AMERICAN LABOR LAW SCHOLARSHIP— SOME COMMENTS

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It is difficult to characterize American Labor Law scholarship, for there are too many authors with too many methods or styles, and a single author may, from time to time, use different methods or styles. I doubt that there would be much profit in attempting to categorize and describe them. Instead, I would like to focus on certain aspects of our legal structure and institutions that produce certain special characteristics of our legal scholarship and more specifically labor law scholarship. First, I want to suggest how legal scholarship is responsive to our case oriented precedential or accretional legal system. Second, I want to describe how the institutional structures of our law schools and law reviews within the law schools shape our legal scholarship. These influence general legal scholarship and labor law scholarship equally. Third, I want to describe some present trends or tendencies in labor law scholarship.

I. SCHOLARSHIP IN AN ACCRETIONAL LEGAL SYSTEM

Much of legal scholarship in the United States is responsive to the particular character of American law that relies heavily on precedent. The common law system is, of course, a system built on an accretion of precedents. The law is built on countless court decisions; if it grows at all, it is not so much by design, but by accretion. This preoccupation with precedent also prevails even where the area is governed by a statute. The meaning of the words of the National Labor Relations Act are not found in any legal lexicon or theoretical conceptions, but in the thousands of decisions by the National Labor Relations Board and the federal courts. The same priority of precedent governs the Occupational Safety and Health Act, the Wage Hour Laws, and the discrimination statutes; indeed, the whole of labor law.

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This inevitably leads to scholarly efforts to organize and systematize the published decisions to determine what the law has been declared to be and to permit predictions of how future cases will be decided. It is scholarship that echoes Holmes's crabbed aphorism, "The prophecies of what the courts will do in fact, and nothing more pretentious is what I mean by law." This scholarship serves an essential, though limited, function. When scrupulously and thoughtfully done, it articulates some doctrinal principles which make sense out of the mass of decisions, provides for some stability or gradual growth, and avoids decisions and developments which reflect merely the values, biases, or whims of the writer or decision-maker

Scholarship that does no more than systematizes past decisions serves a useful purpose for lawyers and judges; it provides them with research tools, an organized encyclopedia of decisions for their own decision-making. Labor law in the United States has several remarkable examples of group authorship by the Labor Law Section of the American Bar Association. They canvass in detail the administrative and judicial decisions under the National Labor Relations Act,[1] the Civil Rights Act,[2] and the Occupational Safety and Health Act.[3] Chapters or sections of each volume were written by individuals or groups consisting mostly of practicing lawyers. As many as 50 authors may be listed for each volume. These volumes have limited doctrinal analysis or criticism of decisions, but they describe quite fully and accurately what the courts or administrative agencies have done in fact.

There are other books by individual authors, mostly academic, dealing with certain aspects of labor law, and of widely varying analytical quality. Among these are Gorman's treatise on the National Labor Relations Act,[4] Mintz's and Rothstein's separate books on occupational health and safety,[5] and Finkin's work on privacy.[6] The most comprehensive is Larson's multi-volume treatise on Workers' Compensation.[7]

One might argue whether some of these deserve to be described as "scholarship," for they may be little more than cataloguing and describing decisions; they may build on no general principles and have no evaluations. Our legal system invites such work, particularly for

1. THE DEVELOPING LABOR LAW (Patrick Hardin ed., 4th ed 2001).
2. EMPLOYMENT DISCRIMINATION LAW (Barbara Linderman et al. eds., 3d ed. 1996).
3. OCCUPATIONAL SAFETY AND HEALTH LAW (Randy Robinowitz ed., 2d ed. 2002).
4. R.A. GORMAN, BASIC TEXT ON LABOR LAW (1976).
5. B. MINTZ, OSHA: HISTORY, LAW AND POLICY (1984).
6. M. FINKIN, PRIVACY IN EMPLOYMENT LAW (2d ed. 2003).
7. A. LARSON, THE LAW OF WORKMENS COMPENSATION (1952) (and supplements).

use by practicing lawyers who are most interested in predictions and finding precedents that can be relied on in giving clients advice, or cited to support their clients' cases. They are also useful to judges to verify or supplement lawyers' inadequate briefs. Such work does not serve to develop and shape the law, which is an important function of scholarship.

