

---

# Negotiating What Matters Most: Collective Bargaining and Student Achievement

CHARLES TAYLOR KERCHNER

*Claremont Graduate University*

JULIA E. KOPPICH

*Koppich and Associates*

Despite a statutorily narrow scope of bargaining, the scope of topics of union-management discussions has widened over the last 20 years, resulting in the birth of reform, or professional, unionism. But over the last half decade, professional unionism has waned. School management often refuses to see unions as partners, politicians fail to view unions as legitimately speaking for education change, and unions themselves are reluctant to assume added responsibility. This article advocates a change in labor law, requiring union and management to negotiate student achievement goals, as a way of beginning to change these dynamics.

## Introduction

When teachers in Los Angeles went on strike in 1970, they passed out a leaflet titled "Teachers Want What Kids Need." The text listed a number of items on which teachers demanded to be heard on matters of educational improvement. The idea that teacher bargaining would work for the educational good of students drew support. Even the historically antiunion *Los Angeles Times* liked the idea.

Yet, five years later when the California legislature passed a collective-bargaining bill, the legitimated scope of bargaining was limited to "wages, hours, and terms and conditions of employment," language appropriated from the federal National Labor Relations Act and the labor doctrine of a strict demarcation between workers and managers. Teachers would teach, administrators manage, and school boards make policy. Unions would represent teachers' economic interests and assure them procedural due process.

Electronically published March 9, 2007

*American Journal of Education* 113 (May 2007)

© 2007 by The University of Chicago. All rights reserved.  
0195-6744/2007/11303-0001\$05.00

MAY 2007 349

### Both Sides Dissatisfied

History shows that things didn't work out the way the law intended. In practice, collective bargaining seriously eroded management's goal of keeping the scope of bargaining narrow. Generally, contracts expanded, binding school districts with a web of work rules. Moreover, the teachers' contract encumbered a majority of a school district's operating budget, and it patterned other expenses because all district employees came to expect salary increases in line with those teachers received.<sup>1</sup> Even under the narrowest, most restrictive scope of bargaining, labor contracts were the source of "accidental policy." Neither labor nor management generally acknowledge that, when wages and working conditions are set, the operating budget is allocated and the division of labor is established. But, in fact, this is the case.

The collective-bargaining contract also sets the psychological contract under which teachers and managers work. Teacher contracts and the practice of labor relations tend to treat teaching as industrial work (Kerchner and Mitchell 1988). This is not to say that it is low-status work but that teaching carries with it some of the organizational assumptions of jobs in the manufacturing sector. School managers determine the outcomes they want to see, and they create work processes and technologies in the form of a required curriculum and instructional practices. They assess the results through inspection of teaching and by testing students. Teachers are expected to faithfully carry out routines and be obedient to orders. Insubordination is dealt with more harshly than incompetence.

Although unions wanted a broader scope of bargaining, they generally haven't wanted broader responsibility. Older teachers, who are often on union representative councils, see relatively little need for change in the bargaining process. As a 30-year veteran teacher wrote to one of the authors, "I do not want to pay union dues to an organization that does anything but help me in defense, income, and benefits. Do you understand?" (personal communication, April 4, 2002). These beliefs percolate upward in the unions.

Under an industrial view of education, teaching, and labor relations, finding solutions to educational problems is management's work, not the unions'. Even statutorily broadening the scope of bargaining, as the California Teachers Association (CTA) proposed in 2002, provided no guarantee that the agree-

---

CHARLES TAYLOR KERCHNER is the Hollis P. Allen Professor of Education at Claremont Graduate University. JULIA E. KOPPICH is the president of J. Koppich and Associates, a San Francisco-based education consulting firm. Both have written extensively on public sector labor relations. They are the coauthors of *A Union of Professionals* (Teachers College Press, 1993) and *United Mind Workers: Unions and Teaching in the Knowledge Society* (Jossey-Bass, 1997).

ments would reflect public rather than private interests. The measure was criticized in the press, and legislators on both sides of the aisle saw the expanded CTA role as a power grab rather than as an educational reform measure (Skelton 2002).

School managers have complained for a quarter century that teacher contracts inhibit their freedom to manage and sop up all the available resources. Yet there are two signatures on the contract. Not only have school boards and administrators failed to eliminate the spread of work rules; they seldom have tried to use bargaining as a means to reform. Likewise, governors and chief state school officers often claim that work rules in teacher contracts make change impossible. Yet they turn a blind eye to reams of regulations that flow downward from statehouses and the federal government.

