



6-1-1999

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## Recommended Citation

Thomas C. Kohler, *Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation*, 73 Notre Dame L. Rev. 1311 (1998).

Available at: <http://scholarship.law.nd.edu/ndlr/vol73/iss5/24>

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THE DISINTEGRATION OF LABOR LAW:  
SOME NOTES FOR A COMPARATIVE STUDY  
OF LEGAL TRANSFORMATION†

Thomas C. Kohler\*

*The political and civil laws of each nation . . . should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.*<sup>1</sup>

*Hüte Dich, sei wach und munter!*<sup>2</sup>

I

Montesquieu's warning about the particularities of legal institutions should be kept in mind by anyone engaged in any sort of comparative work—but perhaps especially by anyone who is tempted to think about labor and employment ordering issues in comparative perspective, and possibly all the more, by anyone who would consider the institutions of collective labor law from such a viewpoint. It may be virtually a “rule” of comparative research that distinct legal systems

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† This article is dedicated with the greatest affection, admiration, and respect to Mary Ann Glendon. I am deeply indebted to her for a great many things, scholarly and otherwise, but most particularly for her friendship.

\* Professor of Law, Boston College Law School. This article is a sketch of a larger work in which the author is engaged. He acknowledges with deep gratitude the support of The German Marshall Fund of the United States and the German-American Fulbright Commission. The author also thanks Professors Spiros Simitis and Michael Kittner for their helpful comments on an earlier version of this piece.

1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* Bk. I, ch. 3 at 8 (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone trans. & eds., Cambridge Univ. Press 1989) (1748) (writing on positive laws). *But cf.* Stig Strömholm, *Rechtsvergleichung und Rechtssangleichung*, 56 *RABELS ZEITUNG FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 611 (1992) [*RABELS*Z] (questioning whether the dominance of economic rationality has so displaced ideological and intellectual habits bound-up with national histories and cultures as to make them largely irrelevant).

2 “Protect yourself, be alert and lively!” [from *Eichendorff*] quoted in KONRAD ZWIEGERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* § 3 III at 35 (3.Auflage, 1996). Translations from German are the author's.

work out strikingly similar solutions to life's common problems, despite the differences in the historical development of those legal regimes, in the character of their theoretical structures, and in the style by which the standards they have developed are applied.<sup>3</sup> Moreover, like the institutions of marriage and family, where comparative reflection has been broadly and fruitfully practiced,<sup>4</sup> employment represents one of life's basic relationships,<sup>5</sup> and some legal scheme for the protection of individual employees and their status, as well as for the collective regulation of the employment relationship, can be found in every economically-developed country. Nevertheless, unlike family law, where there has been an impressive exchange and assimilation of ideas and practices across national and cultural borders, employment law,<sup>6</sup> but particularly collective labor law, has demonstrated relatively

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3 See *id.* § 3 III at 38. But cf. Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L. & COMP. L.Q. 52 (1996) (highlighting epistemological differences between civil and common law approaches, and challenging a praesumptio similitudinis); Pierre Legrand, *Comparer*, 2 REVUE INTERNATIONALE DE DROIT COMPAR 279 (1996).

4 See, e.g., MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); Spiros Simitis, *Familienrecht*, in RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK: STUDIEN ZUR WISSENSCHAFTSGESCHICHTE DER JURISPRUDENZ 390 (Dieter Simon ed., 1994) (see especially at pp. 420-34, discussing the development and application of comparative methods in family law.); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 4-15 (1974) (discussing the surprising susceptibility of family law issues to comparative method).

5 As Blackstone famously observed, the "three great relationships of private life are" those of "husband and wife," "parent and child," and "master and servant." 1 WILLIAM BLACKSTONE, COMMENTARIES \*422. In saying this, he, perhaps unconsciously, echoes Aristotle, who makes a similar observation at the start of the *POLITICS*, Book I, chs. 2-4. On the state of and trends in this elemental, if increasingly unstable, relationship in the United States context, see Thomas C. Kohler & Matthew W. Finkin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 AM. J. COMP. L. (forthcoming 1998).

6 As will be seen, one of the difficulties in comparative discussions of labor and employment law is definitional: the terms and relations of one system often hold very different meanings in another. Hence, nearly everywhere, the term "labor law" refers to the law of collective bargaining and collective agreements. In many systems, however, such as Germany, the term more widely indicates the entire body of legal regulation that touches upon and structures the employment relationship. Broadly speaking, this includes both individual and collective labor law, as well as the law of social security. The last mentioned comprises not only pensions, but unemployment and accident insurance, sickness pay, etc., which originally were tied to the employment relationship. (As the scope of "social legislation" has expanded to include persons outside the labor market, however, social and labor law in Germany, as well as other advanced economies, have become separate areas of the law, and have experienced an increasingly independent development. See generally Hans F. Zacher,

less such porousness, and the specific practices and institutions associated with the latter, decidedly less transplantability.<sup>7</sup>