In an accretional system in which the legal structure is predominately built piece by piece from decided cases, study of the law means, at least in the United States, the use of the case method in law schools. This requires the production of casebooks for student and classroom use. Most casebooks cannot be considered scholarship, for they consist mainly of a selection of cases and excerpts from scholarly works useful for learning and examining the contours of legal doctrines. However, some casebooks, by their structure and organization, selection of cases and comments, and their questions reflect scholarly inquiry and the questioning of established doctrines or conceptions

II. LEGAL SCHOLARSHIP AND THE INSTITUTIONAL STRUCTURE OF THE LAW SCHOOL

Most legal scholarship is, of course, centered in the law schools, with two interdependent but largely independent legal scholarship structures—the faculty and the law reviews. To obtain tenure, a professor need not publish a book, but in most schools is expected to publish at least one, and in many schools two or more law review articles ranging from 50 to 150 pages within the first five or six years of teaching. After obtaining tenure, a professor is expected to, but often does not, continue publishing at the same rate. With some 5,000 law professors in more than 200 law schools, this means that approximately 2,000 legal scholarship articles are published each year.

This volume of publications is possible because of the ubiquitous law reviews. Almost every school, as a matter of prestige, publishes a law review, and many schools, to boost their prestige and public rating, have two, three, or more. Columbia publishes eleven journals, Harvard ten, and Yale six. The Index to Legal Periodicals indexes over 800 journals specializing in different areas of the law. Eight journals are devoted solely to labor and employment law.[8] As a

8. These are the Berkeley Journal of Employment and Labor Law, Comparative Labor Law & Policy Journal, Employee Relations Law Journal, Employee Rights and Employment Policy Journal, Hofstra Labor & Employment Law Journal, Labor Law Journal, Labor Lawyer, and University of Pennsylvania Journal of Labor & Employment Law.

result, there is no lack of space for professorial articles: indeed, law reviews in lower prestige schools energetically solicit articles. In addition to the articles, the law reviews publish student notes or comments which may range from five to 40 pages.

The result is an overwhelming mass of legal publication in practically every field of law. A rough survey of the Index of Legal Periodicals for one year showed approximately 300 articles and notes under various headings relating to labor and employment law. This avalanche of words is far more than any person specializing in labor and employment law can or should try to read.

This raises the question, "Who are these articles and comments written for?" Authors hope that they will be read and relied upon by lawyers, judges, legislators, and colleagues. But lawyers seldom read articles because they are overwhelmed by the week's new decisions, summarized by commercial services. In advising clients or writing briefs, lawyers rely on encyclopedic type texts and cases located through Westlaw and Lexis. Few judges read law reviews, partly because they are overburdened with writing opinions and rely largely on the authorities cited in the lawyers' briefs. Legislators are even less inclined to read law reviews, for they start with the presumption that professors are not of the real world. Publications in law reviews do, at times, infiltrate the legal system, but in an indirect and random fashion which gives authors reason for their hopes.

Apart from the author's own self-satisfaction with having worked through a problem, professors write articles for the appointment and tenure committees, who determine tenure and promotion, for deans who determine salaries, and for their colleagues to gain collegial recognition. The reasonable hope is not that the articles will be thoughtfully read by them, but with expectation that they will be impressed by the length of the articles, the number of footnotes, and the length of the author's bibliography. The only reasonable hope is that the article will be read by other scholars in the particular field, become a part of the dialogue, and gain recognition by those other scholars.

The importance of impressing others leads to long articles of 100 pages or more, with bloated discussion and multiplication of footnotes with 200 to 1,000 citations and sometimes more words in the footnotes than in the text. The citations often include extensive spread-eagled sources from other disciplines, more than any professor younger than Methuselah would have had time to read and understand. The discursive length of the article and its footnotes decrease the likelihood that the articles will be more than scanned, even by other

professors, except those who happen to have a special interest in the subject.

