AN INTRODUCTION TO NATIONAL STYLE IN LABOR LAW SCHOLARSHIP

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Is there such a thing as a "national style"? Wittgenstein thought any talk about "national character" to be extremely dangerous; he nearly broke with a disciple over the latter's passing reference to it.[1] Then, again, Wittgenstein had good reason to be skeptical. In 1938, with the stroke of a pen he was legally metamorphosed from being at the envied pinnacle of the Austrian *haute bourgeoisie* to being a despised German Jew.[2] Even so, that arch-skeptic, David Hume, found room for national character, if not pressed to extremes.[3]

We commonly do speak of national character, of national style—in food, music, art and architecture, even philosophy: of German idealism, French postmodernism, American pragmatism. This manner of thinking has deep roots in the legal academy: In the fourteenth century, jurisprudence in the Italian style (*mos italicus*), associated with Bartolus, Baldus, Alberico de Rosate, and Lucas de Penna commanded the civil science.[4] Two centuries later, the French method (*mos gallicus*), centered at the University of Bourges, strove to take the field.[5] Can one find a national style in what modern scholars write in labor law?

One way to explore distinctive differences is through the portal of commonalities. At least four questions could be posed: (1) who writes; (2) what do they write about; (3) to whom is their writing directed, and so of the form it takes; and, (4) what approach do they

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1. The episode is recounted by RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 424 (1990).

2. So *haute* his father, perhaps the richest man in Austria, turned down the Emperor's offer of a patent of nobility feeling that its acceptance would mark him as a parvenu. *Id.* at 8.

3. David Hume, *Of National Character*, *in* 1 DAVID HUME, ESSAYS MORAL, POLITICAL, AND LITERARY, Essay XXI at 244 (T.H. Green & T.H. Grose eds., 1898), though some of what Hume had to say of different peoples would seem pretty extreme today.

4. RONALD KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION ch. 8 (1990).

5. *Id.* ch. 10.

take to the subject *i.e.* are there models or modes of thought that compete or predominate.

1. *Who writes?* The simple answer, insofar as scholarship is produced primarily by those housed in faculties of law, is law professors. But this simpleminded answer subsumes the question of who becomes a law professor, how he or she is trained, evaluated, selected, and rewarded. Luis Aparicio-Valdez and Juan Raso-Delgue make this the centerpiece of their contribution, on the state of labor law teaching in the universities of Latin America.[6] They focus on reform of a system heavily reliant on a cadre of part-time instructors and on building a corps of full-time academics whom they (and others) call upon to integrate the contributions of other disciplines—an appreciation of economic, political, and social conditions—with legal doctrine. Nevertheless, the tacit assumption of their call is of the critical institutional role the academy plays in deciding who may speak (if not necessarily who is listened to). The role of the institution as a gate-keeper is a strong theme running through the contribution of Miguel Rodríguez-Piñero Royo.[7] Rolf Birk points to the academic circles generated by Gino Giugni in Italy and Gérard Lyon-Caen in France,[8] and Clyde Summers treats the pivotal role of faculty selection in the United States.[9]

In much of the world, graduate preparation in law is much like graduate education in general: It involves a master-apprentice relationship with one's *Habilitationsvater* upon whose network of contacts, personal support, and good-will the would-be professor is greatly dependent. Once appointed, the professor enjoys academic freedom, even if, as Roger Blanpain observes, it is rarely used.[10] Aspirants in the United States are subject to a different system.[11] A prospect with a professional degree from a prestigious law school is never "so-and-so's" student. Selection is done on the basis of grades, the promise of "brilliance," and, increasingly, on the possession of a

6. Luis Aparicio Valdez & Juan Raso Delgue, *Teaching Labor Law in Latin American Universities*, 23 COMP. LAB. L. & POL'Y J. 753 (2002).

7. Miguel Rodríguez-Piñero Royo, *What Do We Talk About When We Talk About Labor Law?*, 23 COMP. LAB. L. & POL'Y J. 701 (2002).

8. Rolf Birk, *Labor Law Scholarship in France, Germany, and Italy: Some Remarks on a Difficult Question*, 23 COMP. LAB. L. & POL'Y J. 679 (2002).

9. Clyde Summers, *American Labor Law Scholarship—Some Comments*, 23 COMP. LAB. L. & POL'Y J. 801 (2002).

10. Roger Blanpain, *National Styles in Labor Law and Social Science Scholarship: A Personal View*, 23 COMP. LAB. L. & POL'Y J. 727 (2002).

11. An excellent comparison is supplied by James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 41 AM. J. COMP. L. 367 (1993).

Ph.D. in another discipline.[12] Though the latter is beginning to have a major ripple effect on the intellectual climate if not on the content of instruction, in the United States we still tend to "hire professors with what amounts to an undergraduate education and then let them teach themselves to write."[13] Elsewhere, they have long been socialized, fitted into a conventional disciplinary mould of scholarship.

(2) *What do we write about?* In his speech delivered to the opening ceremony of the 7th European Congress of the International Society for Labor Law and Social Security in 2002, Tore Sigeman pointed out that one seldom encounters discussion of minimum wage legislation in the literature of Nordic countries for the simple reason that such legislation doesn't exist there.[14] What one writes about is pre-conditioned by national circumstances.

