Talking is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System

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TALKING IS WORTHWHILE: THE ROLE OF EMPLOYEE VOICE IN PROTECTING, ENHANCING, AND ENCOURAGING INDIVIDUAL RIGHTS TO JOB SECURITY IN A COLLECTIVE SYSTEM

BY

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I. INTRODUCTION

We are truly fortunate if we know people who inspire us to author our lives in a deliberate and meaningful way. \(^1\) Professor Clyde Summers is one of those people for me. So influential has he been on my thinking that there is probably nothing that I write that does not have a bit of him in it. Professor Summers began teaching almost seventy years ago, in 1942 – only seven years after Congress passed the Wagner Act and five years before Congress passed Taft-Hartley over President Truman’s veto. And Professor Summers began teaching almost a quarter-century before I was even born and almost a half-century before I ever met him in law school.

My three years in his company and my interactions with him over the past twenty years may be just a blink in his academic career. But those interactions are so inextricably interwoven into the fabric of my intellectual life that it is hard even for me to know what my legal scholarship would look like had we never met.

I went to law school to become a criminal trial attorney – my hero was

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Clarence Darrow. But so taken was I with the questions presented in my basic labor law course that I decided to delve more deeply into the problem of protecting the individual worker within the collective. As a first-year law student in the spring of 1989, I applied unsuccessfully to be Professor Summers’ research assistant – a job he understandably gave to a student with a degree from Cornell’s Industrial Labor Relations School. I regularly attended his office hours, where I learned that Professor Summers was a great storyteller. During those conversations, he would tell me about how he worked his way through college, his neighbors hunting in Vermont, or how his neighbors’ cows would eat the grass on his Vermont property so he did not have to mow the lawn. We talked about his dairy farms, about his experience as an arbitrator, and how he was able to use the money to put his children through graduate school. And of course, we talked about the working class and his latest research projects.

At this point, I couldn’t get enough Summers, so the following year (1989-90), as a second-year law student, I wrote on to the Comparative Labor Law Journal as an associate editor and enrolled in every upper-level course he offered, which included a Comparative Labor Law Seminar and his Employment Law Course, aptly named Legal Protection for the Individual Employee. And when I turned down the job of Articles Editor on the Comparative Labor Law Journal, Professor Summers invited me to become his research assistant, a job I held during my entire third year (1990-91).

Having spent much of my law school career taking labor law courses with Professor Summers and thinking about the problems of coercion, Professor Summers encouraged me to enter the field of comparative labor law. I wrote my upper-level legal writing requirement on comparative pregnancy and child care laws in the United States and the European Union – a paper that both he and Wharton professor, Dr. Janice Bellace, supervised and a paper that examined the values underlying laws protecting parents and pregnant women from workplace discrimination. I used that


paper, with the help of Summers and Bellace, to obtain a fellowship to complete my doctorate in comparative labor law at Oxford, where I focused on the problem of mass economic dismissals in the United States and the European Union and where I worked with, among others, former Summers student, Dr. Paul Davies.

During my time at Oxford (1992-96), I visited Professor Summers several times, most notably at his summer home in Vermont. And while recollections of those visits are sprinkled with the human side of Clyde Summers — being mothered by his kind and gentle wife, Evelyn, and meeting one of his daughters and several grandchildren — they are also firmly grounded in memories of one-on-one conversations or tutorials about the problem of job security. Clyde — a name I, by-then, awkwardly used to refer to him — repeatedly told me not to think too much about theory. He said, “Look at the world and you will see that workers care more about job security than wages.”

In those conversations, he explained to me that job security is about social values and burden sharing — a point he later published in an article about worker dislocation:

> Instability of employment, often in the form of mass dislocation, is a painful fact of our modern market economy, beyond the reach of any country to prevent or even influence significantly. Indeed, for a country to prosper it must embrace and accelerate changes which introduce new products and increase production. These changes, however, with their dislocation of workers, inevitably bring substantial personal and social costs. The costs must be borne either by the workers, the employer, or by society in general. How we distribute those costs implicitly expresses our social values, and may in the long run affect our readiness and ability to absorb those changes rather than to attempt to resist them.

He also encouraged me to talk to union leaders and working class folks to understand their concerns. Handing me Richard Trumka’s phone number, he told me to call Trumka, tell him that Clyde had told me to call, and ask him about union concerns. So I did. And I spent over an hour on the phone with the future President of the AFL-CIO, telling him about my doctoral dissertation and chatting about the concerns of the working class — a phone conversation only, but one that has been emblazoned in my

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4. Professor Summers often protested theory. But to paraphrase Shakespeare, I think the professor “doth protest too much” — a point others have observed. For example, in June 2008, at a labor law dinner at the Law and Society conference in Montreal, James B. Atleson, another one of the big labor law gurus of the twentieth century, warmly commented to me that Clyde always claimed he did not like theory but of course he had his own theory of labor law. I concur, and hope that this tribute to Professor Summers sheds some light on what that theory may have been.

This article then is my tribute to Professor Clyde Summers. It begins in Part II with our meeting – that blink in his eye that has had such a profound impact on me. Using personal stories from my interactions with him, including quotes from my lecture notes, I resurrect that past relationship to show Professor Summers’ influence on my thinking about job security and comparative labor law. Part III examines domestic and foreign laws governing job security, focusing on the Worker Adjustment and Retraining Notification Act (WARN), the National Labor Relations Act (NLRA), and the European Union Collective Redundancies Directive. Part IV argues in favor of borrowing bits of each of those laws to create a job security policy that requires covered employers to engage in bargaining upon contemplating employment loss related to a plant closing or mass layoff. Part V ends this journey with some concluding remarks that tie my argument back to Professor Summers’ inspiring influence over me.

II. THE INFLUENCE OF CLYDE SUMMERS ON MY/OUR THINKING ABOUT JOB SECURITY

I first met Professor Clyde Summers in January, 1989, when as a second-semester, first-year law student I was enrolled in his basic labor law course. On the first day of class, Thursday, January 26, Professor Summers told the students that he was “very biased” and that he was an “uncompromising disciple of collective bargaining.” After acknowledging that his bias did not make him pro-union “except when management tries to destroy unions,” he went on to ask the following set of questions:

How do you operate a collective system and preserve the values of individuals, whose rights and freedoms must be protected? How are you able, within a collective system, to be a liberal – to recognize the rights of individuals?

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9. At the time, the University of Pennsylvania Law School required labor law in the second semester of the first year to fulfill the administrative law requirement. Professor Summers taught half the 1L class and Professor Robert Gorman taught the other half of the 1L class.
11. Id.
12. Id.
Professor Summers then proceeded to examine the other half of this equation – the employer. In Summers’ view:

Employers are collectivists epitomized because they take workers and say “follow or out.” Employers are sometimes benign and sometimes not benign authoritarians. [So the question becomes,] how do you preserve, protect, encourage individual rights in a collective society? This is the fundamental problem of government.  

It was probably with this question that I became hooked on labor law as a discipline worthy of serious scholarly study. I knew, then and there, that the workplace defined us as both economic beings and as human beings with individual rights. And I knew, then and there, that those two viewpoints would clash over and over again, especially at the point of employment termination. And so, I became particularly interested in what Professor Summers had to say about job security. 

Throughout the semester, Professor Summers used example after example to show the extent to which federal labor law did little to protect job security. On January 31, in discussing *NLRB v. Mackay Radio & Telegraph Co.*, and then *American Ship Building Co. v. NLRB*, Summers criticized the extent to which the Supreme Court had weakened the position of the more vulnerable party. Starting with the premise that a main purpose of the NLRA is to equalize the disparity of bargaining power between labor and management, Summers demonstrated that the Court in *Mackay Radio* provided the wrong incentives. By allowing employers to permanently replace economic strikers, the *Mackay Radio* rule further weakens unions that are already vulnerable. Summers’ preferred solution: If collective bargaining fails, then business should close and “see who gets hungry first.” Similarly, in Summers’ view, allowing employers to lockout their workers only tends to equalize bargaining power in cases where the union is already very strong. But once again, the Court in *American Ship Building* got the incentives wrong when it allowed the employer to select the timing of the shutdown in circumstances where the union was weak during the summer but strong during the winter. 

