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Labor Arbitration in the United States and Britain: A Comparative Analysis

by Anthony F. Bartlett*†

I. INTRODUCTION

The United States and Britain share a common legal tradition and enjoy an advanced stage of industrialization. As a result, it would seem reasonable to anticipate relatively similar developments in their respective labor relations and labor law systems. Such similarity has not been evidenced, however, in either their labor relations structures or in the responsiveness of labor law to them. Important points of divergence indicate fundamental differences in approach on the part of the participants to collective bargaining, as well as by the legislative and judicial branches of both countries. This is graphically illustrated by the varying fortunes of the labor arbitration process in each jurisdiction.

In the United States, labor arbitration enjoys a preeminent position in the collective bargaining process, shown by the overwhelming majority of American collective agreements providing for the binding arbitration of unresolved disputes. By contrast, British collective agreements rarely provide for arbitration. Its use is the exception rather than the rule. Most of the American arbitration workload, known as grievance or "rights arbitration," consists of the interpretation or application of the terms found in collective agreements. Some arbitral energy is also expended on the resolution of disputes concerning the construction of the terms of a collective agreement, known as "interest" arbitration.¹ Such minimal arbitration as exists in Britain is concerned normally with "interest" rather than "rights" disputes. The consequences of this focus are serious because much of the industrial unrest in Britain concerns problems at shop-floor level which give rise to unofficial or "wildcat" strikes, matters which are eminently susceptible to resolution through rights arbitration.

An additional factor worthy of note in a comparative examination of

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the two systems involves the legal status of collective agreements. In the United States, such agreements are considered binding as contracts and may be subject to enforcement in court, whereas in Britain legally enforceable agreements are rare. At the risk of over-simplification, this means that evasion of arbitration obligations under a collective agreement is made difficult in the United States but is virtually invited in Britain. Congress has made express statutory provision for the legal enforceability of agreements but left the substantive terms to the wishes of the parties. This construction ensured that labor arbitration in the United States would be a creature of contract, while the absence of legal enforcement in Britain ensured that the arbitration machinery would be left largely to the legislature.

This article proposes to compare and evaluate the nature and extent of labor arbitration as a dispute-resolution mechanism in the United States and Britain. Such an undertaking would be incomplete, if not impossible, without a consideration of the relevant historical, social, and political factors which have contributed to the major differences in this important area of labor law and labor relations. This subject is addressed in the hope of providing some insight into the systems which have produced such markedly different labor arbitration processes. It should be noted, however, that this article will be confined to a consideration of labor arbitration in private industry.

Section II deals with the manner in which the development of collective bargaining influenced the attitudes of labor and management toward third party determination of their differences.

Section III illustrates the crucial role played by the State in the reform of collective bargaining and how the differing nature of this role in each jurisdiction ultimately influences the shape of their respective arbitration systems.

Finally, section IV is concerned with the connection between the legal enforcement of collective agreements and the extent of acceptance of labor arbitration as an alternative to court enforcement of contractual provisions. The attitude of the judiciary of both countries towards the labor arbitration process is also considered.

II. Arbitration and Collective Bargaining

In Britain, governmental intervention in disputes between employers and workers has a long history. However, the initial concern was with regulating differences between individuals, such as an employer and a single worker, rather than the relations between employers and organized workers, and as such it preceded a capitalist industrial economy. Thus, by
A COMPARATIVE ANALYSIS

the provisions of the Statute of Apprentices in 1562, Parliament delegated to Justices of the Peace the task of fixing the wage rates of workers in their respective localities in accordance with the general price level. Various laws, from 1562 until an Act of Parliament in 1747, entrusted these local magistrates with the determination of disputes between masters and individual workers.

Resolution of disputes in the cotton industry was sought in the provisions of several applicable statutes, including the Cotton Arbitration Acts of 1800, 1803, 1804, and 1813. Justices of the Peace had a less direct role under these Acts; they were permitted to intervene only where appointed arbitrators had failed to resolve the differences referred to them. The main problem with enforcement of the rights available under such measures was that they depended to a large extent on the intrepidity of the individual worker in processing a grievance against his employer, particularly as the British unions were in an embryonic stage of development and functioned under a cloak of illegality. In the Arbitration Act of 1824, Parliament attempted the application of general arbitration provisions, similar to those of the Cotton Arbitration Acts over trade and manufacturing. This legislation proved to be a lamentable failure primarily because increasing industrialization, by way of the factory system, brought into existence concentrations of workers who were concerned with wage rates to be paid in the future rather than rates for work already done. However, future rates were excluded from the scope of arbitration under the Act. Two further attempts by the State to foster labor

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2 5 Eliz. 1, ch. 4.
3 This was not the only task of the Justices under the Act but it was their most important one, see C. Mote, INDUSTRIAL ARBITRATION 24-25 (1916).
4 20 Geo. 2, ch. 19.
5 39 & 40 Geo. 3, ch. 90.
6 43 Geo. 3, ch. 151.
7 44 Geo. 3, ch. 87.
8 53 Geo. 3, ch. 75.
9 See, I. Sharp, INDUSTRIAL CONCILIATION AND ARBITRATION GREAT BRITAIN, 279 (1950).