While the manner of their unfolding differs, technology and industrialization hardly represent distinctively national events. Similarly unconfined to one nation's experience is the emergence of independent employee-organizations, and regardless of the initial ideological orientations or programs of these associations, their acceptance in the main of the institutions of a market economy. The legal responses to the consequences of industrialization and technology on employed persons, but especially to organized labor and the institutions of collective bargaining, however, have varied rather widely,<sup>8</sup> and especially the latter seem more deeply-conditioned by a society's political institutions, and its particular "habits of the heart,"<sup>9</sup> than most other aspects

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*Juridification in the Field of Social Law*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 374 (Gunther Teubner ed., 1987) [hereinafter JURIDIFICATION OF SOCIAL SPHERES]. The various components of the labor law scheme operate together as an articulated whole, and it would be very misleading to attempt to understand the law regulating the individual employment relationship in isolation from collective labor law.

In contrast, in the United States, "labor law" typically designates solely collective bargaining, while the term "employment law" refers to a pastiche of statutory and common law protections for the individual employee. These include the statutory prohibitions of race, sex, creed, age, or disability discrimination in employment, as well as judicially-developed restrictions against unfair dismissals. They also include safety, health, and (to the extent they exist) protections of employee privacy. While labor and employment are not wholly distinct fields in United States law, they rest on different bases, and are intended to achieve rather different goals. Unlike systems such as Germany's, American employment law has had a piecemeal development, and its various aspects often stand quite independently from one another. On this problem of language and meanings, see *infra* note 11 and accompanying text.

7 Perceptive commentators long have suggested that standards and practices affecting the substantive terms of the individual employment relationship are far more "transplantable" to other systems than are the rules and standards concerning collective labor law. See, e.g., Kahn-Freund, *supra* note 4, at 20-27; see also Lord Wedderburn of Charlton, *The Social Charter in Britain—Labour Law and Labour Courts?*, 54 Mod. L. Rev. 1 (1991).

8 One distinguished commentator has suggested that despite these variations, "juridification," or growing state involvement, is a universal characteristic of the development of employment regulation in economically-developed nations. See Spiros Simitis, *Juridification of Labor Relations*, in JURIDIFICATION OF SOCIAL SPHERES, *supra* note 6, at 113.

9 The phrase, of course, is Tocqueville's. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287 (J.P. Meyer ed. & George Lawrence trans., 1969) (*i.e.*, "the different notions possessed by men, the various opinions current among them, and the sum of ideas that shape mental habits." *Id.*).

of an ordering regime.<sup>10</sup> Consequently, as one noted commentator has observed, "the language of a labour law system can be learned only from its social history, above all the history of its labour movement. Without a smattering of that vocabulary comparative conversation is impossible."<sup>11</sup>

This hardly suggests that comparisons of employment-ordering regimes constitute bootless undertakings, nor that the characteristics of and the meanings that inform these regimes represent a series of incommensurables that would make any sort of comparative analysis meaningless. The possibility of comparisons for the practical ends of identifying, interpreting, and assessing the impact of foreign standards on contemplated conduct generally is admitted. Nevertheless, strong reservations continue to persist in some quarters about the legitimacy of any critical comparative analysis of labor and employment law issues, and of attempts to suggest the adaptation of the lessons learned from foreign experiences to the resolution of a domestic problem. These misgivings typically rest on the view that labor and employment law represents a field so bound-up with the unique character of national habits, ideology, and experiences as to exclude any sort of reflection employing external, i.e., extra-national, or cognitive, reference points.<sup>12</sup>

At least from an American perspective (or perhaps especially from this perspective), a further difficulty exists. Nearly twenty-five years ago, Otto Kahn-Freund lamented "that labour lawyers do not often show an interest in comparative law, and even more that few

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10 Hence, practices connected with and standards concerning collective bargaining typically have shown themselves to be resistant to transplantation. On this topic, see Kahn-Freund, *supra* note 4, at 20-27. For an extensive review of attitudes toward, and disputes over, the use of comparative approaches in labor and employment law, see Christopher J. Whelan, *Labor Law and Comparative Law*, 63 TEX. L. REV. 1425 (1985).

11 Lord Wedderburn of Charlton, *supra* note 7, at 7. Lord Wedderburn continues:

But it would be absurd to think that the history of each labour movement writes its labour law system on tablets of stone. It writes the vocabulary, but other factors change the story, even the grammar: periods of war, new constitutions, social movements, changes in employers' organisation, in technology and in patterns of capital, and in relations of production national and now, above all, international.

*Id.* at 8. Part of our concern here is to point out the reflexive relationship between the "factors that change the story," and the change in the pattern of human meanings that accompany these transformations in the order of our common life.

12 See Spiros Simitis, *Denationalizing Labour Law: The Case of Age Discrimination*, 15 COMP. LAB. L.J. 321, 323-26 (1994).

comparative lawyers pay much attention to labour law.”<sup>13</sup> Today, at least in the United States, only a relatively small number of academic lawyers devote much attention to either subject (and one might with reason wonder about a person who expresses an interest in both).<sup>14</sup> American lawyers traditionally have exhibited a strong tendency toward insularity, which has been strengthened in recent decades by the growing influence and prestige of American constitutional thought, regulatory and statutory developments, and legal theory. Briefly stated, it appears that we have little reason or incentive to look elsewhere.

