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Reinventing Labor Law: A Rejoinder

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INTRODUCTION

In an Article published recently in this journal,[1] Stanley Gacek, an attorney working with the United Food and Commercial Workers International Union in the United States, takes issue with my analysis of the political consequences of corporatist and contractualist labor law models, especially as applied to the current situations in Brazil and the United States.[2] Despite our many major disagreements, I welcome Gacek's response to my Article and his effort to expand public discussion of the alternative legal-institutional forms of democratic labor organization. Unfortunately, in the course of developing his own position Gacek seriously misrepresents my views. He also misunderstands the development of labor law in the United States and Brazil. I want to correct these misrepresentations, both for the sake of my earlier Article, and for the sake of the broader debate over the future of labor law and the transformation of labor relations.

Stripped to its essentials, Gacek's presentation of my argument comes down to this: Gacek seems to believe that the comparison I make between corporatist and contractualist labor law forms amounts, politically and intellectually, to a choice between two distinct, indivisible, and full-blown systems.[3] Further, Gacek seems to believe that in choosing between these two systems, my own sympathies are clear: I would opt for the corporatist model and its supposed reliance on a centralized state to act as a catalyst in the formation of workers' consciousness and the practice of workers' collective self-organization.[4] By contrast, Gacek clearly chooses the side of contractualist labor relations. For Gacek, contractualism is the form of "truly democratic" labor relations.[5] Contractual-

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1 Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21 (1994).

2 Tamara Lothian, *The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared*, 7 CARDOZO L. REV. 1001 (1986).

3 *See* Gacek, *supra* note 1, at 24-27.

4 *See id.* at 25.

5 Gacek associates contractualism with a "new and truly democratic order" in the concluding sentence of his article. *See id.* at 110.

ism is the form enlightened workers everywhere would choose in the molding of their union structure.

In presenting the choice in these terms, Gacek seriously misinterprets my argument and the use I make of institutional categories. More importantly, Gacek freezes into place a choice I never meant to put forward: a choice between two historical types handed down to us by earlier generations. Both points merit a response.

In the following pages, I propose to set the record straight at each of these two basic levels. I begin by responding to three specific misunderstandings: (1) my supposed support for the corporatist model; (2) Gacek's interpretation of the CUT[6] in Brazil as an exemplary instance of "contractualist" labor militancy, and the related, erroneous idea that the post-1988 labor system in Brazil is nothing more than the continuation of the corporatist model; and finally, (3) Gacek's effort to interpret the American situation as a "deviant" case of contractualism, nonetheless punctuated by periods of intense and politicized labor militancy.

I conclude my comments with a brief sketch of an alternative style of labor organization. The animating impulse behind this alternative is the program of instituting a hybrid form of labor organization, based on a combination of features drawn from the corporatist and contractualist types. As I suggested in my earlier Article, the two leading features of the corporatist model—mandatory unionization in a unified comprehensive union structure and the subordination of this structure to government—can be disassociated.[7] We can maintain the former while rejecting the latter. Here, I seek to develop this conception by giving it concrete institutional content.

Although Gacek attributes to me a " 'conventional leftist' "[8] position, it is he who remains in the grip of the "institutional fetishism" that has so debilitated progressive thinking. By institutional fetishism, I mean the belief that we must choose from a closed list of institutional alternatives in the design of our social order. For the institutional fetishist, representative democracy, the market economy, and free civil society have natural legal forms—namely,

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6 CUT—*Central Unica dos Trabalhadores*—is an affiliate of the Brazilian Workers' Party and the largest and most politically militant labor central in Brazil. CGT—*Confederaçao General dos Trabalhadores*—is the second largest labor central in Brazil and the main rival to CUT. CGT is the successor to CONCLAT.

7 In my 1986 Article, I emphasized that "[t]he institutional characteristics comprising these types are only loosely connected." Lothian, *supra* note 2, at 1005.