The following week, in the context of discussing *Fibreboard Paper Products Corp. v. NLRB*, and the question whether “contracting out” is a mandatory subject of bargaining, Professor Summers commented that

13. *Id.*
17. *Id.*
subcontracting is "akin to discharge." Like the Supreme Court, Summers places subcontracting within the plain language of Section 8(d), which obligates the parties to bargain collectively over "terms and conditions of employment."

The duty to bargain does not prevent management from ultimately making the decision; if the parties bargain to impasse, then management may take unilateral action. But given Summers’ view of the Wagner Act, a view that values bargaining, it is little wonder that Summers viewed the boundary that separates mandatory from nonmandatory bargaining subjects — a line created by those decisions that "lie at the core of entrepreneurial control" — as a line that fails to promote industrial peace and therefore fails to promote the free, albeit collective, labor market.

Professor Summers also had high regard for the role of the employee representative. In the context of discussing NLRB v. Crompton-Highland Mills, where the Supreme Court held that an employer violates the Act when, after negotiating with the union and declaring impasse, it effectuates a substantially greater general wage increase applicable to most of the bargaining unit employees than any wage increase offered during bargaining, Summers discussed the importance of the union as "the voice of the employees." He explained that in this case "the employer was trying to discredit the union in the eyes of the employees (you'd do better without a union), so that the employees would abandon the union." For Summers, "the duty to bargain is based on the assumption that talking is worthwhile" even if it results in impasse because talking empowers workers by taking power away from the employer. By forcing employers to discuss mandatory subjects of bargaining with the union, the "employer has to sit down with employees . . . [and] bargain in good faith." In such

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20. See Fibreboard Paper Prods. Corp., 379 U.S. at 210 (placing the "contracting out of plant maintenance work previously performed by employees in the bargaining unit [and] which the employees were capable of continuing to perform" as "well within the literal meaning of the phrase 'terms and conditions of employment'"); see also id. ("The words even more plainly cover termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit.").
24. Id. at 223.
26. Id.
27. Id.
28. Id.
cases, the "employer cannot take unilateral action without discussing [the subject] with the union to impasse. If there is no agreement, then [the matter will be] resolved by economic force." 29

In this same dialogue, Professor Summers discussed the role of the employer's duty to furnish relevant information. He explained that the duty to furnish relevant information is important "to make discussion meaningful." 30 Professor Summers recounted the story of how General Motors and Ford once used financial information to persuade their unions that the American car industry could not compete with the Japanese car industry. That information exchange helped to explain the automobile companies' negotiating posture, which eventually led to union givebacks and perhaps saved the American auto industry, at least for the time being. 31

Professor Summers, whose focus was always the individual, also showed concern about other sources of coercion (including government and unions). For Professor Summers, the Wagner Act was a free market solution to a free market problem. 32 "Free" collective bargaining is necessary to make that "market function as a market." 33 Government regulation must be kept to a minimum by permitting the parties to negotiate solutions to industrial problems. "The law intervenes only to provide minimum structure and process." 34 This process must, however, be democratic. The union is the exclusive representative kept in check by the duty of fair representation. 35

III. LAWS PROTECTING JOB SECURITY IN THE PRIVATE SECTOR

A. The Employment At-Will Presumption Is the Dominant Default Rule; Its Main Exceptions Can Be Viewed as Placing Limits on Employer Privilege to Discharge Employees for Bad Reasons

In the United States, the dominant default job security rule is governed by state law: employers generally may fire their employees for any reason,
good or bad, or for no reason at all. The rule is the starting presumption in every state except Montana, which requires private-sector employers to have just cause to discharge their employees. As Professor Summers has explained, the “United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice.”

The employment at-will doctrine gives employers broad discretion to terminate the employment relationship unless the law has carved out a particular exception. Because the employment at-will doctrine is the creature of state law, the basic exceptions to at-will employment are themselves state created – either by the state’s court of last resort or by the state’s legislative body. The federal government has also put limits on an

36. See, e.g., Payne v. Western & Atlantic R.R. Co., 81 Tenn. 507, 1884 WL 469, *5 (1884) (observing that “[i]f the service is terminable at the option of either party, it is plain no action would lie even to the employee[e], for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law”), overruled on other grounds by Hutton v. Walter, 179 S.W. 134 (Tenn. 1915); see Payne Western, 1884 WL 469, at *6 (“[M]en must be left ... to discharge or retain employee[e]s at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se”). See generally Clyde W. Summers, Employment at Will in the United States: The Divine Right of Employers, 3 U. PA. J. LAB. & EMP. L. 65 (2000). For a current, in-depth review of the at-will doctrine, see Barry D. Roseman, Just Cause in Montana: Did the Big Sky Fall? (Am. Const. Soc’y for L. & Pol’y Issue Brief, 2008), available at <http://www.acslaw.org/files/Roseman%20Issue%20Brief%200.pdf>.


39. Professor Bastress views the erosions to the at-will doctrine as “squares [on a Bingo board] that could provide relief.” Bastress, supra note 38, at 320.

40. There are four main exceptions to the at-will doctrine. First, employees may expressly contract around the at-will rule. See, e.g., Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 884 (Mich. 1980) (permitting a cause of action for wrongful discharge based on an oral contract); Guiliano v. Cleo, Inc., 995 S.W.2d 88, 91-92, 95-96 (Tenn. 1999) (finding written contract protecting employee against just cause dismissal for three-year term embodied in letter the company President and Chief Executive Officer sent to employee). Second, many states permit employees to establish a wrongful discharge claim through implied contract. See, e.g., Pugh v. See’s Candies, Inc., 171 Cal. Rptr. 917 (Ct. App. 1981) (permitting employee to present entire course of dealings between employer and employee, and longevity of service in particular, to establish an implied contract of employment); Goff-Hamel v. Obstetricians & Gynecologists, P.C., 588 N.W.2d 798 (Neb. 1999) (permitting employee to use a promissory estoppel theory of the case to establish an implied contract); Woolley v. Hoffmann-La
employer's authority to fire at will. For example, under the NLRA, employers may not fire employees to encourage or discourage union activity.\(^{41}\) Nor may employers fire employees, under Title VII of the Civil Rights Act of 1964, as amended, because of their "race, color, religion, sex, or national origin."\(^{42}\)

Many of these exceptions can be viewed as an attempt by the government to insert some fairness into the employment termination process. For example, we might think of the handbook cases (cases where courts have held employers to promises of job security found in employment manuals) as the law's way of holding employers to promises of job security as expressed in the employment manual.\(^{43}\) And we might think of the discrimination cases as the law's way of forbidding employers from discharging employees for reasons that we as a society view as particularly bad—because of, for example, that employee's "race, color, religion, sex, or national origin."\(^{44}\)

Notwithstanding these erosions to the at-will doctrine, many employers may still discharge employees for arbitrary reasons. For example, at-will states do not prohibit employers from firing employees simply because they have red hair.\(^{45}\) In West Virginia, a state judge apparently may lawfully fire his magistrate court clerk because the clerk's
son decided to run for public office.\textsuperscript{46}

These cases may seem outrageous to some. By contrast, a staunch at-will proponent would likely advocate for letting the market, rather than the law, punish the employer.\textsuperscript{47} Where the employer gets away with its conduct, in cases where the market does not punish the arbitrary employer, the at-will proponent might merely view the discharged person as collateral damage. I do not agree with that view, but the question that I have found even more fascinating, a feeling that has only grown since my time as a doctoral student, is a much closer question – what happens when there is no bad guy in the picture? What happens when an employer discharges an employee not for misconduct but for economic reasons?