Self-contentment has its advantages, but as the experience of various sectors of American industry during the 1980s so starkly illustrates, it can be a very costly pleasure. Human creativity and insight knows no borders,<sup>15</sup> and in any event, the juridical boundaries of the modern nation-state are becoming increasingly irrelevant. As everyone now realizes, an intrinsic relationship exists between law and economy, and these structures in turn are anchored in schemes of meanings that proceed from deeply-held, if often unexamined, notions of human personhood. The processes of the “globalization” of the economy imply not only fundamental changes for legal-ordering, but the creation of new meaning schemes by which we understand the societies and institutions which give us our orientation and identity as persons.

In short, our times and circumstances will force us into thinking about issues in comparative perspective, whether we like it or not. This may be particularly true for those who devote their time to questions dealing with employment and the manner of its ordering. For better or worse, employment has become a, if not the, universal preoccupation of our era. The worldwide increase of participation in “market work,” particularly among women, represents one of the most striking and significant social developments of the past thirty years. Technology is transforming the way we work, and the structures and practices by which employment is ordered have come under tremendous, if not destructive, pressure. The metamorphosis of both work and the patterns of its ordering, however, does not imply the disappearance of either. As Bernard Lonergan observed, “non-systematic

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13 Otto Kahn-Freund, *Pacta Sunt Servanda—A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law*, 48 TULANE L. REV. 894, 906 (1974).

14 For an exculpation, see Mary Ann Glendon, *Why Cross Boundaries?*, 53 WASH. & LEE L. REV. 971 (1996).

15 See BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING*, (Harper & Row 1978) (1957).

processes can be the womb of novelty."<sup>16</sup> New patterns are seeking to emerge, and while we can ignore them, hopefully abandoning them and their development to their own devices, work and the issues surrounding it will not vanish. Like the economy, the problems of ordering have jumped borders, and we have no alternative if we are to act responsibly but to follow—however tricky or dangerous that undertaking might be.

"Any attempt to make . . . a comparison is a risky undertaking,"<sup>17</sup> Clyde Summers has remarked. "Because of incomplete knowledge, relevant considerations may be overlooked or misconstrued," and "deep-running social attitudes, political values, or historical traditions may not be fully or accurately sensed."<sup>18</sup> By its nature, he points out, comparative work heightens our sensitivity to these dangers. As one comes to the realization of "how much he has failed to understand his own system, he must fear that he has failed to understand the other. But the value of comparison remains, for comparison provides a framework and focus outside either system for viewing both."<sup>19</sup>

The risks Summers so eloquently and perceptively describes have been exacerbated further by the sorts of issues and challenges that the current situation raises. From the start, those pursuing comparative legal undertakings have been forced to pass not only beyond national borders, but across disciplinary boundaries as well.<sup>20</sup> The movements driving the transformations that are going forward in our economic, legal, and social schemes, however, are dissolving the lines between disciplines even as rapidly as they are eroding the once-firm lines that separated states. These changes will drive lawyers—along with others—still deeper into exotic and uncharted regions, and compel them to confront such unsettling questions as human personhood and its meaning, that once were the province of the philosophers and the moralists alone.<sup>21</sup>

What follows, however, constitutes no full-blown expedition, even though it is prey to all of the dangers, frailties, and missteps to which any comparative excursion necessarily is subject. Instead, as advertised, it represents something in the nature of an advance-party, or a

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16 *Id.* at 51.

17 Clyde Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175, 177 (1984). On the dangers and value of comparative work, see also Glendon, *supra* note 14.

18 Summers, *supra* note 17, at 177.

19 *Id.*

20 This is nothing new to labor lawyers: see *infra* note 67.

21 See, e.g., Xavier Blanc-Jouvan, *Individualisme et "communautarisme" en droit français: le cas des relations de travail*, 1993 BYU L. REV. 693, 693–95.

reconnaissance team. By attempting to scout-out some of the ground and a few of the characteristics of the labor law regimes of two ordering systems, it will seek to provide a tentative and very partial sketch about where we have been, on the way to evaluating where we might be going, and what that might mean for us.