8 Gacek, *supra* note 1, at 25.

the forms they happen to have taken in the modern history of the industrial democracies. Conservative and Marxist thinking have both been victims of such fetishistic assumptions.[9] Gacek's identification of freedom in civil society with a particular institutional form—that of American-style contractualist collective bargaining—and his view that contractualism and corporatism form part of a closed list of options for the ordering of labor relations, are two more examples of this characteristic institutional fetishism.[10]

The polemic about institutional fetishism provides this discussion of labor law with its broader intellectual context. At stake in this debate is much more than a position about labor law. It is an attitude to institutional innovation: without reinventing the institutional forms of free labor, free markets, and free governments we cannot breathe new life and new meaning into the democratic project which has inspired liberals and socialists alike. At issue is also the basic orientation of legal analysis. For only by shattering the idea of fixed institutional options, with their built-in legal content, can lawyers fulfill one of their most important missions in a democracy: the task of awakening us to unsuspected institutional variety and unrealized institutional opportunity.

I. THE COMPARISON OF CONTRACTUALISM AND CORPORATISM REVISITED

In my earlier Article I described and compared the contractualist and corporatist types of labor organization. The contractualist type is characterized by the principle of voluntary and pluralist unionization, by the effort to imagine and shape collective labor contracts by analogy to individual contracts, and by the assimilation of labor relations to private exchange, ruled by individual self-interest.[11]

The corporatist type of union organization conforms to the principles of enrollment of all workers in a unified, comprehensive

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[9] *See, e.g.*, DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (presenting established institutions as the natural product of economic rationality, interacting with objective factors such as population growth); ADAM PRZEWORSKI, CAPITALISM AND SOCIAL DEMOCRACY (1985) (treating capitalism and socialism as indivisible social systems, subject to correction through tax and transfer policies).

[10] Gacek, *supra* note 1, at 96-110.

[11] Most of the labor law regimes of the Western industrial democracies approach this type, at least in formal-legal terms, to a greater or less extent, with some admixture of corporatist elements. But within the formal legal framework of corporatism, a certain group of these national labor law systems has taken on many of the attributes of corporatism. Lothian, *supra* note 2, at 1002, text and accompanying notes (especially n.4).

union structure and of the subordination of this structure to guidance by the national government. Thus, the corporatist regime has its historical origins in the political strategies of controlled mobilization: efforts by authoritarian governments to take the initiative organizing the mass of workers, the better to control them. From Fascist Italy and its *Carta del Lavoro* (1927), the corporatist labor law system spread to several Latin American countries. Yet, in its later history, it showed a multiplicity of uses that belied the politics of its origins.[12]

One thesis of my previous Article was that the labor law regimes of the noncommunist contemporary world can best be understood as a series of variations on these two basic types, with the predominance, never unqualified, of the contractualist type.[13] The second, more controversial thesis was that each of these two institutional types has a paradoxical logic: a set of economic and political consequences that it encourages and a series of transformations of its original structure and meaning to which it is peculiarly susceptible.[14] In particular, the contractualist type favors a persistent, although moderate and economistic style of industrial militancy; that is to say, a style of militancy oriented to wages and benefits rather than to the organization of the workplace or the economy. By contrast, the corporatist labor law regime favors the extremes of passivity and prostration, when the repressive apparatus of an authoritarian government remains undisturbed, or a politicized and comprehensive labor militancy, overriding narrow factional divisions and combining economic and institutional concerns, when that apparatus begins to break down.

Gacek's response to my argument is complex. On the one hand, he seems to endorse my typology of labor law systems and to believe in their explanatory and descriptive power in the comparative study of labor law regimes. Gacek comments at the start of his Article that the comparison of the two labor law systems should be "of particular import to students of comparative labor law."[15] Further, he acknowledges that many contemporary scholars believe that the Brazilian and American labor law systems exemplify the two types.[16]

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12 See, for example, my discussion of the Brazilian experience under a corporatist labor law system. *Id.* at 1069-71.

13 *See id.* at 1005.