As an academic discipline, labor law took root at different times in different countries. As Rolf Birk explains, comprehensive doctrinal writing began in Germany in the early 1900s, was followed a decade later in Italy, and yet a decade later in France. As Cynthia Estlund observes, the social ferment of the 20s and 30s gave rise to what became an important role for labor law in the American legal curriculum for the next fifty years.[15] In Japan, Takashi Araki tells us, labor came into its own in a disciplinary sense only after the American-sponsored reforms in the immediate post-War period[16]—though Tadashi Hanami opines that it has yet to set deep cultural roots.[17] And according to Harry Arthurs, there was no labor law scholarship to speak of in Canada until about 1945.[18]

Consequently, and to underline Sigeman's point, labor law scholars write about issues that the national economy, the political process, or the internal dynamics of the legal system press to the fore, that call for rigorous study, thoughtful exposition, and possible resolution. For members of the European Union in general and, as

12. Which is not to say that other factors play no role. That one is—or is not—a feminist, a neo-classical economic liberal, or even a white heterosexual male, can play a role in whether one is able to secure an appointment, or not.

13. Gordley, *supra* note 11, at 383.

14. Tore Sigeman, *Nordic Labor Law: A Brief Presentation From a Comparative Perspective*, paper presented at the 7th European ISLLSS Congress, Sept., 2002.

15. Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y J. 789 (2002).

16. Takashi Araki, *Labor Law Scholarship in Japan*, 23 COMP. LAB. L. & POL'Y J. 735 (2002).

17. Tadashi Hanami, *Was the Modern Labor Law Accepted in Postwar Japan?*, 23 COMP. LAB. L. & POL'Y J. 749 (2002).

18. H.W. Arthurs, *National Traditions in Labor Law Scholarship: The Canadian Case*, 23 COMP. LAB. L. & POL'Y J. 645 (2002).

Paul Davies and Mark Freedland point out, for the United Kingdom in particular, the growth of a body of European labor law will be grist for the scholar's mill there for quite a while.[19]

(3) *To whom is what is written directed?* Instinct in this question is what counts as scholarship. Harry Arthurs, with a sidelong, bemused glance at me, would be quite catholic in response; but the question here is not a metaphysical one—of what scholarship *is* as distinct from other forms of intellection (though I did ask that question and Clyde Summers seems to agree that some things written by professors, teaching materials, for example, are, at best, a low order of scholarly activity)—it asks what we in the academy value, what we reward as work worth doing. In Europe, professors are expected to display their wares in a variety of forms—books, articles, encyclopedia entries, comments, and, as especially in Germany, exacting (and often exhausting) commentaries. One sees a good deal of empirical work in Germany and certainly in the publications of the Japan Institute of Labor. The American academic reward structure, at least at those institutions that consider themselves the very best the nation has to offer, places a premium on the "cutting edge" article—especially one that generates a "new paradigm"—though one sees a renewed acknowledgement of work that rests on the collation and analysis of empirical data. Whereas writing for practitioners (and even for students) is perfectly respectable on the continent, in the United Kingdom, Canada, Japan, and South America (where Aparicio Valdez and Raso Delgue call for *more* practical orientation), it tends to be denigrated by the elite in the United States in favor of writing for theoretical or policy-directed audiences.

(4) *Do certain modes of thought predominate?* It follows that the audience written for should shape the content of what is written, but here one witnesses a curious geologic discontinuity. Though much of the legal academy outside the United States is fixed on what the legal professoriat in the United States would call "doctrinalism," a comparative eclecticism characterizes Japan, Canada, and increasingly, as a result of federation, Europe as well. The United States, at least at the elite level, looks increasingly to other disciplines

19. Paul Davies & Mark Freedland, *National Styles in Labor Law Scholarship: The United Kingdom*, 23 COMP. LAB. L. & POL'Y J. 765 (2002).

as a source of reference and insight;[20] but it tends, at the doctrinal level, to be insistently insular.[21]

The three papers on national style in social science scholarship—by Dobbin, Frege, and Nitta—make a similar point: that there is a connection between the academic study of labor and characteristics of the society in which scholarship is embedded. These characteristics are both cultural—to do with habits of human interaction and symbolic modes of thought—as well as structural, based on the historical evolution of the institutions that constellate labor markets and employment relations.

But there are deeper currents: As Davies and Freedland explain, the United Kingdom is searching for an organizing principle now that "collective autonomy"—the brain child of Otto Kahn-Freund and long the reigning paradigm—has fallen. Cynthia Estlund makes a powerful argument that labor law has been pushed to the margins in the American academy. And Rodríguez-Piñero Royo argues that the search for a core concept has become an urgent task in Europe. His observation is a good stopping point for this Introduction.

One comes away from these papers with the sense that on both sides of the Atlantic, as well as across other bodies of water, with greater or lesser urgency, given domestic circumstances and the temporal trajectory of the discipline, and with greater or lesser academic anxiety, labor law seems to be in search of an axial principle around which to orient itself. In Europe, it lives in fear of dissolving into the law of human rights. In the United States, it faces collapse at the hands of a regnant neo-classical economic liberalism, which sees nothing particularly distinctive to distinguish the sale of labor from the sale of a sack of peppercorns. It would appear that labor law scholars, irrespective of the national character of their laws (and of their writing about them), are challenged to fashion afresh a persuasive theory of work and the worker.

20. *See* Matthew W. Finkin, *The Marginalization of Academic Labor Law in the United States: A Footnote to Estlund and Summers*, 23 COMP. LAB. L. & POL'Y J. 811 (2002).

21. *E.g.* Matthew Finkin, *International Governance and Domestic Convergence in Labor Law As Seen From the American Midwest*, 76 IND. L.J. 142 (2001). It was not ever thus. Michael Hoeflich, *Translation and the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753 (2002).