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10 5 Geo. 4, ch. 96.
11 These Acts were repealed in 1824, see 5 Geo. 4, ch. 96.
12 I. Sharp, supra note 9, at 281. Further, Dr. Sharp observes, in relation to a Parliamentary Committee's investigation of the failure of the Act:

A more fundamental reason which the committee did not give was that already mentioned in the case of the earlier arbitration, namely the absence of pro-
arbitration resulted in the Councils of Conciliation Act, 1867, and the Arbitration (Masters and Workmen) Act, 1872, both of which were disappointing failures. The latter Act represented the last attempt in nineteenth century Britain to enforce the arbitration of disputes with a legal sanction.

Attempts by employers and unions to construct voluntary mechanisms for dispute resolution had a happier history. Boards of arbitration were formed in various trades, but success was often sporadic. The first board of any significant influence was formed in the hosiery trade at Nottingham, in Northeast England, by A.J. Mundella, an employer in the trade and later an influential Member of Parliament. The board was formed in 1860 and over the next two decades its example spread to other important industries. Throughout this period, the terms “conciliation” and “arbitration” were used interchangeably and often inaccurately. With the wisdom of hindsight, we may validly conclude that the terms referred to were attempts to foster collective bargaining rather than to implement arbitration as we know it today.

In the United States, arbitration was not used until the 1860's and, as in Britain, it reflected greater concern for union recognition and collective bargaining than for third party determination of disputes. There was little interest in State intervention and sponsorship of arbitration; instead, unions and employers concentrated on building voluntary procedures, although such private initiatives were hindered by the haphazard spread of collective bargaining and the corresponding lack of definitive contractual procedures. Much of the pressure for “conciliation” and “arbitration” was actually a plea for the establishment of collective bargaining and union recognition. Thus, it was not uncommon to find employers...
in both countries generally hostile to what then passed for arbitration, while unions in general supported it. Nevertheless, labor leaders were hesitant to entrust many important matters to third party determination despite their espousal of the process, as evidenced by the reluctance of Samuel Gompers to extend the term "arbitration" much beyond conciliation.

The development of labor arbitration was inextricably bound up with the fate of the collective bargaining process. The attitudes of the legislature and judiciary on both sides of the Atlantic were crucial in determining not only the differing paths that their respective labor movements were to take in the joint determination of working conditions with employers, but also in guiding their responses to third party determination of disputes before a court of law as well as before an arbitrator. A brief survey of labor relations history in both countries reveals that, initially, the response of the State and the law to the nascent unions was generally hostile. American unions had their very existence called into question in the Cordwainers case, in 1806, where workers combining for the purpose of improving their wages and working conditions was found actionable as a criminal conspiracy. The rigidity of this particular judicial stance was relaxed in 1842, in the case of Commonwealth v. Hunt, where it was established that either the objectives of a union or the means used to achieve them had to be criminal before an action for criminal conspiracy could be grounded.

Judicial ingenuity was then concentrated on finding illegal the various activities engaged in by unions. Thus, inducing workers to strike in breach of their employment contracts became the tort of inducement to breach contractual relations, and striking to compel an employer to hire only those workers who belonged to a particular union was considered illegal. Judicial enmity was further evidenced by the over-issuance of injunctions in labor disputes for the purpose of preventing or curtailing strikes, picketing, and boycotts. Furthermore, the Supreme Court gave its imprimatur to the

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20 Id. at 230. Gompers certainly did not intend that matters pertaining to working conditions should be turned over to third parties for decision. Rather, the intent was to secure recognition from the employer and, if possible, to bargain, with him over the terms of employment prior to taking strike action.
"yellow-dog" contract, an employee contract stipulating that during the course of his employment an employee would not join a union or participate in union organizational activities; failure to comply would be grounds for dismissal.

A further obstacle to the application of a union's collective bargaining strength was the judicial extension of the terms of the Sherman Antitrust Act, 1890, to encompass the activities of a labor organization. Congress sought to give some protection to unions by the terms of the Clayton Antitrust Act, 1914. However, the Supreme Court soon found a means of circumventing the immunities of the Act by noting that it protected only the existence and operation of a union, it did not exempt the activities of a union where the union engaged in unlawful activities even in pursuit of legitimate objects. The attitude of the Supreme Court had changed somewhat by the 1940s and it developed the concept of a "labor exemption" from the strict application of the antitrust laws where the applicable restraint of trade was merely an incidental consequence of a union's pursuit of its legitimate collective bargaining function.

British unions faced a similar form of hostility from the courts and, initially, the legislature. As early as 1721, the act of combining to force an employer to concede a wage increase was found actionable as a criminal conspiracy. A series of anti-combination acts enacted between 1799 and 1800 made the very existence of a labor organization illegal. When these acts were repealed in 1824, a wave of sometimes violent industrial unrest swept the country. Parliament responded by passing a statute which expressly legalized certain combinations, while at the same time restricting much trade union activity through a section of the act which

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29 Loewe v. Lawlor, 208 U.S. 274 (1908).
30 Clayton Act, 15 U.S.C. § 17 (1976) which provides:
[T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor shall be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
34 Act to Prevent Unlawful Combinations of Workmen, 1799, 39 Geo. 3, ch. 81; Act to Prevent Unlawful Combinations of Workmen, 1800, 39 & 40 Geo. 3, ch. 106.
35 Combination Laws Repeal Act, 1824, 5 Geo. 4, ch. 95.
36 Combination Act, 1825, 6 Geo. 4, ch. 129.
established a number of loosely defined criminal offenses. These offenses were meant to be restricted to circumstances where violence was involved but an all too willing judiciary often applied them to otherwise lawful union activity.