14 *Id.* at 1034-45.

15 Gacek, *supra* note 1, at 26.

16 *Id.*

Unfortunately, Gacek fails to mention the methodological premises underlying my use of these ideal types. As I argued in my earlier essay, the types should be understood as historically contingent sets of arrangements, composed piece by piece, rather than as indivisible systems.[17] No necessary legal-institutional logic holds the pieces together or determines the possible scope or direction of legal-institutional reform. Indeed, in the historical sections, I described the nature and range of alternatives that had vied for supremacy over time.[18] In my argument, corporatism and contractualism were merely two alternative frameworks for the legal ordering of labor relations.[19] Reform was possible in whole or in part along many different institutional dimensions.

For Gacek, on the other hand, the models assume a permanent and necessary cast. Once developed, he seems to imply, they become the horizon for the labor movement and society at large. In treating the models thus, he gives them a stature I never intended and a power they do not deserve.

Our difference on this point fundamentally influences the arguments by which we seek to develop our respective views over the possible futures of the labor movements. For Gacek, the belief in the all-or-nothing character of labor law models translates into an endorsement of the liberal, contractual past. If our choice is indeed so limited to the voluntarist contractualist model[20] or the state-led regulatory apparatus,[21] I, too, would share his faith. But I wrote and constructed my Article on the basis of different assumptions. The very point of the institutionalist approach and the delineation of institutional elements, piece by piece, is to shake up this sense of closure and provide the materials for a transformative effort.

My earlier Article already suggested that the two leading features of the corporatist regime—mandatory unionization in a unified, comprehensive union structure and subordination of this structure to the government—can be disassociated: the former maintained while the latter is rejected.[22] The result would be to produce yet another institutional form, with another set of consequences. It is this suggestion that I now develop more fully. For

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17 *See* Lothian, *supra* note 1, at 1045-73.

18 *Id.*

19 *Id.* at 1005.

20 Gacek, *supra* note 1, at 24.

21 *Id.* at 47.

22 Lothian, *supra* note 2, at 1045-47, 1071-73.

Gacek, this possibility is not even imaginable. My emphasis from the very outset on the contingent character of labor regimes and the potential for cumulative labor law reform leads us beyond the comparison of contractualist and corporatist labor law systems to search for alternative institutional models.

II. Interpreting the Recent Experiences of the Brazilian and American Labor Movements

Gacek's attitude to institutional models orients his subsequent reading of American and Brazilian labor history. Gacek and I agree, it seems, on the narrative of contemporary comparative history—on the development of an energetic and politicized labor movement in Brazil in the late 1970s and 1980s;[23] on the relatively weak and poorly organized labor movement in the United States.[24] But we disagree on the meaning of these two sets of facts and of the role played by the surrounding institutional arrangements in the explanation of the facts.

Our differences come out particularly in the interpretation of contemporary Brazilian events. Gacek's view of the "all-or-nothing" leads to a particularly twisted reading of the rise of CUT in Brazil and of the character of the labor system forged in the wake of the 1988 constitution. Take first the question of interpreting the CUT movement. For Gacek, CUT's rise is problematic.[25] On the one hand, he recognizes in CUT the quality of heightened labor militancy that I had argued could be expected within the corporatist labor form.[26] "CUT represents one of the most politically militant union movements in the world today."[27] All this is endorsed by Gacek. But as an opponent of the corporatist model, Gacek is at pains to condemn any link between this heightened, independent activity and the corporatist structures themselves.

Gacek accomplishes this feat by the remarkable assertion that CUT represents a form of "contractualist" labor militancy.[28] It is contractualist, rather than corporatist, in a sense I had never intended: by virtue of the "subjective" orientation of labor, rather than the legal framework of labor relations within which the labor militancy takes place. For Gacek, CUT should be seen as a "con-

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23 *See* Gacek, *supra* note 1, at 22-23; Lothian, *supra* note 2, at 1071-73.
24 *See* Gacek, *supra* note 1, at 23; Lothian, *supra* note 2, at 1056-57.
25 *See* Gacek, *supra* note 1, at 79-85.
26 *See id.* at 22-23; Lothian, *supra* note 2, at 1035-40.
27 Gacek, *supra* note 1, at 110.
28 *Id.* at 26.

tractualist" movement within a corporatist labor law framework. CUT must be seen this way because its leadership supports the turn to contractualism in Brazil.

