German constitution, which regulates many aspects of private sector labor relations; the extensive network of protective legislation in Germany; judge-made law; the laws governing the negotiation and enforcement of collective bargaining agreements; the laws requiring the representation of workers on works councils and management boards for private companies; and laws governing the negotiation and enforcement of individual labor contracts.

80. See generally Van Wezel Stone, *supra* note 65, at 1000-05.

81. See Johannes Schregle, *Co-determination in the Federal Republic of Germany: A Comparative View*, 117 INT'L LAB. REV. 81, 83 (1978); Frederick Fürstenberg, *Employment*

and labor should have an equal say in the running of the workplace and the division of the proceeds from the enterprise, and that such a partnership will encourage cooperation and the avoidance of disputes.⁸² Pursuant to this ideal, German labor law requires that, in every establishment with five or more employees, a works council of elected employee representatives be set up to communicate with the employer.⁸³ German law also requires that, in certain larger establishments, the employees have representatives on the company's supervisory board (akin to the board of directors for American corporations) and management board (the body responsible for the day-to-day running of the enterprise).⁸⁴ Although works councils are themselves prohibited from undertaking work stoppages, the combination of the works councils and employee representatives on the governing boards of German corporations ensures that workers have at least some input into every corporate decision and have ready access to virtually all information concerning their employer. Of course, workers are also free to associate in independent unions that can undertake work stoppages, and workers are protected from employer discrimination in exercising this right of association.⁸⁵

Although I am not an expert on German labor law, at this point in my studies, it does not seem that German law governing industrial relations is quite as rich as American labor law on the same subject. With respect to conflicts in organizing campaigns, although German workers have constitutional protection against employer discrimination on the basis of union affiliation, there is no formal election or card procedure through which a union can achieve recognition. Employer participation in collective bargaining is purely voluntary.⁸⁶ Similarly, with respect to conflicts in collective bargaining, there is no obligation to negotiate in good faith. However, the resort to economic warfare by either unions or employers is lawful only if it is used as "a last resort" after all means of negotiation have been exhausted and mediation of the dispute has been attempted.⁸⁷

Relations in Germany, in INT'L AND COMP. EMPLOYMENT REL. 201 (G. Bamber and R. Lansbury, 3d ed. 1998).

82. See Schregle, *supra* note 81, at 83.

83. See *id.* at 82-83; see also MANFRED WEISS, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY 169 (1995); Fürstenberg, *supra* note 81, at 211.

84. See Schregle, *supra* note 81, at 82-83; WEISS, *supra* note 83, at 190; see also Fürstenberg, *supra* note 81, at 212-13.

85. See WEIMAR CONST. art. 159; see also WEISS, *supra* note 83, at 121.

86. See *id.* at 134-35.

87. See *id.* at 146, 149-50, 152-53; see also Fürstenberg, *supra* note 81, at 209-10.

All strikes are also subject to a secret ballot by union members.⁸⁸ By common practice, the parties also enjoy an extensive system of mediation for collective bargaining disputes.⁸⁹ Finally, with respect to the enforcement of collective agreements, such agreements are readily enforced as part of each individual's labor contract with their employer through an efficient system of arbitration and labor courts.⁹⁰

Within the context of the bargaining model, it is easy to understand why the German system of industrial relations performs well in terms of producing industrial peace. The frequent consultations and exchanges of information required by the system of co-determination allow the parties to take advantage of the full productivity enhancing qualities of unions and help to ensure that both sides understand their collective interest in avoiding costly strategic behavior. Indeed, one of the most frequent complaints about the system is that it breaks down the distinctions between labor and management.⁹¹ Thus, it is not surprising that Germans have historically enjoyed a much lower rate of work days lost due to strikes or lockouts than the United States or the United Kingdom. Indeed, it may be that the German system goes too far in some regards. I suspect that it is not really necessary to mandate employee representation in all workplaces with five or more employees, and that many works councils of small employers serve no purpose. I also suspect there may be problems in the performance of such managerial duties as monitoring and investment in labor-saving technology under the German system when workers take too active a role in the management of a company. However, such questions are beyond the scope of this study.