A further hindrance to the functioning of unions was evidenced by the application of the “restraint of trade doctrine” to union objectives which left them open to actions for criminal conspiracy at common law. Parliament passed the Trade Union Act of 1871 with one intention being to free unions from illegality where their objectives were not in restraint of trade. Another statute of the same year, the Criminal Law Amendment Act, restricted the definition of “threats” and “intimidation” so that a mere threat to strike was no longer a statutory offense. However, this protection was swiftly overthrown by a judge who held that regardless of the statutory language the common law had not been abrogated, therefore, an act done with improper intent and amounting to an unjustifiable interference with an employer’s business was actionable as a criminal conspiracy. The legislature sought to eliminate this loophole

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37 Id. at § 3 stated:

[I]f any Person shall by Violence to the Person or Property, or by threats or Intimidation, or by molesting or in any way obstructing another, force or endeavor to force any Journeyman, Manufacturer, Workman or other Person hired or employed in any Manufacture, Trade or Business, to depart from his Hiring, Employment or Work, or to return to his Work before the same shall be finished, or prevent or endeavor to prevent any Journeyman, Manufacturer or other Person not being hired or employed from hiring himself to, or from accepting Work or Employment from any Person or Persons; or if any Person shall use or employ Violence to the person or property of another, or threats or Intimidation, or shall molest in any way obstruct another for the Purpose of forcing or inducing such Person to belong to any Club or Association, . . . or if any Person shall by Violence to the Person or Property of another, or by threats or to Intimidation, or by molesting or in any way obstructing another, force or endeavor to force any Manufacturer or Person carrying on any Trade or Business, to make any Alteration in his Mode of regulating, managing, conducting or carrying on such Manufacture, Trade or Business, or to limit the Number of his Apprentices or the number or description of his Journeymen, Workmen, or Servants; every Person so offending, or aiding, abetting or assisting therein, being convicted thereof in Manner hereinafter mentioned, shall be imprisoned and kept to Hard Labour, for any time not exceeding Three Calendar Months.

38 Gregory, supra note 26, at 20-22.


40 34 & 35 Vict., ch. 31 (1871).

41 Id., at § 2 reads:

The purpose of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

42 34 & 35 Vict., ch. 32 (1871).

43 Reg. v. Blunn, 12 Cox. C.C. 316 (1872). In this case a threat to strike by London gas
with the Conspiracy and Protection of Property Act, in 1875, in which it was provided that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute should not be actionable as a conspiracy if such act, committed by one person, would not be punishable as a crime. In 1901, the House of Lords, Britain's highest court, held that the protection given to unions by the 1875 Act from charges of criminal conspiracy did not extend to actions based on civil conspiracy. In addition, in its infamous Taff Vale decision of 1901, the House of Lords held that a trade union could be sued in its own name for a tortious action and that a judgment for damages could be met from union funds. Protection of union funds from such actions and immunity from actions for civil conspiracy were accorded by the Trade Disputes Act, 1906.

Thus far the pattern is a familiar one to American observers. First comes a judicial imposition of liability upon unions; next, a conferral of immunity from this liability from the legislature; followed by judicial circumvention of the statutory protection accorded. However, in Britain, judicial enmity towards unions continued well into the 1960s. In Rookes v. Barnard, the House of Lords undermined one of the most basic union sanctions given protection by the 1906 Trade Disputes Act, the right of a union to require its members to cease working even in breach of their individual employment contracts. What would otherwise have been the tort of inducement to breach contractual relations was made unenforceable by the Act. Nonetheless, the Law Lords were prepared to find that although the completed act of striking was immunized, the act of threatening to withdraw labor was not so protected and as a result constituted the tort of intimidation. Those guilty of the commission of this tort were, therefore, liable for civil conspiracy. This decision rocked the British workers to secure the reinstatement of a colleague discharged for taking part in union activity resulted in their being prosecuted for criminal conspiracy and sentenced to twelve months' imprisonment.

44 38 & 39 Vict., ch. 86 (1875).
45 Id. at § 3.
48 Id. at 438.
49 6 Edw. 7, ch. 47 (1906).
51 Trade Disputes Act, supra note 49 at § 3 which stated:
   An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.
52 Rookes, supra note 50, at 1143. Observing a certain lack of logical consistency in
labor law community which had long felt that the law relating to unions and employers had been settled after 1906. Once again, Parliament had to intercede to protect unions from yet another judicially created liability; the result was the passage of the Trade Disputes Act, in 1965. It is little wonder, then, that a popular British work on labor law opens with the observation that: "[m]ost workers want nothing more of the law than that it should leave them alone. In this they can be said to display an instinct that is fundamental to British industrial relations."

III. STATE INTERVENTION

In the United States, as in Britain, it became evident that some legislative initiative was required to meet the demands of a collective bargaining system which was becoming increasingly sophisticated, too sophisticated to fit within the traditional mold of the common law. The Norris-LaGuardia Act of 1932 confronted the evils of "government by injunction" and the yellow-dog contract; it was very successful in dealing with the former, but less so with the latter as, by its terms, the yellow-dog contract was not made illegal but merely unenforceable. Although such legislation was useful in remedying certain specific abuses, it was inadequate for dealing with the need for the comprehensive reform of collective bargaining which was required in the mid-1930's. Earlier, Congress had passed the Railway Labor Act, in 1926, with the objective of establish-

holding a threat to strike actionable while the strike itself was not, Lord Donovan noted, in the Court of Appeals, Rookes v. Barnard, (1963) 1 Q.B. 623, 683:

"If that be the true position, as I think it is, then the situation is reached . . . that a strike is not unlawful, but the threat to do so is. In other words, the policy which workmen should pursue in order to avoid liability is to strike first and negotiate afterwards." (Emphasis supplied).