But to characterize CUT as contractualist is merely to play a game with words. Gacek may characterize CUT as contractualist because its leaders endorse contractualist principles. But the style of militancy practiced by CUT is precisely the kind I defined as "politicized" within the framework of a corporatist labor law system.[29] Indeed, this combination of facts makes CUT a perfect example of the style of politicized militancy that I attributed to the paradoxical logic of corporatist structures.[30]

Gacek's view of recent developments in Brazilian labor law is equally misguided. The constitution of 1988 paved the way for a fundamental transformation of the labor law system by accepting the basic idea of reconciling the contractualist principle of autonomy with the corporatist principle of unitary unionization. In this way, it has broken with the classic corporatist labor law regime first instituted in the 1930s under the Vargas dictatorship, without adopting the full-fledged pluralist and contractualist system that many critics in the center and the left believe to be necessary to the thoroughgoing democratization of labor relations in the country. It has to a very large extent adopted the hybrid model I merely suggested in my 1986 Article.

For Gacek, however, no change of fundamental importance to the labor law system has taken place. Gacek dismisses as superficial the changes instituted in the labor law system.[31] Because Gacek views these labor law systems through the lens of his reified types, no amount of adjustment in Brazil can address his main complaint: that the recently enacted system amounts to something other than traditional contractualist labor law structures. Gacek is incapable of seeing the changes for what they really are: the creation in Brazil of a hybrid form which combines corporatist and contractualist features.

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29 Lothian, *supra* note 2, at 1003-04.

30 *Id.* at 1071-73.

31 Gacek acknowledges a series of changes to the traditional corporatist labor law structure: the retreat of government-mandated classifications; the opening to competition among different segments of the labor movement within the unitary union structure; the greater use of the strike; and the smaller role allowed to government in the administration of labor affairs. *See* Gacek, *supra* note 1, at 47-79. But, in Gacek's view, these changes leave intact the core of the traditional corporatist system. They do not alter fundamentally the character of that system. *Id.* at 79.

Indeed, from the standpoint of these labor law changes, two stages stand out in the recent history of CUT in Brazil: a first period, during which CUT became a vital labor movement within the traditional corporatist framework; and a second period, during which CUT has continued to grow in strength and independence, no longer within the traditional corporatist structures, but within a hybrid labor law system. To fully appreciate CUT's brand of heightened labor militancy, we must factor in these background arrangements and the transformation from one system to another.

The growth of CUT during the first of these two periods illustrates the paradoxical political logic of the corporatist labor law regime that was explored in my 1986 Article. As the military dictatorship began to break down, the corporatist order ceased to function effectively as controlled popular mobilization. The union structure began to be taken over, from within, piece by piece, by a revitalized labor movement. The movement was able to benefit from the comprehensive, societywide union apparatus that corporatism had forged. The growth of CUT during the second period under the regime established by the 1988 constitution illustrated the democratizing advantages of the hybrid system—the system produced by the recombination of contractualist and corporatist principles—that I explore and defend in the remainder of this Article.

In his interpretation of CUT's experience, as in other parts of his argument, Gacek is the victim of an elementary confusion resulting directly from his basic institutional fetishism. He interprets the kind of political pluralism that exists in a hybrid regime, or even in a corporatist regime broken up by militancy, as an example of the contractualist, collective-bargaining style of militancy. But it is one thing to have pluralism in the form of fragmentary and disconnected union structures—pieces of different jigsaw puzzles—and another thing to have pluralism as the rivalry among different union movements to win a place in a single, comprehensive union structure. Such movements, affiliated or not to political parties, then compete for position in such a structure, just as political parties themselves compete for positions in the structure of a federal government. For it is to a federal and democratic government that the conception of a hybrid, recombined labor law regime is best compared.