## II

The emergence or the disappearance of a legal category, such as labor law, signifies that some fundamental change is going forward in a society. New patterns of acting and cooperating are being worked out and are finding common acceptance. These patterns reflect fresh conceptions, understandings, and intentions about the constitution of our lives in common, and how we most effectively and regularly can achieve the ends toward which our activities are directed. More significantly, the growing acceptance of the new arrangements manifests the cumulative judgment that they are satisfactory, if not desirable, and that they establish sensible schemes to obtain goals that are in themselves worthwhile. In short, the "new order" entails the creation of a new set of meanings, and thereby, a new way of being. As a result, the "old order," and the meanings that grounded it, often become increasingly opaque to us. Other images now condition the way we imagine ourselves and our world, and provide the motives for our daily routines. "The past is a foreign country," opens L.P. Hartley's novel *The Go-Between*, "they do things differently there."<sup>22</sup>

It is easy enough for us to overlook the full or authentic significance of our temporally "domestic" activities. They quietly cut their grooves in us without our notice, thereby steadily and insidiously establishing the horizons by which we take our bearings. Their massiveness in our lives and imaginations seems to suggest a sort of givenness and inevitability about them. This problem of meaning frequently takes on considerably different dimensions when we become the "foreigners" who attempt to deal with the social, religious, or legal schemes previous generations bequeathed to us. Like dazed and disoriented travelers, we can fail to appreciate the complete significance of what we have heard and seen. We mouth the words, gaze at the symbols, and read from the same text, but the full sense of it all somehow eludes us. The world our ancestors inhabited seems to be an entirely different place than ours—and perhaps, we suspect, we somehow have become different sorts of beings as well.



Seventy or so years ago, labor law represented a new legal category that was struggling to come into its own, both in the United States and in the industrialized nations of Europe, particularly in Germany.<sup>23</sup> Few branches of law have had a more contentious development, or have been born of and shaped by such spectacular clashes. After several decades of experimentation, missteps, conflicts, and compromises, the institutional schemes and patterns of meaning began to assume their presently-recognizable forms, and by the early 1920s, labor law had started to emerge as an independent field, both in German as well as in American law.

Of course, in one respect, the legal regulation of the employment relationship hardly represents anything new, as enactments like the Statute of Laborers of 1351,<sup>24</sup> or the famous Elizabethan Statute of Artificers of 1563,<sup>25</sup> remind us. Space constrains anything but the briefest sketch of this vast and complex theme. Suffice it to say that by the end of the nineteenth century, labor law "could be understood and was understood as the realization of two principles: of self-help and state-help."<sup>26</sup> The trade union movement and collective bargaining represent the former, while the latter is exemplified by various types of legislation designed to protect the weaker party in the employment relationship. Generally speaking, interventionary legislation first took the form of protective legislation which set limitations and prohibitions upon labor by children, and later, by women, before slowly developing as more generally applicable safety, health, or hours legislation. More comprehensively, interventionary legislation also took the form of state-sponsored insurance and assistance schemes, such as workers' compensation, sickness and retirement benefits, and similar schemes which acted to spread some of the risks of life in an industrially-based, capitalist economy. As the scope of these schemes were extended to persons outside the employment relationship and the labor market, they became institutional components of the modern welfare-state.<sup>27</sup>

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23 As previously mentioned, the term "labor law" entails definitional problems. See *supra* notes 6 and 11. For a discussion of the term's meaning and influences behind the emergence of the field, see Bob Hepple, *Introduction to THE MAKING OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY ON NINE COUNTRIES UP TO 1945* at 1 (Bob Hepple ed., 1986) [hereinafter *THE MAKING OF LABOUR LAW*].

24 25 Edw. 3, Stat. 2, ch. 2.

25 5 Eliz. 1, ch. 4.

26 Thilo Ramm, *Epilogue: The New Ordering of Labour Law, 1918-45*, in *THE MAKING OF LABOUR LAW*, *supra* note 23, at 277.

27 On this point, see generally Zacher, *supra* note 6.

As is well-known, in the case of the United States, "self-help" rather than "state-help" played the predominant role in the realization of what Americans would come to think of as labor law.<sup>28</sup> A variety of factors account for the relatively modest role played by interventionary legislation during the first several decades of this century,<sup>29</sup> which included not only judicial opposition,<sup>30</sup> but a long-standing policy of distrust of government intervention in employment matters by significant portions of the labor movement as well.<sup>31</sup> Consequently, the appearance in the United States of what we now typically think of as labor law tends to be associated with the passage of the National Labor Relations (Wagner) Act in 1935,<sup>32</sup> but that is a misperception.<sup>33</sup> To the extent that law school curricula serve as any guide, labor law was beginning to be recognized as a distinct legal category shortly after World War I. Harvard, for example, inaugurated a labor law course in 1920.<sup>34</sup> At about the same time, the dean of Columbia's law faculty, Harlan Fiske Stone, declared that the law schools had an important role to play "in the development of this new

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28 Indeed, the notion of "free" collective bargaining would become a fundamental characteristic of the American labor relations law scheme: this is the idea that the substantive terms of the employment relationship are best determined by the parties themselves, free of governmental influence or intervention. (However, as Simitis observes, the very passage of the Wagner Act represents the presence of state intervention. See Simitis, *supra* note 8, at 120.)

29 On this point, see generally the classic piece by Derek Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971).

30 The best-known example of which probably is *Lochner v. New York*, 198 U.S. 45 (1905) (holding as unconstitutional under the due process clause of the Fourteenth Amendment a state statute limiting the working hours of bakery employees).