E. Labor Law in Japan: A "Community of Shared Fate"

The Japanese system of regulating industrial relations is also an interesting contrast to the British experience. The modern Japanese system of industrial relations has its origins in the aftermath of World War II. When the Allied Occupation ordered a rapid expansion of labor unions, Japanese executives moved quickly to comply by encouraging their employees to join labor unions.⁹² Thus, labor unions were born, not from virulent class struggles led by bitter union leaders, but from the initiative of company executives. These

88. See WEISS, *supra* note 83, at 152.

89. See *id.* at 145-48.

90. See *id.* at 137-42; see also Fürstenberg, *supra* note 81, at 208.

91. See Schregle, *supra* note 81, at 84.

92. See EZRA F. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 159 (1979).

corporate executives encouraged white-collar workers, as well as blue-collar workers, to join unions in order to moderate union demands. Furthermore, since companies in postwar Japan were mostly formed by managers rather than independent owners, workers have no wealthy propertied class above them, but only a managerial class whose lifestyle is not very different from their own.⁹³ Indeed, most Japanese managers today, including most members of corporate boards of directors, were promoted from within the company and many were past union members.⁹⁴

The Japanese system of industrial relations is based on the concept of the company as “a community of shared fate.”⁹⁵ Pursuant to this ideal, Japanese managerial practices encourage life-time employment relationships, direct employee interest in the profitability of the firm, and frequent consultation between managers and employees concerning a wide variety of employment related topics. Many workers in Japan are hired with the expectation that the firm will offer them uninterrupted employment for the rest of their life.⁹⁶ Moreover, because promotions are generally made from within the firm and based largely on years of service to the firm, employees have strong incentives to commit themselves to working for the same firm for their entire work life.⁹⁷ In addition to these incentives to cast their lot with the fortunes of a single firm, a significant portion of the pay of Japanese workers is tied to the profitability of their company. As an accommodation to the Buddhist *bon festival* and New Year celebrations, Japanese workers receive two lump sum payments each year, which, on average, are equal to about four months salary. The size of these lump sum payments depends on the profitability of the employee’s firm.⁹⁸ Finally, Japanese management has made a strong commitment to consultation and the exchange of information at all levels of the firm. This commitment includes a system of joint consultation between labor and management on the day-to-day running of the plant, small group discussions among workers on methods of production such as the well-known quality circles, and a

93. Indeed, Japanese executives commonly believe that American executives give themselves too many emoluments compared with what they give the workers. *See id.* at 154.

94. *See* Yasuo Kuwahara, *Employment Relations in Japan*, in INTERNATIONAL & COMPARATIVE EMPLOYMENT RELATIONS 249, 257 (G. Bamber & R. Lansbury, 3d ed. 1998).

95. *See id.*

96. *See id.* at 254.

97. *See id.* at 260.

98. *See id.*

corporate board of directors composed predominantly of past or current employees.⁹⁹

Japan has also developed an extensive system of laws regulating the conduct of collective bargaining. The Japanese have no formal method for selecting a bargaining representative and treat the question of union representation as a matter of individual freedom of association for the workers.¹⁰⁰ The Japanese have no concept of exclusive representation. Different employees with the same employer may designate different unions as their representative.¹⁰¹ In practice, however, one organization generally dominates within a firm. As many as half of Japanese unions have union shop agreements requiring union membership as a condition of employment in the designated firm.¹⁰² Employers have an affirmative obligation to bargain in good faith with any representative designated by their employees.¹⁰³ Interestingly, there is no corresponding obligation for the union to bargain in good faith. The employer's obligation to bargain in good faith can be enforced through an administrative unfair labor practice proceeding similar to that employed in the United States, or through a private civil suit by the union.¹⁰⁴ Remedies for a failure to bargain in good faith include an injunction and tort damages for lost wages and benefits. Collective agreements, including agreements not to strike, are fully enforceable in Japan, although it seems the Japanese rely more on the court system for this task than on private arbitration.¹⁰⁵ Indeed, Japanese courts will infer a "peace obligation" on the part of both parties to a collective bargaining agreement to carry out the terms of that agreement, without resort to economic warfare during the life of the agreement, even if the agreement does not contain an express no strike clause.¹⁰⁶

The bargaining model provides a rationale for why the Japanese industrial relations system has performed so well in terms of promoting industrial peace. Similar to the German system, the

99. See Haruo Shimada, *Japan's Postwar Industrial Growth and Labor Management Relations*, in PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 245-48 (Barbara D. Dennis ed., 1983); see also Kuwahara, *supra* note 94, at 258-60.