\textbf{B. Through No Fault of Their Own}

1. Overview

In this section, I examine the question of what happens when employers, through no fault of their own, must discharge employees for economic reasons? This is the situation that occurs, for example, during economic recessions, bankruptcies, and lulls in the business cycle. These situations present cases where neither the employer nor the employee has engaged in any misconduct. Instead, both employer and employee may even have hoped to maintain an employment relationship but cannot on account of reasons beyond the control of both parties.

These circumstances naturally lead to the following question for workplace law professors and policy makers: What is the law’s role in protecting individual workers who are economically harmed in these circumstances? From the workers’ viewpoint, the law may protect many

\textsuperscript{46} Smith v. Frye, 488 F.3d 263 (4th Cir. 2007). Government employers are not motivated by profits in the traditional sense. Government bureaucrats instead make decisions based upon “salary, perquisites of the office, public reputation, power, patronage, ease of managing the bureau, and ease of making changes.” William A. Niskanen, The Peculiar Economics of Bureaucracy, 58 AM. ECON. REV. 293, 293-94 (1968). This may explain the seeming arbitrariness of Smith and suggests perhaps an additional reason for why the at-will doctrine is particularly inappropriate in such workplaces.

\textsuperscript{47} For example, Richard Epstein has written,

The employer who decides to act for bad reason or no reason at all may not face any legal liability under the classical common law rule. But he faces very powerful adverse economic consequences. If coworkers perceive the dismissal as arbitrary, they will take fresh stock of their own prospects, for they can no longer be certain that their faithful performance will ensure their security and advancement. The uncertain prospects created by arbitrary employer behavior is functionally indistinguishable from a reduction in wages unilaterally imposed by the employer. At the margin some workers will look elsewhere, and typically the best workers will have the greatest opportunities.

things, most of which can be classified as post-termination or pre-termination policies. Below, I touch upon what post-termination solutions might look like before focusing on the primary subject of this paper – pre-termination solutions to the problem of economic job loss.

2. Post-Termination Solutions: Substitute Jobs or Income Replacement?

On the post-termination-side, aside from doing nothing (letting the free market work itself out), policymakers may choose to intervene to protect the worker’s income stream in one of at least three ways. First, the law could encourage entrepreneurship by providing, among other things, tax credits or some other subsidy to nascent businesses. For example, the state of West Virginia encourages entrepreneurship by giving free legal counsel to emerging businesses in the state. The West Virginia University College of Law Entrepreneurship Law Clinic makes it less costly for start-up companies to incorporate and operate, which should have some effect on unemployment. Second, the law could provide alternative work for the unemployed. This solution would likely be coupled with job training, retraining, and cross-training. Third, the law could provide some form of economic benefit unattached to work.

The second solution, providing work for the displaced worker, has not found widespread support as a legal or economic policy in the United States. As a threshold matter, the United States does not, as a matter of federal policy or the policy of any individual state, guarantee full employment.49 There is no constitutional or statutory right to work, let alone a right to work at the job of an employee’s choice.50 Nor has the

48. For a description of the Entrepreneurship Clinic, see <http://law.wvu.edu/public_service/elc>. These corporate solutions are an important part of the dialogue but are well beyond the scope of this paper, which focuses on labor and employment law policies.

49. Indeed, the United States does not even guarantee full employment in the economic sense. In particular, it is not a matter of national economic policy to equate actual unemployment to the natural rate of unemployment. See Robert J. Gordon, _The Time-Varying NAIRU and its Implications for Economic Policy_, J. ECON. PERSP., Winter 1997, at 11, 15; see also Robert E. Hall et al., _Why Is the Unemployment Rate So High at Full Employment?_ 1970 BROOKINGS PAPERS ON ECON. ACTIVITY 369, 370 (citing Milton Friedman, _The Role of Monetary Policy_, 58 AM. ECON. REV. 1 (1968) and Edmund S. Phelps, _The New Microeconomics in Inflation and Employment Theory_, 59 AM. ECON. REV. 147 (1969)).

50. By contrast, Italy “recognizes the right of all citizens to work.” CONST. [Constitution] art. IV, cited in INTERNATIONAL LABOR AND EMPLOYMENT LAWS 6-1 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009); see also Int’l Labour Org. (ILO) Constitution, Declaration Concerning the Arms and Purposes of the International Labour Organization, art. III, May 10, 1944, 49 Stat. 2712, 15 U.N.T.S. 35 (Annex to ILO Constitution) (reaffirming the fundamental principle that I(a) “labour is not a commodity”; and recognizing the solemn obligation of the organization to further programs that will achieve III (a) “full employment and the raising of standards of living”; III(b) “the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being”; and III(d)
United States established a labor policy of forcing employers to maintain jobs\textsuperscript{51} – a strategy that is seemingly incompatible with the values of a capitalist-based economy.\textsuperscript{52}

Nor has the United States typically chosen to protect its workers’ income streams by providing either redundant or displaced workers with substitute jobs.\textsuperscript{53} A weaker form of this right would provide (pre- or post-termination) cross-training opportunities for workers so that a worker has a better chance of finding another job on his or her own because he or she has a more diverse package of skills to offer potential employers.

But the United States has not altogether ignored the problems created by job loss. It has instead focused on the third solution – providing unemployment benefits. In particular, by enacting the Social Security Act of 1935,\textsuperscript{54} Congress has instead established legislation that focuses primarily on providing a safety net for workers who, through no fault of their own, have lost their jobs. This safety net, which is typically cast by the states, includes unemployment compensation for laid-off workers. The federal government encourages the states to provide this net through a

\textquotedblleft policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection	extquotedblright).

\textsuperscript{51} But see David I. Levine, \textit{Just-Cause Employment Policies in the Presence of Worker Adverse Selection}, 9 J. LAB. ECON. 294 (1991) (arguing that government-mandated just-cause employment policy would increase efficiency so long as that policy is implemented as a matter of national employment policy).

\textsuperscript{52} In the view of many law and economics academics, forcing an employer to maintain jobs regardless of the employer’s interests violates basic free market principles by taking away both the employer’s and the employee’s freedom to enter an at-will employment relationship. Epstein, \textit{supra} note 47. Mainstream neoclassical economists seem to agree with this assessment. For example, according to Milton Friedman,

\textit{[t]he possibility of co-ordination through voluntary co-operation rests on the elementary – yet frequently denied – proposition that both parties to an economic transaction benefit from it, provided that the transaction is bi-laterally voluntary and informed. Exchange can therefore bring about co-ordination without coercion. A working model of a society organized through voluntary exchange is a free enterprise exchange economy – what we have been calling competitive capitalism. . . . [C]o-operation is strictly individual and voluntary provided: (a) that enterprises are private, so that the ultimate contracting parties are individuals and (b) that individuals are effectively free to enter or not to enter into any particular exchange, so that every transaction is strictly voluntary.}


\textsuperscript{53} Although the United States has not resorted to such a policy as standard operating policy, it has resorted to such a policy during grave economic circumstances. For example, in 1933, Congress established, as part of President Franklin D. Roosevelt’s New Deal policy, the Civilian Conservation Corps (CCC), a public work relief program to provide vocational training for unemployed young men. CCC Act of 1937, Pub. L. No. 75-163, 50 Stat. 319 (1937).