31 Thus, until the depression-era, the American Federation of Labor opposed nearly all forms of "protective" legislation, including minimum wage and hour legislation, unemployment and retirement insurance, etc. For an analysis of the rationale, development, and changes in this policy of "voluntarism," see GEORGE GILMARY HIGGINS, *VOLUNTARISM IN ORGANIZED LABOR IN THE UNITED STATES, 1930-1940* (Arno & The New York Times 1969) (1944). See also Elisabeth Brandeis, *Organized Labor and Protective Legislation*, in *LABOR AND THE NEW DEAL* 123 (Milton Derber & Edwin Young eds., 1961); Edwin Witte, *Organized Labor and Social Security*, in *LABOR AND THE NEW DEAL*, *supra*, at 241.

32 29 U.S.C. §§ 151-69 (1996).

33 On this point, see the brief but insightful review by Benjamin Aaron, *A Half-Century of Labor Relations Law and Collective Bargaining*, 13 THE LAB. LAW. 551 (1998).

34 Noel T. Dowling, Book Review, 23 COLUM. L. REV. 202, 203 (1923) (reviewing FRANCIS BOWES SAYRE, *A SELECTION OF CASES AND OTHER AUTHORITIES ON LABOR LAW* (1922)). Sayre was the teacher of this course.

body of law.”<sup>35</sup> Columbia subsequently introduced a course in “Industrial Relations” in 1922.

The publication that year of Francis B. Sayre’s casebook on labor law may represent one of the clearest signs of the advent of the field. “Labor law has in recent years been attracting widespread attention,” Sayre observed in his Preface, and it is “in response to the growing demand for an adequate collection of cases on the subject this volume is published.”<sup>36</sup> Sayre’s work departs in significant ways from the precedents established by the founder of the casebook, Christopher Columbus Langdell. Sayre annotated his cases with an extensive series of notes, and he included a rather large selection of ancient and modern English legislative materials, as well as American and Canadian statutes.<sup>37</sup> In addition, the book quotes from a variety of secondary texts and contains several decisions by the Australian Court of Conciliation and Arbitration and the Kansas Court of Industrial Relations concerning the question of “the living wage.”<sup>38</sup> To further elucidate the discussions in these cases, Sayre reproduced in the book’s appendix, the “Minimum of Subsistence and Minimum Comfort Budget” which had been prepared by the Bureau of Applied Economics for the Interchurch World Movement Steel Strike Commission’s Report on the Steel Strike of 1919.

Sayre’s book represents one of the earliest, if not the first, law school texts devoted to the topic we now generally refer to as “labor law.”<sup>39</sup> Despite the novelty of his work,<sup>40</sup> however, Sayre’s terse Pref-

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35 *Id.* at 203. In Dean Stone’s view, “It is for the law schools an important task to systematize this body of legal doctrine as it develops and there already exists a mass of material in the form of judicial decisions requiring study and analysis by modern law school methods as an important step in the development of this new body of law.” *Id.*

36 SAYRE, *supra* note 34, at v.

37 These included excerpts from the Clayton Act, the Sherman Anti-Trust Act, the Thirteenth and Fourteenth Amendments, as well as a portion of the Canadian Industrial Disputes Investigation Act of 1907.

38 Also referred to as the “family wage.”

39 The first American text that I have found using the term “labor law” in its title is F. J. Stimson’s 1896 work entitled, *HANDBOOK TO THE LABOR LAW OF THE UNITED STATES*. Of its ten chapters, one is devoted to a discussion of the individual employment contract; three to various sorts of state protective legislation; one (very short) chapter to employment-related torts; another (and even shorter) chapter to profit sharing and worker-cooperative arrangements; and four chapters to topics related to unions and collective bargaining (these latter chapters make-up more than half the book’s text).

40 A matter noted by several of Sayre’s reviewers. *See, e.g.*, W.R. Vance, Book Review, 36 *HARV. L. REV.* 634 (1923); Herbert F. Goodrich, Book Review, 21 *MICH. L. REV.* 716 (1923); Jackson H. Ralston, Book Review, 71 *U. PA. L. REV.* 294 (1923); Karl Nickerson Llewellyn, Book Review, 33 *YALE L.J.* 226 (1924).

ace gives no discussion of the book's plan, nor does he there or anywhere else in the volume apparently find it necessary to define what he means by "labor law." Instead, Sayre simply expresses the hope that "this collection of cases" may prove useful to those "interested in studying the development and application of the legal principles which make up the body of labor law."<sup>41</sup> The book's contents, however, would be entirely familiar to anyone possessing even a passing acquaintance with the institutions and mechanisms of collective bargaining.

Legal, political, and economic arrangements, the family, mores, and similar social institutions, all represent what might be called schemes of recurrence.<sup>42</sup> Such schemes constitute relatively stable and commonly understood and accepted patterns of cooperating to achieve desired ends. Legal schemes, for instance, in part are intended to facilitate and accommodate the orderly operation of a manifold series of social schemes with one another. They accomplish this not only through the law's direct regulative effects, but through the fact that the law is a highly influential mediator and teacher of values. Consequently, a "legal category," such as labor law or family law, also performs an heuristic function. As specialized branches of legal science, they generate a set of terms and relations through which we organize and attempt to make intelligible various patterns of human activities. In other words, they function as more or less adequate recurrent schemes for structuring our knowing and for assigning meanings to our undertakings. Accordingly, law and its categories play an important role in setting the imaginative conditions under which we live, both for lawyers as well as others in a modern society.