100. See KAZUO SUGENO, JAPANESE LABOR LAW 434-35 (1992).

101. See *id.* at 471-72.

102. See *id.* at 438.

103. See *id.* at 494.

104. See *id.* at 494-95.

105. See *id.* at 522.

106. See SUGENO, *supra* note 100, at 520-21.

Japanese enjoy the benefits of frequent consultations and exchanges of information between employers and employees in promoting industrial peace. In addition, the Japanese promote an identity between the long-term interests of the employer and employees, which encourages the parties to focus on their mutual interest in cooperation rather than their individual interests in costly strategic behavior.¹⁰⁷ Indeed, the linking of employee compensation to the profitability of the firm in the Japanese system tends to undermine the dilemma quality of their collective bargaining relationship by promoting direct unity of interest between the employees and employer in the profitability of the firm.¹⁰⁸ Finally, it seems that the Japanese have developed a rich law governing the conduct of collective bargaining, which discourages strategic behavior in the conduct of collective negotiations and the enforcement of collective agreements. In particular, it seems that the Japanese system does a better job than the American system in providing real penalties for employer strategic behavior that are readily initiated by employees through unfair labor practice proceedings or private civil suits.

III. CONCLUSION

The bargaining model provides a useful framework for comparative analysis of the labor laws and industrial relations systems of various countries. The model suggests that the form of a country's labor law can affect the impact of its industrial relations system on the country's productivity, distribution of wealth, and level of industrial peace. Accordingly, one can use the bargaining model to assess a country's labor laws and system of industrial relations to determine whether these laws have the requisite characteristics to promote productivity, redistribution of wealth, and industrial peace.

By considering the records of the examined countries with respect to days lost due to strikes or lockouts and examining their labor laws and industrial relations systems, I have demonstrated that the relative success of some countries in achieving industrial peace is readily comprehensible within the context of the bargaining model. The United Kingdom suffers from the poorest record on industrial peace among the examined countries. This is not surprising given the fact that, up until this point in time, class strife has left the British

107. See Clyde W. Summers, *Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy*, 16 COMP. LAB. L.J. 467, 474 (1995).

108. See Dau-Schmidt, *supra* note 5, at 489 n.281. Profit sharing by firms with their employees predictably reduces incentives to act strategically in collective bargaining and so promotes industrial peace. See *id.*

without an effective system for regulating collective negotiations. At least during the period examined on this study, the British had little regulation of strategic behavior in organizing or collective bargaining and few requirements for exchanges of information between the parties. Collective agreements and their accompanying agreements to arbitrate, rather than strike, were not even enforceable. Accordingly, the parties were left to act on their own individual interests to engage in strategic behavior in collective bargaining, rather than a mutual interest in cooperation, with the result being a work stoppage rate that was several times that of any of the other examined countries. In contrast, the Germans and Japanese heavily regulate their industrial relations systems to promote exchanges of information and prohibit strategic behavior. These regulations discourage the parties from engaging in individually rational strategic behavior and encourage their ability to recognize and act on their collective interest in cooperation. The Japanese industrial relations system also promotes a long-term relationship between employers and employees and the sharing of corporate profits with employees. These characteristics of the Japanese industrial relations system promote cooperation between the parties and diminish the dilemma quality of collective bargaining relationships in Japan. As a result, the Germans and Japanese have, for many years, enjoyed productive industrial relations with a work stoppage rate that is many times smaller than that of the United States or the United Kingdom.

Somewhere in the middle of these two extremes is the United States. Although we enjoy obvious advantages over the British in terms of the capacity for our legal doctrine to encourage industrial peace, and some theoretical advantages over the Germans and Japanese, these advantages seem dwarfed by the advantages that the Germans and Japanese enjoy in terms of greater exchanges of information and more serious enforcement of prohibitions on strategic behavior. The Japanese also enjoy advantages due to the identity of long-term interests between employers and employees in their system of industrial relations and the sharing of corporate profits with employees. Accordingly, the United States enjoys a work stoppage rate that is less than half that suffered by the United Kingdom, but still several times that enjoyed by Germany and Japan. Law does matter.