Gacek's final error of interpretation concerns the American labor movement and labor law system. Gacek's position on the historic weakness of the labor movement and the contractualist

character of the labor law system mirrors his earlier treatment of the Brazilian situation. Just as the Brazilian CUT is called by Gacek "contractualist," so the American labor law system becomes only a "deviant" contractualism. Where Brazilian labor is sporadically strong, American labor is sporadically weak, an apparent response to the group of critics (myself included) who would claim that the labor movement has lost its charge in the United States. Reading Gacek's remarks about the American labor movement, one would never guess that it has been helped by its poverty of institutional imagination to its present state of virtual collapse.

Here again, Gacek's argument is hard to reconcile with the facts. While it is true, as Gacek notes, that there have been periods of politicized militancy in the history of American labor, the facts of the contemporary labor movement speak all too loudly for themselves. The apparent is sometimes true. Whether or not American structures of collective bargaining perfectly embody the contractualist model, they express as well as any other contemporary system the leading features of the contractualist labor law model. Gacek's emphasis on the procedural machinery for regulating the organization and recognition of unions should not distract us from this point. Each legal-institutional dimension of the American labor law system—from the process of union formation to the determination and recognition of the appropriate bargaining unit—contributes to the creation of a distinctively American approach to contractualist labor law structures.

Gacek's comparative historical polemic is motivated by a single objective and a single intellectual confusion. Both the objective and the confusion reside in the mistaken belief that we must choose once and for all between labor law models. Gacek's misreading of institutional arrangements and of Brazilian labor history reflect and confirm this confusion. Gacek finds it necessary to defend the American system precisely by distinguishing it from its main historical embodiment. Gacek's approach to the Brazilian labor movement serves precisely the opposite effect.

III. Beyond the Contractualist and Corporatist Debate

Although I have argued that Gacek is guilty of misrepresenting my substantive views, it is clear that the explanatory thesis of my 1986 Article remains incomplete without the programmatic sequel that remained underdeveloped in that piece. Here I seek to correct that defect by sketching clearly the outline of an alternative

labor law system. The sketch takes seriously a suggestion of my earlier essay: that we can organize and empower labor by establishing a set of arrangements which combines the most salient features of the two distinct labor types.[32]

Two basic impulses underlie this regime. The first, which characterizes the corporatist structure, is the commitment to a unitary system of classification: everyone is, in principle, unionized within a union structure whose contour the law determines. The second guiding impulse, which negates the practice, if not the theory of the corporatist regime, is the complete independence of the union structure set up by the law from administrative control or intervention by the government. The workers run and use their own organization within the framework set up by the law. The union system thus established represents one fragment of the organization of civil society outside the state, and eventually, even against the state: the workers can use their power to attack the government in office and its policies.

Contrary to what a facile criticism of the unitary principle supposes, there is no contradiction between the commitment to a unified, comprehensive union structure, and the assurance that this structure will remain independent from administrative control. There is a crucial distinction between the legal definition or regulation of a structure and the power of the administration to command its operation. It is also by law that under the purer versions of the contractualist system, workers have at least the formal "right"—(the Hohfeldian "power") to unionize or not to unionize. It is true that under the proposed system workers would lose this hypothetical option—to unionize or not to unionize—the better to exercise their other rights and powers.

The case for this exchange is complex, but it can be fairly summarized as follows.[33] The contractualist regime of purely voluntary unionization consumes the greater part of the effort of the labor movement in the struggle to unionize, and to maintain unions, in the face of employer coercion and seduction. It also helps to give a purely economistic tilt—wages and benefits rather than power in and outside the workplace to whatever labor militancy it allows to subsist. This priority results from both the focus on this initial effort to unionize—and from independent factors such as the tendency of the contractualist regime to encourage a view of industrial

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[32] *See* Lothian, *supra* note 2, at 1003.