No one is particularly happy with the current state of affairs. Teachers rarely have a legitimated voice in the way schools run, and, except as it isolates teachers from external criticism and interference, collective bargaining as practiced has done little to advance teaching as an art or craft. Even though the unions are considered strong—in some cases inappropriately so—the collective-bargaining table has not served as a particularly good place for discussions about what should be taught and how or about how authority and responsibility in schools should be divided up.

School managers, never fans of collective bargaining, increasingly see the union as blocking their ability to institute change and reform. They are joined by many in the education reform community, including public officials, policy researchers, and, most particularly, commentators identified with market-based alternatives to the present government-run education system.

The voting public doesn't connect unions and educational reforms. When unions try to lead or just be a part of reforms, their motives are said to be suspect.

## Reform Unionism

By the mid-1980s signs of change had begun to appear. The signal event was a speech by the late Albert Shanker, president of the American Federation of Teachers (AFT), to delegates of the New York state AFT. Shanker called for what he described as "professional unionism." At the time, his remarks were met by near silence from his teacher audience. Instead of the thunderous applause usually given to convention keynoters, the delegates sat in disbelief that one of their own would advocate that teachers actively work with school managers to improve schools.

But Shanker's comments resonated with a number of influential AFT leaders around the country. As a result, his remarks and subsequent actions ushered

### *Negotiating What Matters Most*

in an era of experimentation or at least gave protective cover to unionists and school superintendents determined that things needed to change. As Shanker noted, "It is as much the duty of the union to preserve public education as it is to negotiate a good contract" (AFT 2000).

Thus, over the last 20 years, many school districts and union locals have tried to work their way out of the box constructed by a narrow scope of bargaining, negotiating on behalf of teaching as well as teachers (Kerchner et al. 1997). Beginning in the 1980s, a number of unions and school districts agreed to substantive changes within the collective-bargaining structure. These agreements included topics such as shared decision making, peer assistance and review, professional development, parent involvement, changes in the reward and incentive system, charters and other kinds of semiautonomous schools, intervention in low-performing schools, and educational standards. For example:

- *Getting the right teachers in challenging schools.* The United Federation of Teachers in New York City—no wimpy union—came to an agreement with the district over staffing the city's lowest-performing schools in which teachers are chosen by a management-labor-parent personnel committee on the basis of a teacher's fit with the school's mission, not seniority.<sup>2</sup>
- *Substantive review of teaching.* Peer review is alive and well in dozens of districts nationwide. This system works, combining coaching with a proven ability to remove the worst teachers from classrooms.
- *Intensive professional development.* This takes place in collaboration with the union in many districts, including New York City, Minneapolis, Rochester (New York), and Montgomery County, Maryland.
- *Incentive systems.* Denver is, of course, the poster child for developing an alternative to the single salary schedule. But there is great interest in tying salary increases to increases in teacher competence, as Allan Odden and his colleagues are showing (Odden and Kelley 1997).

One of the more far reaching of these reform efforts is displayed in peer review. Dal Lawrence, president of the Toledo (Ohio) Federation of Teachers, took the idea of peer review to the bargaining table in 1983, and, much to his surprise, management's negotiator agreed with the truly radical idea that teachers could socialize and evaluate novices and fire poorly performing veterans. Peer review proved viable and now exists in about 50 school districts nationwide. Besides Toledo, the most visible programs exist in Columbus, Ohio, where the peer review extends to extensive coaching and university training programs; in Minneapolis, where peer review is linked to school site reforms; in Rochester, New York, where it is part of a career ladder system; and in Montgomery County, Maryland, where it is one component of an extensive teacher professional growth system.

Case studies of these and other peer programs find that they are more

effective in disciplining experienced teachers than were school administrators acting alone. Unionized teachers will vote to fire other teachers, or “call the question,” as it is referred to in Rochester. They also provide good mentoring, and anecdotal evidence suggests that novice teachers learn the craft skills of experienced teachers more quickly than would otherwise be the case.

In the late 1980s, Rochester, New York, superintendent Peter McWalters and local union president Adam Urbanski began to hold sustained conversations about joint union-management-sponsored reform. These talks led to a breakthrough contract in 1987 that provided a 40 percent raise for teachers and pledged the union to a series of substantive and rapid reforms. Ever since, Rochester has been a magnet for attention and criticism.

Both the political leadership in Rochester and the policy community became restive at the slow pace of change. When Urbanski quipped, “Real reform is real hard,” the response was, “Yeah, but you took the money real fast” (Kerchner and Koppich 1993, 136). Nearly 20 years later, what seems remarkable about Rochester is that the drive for reform persists. Some of the initiatives of the 1980s have held fast and become institutionalized, particularly the Career-in-Teaching program. Other initiatives have been started, including a provision in the most recent contract that allows schools to alter provisions of the master agreement.