See, C. GRUNFELD, MODERN TRADE UNION LAW, 439 (1966):

What startled the trade union world was that, after the Trade Disputes Act, 1906, and more than half a century of case law, in which the courts had shown a deepening understanding of the vital role of the trade unions in running British industry and their need to enjoy freedom of economic action to protect the legitimate interests of their members, there still remained coiled in the common law the possibility of an action against union officials for crushing damages and costs for threatening strike action in the breach of contracts of employment, whether to remove an objectionable employee . . . or to pursue any other industrial purpose, like a claim in respect of wages or any other term or conditions of employment.

Trade Dispute Act, 1965, c. 48, § 1.


ing stable labor relations in that industry. Subsequently, the administration of President Franklin D. Roosevelt sought an even more ambitious objective, that of regulating labor relations over industry in general.

The Roosevelt administration initially sought to regulate industry labor relations in § 7(a) of the National Industrial Recovery Act of 1933, but this statute was invalidated on constitutional grounds. In 1935, the National Labor Relations Act (Wagner Act) was passed and the Roosevelt administration made known to the Supreme Court its determination to save this measure from being declared invalid as an unconstitutional regulation of interstate commerce. Whatever may have motivated the Court, the Act was upheld on constitutional grounds in 1937. The Wagner Act established procedures for requiring the recognition of a union which could demonstrate that it represented a majority of the applicable work force and enumerated “unfair labor practices” which could be leveled against an employer who engaged in proscribed anti-union conduct or conduct aimed at individual employees. The Act also provided for an administrative agency, the National Labor Relations Board (NLRB), to enforce the unfair labor practice jurisdiction and supervise electoral procedures.

No similar initiative was undertaken in Britain during this period. Earlier British administrations contented themselves with addressing problems as they arose and passing specific pieces of legislation to deal with the perceived evil in question, but comprehensive regulation of collective bargaining was not yet attempted. In the hope of providing for

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63 President Roosevelt had made public his intention to appoint a sufficient number of Justices to get the Act validated. For details of his “Court-packing” strategy see R. Cortner, The Wagner Act Cases, 150-155 (1964).
64 N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937). What happened in between these two historic court decisions? For one thing, the sit-down strikes, which alarmed the nation. For another, the national elections of 1936, which returned President Franklin D. Roosevelt to the White House by the greatest majority ever—up to that time. Critics of the conservative Supreme Court of that era had called its members, contemptuously, “nine old men.” Now they allowed that it consisted of nine old men who read the election returns. See also Beal, supra note 58, at 44.
65 National Labor Relations Act, supra note 62, at § 159.
66 Id. at § 158.

The principal reason for making the foregoing general observations was to provide a background for the, at first sight, astonishing fact in a country in which collective bargaining is so highly developed and of such comparatively ancient origin, the bulk of collective bargaining and collective agreements continues to exist outside the law and without any development of a “collective labour law” of any major proportions.
the peaceful resolution of industrial disputes, Parliament passed the Con-
ciliation Act of 1896, which provided governmental machinery for con-
ciliation and arbitration which the disputants could use if they so de-
sired. Later, Parliament provided additional machinery under the
Industrial Courts Act of 1919, but its use remained voluntary. Experi-
ence under both statutes demonstrated that unions and employers were
not partial to the concept of third party intervention into their private
disputes, as shown by the apparent underutilization of the machinery and
procedures provided. One could conclude that Parliament thus seemed
ignorant of the fact that arbitration and conciliation were not widely ac-
cepted in British labor relations, particularly by the unions. An impor-
tant factor in his phenomenon was growth and strength of the trade un-
ions, many being mature and stable organizations which, by this time,
felt capable of dealing with employers by exercising collective bargaining
strength rather than by using a procedure which in the past had sought
as its goal recognition rather than actual conciliation or arbitration.
Dislike of legal intervention in labor relations had become an estab-
lished part of British trade union lore, but this was far from being the
case in the United States. American unions welcomed the passage of the
Wagner Act and for many of them the existence of the Act was critical for
their survival. In fact, several present day unions came into being during
this period. Therefore, the Wagner Act aided in the development of
strong representative unions. The affirmative obligation of employers to
bargain with the unions led to many stable collective bargaining relations-
ships and the widespread use of collective agreements, features which
were to prove crucial in the establishment of a labor arbitration system.

See also Phelps-Brown, The Growth of British Industrial Relations 355 (1959): "When
British industrial relations are compared with those of the other democracies they stand out
because they are so little regulated by law."