[33] *See id.* at 1034-45.

relations as a matter of purely private self-advancement, unrelated to public policy, or to the basic distribution of power and wealth in society. For these and other reasons, contractualism simply has not worked to achieve some of its professed objectives of equalizing the power of employers and workers and ensuring industrial peace through industrial democracy rather than through managerial despotism or paternalism. The institutional machinery of collective bargaining has either been cut back and confined as collective contracts give way to legal regulation of the employment relation in many sectors of the labor force, or transformed fundamentally its meaning as national governments broker and uphold deals between the more organized parts of business and labor. The adoption of unitary unionization represents part of an attempt to shift the focus from whether to unionize to what to do with union power and from an exclusive concern with focussed, short-term material gains to the organization of work and the macroeconomic control of industry.

Although there is no contradiction between unitary unionization and independent union structure, there is a tension, or rather a family of tensions, between them. Each of the following institutional descriptions represents a way to cope with this tension and turn it into an advantage.

The hybrid model includes five institutional features:

(1) *The unitary classification scheme and its revision.* Every worker is unionized in a single, comprehensive scheme of union classification, established by law. Through elections, the union movement may, from time to time, alter this classification scheme in whole or in part. But opposition to this initiative is feasible: the legislature (or whatever bodies are constitutionally charged with making the general laws) may override a labor-initiated change in the classification scheme, thus emphasizing that the basic structure of the classification system is meant to serve a public interest and remain a part of public law.

(2) *Union elections and their administrative and judicial supervision.* Under the pure corporatist regime, the union election system has traditionally served as one of the most important means of control over the labor movement. The government can back its allies and undermine its adversaries by discretionary administration of the electoral machinery and arbitrary recognition of unions and union leaders favorable to the government in office. In conformity with the general spirit of the proposed regime, the organization of union elections becomes a matter of law, to be

accomplished by the bodies and through the processes constitutionally charged with the administration of the legal system, not by administrative bodies acting under discretionary standards and executing the policy of the government in office.

As in the broader political democracy, elections within the unitary union structure should be organized along territorial and functional lines, permitting a pyramidal organization and creating a framework of internal democracy and successive levels of representation. Different organizational movements within the labor force, whether or not affiliated with political parties, compete for places within the union structure. At each succeeding level on the hierarchical ladder, opportunities for direct democracy—referenda, recalls, rotations, and assemblies—supplement the traditional methods of representation.

(3) *Mandatory funding of the union structure.* As part of the public organization of society, the unions should receive broad-based financial support to conduct their activities. One simple way to provide this financing is through the imposition of a union tax, applied by law to workers and employers and distributed to all parts of the union structure in accordance with legally specified criteria. In keeping with the spirit of this hybrid model, application of funds by unions should remain entirely independent of government. Moreover, the hierarchical structure of the union system should be skewed toward its bottom: the plant and local levels should retain the broadest measure of control over financial resources and industrial or political initiatives.

(4) *The relation between law and contract under the proposed regime.* Under the traditional contractualist model, collective bargaining is considered the main technique for promotion of workers' interests. Legal regulation of the employment relation is considered a second and competing strategy, incompatible with the primary emphasis on collective bargaining and negotiation over the terms and conditions of employment.

Under the hybrid model, contract and law become, simply, two different legal strategies for the organization of an energetic and independent union structure. Collective bargaining may be supplemented by the legal guarantee of social minima. Indeed, under the conditions facing most third-world countries, legal guarantees of social minima may be required to establish the practical conditions of workers' freedom across all categories of the labor market.

(5) *The procedural framework for the resolution of industrial disputes.* Labor conflicts should be left to the parties themselves, within a legal framework that recognizes the right to strike and allows maximum discretion to workers and employers. Government participation in industrial conflict should be kept to a minimum. Following the contractualist model, collective action by workers (acting independently or through unions) should be broadly permitted and independent of government control.