By the late 1990s, a dozen or so locals engaged in reform started the Teacher Union Reform Network (TURN) under the leadership of the late Helen Bernstein, president of United Teachers Los Angeles. TURN continues to operate and has developed satellite organizations in Ohio and the Great Lakes region. Member organizations and others have produced a substantive catalog of reforms. Miami-Dade County, Florida, and Louisville, Kentucky, organized around site-based management. Minneapolis created a program linked to pedagogy. Hammond, Indiana, created a “living contract,” a long-term agreement, which could be amended as problems arose (Kerchner 2001).

Yet, by the turn of the century, the spread of labor reform seemed stalled. No national organization advocates reform unionism foursquare—not the National Association of School Boards, not the American Association of School Administrators, not the Council of Chief State School Officers, and not the unions themselves. The National Education Association’s (NEA) experimentation with what it called “new unionism” disintegrated after its chief sponsor, Bob Chase, left the presidency. Shanker died, and reform took a much lower profile within the AFT, although the organization adopted the tagline “a union of professionals” in its publications and on its Web site (see Kerchner and Koppich 1993). Although recently there have been very interesting changes in some large district locals, notably New York City (AFT) and Montgomery County, Maryland (NEA), it is clear that reform unionism is not likely to reach what Malcolm Gladwell (1996, 2000) famously called the “tipping point.”

### *Negotiating What Matters Most*

Twenty years of labor relations reform have revealed numerous barriers to using collective bargaining as a means to organize teaching around educational quality. Recalcitrant unionists and school administrators, comfortable with the industrial status quo, clearly impede building unions around craft, artistic, or professional principles. Even when unions accept the idea of change, they often are not well organized to engage it. Union locals have relatively small staffs, and joint labor-management reform efforts tax their capacity.

Ellen Bernstein, president of the Albuquerque Teachers Federation (ATF), captures the efforts to transform the local toward professional unionism:

For 20 years Albuquerque [ATF] had attempted to further a reform agenda by engaging the district through the collective bargaining process. We were frustrated in our attempts and concluded that it was impossible to practice “new unionism” in the context of “old managementism.” It wasn’t until we systematically explored our own organizational structure that it was evident to us that our internal structures were focused on a traditional union role; we were wholly ignoring any efforts to engage our own membership in our reform agenda. The self-study painted a picture of our organization as a prisoner of the industrial era just as the school system we had been attempting to change. Our organizational structures and activities were completely focused on maintaining efficacy as a union able to bargain for salary increases and provide service to its constituency. As a union whose existence is still based on voluntary membership of less than half of the work force, this was not surprising. (Bernstein 2003, 243)<sup>3</sup>

Most staff members in most locals continue to spend their working days attending to the nuts and bolts of conventional unionism: representing teachers in grievance processes, negotiating contracts, training teachers for union leadership posts, and attending to the union organization itself.

Antiunion politicians make it difficult to forge useful alliances between unions and school reformers. The politics of educational reform is to create a sufficiently large common space where persons and interests who do not always agree can work together. But alliances are impossible when one party maintains that the other is politically illegitimate or improper (Dunlop 1958). Both legally and culturally, management, unions, and the broader society must perceive that student achievement is union work.

An array of political and ideological forces that do not perceive unions in any form as the legitimate representative of teachers and teaching clearly dampens the possibility of working toward a solution. The same voices that decry teacher unionism’s embrace of educational reforms are frequently heard applauding anti-collective-bargaining legislation or charter school laws that remove the right to organize from those who work in them.

Engaging teacher unions does not mean forgoing criticism, debate, or con-

frontation. It does not mean the end to fractious bargaining: quite the contrary. But it does mean expecting more of labor relations, expecting as a matter of public policy that union leadership will also lead teachers on reform issues. It means raising questions about the connections between union activities and educational reform again and again until they are answered. Those who think that unions should speak for teaching as well as teachers, for the institution of public education as well as for explicit teacher self-interest, have both the right and the ability to ask tough questions. Those who don't think unions should lead educational reforms have just let them off the hook. In effect, they have acquiesced to a policy environment in which labor is allowed to encumber most of a school district's operating budget without having to discuss whether the allocation of funds makes schools better, fixes a problem, or is more productive than an alternative.