Crucial in the production of this scholarship is the unique character of the law review, which has three particularly relevant aspects. First, these are student journals, typically edited solely by second and third year law students with little or no faculty guidance. Articles are not refereed by outsiders, but are selected by the student editors for publication from among the articles submitted. As a result, articles on labor law can be selected or rejected for publication by students who have never had a course in labor law and without any consultation of the professor who teaches labor law.

Second, the value of getting an article published depends on the prestige of the law review in which it is published, which, in turn, depends on the prestige of the law school which publishes it. An article in the Harvard Law Review counts for more with tenure and promotion committees than one published in the Boston University Law Review, and an article in the Yale Law Journal is more likely to be read and given credence than one in the Connecticut Law Review. Colleagues will be more impressed by the publication of an article in the Stanford Law Review than one published in the California Western Law Review. As a result, authors compete to get their articles published in the journals that are perceived to have the higher prestige.

Third, because of the competition to get published in as prestigious journal as possible, authors make multi-submissions, sending the same the article to as many as 50 journals at the same time. As a result, the more prestigious journals receive as many as seven or eight thousand submissions each year. Student editors, with what must be cursory examination, discard many on the basis of the student editor's lack of interest in the subject, the manner of presentation, the number of footnotes, the name of the author or the law school where he or she teaches, or other factors that a student can weigh without evaluating quality.

One consequence is that articles, particularly in the more prestigious reviews, tend to reflect the "flavor of the month," chosen because student editors consider they are "hot" topics. Articles on "How Contract Law Reflects and Solidifies Male Dominance" or "Covenants Not to Compete As Instruments of Oppression of Women," will get snapped up, while articles on "Enforcement Gaps in The Wage-Hour Law," or "Unemployment Insurance, Holes in a Safety Net" may get rejected unread. Short articles with few footnotes that attempt to present a new perspective on a non-current

subject will not likely get accepted while a 100 page article with 500 footnotes on a popular topic will get accepted. One wonders if Holmes's, "Privilege, Malice and Intent," or Brandeis and Warren's, "The Right of Privacy" would get accepted by the Harvard Law Review today.

This does not mean that articles on less popular subjects or less inflated do not ultimately get published, for authors make multiple submissions, hoping to get accepted by a prestige journal, but if necessary, agreeing to publication by one of the lesser journals, even one which must solicit submissions. It does mean that because authors want to get published in the more prestigious law reviews, they tend to write on those problems that will appeal to student editors, elaborate their argument and multiply their footnotes to impress those who have the power to accept or reject. Law review publications in labor and employment law of the last 30 years have been heavily weighted with articles on minority rights, feminism, critical legal studies and critical race theory. Some of these have contributed significantly to the development of the law, but many have been more polemical than scholarly, seizing on bits and pieces of the law, to find a pervasive pattern by ignoring all that does not fit the particular perspective. Much should not be described as serious scholarship but as political pleading.

III. PATTERNS OF LABOR LAW SCHOLARSHIP

It is impossible to say that there is any distinctive style of American labor law scholarship, for there are too many sources, particularly too many law reviews, and the patterns and practices are constantly changing. However, we can look at patterns of articles in 15 or 20 so-called "leading" law reviews and the scholarship of the professors in the dozen self-proclaimed "elite" schools, for they form patterns that the more plebeian journals and schools attempt to ape. These manifest certain characteristics of special interest.

First, there is a heavy emphasis in legal scholarship relating law to non-law areas of learning, what might be called "Law and ___": Law and Economics, Law and Politics, Law and Literature, Law and Psychology, but it goes far beyond this to what is generally considered as interdisciplinary scholarship. For more than half a century, since the coming of the Realists, many legal scholars have gone beyond doctrinal analysis to look at the law in its social context and examine the practical impact of legal rules, and how courts have actually applied those rules. But in the last twenty-five years, legal scholars

have increasingly examined and evaluated the law in terms of the premises and results of scholarly research in other disciplines, and have attempted to apply the research and analytic methods of other disciplines. As those other disciplines have become more theoretical, labor law scholars have increasingly followed along.