These recurrent social schemes stand in a mutually conditioning relationship, and a change in the operation of one eventually will affect the others. Thus, the emergence, stability, development, or decline of recurrent social schemes is not the product of some blind determinism, but of a conditioned series of probabilities which reflect long and intersecting series of human choices. Each of our choices is made in accordance with a scale of values, and in light of the context of meanings available to us.<sup>43</sup> Similarly, each of our decisions, when acted upon, shifts in some degree the scale of probabilities. In short,

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41 Sayre, *supra* note 34, at v.

42 For commentary on recurrent schemes, see JOSEPH FLANAGAN, *QUEST FOR SELF-KNOWLEDGE: AN ESSAY IN LONERGAN'S PHILOSOPHY* 100-12 (1997); BERNARD J.F. LONERGAN, *METHOD IN THEOLOGY* 47-55 (Univ. of Toronto Press 1990) (1972) [hereinafter LONERGAN, *METHOD IN THEOLOGY*]; LONERGAN, *supra* note 15, at 118-25, 207-14, 459-63.

43 On valuing, see LONERGAN, *METHOD IN THEOLOGY*, *supra* note 42, at 27-41.

everything counts. For the reasons sketched in the opening paragraphs of this essay, however, changes in institutional schemes tend to occur slowly because they involve some common acceptance of new understandings and a certain degree of willingness to cooperate in some new way of being. Hence, the emergence or disappearance of a legal category also tends to be more a matter of rumor, suggestion, the slow recognition of developing patterns, or a creeping sort of forgetfulness, than an unexpected discovery breathlessly announced in a hastily-arranged press-conference.

As in the United States, the recognition of labor law as a distinct legal category occurred in Germany in the period following World War I. Its arrival there was proclaimed by the prominent Frankfurt lawyer, law professor, and social democrat who had played the leading role in developing a consistent methodological framework within which to order and accommodate its various features: Hugo Sinzheimer.<sup>44</sup> In a lecture he delivered in 1926 entitled, "Basic Questions about Labor Law,"<sup>45</sup> Sinzheimer confidently declared to his listeners that "[l]abor law has become its own, independent [body of] law, that has its own principles and its own independent forms."<sup>46</sup> Moreover, this new field was not just another dust-dry set of recondite general principles and niggling exceptions. It represented the law on a mission. "To uphold human dignity," Sinzheimer explained, "is the special task of labor law . . . [:] it brings into being a 'real humanity,'

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44 On the significance of Sinzheimer's work and contributions, see Otto Kahn-Freund, *Hugo Sinzheimer (1875-1914)*, in I HUGO SINZHEIMER, *ARBEITSRECHT UND RECHTSZOLOGIE: GESAMMELTE AUFSÄTZE UND REDEN 1* (Otto Kahn-Freund & Thilo Ramm eds., 1976) [hereinafter, SINZHEIMER]; for a concise biography of Sinzheimer, see the entry by R. Schimmel in *JURISTEN: EIN BIOGRAPHISCHES LEXIKON* 568 (Michael Stolleis ed., 1995).

45 See Spiros Simitis, *Hat das Arbeitsrecht noch eine Zukunft?*, Plenary Address Before the Fifth European Regional Congress of Labour Law and Social Security (Sept. 18, 1996); see Hugo Sinzheimer, *Das Wesen des Arbeitsrechts*, in SINZHEIMER, *supra* note 44, at 108.

46 As early as 1910, Sinzheimer stated that Philipp Lotmar, through the publication of his work, *DER ARBEITSVERTRAG* (THE EMPLOYMENT CONTRACT, vol. I, 1902; vol. II, 1908) had "created labor law as a special discipline within legal science." Quoted in Reinhard Richardi, *Begriff und Entstehung des Arbeitsrechts*, in I MÜNCHNER HANDBUCH ZUM ARBEITSRECHT §1 at 2 (Reinhard Richardi & Otfried Wlotzke eds., 1992). According to Alfred Söllner, however, Lotmar's conception of the employment agreement was not as advanced as that which appeared in the much-criticized provisions of the 1900 German Civil Code [BGB]. This explains why Lotmar's work had comparatively little practical influence in the years after its appearance. Alfred Söllner, *Der industrielle Arbeitsvertrag in der deutschen Rechtswissenschaft des 19. Jahrhunderts*, in *STUDIEN ZUR EUROPÄISCHEN RECHTSGESCHICHTE* 288, 293-94 (Walter Wilhelm ed., 1972).

that is much more than some mere ideological humanism."<sup>47</sup> Consequently, labor law constituted a living topic, or as Sinzheimer described it, "the developing law of the present."<sup>48</sup> Like the contemporary biological sciences, labor law represented the cutting edge of legal science, and the problems and adversities of concrete human existence<sup>49</sup> in a technological age would be pursued and

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47 Simitis, *supra* note 45, at 1.