From a public policy standpoint, not letting unions off the hook means changing their duties and responsibilities under the law. Collective-bargaining statutes do not simply create the freedom to engage in collective bargaining; they create specific expectations and responsibilities. For example, a teachers union must bargain for all the employees in a particular bargaining unit, including those who do not belong to the union. Nonmember employees—even those who dislike the union—receive the benefits of this representation. Likewise, the union is obligated to a duty of fair representation for all the employees, including nonmembers. They must, for example, represent employees in grievance proceedings whether or not those employees are members of the union.

Yet nowhere in the law does it say that teacher unions have a duty to raise the issue of student achievement. The teacher unions, and particularly the AFT, have asserted that it is their duty. Beginning with the publication of *Redesigning Low Performing Schools: It's Union Work* (AFT 2000), the AFT signaled a willingness to take on educational reform issues. But the spotty engagement of reform issues—differing widely among union locals and from one superintendent's administration to another—makes clear that depending on the presence of progressive union leadership or an era of good feeling between union and management is not enough. Changes in statute are necessary to create both a legitimate status for unions to engage student achievement and the organizational qualities that cause it and a duty for unions to do so.

### The Need for a New Labor Law

Education needs to attach collective bargaining's private interests to the larger public good of student achievement. The process that distributes money and authority should be required to address the public's interest in student achievement.

### *Negotiating What Matters Most*

Unions and teachers certainly have private interests, and so do school administrators, school board members, legislators, and governors. There is no political arena—from Congress to school site councils—that doesn't contain a mixture of public good and private interests. Under current labor law, collective bargaining is supposed to separate the two through restrictions in what can be bargained. Unions are allowed to represent the private-regarding interests in their wages and working conditions, while school managers and school boards are expected to represent the public interest. Managerial literature typically refers to this division as the "right to manage." Individually, teachers are allowed, even expected, to govern their behavior in public-regarding ways, but collectively they are not.

If, as union critics hold, teacher unions always represent private interests, they are doing exactly as the law intends. It is labor law that sets out the areas of legitimate behavior for unions and creates specific duties and responsibilities. The culture and standards of good practice attached to existing labor law strongly pattern the behavior of labor and management, their attorneys, arbitrators, and judges. As Daniel Bell (1973) noted, unionization has always been dependent on government structures. Unions may have started as social movements, but they are patterned by statute.

This was the case in the private sector after the National Labor Relations Act (NLRA) was passed in 1935, and it was only after states began to adopt NLRA-like statutes that teacher collective bargaining spread rapidly across the country. States copied statutory language from one another, tweaking it as the words crossed state lines. A common culture and practice also followed unionization from place to place. Wollett and Chanin's *The Law and Practice of Teacher Negotiations* (1974) patterned practice within the NEA, and collective bargaining spread relatively easily from place to place because each school district and union did not have to invent it anew. Behaviors and structures could be copied from one another (DiMaggio and Powell 1983). If society wants unions to behave differently, then it needs to change statutes in order to legitimate union activity and create a duty for them to do so.

### *Creating Legitimacy for Teacher Voice*

First of all, labor law will have to make what are now the frontiers of educational labor relations permissible territory. Unionists should not have to wonder whether participating in joint labor-management committees or making substantive decisions is likely to be interpreted as supervisory work, thus rendering teachers ineligible for collective-bargaining rights. (The very existence of a joint committee, rather than the substance of its decisions, has been taken as a reason to classify workers as supervisors who are thus not entitled



to bargaining rights.) The NLRA posits a fundamental dividing line between labor and management. Legislative history and court decisions interpreting the law asserted that collective bargaining by managerial employees would create intolerable divided loyalties (Rabban 1989).

The 1980 U.S. Supreme Court decision in *National Labor Relations Board v. Yeshiva University* reinforced the separation of workers and managers in higher education, as did the recent case involving nurses (*National Labor Relations Board v. Health Care and Retirement Corporation of America*, 1994). Faculty members at Yeshiva were denied collective-bargaining rights because their faculty senate and its committees made substantive decisions at their university. Thus they were considered “supervisors” under the law and ineligible for bargaining rights. The 1947 Taft-Hartley amendments to the NLRA specifically excluded supervisors from coverage under the law, specifying (in sec. 2[11]) that supervisors are those who have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees. Although this federal legal doctrine has never been applied to a state case governing public school teachers, it stands as a symbolic barrier, a monument to the notion that the law did not intend workers and management to share decisional power. “In the end, the *Yeshiva* case is troubling because it is at war with the idea of consensus between professional employees and their administrators” (Schlossberg and Fetter 1986, 15).

