VI

THE TREND TOWARD LAW

THE PERIOD since World War I has been characterized in America by a tendency to rely upon laws as easy ways to reach desired objectives. This tendency is one which should deeply concern anyone involved in the relations between employers and employees. Some of its most radical expressions have been in this field.

Of course, it is implicit in the American tradition that ours is a government of law. Only in rare emergencies have we attempted to entrust broad powers to rulers or officials, which would permit them to govern by decree. Even the powers of the state and the nation are limited by laws, which have the primary purposes of protecting individual freedom and promoting the general welfare. It is when these two primary purposes seem to conflict that we burden ourselves with futile and impractical statutes.

The emergency legislation growing out of World War I may be looked upon as an exceptional incident in our history of laws. The Prohibition experiment may well be considered as marking the beginning of the present trend. It seems fair to admit that both the Eighteenth Amendment and the statutes based upon it were sincerely advocated as measures to promote the general welfare. Regardless of the fact that their enactment was strictly in accordance with our basic constitutional procedure, the majority of Americans believed, sooner or later, that these were laws which unduly invaded the freedom of the individual. When the majority had the opportunity to express itself, the Eighteenth Amendment was repealed, and the statutes based upon it disappeared.

Although we accept the Prohibition laws as the beginning

of the present trend, some of the laws dealing with relations between employers and employees were actually earlier. A few federal statutes, and many of the state laws, date from the years before World War I. A sufficient example would be the laws governing industrial safety and workmen's compensation for industrial injuries. It is difficult for many of us today to realize that such measures excited bitter controversy less than forty years ago. They were challenged as fundamental violations of the constitutional guarantees of liberty. Many state constitutions had to be amended to make the laws possible. In general they were found to involve no violation of the Constitution of the United States. In this discussion we are concerned with such laws only as early examples of efforts by law to correct hardships or injustice arising from the relations between employers and employees. They can be easily distinguished from laws insuring the payment of wages, laws providing for mechanics' liens, and many others which were parallel to the usual civil protections.

Aside from the Workmen's Compensation Acts, the first significant effort to create a body of special law dealing with industrial relations was probably the Norris-LaGuardia Act. There is no period when the record shows any widespread legal prohibition of strikes. The general laws protecting property rights and personal rights were effective, over a long period of time, to prevent or punish certain kinds of strikes. The process of injunction was available to prohibit, by court order, any injury which one party threatened to inflict upon another, if a court found that the injury was unjust and sufficiently serious to justify the writ of prohibition. There was a sign of changes to come, in the language of the earlier Clayton Act. But it is broadly correct to say that the relations between employer and employee were governed by the same laws, or at least the same principles of law, as the relations between buyer and seller, between landlord and tenant, or

between the parties to any other transaction involving services, goods, or values of any kind.

With the adoption of the Norris-LaGuardia Act, the relations between employer and employee were distinguished from practically all other forms of civil contract. The protection of the injunction process was denied in cases of labor disputes, with very limited exceptions. Similar laws were soon enacted in many states. The significance to the modern student of industrial relations has nothing to do with the basic propriety of prohibiting or limiting injunctions in labor disputes. It has a great deal to do with the implied and almost explicit declaration that relations between employers and employees constituted a field for the creation of a special body of law, distinct from the laws governing other business relationships. This involved a deliberate acceptance of class legislation as a necessary means to a desirable end.

For almost two generations, groups of employees in America tried to improve their economic and physical working conditions through the organization of trade unions. Essentially these unions were associations of free individuals who voluntarily surrendered portions of their individual freedoms in order to create collective strength. They were generally successful in their efforts, when they had the initial strength which came from voluntary association of substantially all the workers who possessed a particular skill, needed by the community. As the needs of the community changed, during the development of the mass-production industries, such unions were generally unsuccessful in organizing the new type of workers. The setting of the Great Depression and the New Deal gave them an opportunity to acquire legal protection through drastic forms of class legislation. Beginning with the National Industrial Recovery Act and the National Labor Relations Act, the years since 1933 have marked a rapid advance in the trend toward law in the conduct of employee relations. This trend cannot be viewed in proper per-

spective without relating it to some of the popular concepts of the American way of life which date back for many generations.

Spokesmen for the American Way, or the Free Enterprise System, or Capitalism, or Capitalist Democracy, constantly emphasized the fact that America means a high standard of living, and the chance for every one of us to improve his status. They stressed Freedom of Opportunity, the right of every American to choose his own occupation and to advance in that chosen field. They pointed out his right to work, where he chose, at the job he chose, for the wages he chose to accept.