48 *Id.* Sinzheimer's characterization of labor law as "developing law" had a special significance in the German context. The German Civil Code, including the provisions through which it mediated the order of the employment relationship (primarily §§ 611–30 BGB), grew out of the methods of an abstract "conceptual jurisprudence." In Max Weber's analysis of patterns of legal thought, this approach epitomized a system of "logical formal rationalism," *i.e.*, a pattern of legal thought that expresses its rules through abstract concepts that are creatures of legal thought itself, and which constitute a "gapless" system that encompasses or "subsumes" all contingencies. On this topic, see Max Rheinstein, *Introduction to MAX WEBER ON LAW IN ECONOMY AND SOCIETY* xxv, xxxv–lv (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Harvard Univ. Press 1954). For an excellent discussion of the development of this methodology, see FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 341–62 (Tony Wier trans., 1995).

49 As was true of the American common law of the late 19th Century, the BGB's understanding of employment was conditioned by formal notions of contractual freedom and household-based, master-servant relationships. (On the American common law, see MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY*, 147–70 (1981). Hence, Sinzheimer and his colleagues faced two related tasks: they had to separate labor law from the dominant private law scheme and had to establish it as a separate category by developing a new set of terms and relations through which mass employment relationships and collective bargaining agreements could be comprehended by German law.

On the way to accomplishing these tasks, Sinzheimer insisted that labor law must abjure the abstract formalistic methodology of the civil code and attend instead to the concrete data of real life work-relationships. Thus, he maintained, the principles for the shaping of labor law could not be drawn "simply from the elements of statutory provisions" that the civil code posited. Rather, "because these elements are not exhaustive, the attempt [must] be made to bring to recognition the way the employment relationship actually manifests itself." Such an approach, Sinzheimer observed, would "show immediately, that the content of the employment relationship is much richer, and therewith the scope of its governing formal principles much wider, than it appears according to the abstract statutory elements." HUGO SINZHEIMER, *I DER KORPORATIVE ARBEITSNORMENVERTRAG* 1–2, 3–27 *passim* (1907).

It is interesting to compare Sinzheimer's approach with that taken by the United States Supreme Court in the *Steelworkers Trilogy*, 363 U.S. 564 (1960). There, the Court warned the lower courts against a "preoccupation with ordinary contract law" when approaching labor law issues. *Id.* at 567. "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements," the Court instructed, "we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose they are intended to serve." *Id.* at 567. Such an approach is required because the

worked out on its terrain, according to its dynamically developing protocols. The sheer importance of the field, and intellectual challenges it posed, would draw the best minds to it. The so-called "social question" or "worker question" had preoccupied both Europe and the United States for decades and had absorbed the attention of everyone from Karl Marx to the incumbents of the Holy See, in particular Pope Leo XIII.<sup>50</sup> After years of trying, the law finally had developed a method for approaching and attempting to resolve labor issues, which of necessity affected nearly every other aspect of life as well. Bluntly put: this would be the field where the legal rubber hit the road. Sinzheimer's palpable excitement about his subject mirrored both its novelty and its importance.

Certainly, the circumstances and attitudes that conditioned and informed the conception and realization of labor law in Germany differed in several important respects from those that affected its emergence and development in the United States. Once more, this is a large and complex topic, and space permits only a brief mention of a few of its key features. Succinctly stated, if labor law represents the product of self-help and state-help, it is the role of the latter in the German case, and the attitudes toward the state that it reflects,<sup>51</sup> that constitutes one of the most striking differences between the American and German versions of labor law.

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collective bargaining agreement "is more than a contract; it is a generalized code" which represents "an effort to erect a system of industrial self-government." *Id.* at 578, 580. The special nature of the collective agreement is reflected in the fact that it "covers the whole employment relationship" and "calls into being a new common law—the common law of a particular industry or a particular plant." *Id.* at 579. A comparative study of the impact of labor law on the legal methods of common and civilian lawyers might reveal much about the development of legal thinking generally during the past seventy years.

50 Leo XIII (1878–1903) was the author of the highly influential *RERUM NOVARUM* [THE CONDITION OF LABOR] (1891), the first in the line of social encyclicals. Among other things, the encyclical approved of the formation of autonomous unions, encouraged the adoption of the family wage, and provided a preliminary sketch of what would become known as the principle of subsidiarity. The vastness of the literature concerning the social teachings reflects the breadth of their influence. For an historical introduction, see PAUL MISNER, *SOCIAL CATHOLICISM IN EUROPE* (1991); on subsidiarity, see Thomas C. Kohler, *Lessons from the Social Charter: State, Corporation and the Meaning of Subsidiarity*, 43 U. TORONTO L.J. 607 (1993) and sources cited therein.