Consensus and joint labor-management committees are legally suspicious. Although Senator Robert Wagner espoused cooperation among workers, the law for which he is remembered, and the state statutes derived from it, nearly universally place barriers in the way of a close working relationship between unions and management. The framers of the law were concerned with so-called company unions, organizations that looked like unions but were dominated by management and formed to forestall worker organization by independent unions. Section 8(a)(2) of the NLRA provides that it shall be an unfair labor practice for an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” Under the statute, employee organizations (sec. 2[5]) include virtually any kind of employee representation committee or organization that deals with wages or working conditions.

Peer review challenges both the ideology and the practice of current labor relations in rather obvious ways. The courts have held that by achieving the status of exclusive representative for a group of employees, unions also take on a duty to “exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination among them” (*Steele v. Louisville and N.R.R.*, 323 U.S. 192).

This duty is felt in several circumstances, but the one most associated with peer review is the representation requirement when employees are disciplined

### *Negotiating What Matters Most*

or discharged. The courts have held that a union has discretion in deciding how far to press a grievance brought by a member in these cases, so long as it does not discriminate against or among groups of members (Morris 1971). Thus, not every grievance needs to be carried to arbitration or into the courts. But in peer review cases, the union approves of and participates in a process in which members judge other members, and unions have generally agreed that they will not challenge the substance of peer review rulings. While the existing peer review experiments have produced no legal challenges from teachers who were judged to be incompetent, the status of unions remains unclear.

Peer review also challenges sections of education statutes that reserve managers' right to evaluate employees. Principals in Rochester, New York, unsuccessfully challenged the teacher union's introduction of peer review on this ground. In California districts that adopted peer review, administrators sign the final recommendations, thus complying with the letter of the law.<sup>4</sup> A recent analysis of peer review by union attorneys suggests contractual language that would assure that teachers serving on peer review panels or as supervising teachers would not compromise their status as bargaining unit members (AFT-NEA 1998). But most state collective-bargaining laws do not send a clear message that these guildlike activities are what unions and management need to do, rather than what they can get away with if they want. If a focus on student achievement is to come about, it will be necessary to encourage joint labor-management enterprises, such as professional practice committees and jointly sponsored professional development schools, as in Cincinnati, without violating the employer assistance or domination prohibition.

The development of a legal structure more focused on student achievement requires changes in the concept of company domination. Collegial committees or actual joint operations need support from employers. Teachers should be able to form committees that advise and actually make policy, and school authorities should be able to assist those committees with staff support and budgets without violating the labor statute.

As David Rabban writes, "The definition of company domination that best promotes professional values should be limited to actual employer interference with the independent decision making of employee committees, whether or not this interference derives from anti-union animus. Unless committees of professional employees are able to reach their own conclusions, they cannot provide the employer with the expert advice that justifies their existence" (1990, 755).

Addressing the labor law issues necessary to make guildlike teacher unions legally safe provides symbol and substance for changes in labor-management relations but no incentives. It must be remembered that state statutes under which teachers bargain have not been much of a barrier to innovative practices

in the places that wanted to undertake them. Virtually all the practices described in this article have taken place without changing laws. Most of the existing labor reforms have taken place within existing statutory restrictions, simply because both labor and management wanted changes to come about and the statutes and case law were sufficiently permissive that union efforts to organize around quality and management promotion of or agreement with these efforts have not prompted legal challenge. When there has been a challenge, the courts have ruled in favor of the innovative practice.

*Creating a Duty to Negotiate Student Achievement*

We argue that it is in the public interest for teacher unions and school districts to negotiate student achievement goals even though neither may want to do so. It took no coaxing to persuade unions to negotiate wages, once they gained a legitimated right to do so, but neither labor nor management wants to own the student achievement problem, and they particularly don't want to place it in joint custody. After all, specifying goals creates accountability to them. Specifying goals requires specifying which objectives are most important. Putting goals on the same table as wages, hours, and working conditions requires labor and management to face the reality that how money and time are spent has a relationship to achievement.

Creating a duty to specify student achievement goals runs counter to several precepts of contemporary labor law. In addition to scope of bargaining restrictions, labor statutes generally do not require that contracts contain agreements on specific topics.

Instead, the NLRA tradition, which most state statutes and case law draw upon, divides subjects of bargaining into mandatory, permissive, and prohibited. As the names imply, mandatory subjects are those over which negotiation is required. Employers may not make unilateral changes without first bargaining and exhausting statutorily prescribed impasse procedures. Permissive subjects are those about which bargaining is allowed but not required. Generally, a party may not insist on its position on a permissive subject to impasse, and disputes over such subjects are not subject to statutorily prescribed impasse procedures. An employer may choose not to bargain and act unilaterally at its option. Prohibited subjects are those on which the parties are forbidden to bargain and on which any collective-bargaining agreement is unenforceable.