\textsuperscript{54} The original Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), has been significantly amended. A thorough discussion of the United States social security system is beyond the scope of this paper.
system of tax incentives.\textsuperscript{55} In addition to establishing programs for the unemployed,\textsuperscript{56} Congress has also established social security programs for the elderly,\textsuperscript{57} for needy families with children (along with other child welfare programs),\textsuperscript{58} for veterans,\textsuperscript{59} for the aged, blind and disabled,\textsuperscript{60} and other programs.\textsuperscript{61}

3. Pre-Termination Solutions: Information, Bargaining and Consultation Rights

a. Overview: Alternatives to At-Will Employment

On the pre-termination side, aside from setting up a default rule making it legally easy for employers to terminate employees for any reason, including economic reasons (e.g., the at-will employment doctrine), policymakers may choose to intervene to help workers who are in danger of losing their jobs in at least five ways. First, the law could compel employers to provide workers with notice of job loss. Second, the law could require employers to provide workers with information relevant to understanding the possibility of job loss. Third, the law could also compel employers to consult with workers or their representatives about the decision to terminate those workers. Fourth, the law could compel employers to bargain with workers either before deciding to terminate those workers or about the effects of the decision to terminate workers. And finally, the law could require employers and workers to work together to determine how best to resolve issues of job security. The type of procedural roles for the law can be mapped as follows:

\begin{itemize}


\end{itemize}
In the United States, these rights can be found in two sources of law. First, federal law (and in some cases state law) requires employers to provide advance notice of certain mass economic dismissals. Second, labor law statutes impose on employers a duty to bargain and a duty to furnish relevant information. I look to the European Union to discuss the idea of pre-decisional consultation. The discussion below is organized accordingly.

b. Notice and the WARN Act

In 1988, Congress passed the WARN Act, a law that became effective on February 4, 1989. The purpose of the WARN Act is to

- protect workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs.
- WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

62. Oxford Professor Mark Freedland used a similar rubric in discussing these ideas in his graduate law course, International Labor and Employment Law, which he co-taught with Professors Paul Davies and Sandra Fredman during the mid-1990s.


64. The relevant laws here are the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1) and (5) (2006), and the Railway Labor Act of 1926, 45 U.S.C. §§ 151-88 (2006). This article focuses on the duty to bargain under the NLRA.


66. 29 U.S.C. §§ 2101-09 (2006). For an excellent discussion of the WARN Act, see Arnow-Richman, supra note 38. In that article, Professor Arnow-Richman recommends universal notice, among other things. And, like my recommendation, she would broadly extend the notice requirement to encompass more workers.

At the time, the WARN Act was viewed as a "compromise between the workers’ need for advance notice and the concerns of business."68 On the one hand, policymakers recognized that "workers and their families [needed] some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market."69 Indeed, by requiring that notice be given not only to affected employees or their representatives but also to the state dislocated worker unit, "WARN notice begins the process of assisting workers who will be dislocated," by "encourag[ing] maximum coordination of the actions and activities of [the federal programs designed to assist dislocated workers] to assure that the negative impact of dislocation on workers is lessened to the extent possible."70 On the other hand, employers were concerned that "providing advance notice would be costly" – a concern that has not borne fruit.71

The WARN Act provides a narrow claim-right to workers by placing a statutory duty on covered employers to provide written notice at least sixty days in advance of a plant closing or mass layoff. In particular, the WARN Act forbids statutory employers from "order[ing] a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order."72 Under the WARN Act, employers must notify each affected statutory employee (or his/her representative); the State dislocated worker unit; and the local government where the plant is located.73

The WARN Act confers a fairly narrow statutory right on workers.74

70. Id. at (f). For example, the Department of Labor administers the Trade Adjustment Assistance Program (TAA), a federal program established by the Trade Act of 1974, 19 U.S.C. §§ 2101-2479b (2006), which helps workers who have lost their jobs as a result of foreign trade. The Department of Labor also administers the Economic Dislocation and Worker Adjustment Assistance (EDWAA) Program, a federal program established through the Job Training Partnership Act of 1982, Pub. L. No. 97-300, 96 Stat. 1322, that provides occupational training, placement assistance, job search services, job counseling, remedial education, relocation allowances, and other support services to dislocated workers.
71. U.S. GEN. ACCOUNTING OFFICE, supra note 68, at 6, 33.
73. 20 C.F.R. § 639.6 (2009). The statute provides that the employer must provide written notice (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and (2) to the State dislocated worker unit . . . and the chief elected official of the unit of local government within which such closing or layoff is to occur.
As a threshold matter, the employer's duty to notify is limited to the following circumstances. First, that duty is placed only on employers who have 100 or more full-time workers. And the duty to provide notice is potentially triggered in only two circumstances: a plant closing and a mass layoff. Based on these statutory definitions, the following businesses potentially have obligations under the WARN Act: (1) businesses that employ 100 or more full-time workers that effectuate a plant closing resulting in the layoff of at least fifty full-time workers; and (2) businesses that employ 100 or more workers that effectuate a reduction in force of at least one-third of the workforce (for businesses laying off fewer than 500 workers) or for a total of 500 workers.

The WARN Act only protects statutory employees who have suffered an "employment loss," which the Act defines as "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period." Temporary layoffs of less than six months and work hours reductions of not more than 50 percent of hours worked do not constitute an employment loss.

description of the covered employer's duties under the WARN Act by way of background and in the context of holding that state law provides the limitations period for civil actions brought to enforce the WARN Act).


76. The WARN Act defines a plant closing as

the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding part-time employees.


77. The WARN Act defines a mass layoff as

a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for

(i) (I) at least 33 percent of the employees (excluding any part-time employees); and

(ii) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees).


80. But see 29 U.S.C. § 2101(b) (2006) (excluding various circumstances from the definition of
There are also many exceptions to what constitutes an employment loss. Perhaps the most troublesome exception (from the employee's point of view) is the transfer exception. Under this regulation, an employee who loses his or her job because he or she refuses to accept a transfer within a reasonable commuting distance does not suffer an employment loss for purposes of the WARN Act.81

The extent to which the WARN Act buys into a unitary system of industrial relations – a system of industrial relations in which the employer is the main, if not sole, authority of workplace decision-making – is made clear not only by the narrow claim-right conferred by the Act but also by its exceptions. In particular, the WARN Act “sets forth three conditions under which the notification period may be reduced to less than 60 days:”82 (1) the unforeseeable business circumstances exception;83 (2) the faltering company exception;84 and (3) the natural disaster exception.85

Under the unforeseeable business circumstances exception, “[a]n employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.”86 To satisfy its burden, the employer must establish that (1) the circumstance was unforeseeable and (2) the layoffs were caused by the circumstance.87

The Department of Labor has promulgated regulations clarifying that an “important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer’s control.”88
the right circumstances, examples of such an action or condition might include the "unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn." The regulations further instruct that the test for foreseeability "focuses on an employer’s business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market." But the WARN Act does not require the employer to be able "to accurately predict general economic conditions that also may affect demand for its product or services." The faltering company exception applies only to plant closings. Under that exception, an employer may order a plant closing before the conclusion of the sixty-day period, thereby reducing the notice to employees where (1) the employer was actively seeking capital at the time that sixty-day notice would have been required; (2) there was a realistic opportunity to obtain the financing sought; (3) the financing would have been sufficient, if obtained, to enable the employer to keep the facility open for a reasonable period of time; and (4) "the employer reasonably and in good faith . . . believed that giving the required notice would have precluded the employer from obtaining the needed capital or business." Under the natural disaster exception, "[n]o notice . . . shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently raving the farmlands of the United States." To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.

89. Id.
90. Id. at (b)(2).
91. Id.
92. Id. at (a).
93. The full text of the exception is as follows:
   An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

94. Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1009 (9th Cir. 2004) (quoting 20 C.F.R. § 639.9(a)(4) (2003)); see id. (finding that the company failed to qualify for the faltering company exception because it failed to produce evidence that giving notice would have precluded the company from obtaining credit from the bank).
96. 20 C.F.R. § 639.9(c)(2) (2009).
These three conditions or exceptions are affirmative defenses; therefore, the “employer bears the burden of proof that conditions for the exceptions have been met.” An employer relying on one of these defenses “shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.” But once the employer has met its burden of proving one of these conditions as a defense, the employer’s liability is reduced. In other words, the very real and tangible effects of the unforeseeable business circumstance, the company’s faltering financial condition, and the natural disaster are borne not by the employer, who arguably is in a better position to bear those burdens, at least with respect to the unforeseeable business circumstances and faltering company exceptions. Rather, those burdens are borne by the workers.