68 59 & 60 Vict., ch. 30 (1896).
69 For a description of the conciliation and arbitration of this Act, see, Written Evi-
dence of the Ministry of Labour (to the Royal Commission on Trade Unions and Em-
ployers' Association), 94-96 (1965).
70 9 & 10 Geo. 5, ch. 69 (1919).
71 Written Evidence, supra note 69, at 111.
73 By the end of the nineteenth century trade unions had become firmly established not
only among skilled craftsmen but also among unskilled and semi-skilled workers, see, B.
Cooper & A. Bartlett, Industrial Relations—A Study in Conflict 11-13 (1976).
74 Wedderburn, supra note 55, at 317. Referring to the Taff Vale decision Professor
Wedderburn notes: "Election posters of 1906 depicted a judge handing to an employer a
scourge with which to beat workers. The Taff Vale case became part of working-class cul-
ture, part of the way 'they' treat trade unions if they can. Such feelings have not died."
Arbitration as such was not widespread before the Second World War. During the War, the National War Labor Board was established by Executive order.\textsuperscript{78} Its function was to resolve those disputes which affected or threatened to impede war production.\textsuperscript{79} Often the Board would require in a collective agreement the inclusion of a clause requiring the arbitration of future disputes.\textsuperscript{80} In this way, the parties were exposed to the advantages of this particular form of dispute resolution; such advantages sustained its use and popularity even after both the War and the War Labor Board had passed into history.\textsuperscript{81} In Britain, compulsory arbitration was imposed for the duration of the War and continued to exist for a short period thereafter.\textsuperscript{82} Enjoying some support from the unions,\textsuperscript{83} when finally revoked, compulsory arbitration left behind no habit or custom of referring disputes to an arbitrator, unlike the case in many areas of American industry.

IV. ARBITRATION AND LEGAL ENFORCEMENT OF COLLECTIVE AGREEMENTS

The continued development of labor arbitration in the United States was made possible by a major legislative innovation, the passage of the Labor Management Relations Act (Taft-Hartley), in 1947.\textsuperscript{84} The Taft-Hartley amendment to the National Labor Relations Act was felt necessary by Congress as a response to mounting criticisms of the Act as being weighted against employers,\textsuperscript{85} coupled with public concern over the large scale industrial unrest in 1946.\textsuperscript{86} For purposes of labor arbitration, the most significant part of the Act was section 301\textsuperscript{87} which provided for the legal enforcement of collective agreements. This was to prove a boon to

\textsuperscript{78} Loewenberg, Compulsory Arbitration in the United States, in COMPULSORY ARBITRATION, AN INTERNATIONAL COMPARISON 141, 143 (1976).
\textsuperscript{80} Id. at 62.
\textsuperscript{82} Cooper & Bartlett, supra note 73, at 96.
\textsuperscript{83} Bob Hepple, Compulsory Arbitration in Great Britain, in COMPULSORY ARBITRATION, AN INTERNATIONAL COMPARISON 83, 86 (1976).
\textsuperscript{87} Labor Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1978):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.
the increased use of arbitration for dispute settlement because evasion of contractually agreed arbitration provisions could result in the prosecution of the offending party. A new respectability was thus extended to the arbitration process because obligations in this area could not be taken lightly. However, in spite of the collective bargaining advantages offered by 301, a serious challenge against the section was building on constitutional grounds, and the actual fate of the provision was unclear until 1957. In that year, the Supreme Court vindicated the constitutional status of section 301 in the celebrated *Lincoln Mills* decision, which provided Justice Douglas with an opportunity to present an extraordinarily creative defense of the section along with an elaboration of the objectives of the national labor policy.

Prior to the *Lincoln Mills* decision, the legal status of collective agreements had been unclear. The common law approach indicated that they were unenforceable at law, and attempts by various U.S. courts to make them binding under doctrines of agency, implication, or other means proved largely unworkable, for both theoretical and practical purposes. These difficulties were resolved for Americans, but, in Britain the original attitude toward collective agreements, that of being "binding in honor only," was restated by a British court as recently as 1969.

In Britain, comprehensive reform of the collective bargaining system was finally attempted in 1971 with the passage of the Industrial Relations Act. This Act may be interpreted to have incorporated many American measures such as determination of bargaining agents by election, and the establishment of standards for the furtherance of internal union democracy. Section 34 of this Act made all future written collective agreements legally binding unless the parties stipulated to the contrary. However, most unions and employers took advantage of this escape de-

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90 Id. at 456-57.
93 *Industrial Relations Act, 1971*, c. 72.
95 *Industrial Relations Act, 1971*, ch. 72, § 34 reads in pertinent part:
(1) Every collective agreement which—
(a) is made in writing after the commencement of this act, and
(b) does not contain a provision which (however expressed) states that the agreement or part of it is intended not be legally enforceable, shall be conclusively presumed to be intended by the parties to it to be a legally enforceable contract.
vice and constructed appropriate clauses to ensure that their agreements were binding in honor only. 6

The unions were implacably opposed to the Industrial Relations Act from its very inception and they worked actively for its repeal. This illustrates a major difference between the political strategies of British unions and that of their American counterparts. British unions have had a political party, the Labour Party, to which they normally have given not only their allegiance but also a major portion of funding. 7 While the British Labour Party is by no means only a party of the unions, they exercise a great deal of influence on it, both financially and as a result of the Party’s traditional appeal to working people.

American unions worked actively against the Taft-Hartley amendment in 1947 but, unlike their British counterparts, they had no distinct political party of their own. 8 Instead, they relied on the traditional policy of American unions, that “labor will reward its friends and punish its enemies.” 9 Had American labor been successful in overthrowing the Taft-Hartley amendment, section 301 would have inevitably perished and labor arbitration in the United States could not have achieved its present status.