But even in mandatory topics of bargaining, management is required to negotiate a topic only if the union raises an issue. If, for example, a union had never raised the length of the teaching day as a topic of bargaining, management would not be required to negotiate it. (As it is, hours of employment have been among the most litigated topics in labor law.) For all the

### *Negotiating What Matters Most*

reasons described earlier, the union might not raise student achievement as a topic of negotiation. If management were operating according to the tradition that contracts should contain as few topics as possible, it would not be likely to raise student achievement as something it wanted to discuss. Hence, public policy needs to require labor and management to reach agreement about what matters most in education.

### *Why Goal Setting Matters*

It is reasonable to raise the objection that school districts have lost the ability to set their own goals and thus it is meaningless to negotiate them. Indeed, in the last 20 years, particularly since passage of No Child Left Behind (NCLB) in 2001, student achievement goals have become more explicit and more imposed from outside schools and districts. While NCLB is the visible and most debated tip of the imposed goal iceberg, a much larger mass remains unseen. As the need and expectation for postsecondary education have risen, goals for public school systems increasingly are controlled by college and university systems and the testing companies that create their entrance examinations. Courses of study and the means to evaluate them arise increasingly from college entrance tests, such as the SAT, and from entrance requirements of state colleges and universities. High school exit examinations and state imperatives create another level of expectations for students and, often, sanctions for school districts. One can question whether there are any goals left to be set in the collective-bargaining agreement.

Even if the collective-bargaining agreement simply incorporated existing federal requirements, it would have the advantage of aligning the budget with school district goals. There are virtually no other arenas in the school budgeting process that bring money and intent together with such force.

However, if the experience of reform unionism is any guide, teachers and school managers will bring more important goals to the table. Externally set goals often reflect easy-to-measure aspects of student achievement, such as reading fluency and comprehension. More authentic assessments that teachers value, such as a portfolio of student work, are pushed aside. Schools and teachers commonly have goals other than test scores: graduation rates, percentage of students leaving school ready for college or apprenticeship programs, decreased numbers of students expelled or suspended, and increased numbers of second-language learners classified as English proficient. Goal setting through bargaining allows teachers and the school district to make these explicit.

Bargaining goals also provides a chance to rationalize them. External goal and sanction overload will lead education back to the same place that an

abundance of goals always leads bureaucracies. Goal overload produces street-level choice about which mandates are real. When there are more rules than can possibly be followed or goals than can possibly be attained, teachers and principals decide which rules they will follow and which goals they attend to. So do students and parents, who, along with the salaried educators, create the cultural expectations and behavioral norms of schooling that have been recognized for generations.

Bargaining goals creates a process of internalization. Internally set goals represent a different kind of educational policy than those set on the outside. External goal setting becomes a mandate, and the natural response is compliance to the artifact of the goal rather than its intention. As this is being written, the authors' attention was drawn to a school district that had decided to eliminate the reading of whole books in its literature classes, the rationale being that only the decoding of passages was tested on the state examination. Internal goal setting builds capacity by linking the motivation of those who do the work to the expected outcomes. Thus goals are actually set twice: once through pronouncement, through standards, curriculum, and tests, and a second time in the enactment, through teacher, student, and parent interaction. The nature of this interaction depends partly on expectations and partly on how a school marshals its resources—money, time, talent, and attention. Dividing up these resources is a core function of collective bargaining, so regardless of how narrow the scope of bargaining, the teachers' union contract in effect sets student achievement goals or the means to reach them.

While many critics of collective bargaining have taken pains to show that unions have encroached on the educational policy arena, they miss the point. Even the narrowest constriction of the scope of bargaining—wages, classification of workers, benefits, and hours of work—effectively encumbers virtually all the operating budget of a labor-intensive organization, such as a school system. Moreover, the scope of bargaining has a tendency to expand over time as the parties to labor agreements use that vehicle to solve personnel problems and settle disputes. This is most often done without reference to the educational consequences of the agreement, thus creating what is called accidental policy making. It is the worst of all worlds, one that preserves the legal assertion that educational policy remain in the hands of legislatures and school boards while operating in an environment where the control of budgetary expenditures and time allocation are not examined as educational policy decisions. Narrow scope bargaining, as embodied in the NLRA framework, makes it impossible to tie the problem of professional judgment to fiscal and operational decisions.