Since the 1930s, or before, labor law has been examined and evaluated in terms of scholarly work in industrial relations dealing with union-employer relations, the structure and practices of collective bargaining and arbitration, and the internal processes of unions; and in the last twenty-five years with studies of personnel practices in non-union establishments. The focus has been primarily institutional, examining how the law reflected or affected the structures, processes and practices in the workplace. It was fact centered with emphasis on direct observation and case studies. As other disciplines have become less institutional and more theoretical, labor law scholars have increasingly followed along, attempting to apply the theories and methods of other disciplines to labor law.

Currently, the emphasis is on economic theory, examining labor law rules from a theoretical economic perspective. The dominant economic theory applied is that of the Chicago School fundamentalists for whom the market is the one true God. Articles in leading law reviews include those arguing the economic benefits of employment at will, the economic inefficiency of collective bargaining, the economic validity of the legal rules allowing the hiring of strikebreakers and limiting the subjects of collective bargaining. The discrimination laws are decried by these lawyer economists as distortions of the market, and health and safety regulation, they argue, should best be left to the market forces.

This economic analysis is appealing to both professors and students because its perspective is interdisciplinary, not limited to legal rules. It purports to describe how the world works without the laborious study of stubborn fact, but by disciplined application of market theory. The logic appears beyond dispute and the conclusions seem clear cut. Solutions are simple: look to the market, it is God and cannot be questioned. The only weakness is in the premises. It ignores the manifold problems of market failure: It assumes that the controlling human motivation is always economic gain. It assumes that collectivities such as unions and management behave solely according to market forces the same as individuals, and it considers no values other than economic efficiency. As a result, it makes a limited constructive contribution to the understanding, evaluation, or guidance of labor law. Not all economists, of course, belong to the

Chicago School, and not all labor law scholars are seduced by its apparent simplicity, but market economics, and the economist's method of analyzing problems has had a significant impact on labor law scholarship.

Other disciplines such as philosophy, political science, sociology, and psychology have claimed major roles in law schools under the banner of the "interdisciplinary" approach, but except for history, they have thus far had limited impact on labor law scholarship. A number of labor law scholars, perhaps out of despair with existing collective bargaining law and the hopelessness of change, have turned to looking to the past, and have made important contributions to the history of labor law.

Because of the recruitment practices of leading law schools, there is a likelihood that other disciplines will play an increasing role in legal scholarship generally, and this may influence labor law scholarship in two ways. It has become increasingly important, bordering on a requirement, that persons seeking a teaching position in a leading law school to have, or be in the process of getting, a Ph.D. in another discipline. For many of those being hired, the other discipline is their primary interest. Many of them wanted to be an historian, political scientist or philosopher, but there is a scarcity of jobs in those fields, so they opt for a more promising market, going to law school. If they are bright and do well in law school, they enter the academy through the law school doors. They carry with them their knowledge, interest and perspective of their primary discipline. They inevitably see the law through the lens of the other discipline, and they will employ it in their legal scholarships. As they join in hiring other faculty members, they will prefer others in their own image. As one noted law professor in an elite school said, ultimately law schools will consist of departments of graduate work in other disciplines.

This process may operate in the hiring of labor law teachers, but it may operate in a perverse way. Labor law, as a scholarly field, is not amenable to the analytical style of most other disciplines. Its focus is institutional and looks to life in the workplace. It is concerned less with theory and more with what unions, management, employees, and supervisors do. It is concerned with how institutional structures, processes, and legal rules function in the workaday world. To those trained in other disciplines, labor law as presently conceived and taught, seems to lack any theoretical structure, and labor law scholarship tends to be viewed as pedestrian or mundane. For those building on theoretical models, it is not a substantial academic, but a practical subject. A number of leading law schools have no full time

faculty member who specializes in labor law; the labor law course is taught by a practicing lawyer. Labor law, both as an academic and scholarly subject, is in the process of becoming viewed as of secondary importance, in the law schools.