Such spokesmen consistently resisted the efforts of organizations to enforce, on individual workers, any limitations on these freedoms. They saw threats to the fundamental American liberties in the imposition of compulsory union membership, or in concerted action against workers who accepted less than standard wages or working conditions. They feared even more the limitations imposed by law. They recognized the restrictions on individual freedom which are inevitable when government decrees a minimum wage, a limit on daily hours.

Those who sincerely believed both in freedom of opportunity and in a general advance in the individual level of living, eventually found themselves victims of internal conflict and confusion. The mass-production phase of the industrial revolution created a new set of conditions. The old philosophies which combined the objectives of individual freedom and general improvement were not readily adjusted to these new conditions.

At an increasing rate, Americans became employees instead of self-employed workers. They became unskilled and semiskilled workers, instead of craftsmen. They became members of mass groups of employees working for huge corporations, instead of small groups working for individuals, partnerships, or small corporations. Under the new condi-

tions, the opportunity for the individual to improve his own level of living by his own individual effort was greatly restricted. We moved dangerously toward the creation of an actual class in America, composed of a substantial portion of the employed workers, possessing no particular skills, no personal tools, and no property. As this group grew larger, its members became conscious of their common limitations and frustrations. Crusaders arose to awaken them to this consciousness. Efforts were made to use the counterpart of the old trade union of skilled craftsmen as an instrument for collective action to improve the economic condition of the members of the group.

At this stage, the conflict within the mind of the typical American employer became sharp. He believed firmly in the theory of individual opportunity as the foundation of the American system. If he was wise, he recognized the need of widespread prosperity and purchasing power to support the American economy. The combination of these two was in harmony with his dual faith in freedom of opportunity and the improvement of the general welfare. But he looked upon collective action by individual workers as socialistic in nature and as a serious departure from the theory of individual effort.

We still believe that freedom of choice and freedom of opportunity are essential in the spirit of America. We consider this one of the most important beliefs, traditions, or principles which should be planted in the minds of children in our schools, and in our homes. We point out the progress of the common man under our system, which not only exceeds the achievement of any other system, but which far exceeds the rosiest promises of the totalitarians.

We impress upon young Americans that these opportunities for progress are still here. We teach them not only that it is their privilege to advance themselves, but that this effort to advance is their personal obligation to their nation.

We point out that the progress of that nation has been the sum of the progress of all the men and women who have honorably advanced themselves. We demonstrate that this opportunity for progress is the incentive which has led America forward, man by man, until the nation stands at the highest economic level among all nations of the world.

The effect of this teaching is to strengthen the active desire of the average young American to better himself. This is completely in harmony with his natural inclination and inherent self-interest. But his individual attempt to use his opportunity to get ahead brings him into conflict with some other person who is using his opportunity and exercising his rights in the same area of activity. It is not important that there is competition between two who are at the same point in their advances, and racing for the next rung in the ladder. The problem is created when the ambitious young free enterpriser finds that the one who is already ahead can block his progress, and the progress of a lot of others like him.

We encourage every school boy and girl to want and expect a Better Life. We teach that in America, and here alone, there is free opportunity to go after and get that Better Life, and that it is a duty to go after it and get it. Then almost every one of them finds some blockade in his way, some actual or apparent denial of his freedom of opportunity. He still wants the Better Life but he comes to believe, in many cases, that the opportunity is denied, and his ambitions thwarted, by someone else. In most cases, it is easy for him to find others who are similarly thwarted. In the simplest example, he is likely to find a common sense of frustration among those who work with him, for the same employer. There is likely to be a gradual articulation of their feeling and belief that their sacred American right to a Better Life is denied by the owner or the office manager or even the foreman.

We do not want these ambitious but frustrated workers to conclude that they are mistaken in believing that America

is still the "Land of Opportunity." We dare not admit that the American Way is not the way to the Better Life. Yet the evidence of their own experiences seems to deny that greater individual effort, every man for himself, will surely bring to each of them that Better Life.

This is one of the explanations for the long and bitter opposition to the self-organization of mass-production workers. It was an opposition shared by sincere citizens and honest employers. They looked almost with horror upon the suggestion that those who had common ambitions and common frustrations could justly unite their efforts, and make common cause of their advancement. That seemed to contradict the whole theory of individual rights and individual progress. Progress by group action seemed to be socialistic, unionization to be inconsistent with personal liberty. One movement to retard unionization was actually called The American Plan!