### How This System Would Work

The legislation we propose would require that all teacher collective-bargaining agreements contain a clause specifying student achievement goals. Such a clause could be simple, or it could be complex. If teachers wanted to act on the commonly espoused belief that single measures of achievement are not enough, or that standardized tests are inadequate or unfair, they could propose additional or alternative measures of achievement. If the administration wanted to decrease high school dropout rates or increase performance on a high school exit examination, it could propose these as student achievement goals. If a group of schools wanted the option to use portfolio assessment, that could be proposed. If someone wanted to propose unrealistically high standards, they could be proposed. If someone wanted ridiculously low student achievement standards as a way of guaranteeing that they would be met, they could be proposed, too, and take the criticism that surely would come from parents and the public.

At the end of the negotiations, the contract would be required to contain student achievement goals. Otherwise, under our proposal, there would be no labor contract. No new wage rates could be paid; no new terms and conditions of employment could be put into effect. If a contract were to be signed without student achievement goals, it could be immediately challenged before the courts or the public employment relations board, depending on how the state adjudicates labor disputes. Any citizen could bring such a challenge.

What happens if labor and management disagree? We favor binding arbitration. In the logic of collective bargaining over economic issues, an impasse leads to mediation, sometimes fact finding, and, if still unresolved, ultimately to work stoppage. Both labor and management are willing to suffer economic consequences in order to advance their positions. However, in most public education settings, and in much of the rest of bargaining in the public sector, employee strikes are illegal. They sometimes happen anyway, but in some states, such as New York, they are heavily penalized.

For police, firefighters, and other workers where a strike would endanger public health and safety, state labor laws have tended to find substitutes for the strike that impose an agreement on both sides. These arbitrations are different from those that occur as a result of grievances once a contract is signed. In grievance adjudication, the arbitrator decides whether an individual grievant's rights under the contract have been violated and, if so, what the remedy should be. For example, should the grievant receive financial compensation, be moved from one school to another, receive a different teaching assignment? Grievance arbitration is a conventional and usual part of contract administration. Binding arbitration of contract disputes is rare in public education.

In binding contract arbitration, each party presents its position to an in-

dividual arbitrator or a panel. If a panel, it typically is composed of three persons: one selected by labor, one by management, and the third by mutual consent of the two parties.

Other models exist, such as the naming of a permanent arbitration panel or a single umpire. The state public employment relations board might arbitrate. In at least one jurisdiction, Colorado, the governor is empowered to resolve disputes in which public health and safety are declared to be at risk and to write the entire contract.

There are a number of alternative modes of contract dispute arbitration. The arbitrator or panel may be required to choose between the final offers of each side. Such final offer arbitration is thought to cause each party to the negotiation to make its final offer as reasonable as possible. In other settings, the arbitrator is limited to deciding only specific points of disagreement, leaving the rest of the partly negotiated contract untouched.

### The Risks and Rewards Involved

As with any statute, labor law does not always create the world that it intends. The framers of the NLRA, for example, thought that they were creating a more cooperative society in which class tensions would be dampened (Bar-enberg 1993). At the same time, the bill's authors, principally Senator Wagner of New York, were faced with the example of company-dominated unions, which were prevalent in the 1920s, in which an employer would establish a domesticated employee organization in order to forestall more militant union-ization. Thus was born the U.S. tradition of requiring that labor and management have an arms-length relationship.

It was thought that by creating powerful unions, which would represent the voice of workers at the national level, workplace relationships would become less tension filled and more flexible. But the mechanics of contract implemen-tation led to the rule-dominated environment we see today. Management and labor, particularly rank-and-file workers, wanted agreements that were more specific and rationalized. If two workers were vying for the same assignment, who would get it? Objective criteria, such as seniority or certification, became the way around intramural disputes. And so developed a labor doctrine built around continuing tension between labor and management and a reliance on simple objective criteria, such as seniority, to settle workplace decisions.

The potential use and value of worker voice in how firms operated were lost, and labor law doctrine has not figured out a way to reclaim them. Thus, in the case of teachers, union reform has almost always been somewhat extra-legal. Efforts at professional or reform unionism take place under cover of existing labor law but deviate from its accepted operation.

### *Negotiating What Matters Most*

In advocating that teachers and school districts negotiate achievement goals and, as a consequence, the ways resources will be used to achieve them, we seek gradually to change the labor law doctrine as it applies to teachers while leaving all the familiar structures of labor relations in place. The negotiated contract would continue to be the centerpiece of the relationship. Unions would continue to talk about economic issues. The grievance procedure would remain in place. What would change is that the parties would be obligated to talk about student achievement.