In contrast, British labor, which has had a direct influence on one of the major British parties, was successful in opposing Britain’s equivalent to the Taft-Hartley amendment. 10 This was unfortunate for the proponents of arbitration because a fundamental purpose of the statute had been the establishment of procedures for the settlement of disputes through conciliation and arbitration. 11 When the Labour Party returned
to power, true to one of its major election promises, it repealed the Industrial Relations Act by passing the Trade Union and Labor Relations Act in 1974.\textsuperscript{102} Section 18 of the 1974 Act reinstituted the former status of collective agreements at common law so that they remain unenforceable unless the parties provide specifically for enforcement.\textsuperscript{103}

While legal enforcement of collective agreements proved antithetical to the prevailing trends in British labor law, it had become an accepted part of the American scene. The Supreme Court, while developing a federal substantive law relating to labor contracts, had occasion to examine the nature of the labor arbitration process and, in particular, its position in relation to the courts. A prior fear of American unions had been the prospect of legal intervention in labor relations; while this spectre had been largely laid to rest, it reappeared in a threatened judicial intrusion into voluntary labor arbitration procedures agreed upon by the parties. Echoing a widespread judicial sentiment, a New York court, in the notorious Cutler-Hammer decision,\textsuperscript{104} observed that if the meaning of a contractual provision, which one of the parties purports to arbitrate, is beyond dispute there cannot be anything to arbitrate. The labor contract in such an instance cannot be said to have provided for arbitration of the disputed matter.\textsuperscript{105} This would have meant that judges alone should determine whether or not a subject was arbitrable and that they could examine the merits of the dispute, despite the fact that both union and employer had contracted for private determination of their differences.

The Supreme Court gave a fundamental boost to the labor arbitration process in its seminal Steelworkers' Trilogy,\textsuperscript{106} a set of decisions in which it virtually eliminated the possibility of an interventionist role for the judiciary. As the Court perceived it, judicial participation was limited

\textsuperscript{102} Trade Union and Labour Relations Act, 1974, c. 52.

\textsuperscript{103} Id. § 18 in pertinent part:

\textit{[A]ny collective agreement made before 1st December 1971 or after the commencement of this section shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—

(a) is in writing, and (b) contains a provision which (however expressed) states that the parties intended that the agreement shall be a legally enforceable contract.}


\textsuperscript{105} Id. at 918, 67 N.Y.S. 2d at 318.

to ascertaining whether or not the applicable collective agreement provided for arbitration.\textsuperscript{107} If arbitration is required, then the dispute must be referred to an arbitrator, even if a court might think a particular grievance to be without merit or patently frivolous.\textsuperscript{108} Any doubt as to the arbitrability of a dispute was to be resolved in favor of arbitration.\textsuperscript{109} The Court concluded that an arbitrator, by applying the common law of the shop or industry, was in possession of an expertise which the "ablest judge" could not share.\textsuperscript{110} The glowing terms in which the Court described the labor arbitration process were welcomed by some prominent arbitrators who, while partial to the compliments paid them, were critical nonetheless of the theoretical basis of the Court's explanation of the function of labor arbitration.\textsuperscript{111}

The most likely explanation for the excessive bestowal of praise upon the process was the desire by the Supreme Court to halt the intrusion of lower courts into the system; their utterances being, in effect, an allocation of jurisdiction upon arbitrators.\textsuperscript{112} The Court further established

\textsuperscript{108} Id. at 568.
\textsuperscript{109} United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960).
\textsuperscript{110} Id. at 582.
\textsuperscript{111} See, e.g., Davey, The Supreme Court and Arbitration: The Musings of an Arbitrator, 36 Notre Dame Law. 138, 140 (1961):

Arbitrators, being human, cannot fail to be impressed with the respect which the Court manifests for the superior knowledge, ability and wisdom of arbitrators. This deference to the specialized knowledge of arbitrators, which the Court feels apparently cannot be equaled by the "ablest judge" is certainly most gracious. At the risk of appearing ungrateful and traitorous to the arbitration profession, I shall venture the observation that such unstinted praise is in many cases probably not deserved.

See also Feller, Arbitration: The Days of its Glory are Numbered, 2 Indus. Rel. L. J. 97, 98 (1978).


Apparently, the promptness with which the district and circuit courts of appeals fell into line in applying the new federal law of arbitration is attributable in major part to the wide-ranging dicta in the Supreme Court opinions which have evoked so much adverse comment . . . Although the exuberant language in the Court's opinions has been widely deplored by practitioners and occasionally regretted by arbitrators, it seems to have accomplished the intended results. While emitting occasional literary grunts of disapproval or sighs of resignation, the great majority of federal district and circuit court judges have seen their duty clearly and have done it.

Not everybody was as enamoured of the arbitration process as the Supreme Court seemed to be; for an interesting critique of the process from a former arbitrator see, P. Hays, Labor Arbitration: A Dissenting View (1966).
principles pertaining to the enforcement of collective agreements in light of national labor policy, rather than traditional contract law, in a number of decisions which were to prove significant for both labor arbitrators and the parties to collective bargaining.\(^{113}\) As an example, one decision noted that under certain circumstances an arbitration obligation might survive even the merger or takeover of the company involved because although contract law would not bind an unconsenting successor, "a collective agreement is not an ordinary contract."\(^{114}\)

The replication of this success story was rendered impossible in Britain with the repeal of the Industrial Relations Act and its section 34. The Labour government, which supervised the Act's repeal, attempted to strengthen voluntary collective bargaining with the establishment of a Conciliation and Arbitration Service in 1974, and giving it a statutory basis with the Employment Protection Act of 1975.\(^{115}\) Like its American counterpart, the Federal Mediation and Conciliation Service, the Service is entrusted with an arbitration function, in addition to its principal task of providing dispute resolution assistance and advisory services to both unions and employers.\(^{116}\) Its title was changed to the Advisory Conciliation and Arbitration Service (ACAS), thus stressing its advisory function. As could be easily predicted in a collective bargaining system which has traditionally accorded little importance to labor arbitration, the overwhelming bulk of the ACAS workload consists of conciliation rather than