A great number of our sincere citizens stood their ground in this negative position for too long a time. They failed to grasp the confusion in their thinking, failed to see the inconclusive handling of the very real problem. If they persisted in repeating the promise of the schoolroom about the Land of Opportunity, the frustrated worker could only be convinced that someone had interfered with the rules of the game as far as he was concerned. The hard-working and ambitious young man was still frequently unable to get ahead. If he tried standing on his own feet for his own rights to his own Better Life, instead of pooling his interests with all the others who were similarly disappointed, he (and the others) still felt that the promise of America was being denied them.

If the frustrated worker had been well taught that America meant the promise of opportunity and the Better Life, he could only conclude that some person or some group was interfering with that promise. He could not make real progress by individual effort, and he was thwarted in his attempts to unite his efforts with others in an organization. The logical

conclusion was that his employer and other employers were interfering with the same freedom of opportunity which these employers preached about.

This changed the worker's grievance into America's grievance. If there had been a personal Uncle Sam to whom the worker could talk, the result would have been easily reached. But Uncle Sam, he understood, was the Senator, the Congressman, the President, or the men who wanted to be in those positions. With perfect logic he turned to them for a joint attack on the mysterious forces which were denying his personal rights and, by the same actions, defeating the purposes of America.

The trend toward law became a trend toward federal law for several reasons. The America which the worker had been taught to believe was the protector of opportunity was a federal America. "We, the people of the United States, in order to . . . promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. . . ." Furthermore, the efforts to use state legislation to remove some of the barriers erected against the advancement of workers toward the Better Life were already proving futile or ineffective.

The trend toward law, and toward federal law, which began to show in the third decade of this century, was at first opposed by the leaders of old-line trade unions. These were men as firmly committed to the status quo as any conservative employer. They had usually achieved a Better Life under the existing rules. They generally represented skilled workers who were automatically somewhat ahead in the race for economic status. They had an inherent skepticism of any effort to improve directly the status of the mass of unskilled or semiskilled workers, even by organization. They believed and preached that the rank and file automatically shared in the benefits of the organized skilled worker. And they certainly objected to any group, skilled or unskilled, leaning on gov-

ernment for the benefits which the unions sought to provide.

They also stood their ground too long. The trend to law swept past them as it swept past the conservative employer. In less than twenty years we have seen federal labor law move out of its traditional fields of railroad and water transportation, the obvious fields of interstate commerce, to deal with every phase of employer-employee relations. The dykes of constitutional limitation stopped the first attempts to prohibit child labor by federal law. While that barrier still held, the concept of federal power in the minds of Supreme Court justices advanced to the upholding of federal laws going far beyond the mild social welfare purposes and powers of the child labor laws.

The existence of a Supreme Court with this new concept of federal power was in itself a dramatic result of the trend to law. The presence of its new members was the result of appointments by a President chosen mainly for his promises to exert the federal powers toward the securing of the Abundant Life for the Common Man. Franklin Roosevelt and the New Deal were dramatic evidence that the Common Man was turning his hopes toward federal law. He had been blocked, in too many cases, in his efforts to achieve the Better Life through personal hard work, or even through organization with his fellow workers.

How far has the trend gone? In the nature of enterprise covered by federal power, it has been extended almost to the shoe-shine stand. It is conceivable that a shoe-shine stand in a railroad terminal used exclusively by interstate trains is an activity "affecting commerce." The contractor erecting a building inside the city limits may be similarly classified. The local electric light company in certain cases is certainly covered by federal law. A downtown office building which is largely occupied by the company which owns it is definitely "in or affecting commerce" if the company business is an interstate activity.

In the nature of the relations covered by the federal power, the trend has gone far, and there is no safe estimate of its limit. It comprehends safety and sanitation, age and sex, wages and hours, selection and retention of employees, definition of "work," and the purchase price of some commodities. The trend has reached to the prohibiting of the selection of employees with regard to union activities, and it points toward the control of selection in relation to race, color, or creed. It makes the purchaser of certain commodities responsible for the wage and hour practices of the producers of the goods he buys.

The Labor-Management Relations Act of 1947 is not a reversal of the trend toward law. It is a radical advance of the trend toward more law. It applies specific prescriptions of law to a body of material which had merely been legislated into the realm of collective bargaining by previous law. It definitely limits the scope of collective bargaining in certain directions, and injects new agencies of government into the collective bargaining process. It sets up statutory processes and even timetables for certain steps in collective bargaining.