The WARN Act does require employers to give notice to employees regardless of whether those employees are unionized. In particular, the WARN Act requires employers to notify “each representative of the affected employees . . . or, if there is no such representative at that time, to each affected employee.” In that way, the WARN Act potentially covers many more employees than other federal statutes, such as the NLRA and the Railway Labor Act, the purpose of which are to protect union employees in these circumstances. But as shown below, the rights conferred on employees protected under the NLRA are much more extensive.

99. Arnow-Richman, supra note 38 (critiquing the unforeseen business circumstances defense on similar grounds and arguing that where unforeseen circumstances preclude advance notice to employees, employers should be required to pay severance instead).
100. Id. at (a)(1). Under the WARN Act, the employee representative of unionized workers is the exclusive representative of employees within the meaning of the National Labor Relations Act, 29 U.S.C. § 159(a) (2006) or id. § 158(f), or the Railway Labor Act, 45 U.S.C. § 152 (2006); see 20 C.F.R. § 639.3(d) (2009) (clarifying the statutory term, “representative”); see also United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 548-50 (1996) (holding that the WARN Act authorizes unions to sue for damages on behalf of their employee members and that unions have standing to bring a WARN action on behalf of their members).
101. For purposes of this article, I focus exclusively on the rights conferred upon employees under the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2006).
c. The NLRA’s Negotiation Solution: Information Requests Coupled with Decisional and Effects Bargaining

i. Introduction

The NLRA forbids employers from discharging employees because of their union activity. In that way, the NLRA’s discrimination provision can be viewed as a federal exception to the at-will doctrine. But while the question whether an employer may discriminate against employees because of their union activity implicates the job security of those employees harmed by an employer’s union animus, it does not present the question of economic job security. Suppose instead that an employer discharges employees not because of their union activity, or out of union animus, or even because they have engaged in activity protected under Section 7 of the NLRA. Imagine instead that the employer of a unionized workforce simply wants or needs to lay off employees. What protections does the NLRA offer those unionized employees?

The answer to that question generally turns on the construction of NLRA Section 8(a)(5) as interpreted by the National Labor Relations Board (NLRB) and reviewing appellate courts. The answer to that question also depends on the context in which the layoffs arise; for example, whether the layoffs were part of a plant closing, a subcontracting arrangement, or under a collective-bargaining agreement, just to name a few of the most significant circumstances under which this question may arise. The answers to those questions are reviewed below.

ii. The Duty to Bargain Means the Mutual Obligation to Bargain in Good Faith with a View Toward Reaching an Agreement

Section 7 of the NLRA grants employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” NLRA Section 8(a)(5) makes it an unfair labor practice for employers “to refuse to bargain collectively with the representatives of [their] employees.” NLRA Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce

102. Id. §§ 157, 158(a)(3) and (1).
103. Id. § 157.
104. Id. § 158(a)(5).
employees in the exercise of [their Section 7 rights]." 105

NLRA Section 8(d) defines the duty to bargain collectively as
the performance of the mutual obligation of the employer and the
representative of the employees to meet at reasonable times and confer in
good faith with respect to wages, hours, and other terms and conditions
of employment, or the negotiation of an agreement, or any question
arising thereunder, and the execution of a written contract incorporating
any agreement reached if requested by either party. 106

The duty to bargain "does not compel either party to agree to a proposal or
require the making of a concession." 107

Section 8(d) defines the contours of the statutory duty to bargain,
which limits mandatory bargaining "to wages, hours, and other terms and
conditions of employment." 108 The Supreme Court has defined these
mandatory subjects of bargaining as those matters that are "plainly
germane to the 'working environment'" 109 and "not among those
'managerial decisions, which lie at the core of entrepreneurial control.'" 110
The Court has further observed that the matters that are subject to
mandatory bargaining are numerous. 111 Mandatory subjects broadly
include, among other things, overtime and other pay, 112 bonuses, 113
pensions and other employee benefits, 114 wage increases, 115 work schedules

105. Id. at (a)(1).


107. 29 U.S.C. § 158(d); see H. K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970) (holding that although the NLRA authorizes the NLRB to require employers and unions to negotiate, "it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement"); NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 487 (1960) (interpreting Section 8(d) as "an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements"); NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952) (clarifying that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements").


110. Id. at 498 (quoting Fibreboard Paper Prods. Corp., 379 U.S. at 223 (Stewart, J., concurring)).


113. NLRB v. Frontier Homes Corp., 371 F.2d 974, 978-79 (8th Cir. 1967) (bonus plan that was part of company's compensation structure is a mandatory bargaining subject); Union Mfg. Co., 76 N.L.R.B. 322, 324 (1948) (bonuses and vacations).

114. Inland Steel Co., 77 N.L.R.B. 1, 4-8 (1948) (pension and retirement plans), enforced, 179 F.2d 247, 251-55 (7th Cir. 1948).

including working hours and work day, work assignments, seniority, promotions, transfers, dress code, work and discipline rules, health and safety rules, drug testing policies, and grievance and arbitration procedures.

To paraphrase Professor Summers, that means that, if the union wants to talk about these subjects, the employer is obligated to bargain with the majority union to impasse in good faith with a view toward reaching agreement.

iii. The NLRA Does Not Require Employers to Bargain over the Decision to Close a Plant but Employers Are Required to Bargain over the Effects of that Decision

More pertinent to the question whether the NLRA protects the job security of unionized employees is the following: Although layoff practices and subcontracting are mandatory subjects of bargaining, the

116. Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 691 (1965) (working hours and workdays: "[T]he particular hours of the day and the particular days of the week during which employees shall be required to work are subjects within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain"); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 529 n.4 (9th Cir. 1968); NLRB v. Bonham Cotton Mills, Inc., 289 F.2d 903, 904 (5th Cir. 1961) (workloads).


120. Cont'l Ins. Co. v. NLRB, 495 F.2d 44, 50 (2d Cir. 1974) (transfer of six employees from one office to another at a different location).


123. NLRB v. Gulf Power Co., 384 F.2d 822, 825 (5th Cir. 1967) (plant safety rules and practices are mandatory subjects).


127. NLRB v. Frontier Homes Corp., 371 F.2d 974, 979-80 (8th Cir. 1967) (layoff practices are mandatory subjects).

128. Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 215 (1964) (concluding that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is a mandatory bargaining subject); Airo Die
decision to close a plant\textsuperscript{129} is not a mandatory subject. In particular, in \textit{Textile Workers v. Darlington Manufacturing Co.}, \textsuperscript{130} – a case that “echos \textit{MacKay Radio}”\textsuperscript{30} – the Supreme Court held that “an employer has an absolute right to terminate his entire business for any reason he pleases” even if that reason is union animus.\textsuperscript{131} The Court went on to conclude that an employer does, however, violate Section 8(a)(3) when it closes \textit{part} of its business because of union animus – because that decision can be used to intimidate the remaining workers by threatening their job security. The Court left open the question whether an employer’s decision to close \textit{part} of its business for economic reasons without bargaining would violate Section 8(a)(5).

In \textit{First National Maintenance Corp. v. NLRB},\textsuperscript{132} the Court answered that question, concluding that the management decision to shut \textit{part} of its company’s business for purely economic reasons was not, under the facts of that case, a mandatory subject of bargaining. The Court recognized the union’s legitimate “interest in participating in the decision to close a particular facility or \textit{part} of an employer’s operations [as rooted in] its legitimate concern over job security.”\textsuperscript{133} But it nonetheless held that “an employer’s need to operate freely in deciding whether to shut down \textit{part} of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision.”\textsuperscript{134} The Court further held that “the decision itself [to close a plant] is \textit{not} part of \S 8(d)’s ‘terms and conditions’ . . . over which Congress has mandated bargaining.”\textsuperscript{135}

Thus, the test used for determining whether a subject is a management prerogative or a mandatory subject of bargaining is not whether the subject touches upon employment terms or conditions, as the plain language of the NLRA would suggest. Rather, the Court concluded,

\begin{quote}
in view of an employer’s need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining
\end{quote}

\textsuperscript{130}. \textit{Lofaso Lecture Notes}, \textit{supra} note 10, at Apr. 4, 1989 (explaining that the decision runs counter to the NLRA’s plain language).
\textsuperscript{131}. 380 U.S. at 268.
\textsuperscript{132}. 452 U.S. 666 (1981).
\textsuperscript{133}. \textit{Id.} at 681.
\textsuperscript{134}. \textit{Id.} at 686.
\textsuperscript{135}. \textit{Id.} (emphasis in original).
process, outweighs the burden placed on the conduct of the business.\textsuperscript{136}

The Court so concluded even though it found "past instances where unions have aided employers in saving failing businesses by lending technical assistance, reducing wages and benefits or increasing production, and even loaning part of earned wages to forestall closures."\textsuperscript{137} Despite such instances, and despite the "open-endedness" of the NLRA’s plain language, the Court based its conclusion on its own bald assertion that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed."\textsuperscript{138} That assertion reveals the Court’s misunderstanding of bargaining’s role in such cases. The Court fundamentally confused bargaining with co-determination.