In my judgment it is a mistake to attempt to force agreements between labor unions and employers into more familiar legal pigeonholes such as usage, third party beneficiary contracts, or contracts negotiated by the union as agent for the employees as principals . . . . The group interests . . . . may conflict with the claims of individuals because several classes of individuals have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or even because the union officialdom is not immediately responsive to the wishes of a numerical majority of the members. Since experience offers no factual parallel to these arrangements, no other legal conception is quite analogous. (emphasis added)


arbitration, and much of this workload exists because of statutory referrals to conciliation. The departure from arbitration and legal enforcement of collective agreements is made all the more regrettable because of an ailment which has long plagued British industry, the unofficial or "wildcat" strike. This problem was exacerbated, in the view of the Royal Commission on Trade Unions and Employers' Associations (The Donovan Commission), by conflict between what it termed the formal and informal systems of collective bargaining in British industry.

The formal system of collective bargaining is apparent in the existence of national and industry-wide agreements drawn up between representative unions and employers' associations. These agreements stipulate the applicable terms and conditions and are followed in the undertakings which they cover. In the informal system each local factory management and union branch negotiate terms and conditions which make the national or industry-wide agreement a mere starting point for local additions. The Donovan Commission's report emphasized the prevalence of the informal system and the dichotomy which followed between it and an apparatus based on the formal system: "The informal system is founded on reality, recognizing that organizations on both sides of industry are not strong. Central trade union organization is weak, and employers' associations are weaker."

The reality, then, is that Britain has an actual system of local regulation of terms and conditions similar to that of the United States, in which one union normally negotiates with one employer to construct an agreement which covers a particular plant. Where the American industry-wide

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It is noteworthy that whereas the pattern of ACAS work shows a continued increase, the figures for arbitration are static. There is really no readily apparent reason for this. One point must be stressed. In the United Kingdom arbitration is to some extent regarded by conciliators as a failure. Their aim is to settle the problem without there being further processes. In this area arbitration is far from being the accepted and easy method of settling a dispute.

118 Id. at 404.


120 ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYER'S ASSOCIATIONS, DONOVAN REPORT, Cmnd. 3623 (1968).

121 Id. at 12. "Britain has two systems of industrial relations. The one is the formal system embodied in the official institutions. The other is the informal system created by the actual behavior of trade unions and employers' associations, of managers, shop stewards and workers."

122 See id. at 36.

123 Id. at 12.
agreement applies locally, it usually provides for local, not national or industry-wide, enforcement through arbitration. However, appropriate plant-wide or local agreements are not available in Britain because of adherence to the formal system.\footnote{Id. at 36.}

The Donovan Commission noted that much of the "wildcat" strike problem concerned disputes which were appropriate for resolution on a local level.\footnote{Id. at 100:} Among its proposals for reform of the British system, the Commission recommended the establishment of local agreements dealing with local matters, leaving the national or industry-wide agreement to cover more general issues.\footnote{Id. at 262-263. See also, R. Rideout, Trade Unions—Some Social and Legal Problems, 52 (1964):}

In this proposed reform, the Commission envisaged a role for arbitration of disputed matters at plant level\footnote{Donovan Report, supra note 121., id. at 100, where it is noted:} but, surprisingly, did not propose that collective agree-

\footnote{The formal and informal systems are in conflict. The informal system undermines the regulative effect of industry-wide agreements. The gap between industry-wide agreed rates and actual earnings continues to grow. Procedure agreements fail to cope adequately with disputes arising within factories. Nevertheless, the assumptions of the formal system still exert a powerful influence over men's minds and prevent the informal system from developing into an effective and orderly method of regulation. (emphasis added)}
ments be made legally enforceable.\textsuperscript{128}

V. Conclusion

In the period from the end of the Second World War until 1957, the use of labor arbitration clauses in American collective agreements grew on a voluntary basis to the extent that this method of dispute resolution was provided for in over 90 percent of the labor contracts;\textsuperscript{129} in the decade following the 1956 \textit{Lincoln Mills} decision, the use of labor arbitration clauses was firmly established in over 94 percent of such agreements.\textsuperscript{130} However, this robust system could not have achieved its present status without fulfilling certain prerequisites; these include stable collective bargaining relationships and their end product, legally enforceable collective agreements. In turn, these factors have required both comprehensive legislative intervention, promoted by a determined administration, and a high level of judicial creativity amounting to a judicial stance of self-abnegation in relation to the labor arbitration process. Nonetheless, Congress and the Supreme Court could only take limited action to assist in voluntary third-party resolution of labor disputes; they provided the structural underpinnings, implementation was left to the parties.