There are four primary risks in adopting the statutory change we suggest and one big potential reward. First, teachers might act out of self-interest in setting student goals and the means to reach them. The unions might advance goals that are too easy to reach and solutions that are far more expensive than need be. Second, by discussing student outcomes at the bargaining table, unions would usurp decisions that belong to elected public officials, thus creating an improper and perhaps illegal delegation of powers. Third, the process might become ponderous and drawn out and interfere with school operations. Fourth, the process might be trivialized. Student achievement goals could be reduced to flowery and largely meaningless language of the type now often found in the preambles of labor contracts.

All four of these risks are real. But we think they are outweighed by the potential reward of actively engaging teachers as a collective in what matters most: student achievement.

### Notes

1. Although the document often is referred to as the “teachers’ contract,” this is a misnomer. The contract is not a legally binding document unless it carries the signature of both the union and the school board.

2. This set of schools became known as the Chancellor’s District under then-chancellor Rudy Crew. Despite the success of this effort—math and reading test scores for students in these schools rose substantially and faster than measured improvement in other New York City schools—when Joel Klein became chancellor, he disbanded the Chancellor’s District.

3. This is from Bernstein’s doctoral dissertation, which focused on Albuquerque’s participation in a union capacity building project sponsored by TURN and directed by one of the authors of this article.

4. This applies in California to districts that adopted peer review prior to 1997. In that year, the state legislature enacted a new law (not an amendment to the collective-bargaining law) that legitimized peer review and assured the reviewers their status as members of the teacher bargaining unit would not be jeopardized. Some years earlier, Ohio had amended its state collective-bargaining law to make peer review legal.



## References

- AFT (American Federation of Teachers). 2000. *Redesigning Low Performing Schools: It's Union Work*. Washington, DC: AFT.
- AFT-NEA (American Federation of Teachers–National Education Association). 1998. *Peer Assistance and Review: An AFT/NEA Handbook*. Washington, DC: AFT-NEA.
- Barenberg, Mark. 1993. "The Political Economy of the Wagner Act." *Harvard Law Review* 106:1381–1496.
- Bell, Daniel. 1973. *The Coming of Post-industrial Society*. New York: Basic.
- Bernstein, Ellen. 2003. "A Journey toward Professional Unionism: The Struggle for Transformation of a Local Teachers' Union." PhD diss., Department of Education, University of New Mexico, Albuquerque.
- DiMaggio, Paul J., and Walter W. Powell. 1983. "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields." *American Sociological Review* 48 (1): 147–60.
- Dunlop, John T. 1958. *Industrial Relations Systems*. New York: Holt.
- Gladwell, Malcolm. 1996. "The Tipping Point." *New Yorker*, June 6.
- Gladwell, Malcolm. 2000. *The Tipping Point: How Little Things Can Make a Big Difference*. Boston: Little, Brown.
- Kerchner, Charles Taylor. 2001. "The Struggle for the Knowledge-Based Workplace." *International Journal of Educational Management* 15 (5): 220–38.
- Kerchner, Charles Taylor, and Julia E. Koppich. 1993. *A Union of Professionals: Labor Relations and Educational Reform*. New York: Teachers College Press.
- Kerchner, Charles, Julia Koppich, and Joseph Weeres. 1997. *United Mind Workers: Unions and Teaching in the Knowledge Society*. San Francisco: Jossey-Bass.
- Kerchner, Charles T., and Douglas E. Mitchell. 1988. *The Changing Idea of a Teachers' Union*. Stanford Series in Education and Public Policy. New York: Falmer.
- Morris, Charles J., ed. 1971. *The Developing Labor Law*. Washington, DC: Bureau of National Affairs.
- Odden, Allan, and Carolyn Kelley. 1997. *Paying Teachers for What They Know and Do: New and Smarter Compensation Strategies to Improve Schools*. Thousand Oaks, CA: Corwin.
- Rabban, David M. 1989. "Distinguishing Excluded Managers from Covered Professionals under the NLRA." *Columbia Law Review* 89 (8): 1775–1860.
- Rabban, David M. 1990. "Can American Labor Law Accommodate Collective Bargaining by Professional Employees?" *Yale Law Journal* 99 (4): 689–758.
- Schlossberg, Stephen I., and Steven M. Fetter. 1986. *U.S. Labor Law and the Future of Labor-Management Cooperation*. Washington, DC: U.S. Department of Labor.
- Skelton, George. 2002. "Making Textbooks a Bargaining Tool for Teachers Is a Tough Sell." *Los Angeles Times*, April 15, <http://www.latimes.com/local/la-00002854apr15.column>.
- Wollett, Donald H., and Robert H. Chanin. 1974. *The Law and Practice of Teacher Negotiations*. Washington, DC: Bureau of National Affairs.