The Court also seemed persuaded by the policy argument that imposing on employers a duty to bargain over plant closing decisions would give unions an unfair advantage in the bargaining process: "Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management’s intentions in a manner unrelated to any feasible solution the union might propose."\textsuperscript{139}

The Court’s reasoning confused the union’s role as workers’ advocate in times of industrial peace with the union’s economic power wielded in times of economic warfare. The point at which an employer is considering shutting down part of its facility is a point at which the employer and the workers share a mutual interest to ensure profitability. The union has no interest in harming a business whose life it needs to sustain its members.\textsuperscript{140} That is a very different role that the union plays in cases where negotiations have broken down and in response to the declaration of impasse, the union and its workers strike in a show of economic force designed to move the employer off its bargaining position.

In an attempt to "undo" this perceived harm, the Court in an act of judicial activism compounded its error by violating the NLRA’s plain language and reading into the statute subjects over which employers need "unencumbered decisionmaking." In so holding, the Court not only did violence to the NLRA’s plain language, but also ignored the NLRA’s main

\textsuperscript{136} ld. at 679.
\textsuperscript{137} ld. at 681 n.19.
\textsuperscript{138} ld. at 676.
\textsuperscript{139} ld. at 683.
\textsuperscript{140} Anne Marie Lofaso, The Persistence of Union Repression in an Era of Recognition, 62 ME. L. REV. __ (forthcoming 2010) (discussing this very same confusion in the Bush II Board’s recent September Massacre cases, especially Toering Elec. Co., 351 N.L.R.B. 225, 231 (2007)).
purposes – to equalize bargaining power and to prevent industrial strife. The Court’s decision, which gives employees no voice, no outlet, and no choice, makes industrial strife much more likely.\(^{141}\)

iv. The NLRA Requires Employers to Bargain with Unions over the Effects of Their Decisions to Close Plants

The question whether a topic is subject to mandatory bargaining is plainly very significant. Employers must bargain over mandatory subjects. As the Court long ago recognized,

A refusal to negotiate in fact as to any subject which is within §8(d), and about which the union seeks to negotiate, violates §8(a)(5) though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargains to that end.\(^{142}\)

That means that employers may not make unilateral changes to mandatory subjects without bargaining to impasse. As the Court has insightfully explained, “an employer’s unilateral change in conditions of employment under negotiation is . . . a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal” to negotiate.\(^{143}\)

By contrast, absent prior agreement, an employer may lawfully change, without notice to or bargaining with the union, matters that are not subject to mandatory bargaining. The logical extension of this doctrine seems to suggest that, absent some other doctrine, employers may unilaterally close plants without first talking to unions. But this is not completely accurate.

It is well settled that, although an employer is not obligated to bargain with a majority union over the decision to shut down a plant, it is obligated to bargain over the effects of that decision.\(^{144}\) Effects bargaining must be meaningful; unions are entitled to “as much notice of [a] closing and termination of employees as [is] needed for meaningful bargaining at a meaningful time.”\(^{145}\) Accordingly, “[n]otice on the day of closing is insufficient to give the Union an opportunity to bargain regarding the


\(^{143}\) Id.


\(^{145}\) Willamette Tug & Barge Co., 300 N.L.R.B. 282, 283 (1990); accord NLRB v. Compact Video Servs., Inc., 121 F.3d 478, 482 (9th Cir. 1997).
effects of the closing." The duty to engage in "effects bargaining" remains even after the plant has closed.

v. The NLRA also Requires Employers to Furnish Relevant Information to Unions

It is well settled that an employer’s duty to bargain in good faith with the majority union "includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees’ bargaining representative." This duty includes the duty to furnish information relevant to negotiations. An employer’s failure to furnish relevant information upon request is viewed as "conflict[ing] with the statutory policy to facilitate effective collective bargaining."

The employer’s duty to produce information is triggered if the information is relevant. In determining whether requested information is relevant, the NLRB need only find a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." The standard for determining whether information is relevant to the union’s bargaining obligations is a liberal "discovery-type standard." "A broad disclosure rule is crucial to full development of the role of collective bargaining" under the NLRA because "[u]nless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiations cannot occur."

Information sought in furtherance of effects bargaining is presumptively relevant. As reviewing courts have observed, certain information is considered "so intrinsic to the core of the employer-employee relationship as to be presumptively relevant." And

146. Asher Candy, Inc. v. NLRB, 258 F. App’x 334, 334 (D.C. Cir. 2007).
147. United Food & Commercial Workers v. NLRB, 519 F.3d 490, 495-96 (D.C. Cir. 2008).
149. For example, an employer’s refusal to furnish information to substantiate an inability to pay violates the duty to bargain. Truitt Mfg. Co., 351 U.S. at 152.
150. Acme Indus. Co., 385 U.S. at 437; see also Detroit Newspaper Printing & Graphic Commc’ns Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979) (information is relevant if it is germane and "has any bearing on the subject matter of the case").
151. Acme Indus. Co., 385 U.S. at 437 (citing 4 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE §§ 26.16(1), 1175-76, 1181 (2d ed. undated)).
152. Detroit Newspaper Printing & Graphic Commc’ns Union, 598 F.2d at 271 (D.C. Cir. 1979) (information is relevant if it is “germane” or if it “has any bearing on the subject matter of the case” (internal quotation marks omitted)).
"[i]nformation directly relevant to mandatory subjects of bargaining is 'presumptively relevant,' and must therefore be disclosed unless it is plainly irrelevant."\(^{156}\)

The duty to furnish information is vital to meaningful effects bargaining. After all, the union is under an obligation to bargain over the effects of a plant closing, which necessarily means the effects of job loss. As the Court observed in the context of an employer's asserted inability to pay a wage increase, "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims."\(^{157}\) This observation is no less true in the context of a plant closing, especially where the employer may be claiming economic reasons for closing the plant and the likely subjects on the bargaining table would include severance pay.

d. A Comparative Look at the Consultation Requirement Under the European Collective Redundancies Directive: Consulting with Workers' Representatives with a View to Reaching an Agreement

The European Union has taken a more cooperative approach to resolving problems associated with mass economic dismissals. In legislation that values "talk," the European Union expresses both its concern with painting a human face on its integrated economic system while also maintaining a competitive trading block in this increasingly global economy.

The first employment laws to come out of the European Union (EU)\(^{158}\) can be traced to the 1972 Declaration of the Heads of State or Government in Paris, in which the EU Member States declared that they "attached as much importance to vigorous action in the social field as to the achievement of economic union . . . [and thus] it is essential to ensure the increased involvement of labour and management in the economic and social decisions of the Community."\(^{159}\) The 1972 declaration led directly to


158. At the time, the EU was known as the European Economic Community (EEC). Moreover, the EEC has had several names, including the European Community (EC), depending upon which treaty is in effect and other conditions. For simplicity's sake, I refer to the EEC and the EC as the EU throughout.


This social face being painted on Europe also had its roots in the European Court of Justice's (ECJ) interpretation of Treaty of Rome Article 119, which declared in part that "[e]ach Member State
the EU’s first Social Action Programme – the Social Action Programme of 1974 (SAP 1974). Three (economic) employment directives were the direct result of the SAP 1974.