Although the hybrid model relies on the principle of unitary classification, it does not for that reason exclude pluralistic competition within the labor movement. The hybrid model is pluralistic, but the style of pluralism is different from that which characterizes the contractualist labor law form. Whereas contractualism encourages the creation of plural organizational frameworks, the hybrid model encourages pluralism within a unitary framework. The appropriate analogy is to the competition among different political parties within a federal democratic state. Just as political parties compete for a place within a federal democratic framework, so different factions within the union movement (CUT and CONCLAT in Brazil are two examples) compete for a place within a unitary union structure.

I see this proposal as a way to realize more effectively the ideas of industrial democracy and countervailing power that helped shape the original theory and practice of contractualist collective bargaining. But I also view it as an expression of a criticism of the ruling traditions of representative democracy, of their tendency to accept unnecessarily stark divisions between the areas of social life that do or do not fall under democratic principles and their willingness to let individual initiative and contract-making take care of the problem of social organization. These two lines of justification—the one from within the dominant institutional and ideological traditions of contemporary Western democracies, the other more independent of those traditions—are not as distinct as they may first appear.

The labor law regime proposed here departs from the classical contractualist regime, the better to realize some of the ideal aims that the divergent sequels of the regime have betrayed. It is precisely by combining features of this contractualism with certain other characteristics of its traditional corporatist rival that we may be able to better realize whatever part of the original contractualist program in labor law had to do with equalization of power through self-directing collective organization, rather than merely with in-

dustrial peace, higher material benefits for workers, and security against managerial discretion. Then, in the high, confident phase of the contractualist regime, as now in this proposal partly to replace the former, a political set of goods is valued both as a means to the realization of the latter, economic set of goods and as a valued aim in its own right—an unrealized part of a promise of democracy for social life.

Such a proposal has never quite been carried out in any country. I say "never quite" because the recent Brazilian Constitutional Convention, in the course of drafting a new constitution, has in fact accepted the basic idea underlying the hybrid system.[34] Subsequent legislation has enacted a version of the very style of unionization I proposed in the Article published two years prior to the enactment of the new constitution.[35] The Brazilian example shows that the proposal for a hybrid form is not just a fantastic hypothesis. It is a practical proposal for an alternative model of labor relations based on the reconciliation of commitments to democratic pluralism and flexibility.

CONCLUSION

When I wrote my original piece on corporatist and contractualist labor law systems, I did so in the belief that the study of these two systems would help advance the search for labor law regimes that more fully reconcile the demands of a productive market economy with democratic forms of labor organization. Gacek's response to my piece shows that institutional analysis and proposal may, in the end, not be enough. We must rebel, as well, against the continuing conceptual confusions which prevent us from imagining alternatives to our existing social arrangements.

The debate over the future of labor law is merely one among many theaters in which to carry forward this campaign. We need institutional imagination about the past and the present to tear away from our social experience its false and inhibiting semblance

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34 The Brazilian Congress of 1987 served as a Constituent Assembly until October 5, 1988, the date of the ratification of the new Brazilian constitution. The fundamental principles of the labor law system are set out in Article 8. *See* CONSTITUIÇAO FEDERAL art. 8 (1988) (Braz.).

35 Subsequent legislation and administrative orders have expanded the right to strike, reduced the scope of governmental involvement in the process of economic conflict and collective bargaining, and transferred the power to recognize and classify unions from the Labor Ministry to the workers and unions themselves. *See* Law No. 7.783 art. 10 (June 28, 1989) and *Instrução Normativa* No. 5 (Feb. 15, 1990), published by Labor Minister Werneck, Brasília (Feb. 19, 1990).

of naturalness. We need institutional imagination about the future to break through self-imposed limitations upon the realization of our ideals and interests. We need a style of legal analysis that can help democracies, like Brazil and the United States, understand their possibilities rather than accept their fate.