The trend toward law has gone far and may go farther. It began because enough people were convinced that the old roads toward the Better Life were blocked, and that if the promise of opportunity was still a proper American dream, it must be protected and implemented by law. The trend was accelerated immeasurably when business itself sought the benefits of the abortive National Industrial Recovery Act.

The laws reflecting this trend, although varying greatly in form and substance, can be classified broadly in two general groups. The first is a group which establishes definite standards or specific benefits for all persons in a given class. This group includes the Fair Labor Standards Act, regulating minimum wage rates, payment of overtime, and, to some degree, the employment of minors. It also includes the provisions of the Social Security Act for unemployment com-

pensation and old-age insurance. It includes specific statutes setting up minimum standards in occupations or industries where the national interest is traditional or obvious: the La Follette Seaman's Act, the Mine Safety Act, and the federal Longshoremen's Compensation Act.

The other broad category includes a number of laws which do not set absolute or minimum standards, but which attempt to place in the hands of workers certain powerful weapons that they can use to win for themselves the standards they want. Some of these are negative laws to prohibit interference with the collective efforts of workers to advance their standards. In this category we find the Norris-LaGuardia Anti-Injunction Act, the Wagner Act, and most features of its successor statute, the Taft-Hartley Act. An inevitable consequence of this type of legislation is the corrective type of statute represented by the more controversial portions of the Taft-Hartley Act—measures that regulate and restrict the use of the same powers which have been granted by other legislation. There is increasing demonstration of the old adage that more law leads to more law.

How far the trend will go is one of the big questions facing American management. And management will have more influence on the answer than will politicians or spokesmen for organized labor. If management can find a way by which the average worker can achieve his reasonable ambitions without the benevolent paternalism of law, there will be less pressure for more law.

To do this, management must engage wholeheartedly in the activities of collective bargaining. It must abandon the defensive and negative position as to the scope of collective bargaining. It must recognize the compulsion to agree with organized employees on matters which are on the border line of "working conditions." It must recognize the need to go farther and satisfy employees on matters affecting their interests, before new laws are enacted to extend the compul-

sions. To illustrate the possible extension, a segment of management might be committed to a program which called for the filling of all supervisory and management positions with college graduates. One practical effect of this policy would be to deny to workers the chance for promotion to such positions. We might reasonably expect a law to make such promotions a matter of collective bargaining, or even to make promotions within the establishment compulsory.

The best results which could have come through the natural evolution of collective bargaining have been discounted where collective bargaining has been compelled by law. The trend toward law has deprived both employees and management of benefits which they could have achieved by mutual goodwill and long-range planning in their mutual interest.

It is still possible to achieve industrial peace, and to progress toward the Better Life, within the present framework of collective bargaining. But collective bargaining in its widest conceivable scope is not the whole process, not even the principal implement, for the creation of industrial peace, industrial democracy, and the Better Life. And these are the objectives which will prove the practical superiority of the American system over any totalitarian system. Their achievement requires intelligent collective bargaining, and much more that is, and always will be, beyond collective bargaining. A failure to achieve them by these means is an invitation for more law and less freedom.

Our trend toward law in the field of employee relations is the gradual confession that we must reduce our emphasis on "freedom of opportunity" and substitute guarantees and compulsions. One long chapter ended with the proven inability of the average worker to "get ahead" on his own in the new economy of mass production, mass distribution, and mass employment. The second long chapter began with law to break the resistance against the efforts toward joint action by groups of average workers, through collective bargaining.

It broke that resistance and forced acceptance of that form of collective action as a substitute for individual freedom. The third chapter may be marked by laws to decree the standards of wages, hours, and an ever-growing list of working conditions. The logical end can be the prohibition of collective bargaining wherever standards are set by law. It is an end already foreshadowed in some of the provisions of the Taft-Hartley Act.

The ambitions and hopes kindled in the schoolroom can still be realized through our present compulsory collective bargaining, plus much more voluntary co-operation beyond collective bargaining. If they are not thus realized, the next long chapter may well be the succession of laws necessary to guarantee to every man the end results, instead of just the opportunity to achieve them. The federal Full Employment Bill of 1943–44 gives a mild forecast of what we must expect if the trend toward law continues.

The trend can be stopped by restoring opportunity, under collective bargaining, through the understanding and co-operation which are beyond collective bargaining.