Based on those three original employment directives, the European Union (EU) now regulates to some extent workers’ rights in three types of circumstances involving economic dismissals: collective redundancies; business reorganizations and transfers; and insolvency. In this article, analysis focuses on the Collective Redundancies Directive.

The Collective Redundancies Directive was the first of the SAP 1974 economic proposals to obtain the force of law. In 1975, the European
Economic Community (as it was then known) enacted the Collective Redundancies Directive. Since that time, the Directive has been amended and then consolidated as recently as 1998.

The current version of the Directive applies to collective redundancies, defined as

(a) . . . dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:
   - at least 10 in establishments normally employing more than 20 and less than 100 workers,
   - at least 10 percent of the number of workers in establishments normally employing at least 100 but less than 300 workers,
   - at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.\(^{166}\)

By defining “collective redundancies” in this exclusive manner, the Collective Redundancies Directive, just like the WARN Act, exempts small businesses from coverage. But coverage under the Collective Redundancies Directive is potentially broader. Businesses employing at least twenty workers are potentially covered by the Directive. By contrast, the WARN Act potentially places duties only on businesses employing at least 100 workers.\(^{167}\)

Moreover, like the WARN Act, the protections provided by the Collective Redundancies Directive are triggered by mass dismissals. But once again, the coverage under the Collective Redundancies Directive is broader because those protections are triggered by a lower threshold. For example, in a business that employs 100 workers, the Collective Redundancies Directive protects workers if that employer lays off ten workers over a thirty-day period.\(^{168}\) By contrast, that same employer in the United States would not have any duties under the WARN Act until it had laid off at least thirty-four workers over a thirty-day period or had closed a plant in which at least fifty full-time workers had been laid off.\(^{169}\)

As a matter of the substantive nature of the rights granted in both jurisdictions, the Collective Redundancies Directive requires almost

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everything required by U.S. federal labor law and more. As shown below, the Directive starts with the premise that employers are compelled to discuss the possibility of redundancies prior to making a decision about redundancies. The Directive further compels employers to notify the competent public authority and the workers’ representatives about projected redundancies for the purpose of seeking solutions to the problems raised by the possibility of the redundancies. To make discussions meaningful, the notification must contain all relevant information. In this way, unlike U.S. federal laws, which resist dislodging the decision to layoff from residing within the core entrepreneurial control of management, the Collective Redundancies Directive takes a more labor-management cooperative approach to the layoff decision and its effects.

Unlike the WARN Act, which requires employers to give employees (or their representatives) advance notice of a mass layoff or plant closing that has already been decided by management, and unlike the NLRA, which requires employers to bargain with employee representatives over the effects of a plant closing or at best the decision to lay off unionized employees in some very limited circumstances, the Collective Redundancies Directive requires consultation with the workers’ representatives prior to a decision being made. Directive article 2(1) provides:

Where an employer is contemplating collective redundancies, he shall begin consultations with the workers’ representatives in good time with a view to reaching an agreement.

The obligations placed on employers are significant in two ways. First and significantly, the Collective Redundancies Directive places on employers a duty to consult “with a view to reaching an agreement.” Given the Directive’s language choice, this consultation right seems to be at least coextensive with the federal right to bargain under the National Labor Relations Act and perhaps even greater than the right granted under the NLRA. Federal courts interpreting NLRA Section 8(d)’s definition of the bargaining duty have made clear that the duty to bargain does not include the duty to come to agreement. Perhaps this is why Professor

172. Id.
174. See H. K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970) (holding that although the NLRA authorizes the NLRB to require employers and unions to negotiate, “it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement”); NLRB v. Ins. Agents’ Int’l Union, 361 U.S. 477, 487 (1960) (interpreting Section 8(d) as “an attempt by Congress to prevent the Board from controlling the settling of the terms of collective
Summers, in describing the duty to bargain under Section 8(d) always referred to it as obligating the parties to bargain in good faith with “a view toward reaching agreement.” The use of the preposition “toward” suggests a duty to come close to agreement but not a duty to close the deal.

Second and also significantly is the timing of the duties in the two jurisdictions. Under the Collective Redundancies Directive, the duty to consult is triggered not once the decision to layoff is a fait accompli but is “imposed on the employer . . . prior to the employer’s decision to terminate employment contracts.”175 In particular, the “consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken.”176 By contrast, under federal law, the duty to notify or bargain typically is imposed once a decision is made. And the duty to supply relevant information under federal labor law is imposed upon request by the union.

Article 2(2) of the Directive once again highlights that the imposed duties are triggered prior to any decision being made. The Directive does this by fleshing out the required subjects of discussion during consultations:

These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.177

The Directive thereby promotes bringing the affected parties together in an effort to find a social solution to an economic problem, by forcing employers and employee representatives to discuss ways to avoid or reduce the redundancies and ways to mitigate the accompanying social and economic consequences of redundancies.

Article 2(3) of the Directive also attempts to ensure that these discussions are meaningful and productive by ensuring that the workers’ representatives have ample time and ability to make constructive proposals. The Directive does this in much the same way that federal labor law does – by compelling the employer “during the course of the consultations” to

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176. Id. ¶ 48.
177. Collective Redundancies Directive, supra note 8, art. 2.
provide the workers with “all relevant information.” The Directive also requires the employer “during the course of the consultations . . . [to] notify [the workers’ representatives] in writing of:

(i) the reasons for the projected redundancies;
(ii) the number of categories of workers to be made redundant;
(iii) the number and categories of workers normally employed;
(iv) the period over which the projected redundancies are to be effected;
(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefore upon the employer;
(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

To use federal labor jargon, the European Union has effectively made this information per se relevant. Such information provides a useful starting point for the workers’ representatives to begin meaningful consultation about avoiding or mitigating potential layoffs.

Like the WARN Act, the Collective Redundancies Directive also has a notification requirement. In particular, the Collective Redundancies Directive requires employers to “notify the competent public authority in writing of any projected collective redundancies” and to “forward to the workers’ representatives a copy of [that] notification.” The purpose of the notification period is for the “competent public authority to seek solutions to the problems raised by the projected collective redundancies.” The notification period may not be any shorter than thirty days; but in cases where the notification period is less than sixty days, “Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.”

There is no analogous requirement under the NLRA. Unlike the Directive, which expressly authorizes the competent public authority “to seek solutions” to the effects of the projected layoffs, construction of the NLRA has evolved in a way that generally forbids the public agency – the

178. “To enable workers’ representatives to make constructive proposals, the employers shall in good time during the course of the consultations . . . (a) supply them with all relevant information . . . .” Id., art. 2.
179. Id., art. 3.
180. Id.
181. Id., art. 4.
182. Id.
NLRB – from injecting itself into the bargaining process. That distinction is significant. In the United States, absent extreme circumstances, collective bargaining is viewed as an act between employers and the employees’ bargaining representatives. The European Union, by contrast, values the public interest in these matters – a value that is often overlooked under federal labor law.

IV. BORROWING FROM THE COLLECTIVE REDUNDANCIES DIRECTIVE TO MAKE BARGAINING OVER ECONOMIC JOB LOSS MORE MEANINGFUL

This article examines how two jurisdictions have attempted to solve the problem of economic dismissals. One jurisdiction – U.S. federal law – mandates bargaining in good faith with a view toward reaching an agreement over the effects of the decision (and perhaps, in limited circumstances such as subcontracting away bargaining unit work, the decision itself). Federal law mandates such bargaining but only in circumstances where the employees are actually represented by a labor union. In cases where employees are unrepresented, federal law merely requires advance notification of layoff or plant closing. The other jurisdiction – the European Union – mandates employers to consult with the workers’ representatives before any decision is made and with a view to reaching an agreement. And significantly, where the employees are unrepresented, the European Union still requires the employer to consult with the workers by requiring the member states to amend their domestic laws to ensure representation in these circumstances.183 Both jurisdictions require employers to furnish information relevant to the bargaining process.