Timing has been important in this respect. In the 1930's, many American unions turned to the law, specifically to the Wagner Act, for help in their organizing. Further, experience under this Act had demonstrated that labor could go to a tribunal with their complaints and have decisions rendered based on the law and not on anti-union sentiment; such was the impact of the NLRB. In addition, many of the more author-

\begin{itemize}
\item agreement on a proposal for changing terms and conditions of employment. It is sometimes suggested that its more widespread use to interpret agreements might help to avoid unofficial strikes.
\item The introduction of this kind of arbitration into the existing unsatisfactory procedures of most industries would solve nothing. . . . when collective bargaining has been reformed, however, and companies negotiate comprehensive and effective agreements, the parties may conclude that their arrangements would be strengthened by providing for arbitration on all unresolved differences relating to the application of the agreement during its currency . . . with voluntary acceptance of the resulting award as binding.
\item \textsuperscript{128} Id. at 268. \textit{See also} R. \textit{Rideout, supra} note 116, at 244:
\item It may still be argued that if contractual enforceability has the theoretical advantages previously outlined this retreat in favour of conservation is unjustified. The problem, however, is more intractable than one merely of persuading hidebound trade unionists to change their minds. It is one of persuading those who have no need of legal intervention that it’s beneficial to them.
\end{itemize}
itative American courts, following the Supreme Court, had begun to adopt a more sympathetic stance towards the objectives of organized labor. In short, American unions did not develop a dislike of the law in the manner of their British counterparts, but instead, frequently resorted to it. Thus, the job of the National War Labor Board was made easier and the parties voluntarily adopted its arbitration recommendations. This responsiveness led in turn to a widespread acceptance of arbitration for a period which was long enough for labor and management to grow accustomed to using it as an alternative to industrial strife.

In Britain, unions had developed and matured much earlier than was the case in the United States; this meant that historically the unions survived and flourished not because of the law, but rather, in spite of it. They could hardly have been expected to entrust their destiny to tribunals which had so clearly demonstrated their anti-union animus, and so they concentrated instead on exerting pressure upon Parliament through the Labour Party. The consequences were unfortunate; when a British administration finally resolved to pass comprehensive legislation to reform collective bargaining, British Unions, unlike their American counterparts in relation to the Taft-Hartley Act, were in a position to work directly for the downfall of this measure. So, future reform of collective bargaining in Britain will most likely be in the traditional manner, through the passage of piecemeal legislation, addressing each problem as it arises.

Meanwhile, conflict between the formal and informal systems of collective bargaining, highlighted by the Report of the Donovan Commission, continues. Therefore, it seems appropriate to cautiously tender some suggestions for reform of the British system of labor arbitration, based on the American experience. At worst, this will produce only futile (but harmless) speculation and, at best, it might suggest viable alternatives to industrial conflict in the future. Probably, the most significant lesson obtained from the United States is that initiatives in relation to labor arbitration must come from the legislature. Experience has shown that voluntary resort to arbitration is not considered feasible in British collective bargaining. The unions have unequivocally manifested both their hostility to comprehensive labor relations legislation and their ability to undermine it. Therefore, any proposed changes must be piecemeal in nature;

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131 K. Wedderburn, supra note 55 at 304:
In 1800 trade unions were utterly illegal. That fact remains today a critical feature of their legal situation. The explanation of this paradox will provide us with the key to the peculiar structure of our law concerning trade unions and industrial conflict. The most powerful influence on that law, . . . has been the unions' struggle to emerge from that illegality.

132 B. Cooper & A. Bartlett, supra note 73, at 32.
and, such changes must clearly establish the rights and obligations of unions as well as minimize the degree of judicial abstention of their American counterparts.

The question of legal enforceability of collective agreements must first be met squarely and courageously by a future British Government. Anticipating the obvious objection that this has been tried and rejected, it must be borne in mind that the Industrial Relations Act of 1971 was rejected as a package; it does not follow that legal enforceability would have perished as a measure standing alone. And, to the objection that the parties contracted themselves out of legal enforcement, it must be pointed out that the Act invited this by providing an escape clause. A new Government initiative on legal enforceability might succeed if no escape measure was provided, and if the sponsoring administration could hold its ground against union opposition long enough for the measure to have a chance of acceptance as being the normal, and not the eccentric, thing to do, as expressed by a dissenting voice on the Donovan Commission.138

However, legal enforcement of the present day British collective agreement would prove unworkable because realistic local agreements are not yet common in that country. An enforceability measure standing alone would, therefore, serve only to perpetuate the antiquated formal system of collective bargaining. Thus, Government encouragement of the development of local agreements—whether by legislative intervention or some administrative alternative—coupled with legal enforceability seems the best way of bringing the outdated formal system in line with industrial realities. Unions and employers would then have to assume greater responsibility for their local agreements, and unions in particular would be forced to grapple with the problem of unofficial strikes. It would then be likely that arbitration would be successful at providing a speedy and informal alternative to court enforcement of disputed matters under collective agreements.

138 Note of Reservation by Mr. Andrew Shonfield, DONOVAN COMMISSION REPORT, supra note 120, at 300:
The arguments that are commonly advanced for the contention that the contractual form is an inappropriate one for collective agreements are not persuasive. They are regarded as having binding force in other countries, and no special difficulties arise from that fact . . . . The proposal in essence is that the bias of English law, as it has been hitherto, should be changed. Instead of making it complicated and difficult for unions to enter into contractual obligations which are enforceable at law, so that it has become an eccentric thing for a union to do, unions and employers should be encouraged to treat it as the normal thing to do. For a more recent espousal of legal enforceability, see, Hit & Miss, THE ECONOMIST, November 28, 1981, at 15: “The overwhelming number of British stoppages break out before union officials have worked their way through laid-down disputes procedures. Britain’s long-term aim should be to make collective agreements as binding as any other contracts.”
The future of labor arbitration in Britain is, therefore, inextricably bound up with the question of legal enforcement of collective agreements. Present trends in British labor relations indicate that the prospects for a popular system of arbitration of labor disputes seem as bleak as those for the legal enforceability. It is hoped though that the worsening labor relations situation in Britain may one day indicate that the implementation of these arbitration measures has been not eliminated, but merely postponed.