This was the problem that I told Professor Summers I wanted to think about as a graduate student in England. What is the law’s role in regulating mass economic dismissals? For Professor Summers, the answer would have to be to protect the individual against collective coercion. For him, the answer would lie in minimizing the role of government by maximizing the role of collective bargaining. In my view, as influenced by my great mentor, the solution must enhance the autonomy and raise the dignity of the workers.184 In particular, for me, any solution would necessarily need to enhance worker autonomy by: ensuring employees are sufficiently educated to properly represent themselves; granting employees access to relevant information sufficient for employees to generate a range of options; ensuring employee independence from coercion; and providing

184. My theory on how to do this can be found at Lofaso, supra note 1.
sufficient democratic (participatory) structure to empower workers to effect the necessary changes.185 Any solution would also have to dignify workers by treating each worker with "equal concern and respect in the design and administration of the ... institutions that govern them."186 Those views, Summers' pragmatic and mine more theoretical, land on the same solution: Require employers to bargain in good faith with a view to reaching agreement before any decision to lay off workers has been made.

Of course, this leaves the United States with the same problem that the United Kingdom claimed that it had when, in Commission v. United Kingdom,187 it argued that the Collective Redundancies Directive did not apply to unorganized workforces. When the European Court of Justice felled that argument, it compelled the UK to amend its trade union laws and the structure of its system of collective representation in a manner that shook the British people.188 Since that time, the UK has amended its laws to require employers to consult with "appropriate representatives" of employees who may be affected by a collective redundancy. Appropriate representatives are: "(a) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union, or (b) ... employee representatives elected by them."189

The UK experience tells us that, although Congress could enact legislation based on the Collective Redundancies Directive, the fight would be in providing a mechanism for universal representation, at least on universal representation for purposes of bargaining over mass economic dismissals. Nevertheless, that is precisely what I would recommend. The simplest solution, in my view, is to amend the WARN Act to compel employers to consult with or bargain with employees' representatives over mass layoffs or plant closings with a view toward reaching agreement. In that case, it could define employees' representatives as the UK did: (a) elected by employees designated for possible layoff; (b) unless the employees are represented by a union, in which case, the workers' representatives to be consulted would be the majority union. The problem with this solution (the UK solution) is the following: in the case of the

185. Id. at 40-42.
186. Id. at 49 (quoting RONALD DWORIN, TAKING RIGHTS SERIOUSLY 181 (1977) and citing JOHN RAWLS, A THEORY OF JUSTICE, 504-12 (1972)).
unorganized workforce, it provides bargaining representatives with very little time to organize themselves in preparation for meaningful bargaining. Indeed, that group may be rather diverse and have very little in common (other than foreseeable job loss) that would permit meaningful bargaining as would ordinarily be required by federal labor law's community of interest test.\footnote{190}

An alternative to the UK solution might be to amend the NLRA to mandate certain forms of worker organizations for specific purposes — an ad hoc bargaining committee of sorts. The mechanisms for electing full-range majority bargaining representatives would remain intact under Section 9.\footnote{191} And the practice of voluntary recognition can remain intact.\footnote{192} But the newly amended NLRA would also require every statutory employer to voluntarily recognize an ad hoc bargaining committee for purposes of bargaining over mass economic dismissals. The NLRB would have to issue regulations regarding selection of these committees. And because the committee would be long-standing, the NLRB might have to issue regulations regarding re-selection of the committee every year or so. In cases where the parties could not agree, the parties would have to submit their question concerning representation to the NLRB for review and possibly for a Board-conducted election.

This labor-inspired solution has the benefit of enhancing worker autonomy, at least insofar as it grants employees access to relevant information sufficient for employees to generate a range of options and provides sufficient participatory structure to empower workers to effect the

\footnote{190. In defining appropriate bargaining units, the Board “focus is on whether the employees share a ‘community of interest.’” NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985) (citing S. Prairie Constr. Co. v. Operating Eng’rs, 425 U.S. 800, 805 (1976) (per curiam)); see id. at 494-99 (Board did not abuse its discretion in excluding wife of company president and part-owner of company from bargaining unit). The unit need not be the most appropriate. See Am. Hosp. Ass’n v. NLRB, 499 U.S. 606, 610 (1991) (citing 29 U.S.C. § 159(a) (1988)).}

\footnote{191. 29 U.S.C. § 159(a) (2006).}

changes necessary to circumvent or reduce layoffs.\textsuperscript{193} It also dignifies workers by allowing them to participate in a decision affecting their work life. But it has the potential problem of undercutting union representation more generally, which may have the unintended consequence of diminishing overall worker autonomy and de-dignifying other workers. Accordingly, this solution may work best if broadened – a subject for a future paper.

A third alternative, which I do not recommend, is to allow the employer to choose the representatives. The problem with this solution is that does very little to enhance worker autonomy or dignity to the extent that the committee becomes merely a tool for management. Moreover, such a committee would likely violate Section 8(a)(2) of the NLRA.\textsuperscript{194} Indeed, just as Professor Summers pointed out in the replacement worker context of MacKay Radio\textsuperscript{195} and again in the lockout context presented in American Ship Building,\textsuperscript{196} that solution gets the incentives wrong because it allows the employer to make a significant decision about the economic fate of its workers in circumstances where the union is weak. That policy hardly enhances the NLRA's goal of equalizing bargaining power, but rather exacerbates the inequality of power between the employer and its workers.\textsuperscript{197}

V. CONCLUSION

Late in the semester of my first-year labor law course, Professor Summers, with the benefit of having taught that course under every variation of the NLRA, including the Wagner Act itself, revealed his assessment of twentieth-century labor law. In his view, the United States had “adopted a system of free collective bargaining in the 1930s. But after fifty years, we do not have a system of free collective bargaining that touches 80 percent of the labor market. Overall, we have failed in the purposes of the Wagner Act.”\textsuperscript{198} Summers then asked: “What do you do when you don’t have collective bargaining?” Answering his own question, he said,

lots of government regulation. . . . Collective bargaining [was] meant to

\textsuperscript{193} Lofaso, \textit{supra} note 1, at 40-42.
\textsuperscript{194} 29 U.S.C. § 158(a)(2) (2006) (forbidding employers from “dominant[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it”).
\textsuperscript{195} 304 U.S. 333 (1938).
\textsuperscript{196} 380 U.S. 300 (1965).
\textsuperscript{197} Lofaso Lecture Notes, \textit{supra} note 10, at Jan. 31, 1989.
\textsuperscript{198} \textit{Id.}, at Mar. 2, 1989.
solve problems but because collective bargaining has not done it ... now it is being done by [statutory regulation]. Because 80 percent of the people are not protected, even though all unions have provisions against discharge without just cause, there are statutes that reiterate this. 199

So how do my proposed solutions fare under the Summers test? The possibility of extending collective bargaining to more workers would likely appeal to my mentor. But do any of those solutions protect the individual from collective sources of coercion? The very question – how can the law protect employees in the case of impending mass economic dismissals – lends itself to a Summers-like conclusion. After all, few events in workers’ lives are more coercive than being told that they are being terminated through no fault of their own. The solution – allowing employees to participate in discussions about impending mass layoffs with a view toward circumventing, reducing, or mitigating those dismissals – both dignifies the workers and allows them to become part authors of their work life. These workers need not “follow or be out” to paraphrase Summers’ view of the typical worker’s choice under an authoritarian employer in a unitarist system of industrial relations. 200 Instead, these solutions empower workers to take control of their destinies by helping to save their jobs and the businesses that employ them. By requiring employers to consult workers’ representatives in circumstances of possible layoffs, the law gives a “voice” to employees. And, as Summers points out, “talking is worthwhile” because it empowers workers by taking away power from employers, in this case the power to unilaterally decide their fate. 201 My tribute to Professor Summers then is to thank him for dignifying workers and for believing that the working class is intelligent enough to participate fully in decisions affecting our working lives.

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199. Id.