51 On these attitudes see Hepple, *Welfare Legislation and Wage-Labour*, in *THE MAKING OF LABOUR LAW*, *supra* note 23, at 135–37; Ramm, *supra* note 26, at 277–78; Kahn-Freund, in *SINZHEIMER*, *supra* note 44, at 7–8. For a comprehensive discussion and analysis of the development of these social welfare and worker-protection schemes, see THOMAS NIPPERDEY, *I DEUTSCHE GESCHICHTE, 1866–1918: ERSTER BAND ARBEIT-SWELT UND BÜRGERGEIST*, 335–73 (1994).

To characterize it in a few words, German labor law began its development in a "top-down" fashion, as "worker protection law."<sup>52</sup> This protective law first appeared in the guise of the Bismarkian social insurance legislation (which intervened little in the substantive terms of employment), and subsequently (after 1890), as enactments which limited working hours and set specifications concerning health, safety, and other conditions of employment. A second aspect of state interventionary legislation, to which Sinzheimer referred as "work freedom legislation,"<sup>53</sup> concerned the statutory establishment of worker participation in decisionmaking through the establishment of works councils. A third component of this protective scheme, which embodies the elements of self-help, and which might be thought of as arising in something of a "bottoms-up" way, is the law governing collective bargaining and associational freedom.<sup>54</sup> Thus, historically there has been a close relationship between labor law and social legislation in Germany, and the German unions have employed both legislation and collective bargaining in a more or less coordinated way to achieve their goals.

As can be seen, several factors distinguished the German labor law scheme from the one that contemporaneously was emerging in

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52 See, e.g., ALFRED SÖLLNER, *GRUNDRIß DES ARBEITSRECHTS*, § 5, II at 30 (11.Auflage, 1994). The basic features of German labor law were shaped during the period between 1918 and 1928. Some sense of the prevailing view of the state's role in employment can be found in the Weimarer Reichsverfassung [Constitution] of 1919; e.g., Art. 7, ¶ 9: "The Reich has law-making authority over . . . labor law, the insuring and protection of workers and salaried employees . . . ; Art. 157: "The labor force stands under the special protection of the Reich."

53 ("*Arbeitsfreiheitsgesetzgebung*") Sinzheimer, *Arbeitsrecht und Arbeiterbewegung*, in SINZHEIMER, *supra* note 44, at 102. The works councils were not an invention of the unions, and their rather involved history dates back to the first part of the nineteenth century. On the whole, however, their use was a reaction to the labor movement and represents the attempt by management to provide an alternative to unions, as well as a means to legitimize its authority. The first act concerning workers participation was passed in 1891 over the opposition of the unions and the Social Democratic Party. A change in views and strategies by the labor movement concerning workplace interest representation led to the 1920 Works Councils Act (see *infra* note 56), in which Sinzheimer's ideas played an important role. On these points, see MANFRED WEISS, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY*, ¶¶ 448-51 (1995); for a comparative overview, see Thomas C. Kohler, *Betriebliche Interessenvertretung in den Vereinigten Staaten: Ein Überblick*, 46 *ARBEIT UND RECHT* (forthcoming 1998).

54 See Sinzheimer, *Arbeitsrecht und Arbeiterbewegung*, in SINZHEIMER, *supra* note 44, at 102. As Ramm remarks, "Labour protection law in the wide sense of the word covered all employment protective statutes as well as the law on collective labour organisations and industrial disputes and the law on workers' representation. It was more than labour law, because besides the law on labour relations," it covered welfare legislation as well. Ramm, *supra* note 26, at 278.



the United States.<sup>55</sup> Taken together, the two can be seen as representing contrasting "ideal types," between which the employment ordering regimes of other nations would come to fall. Given its development as protective law, it is not surprising that a relatively high level of intervention has characterized the German system, which expresses itself in the rather elaborate statutory "scaffolding" that has come to surround the employment relationship both at the individual and collective level. It early developed a statutorily-based scheme of protection against unfair discharge,<sup>56</sup> and it consistently has emphasized employment stability over capital mobility. Its idea of social solidarity is in part reflected in the fact that the system rests on a corporatist structure of worker and employer organizations, whose relationship partially is mediated through various formal and informal state structures. Beneath it all rest notions of personhood and individualism that, while distinct in origin from those which traditionally informed the American system, nevertheless have had considerable influence upon it, particularly during the past half-century.

Fifteen years after labor law's entry into the law school curricula, Congress, through its passage in 1935 of the Wagner Act, adopted an employment ordering scheme whose features had been worked out on a grass-roots basis during the previous forty or so years. The meanings and understandings that informed this scheme were by that time well-known and broadly accepted. As one observer put it, they constantly had been reiterated "in reports of industrial commissions, court decisions, rulings of administrative bodies, and legislation"; Congress merely "gathered up the . . . threads" and wove the statute from them.<sup>57</sup> In short, labor law was not a congressional invention. The threads in the legislative loom had been spun by many hands, and of these, many never had held a law book. Similarly, and in contrast to the German experience, the set of legal terms and relations that established this category and mediated its meanings were not largely the product of any single individual's architectonic insights, but the fruit of a great deal of combined legal creativity.

Unlike its development in Germany, American labor law did not proceed from the motive of erecting a comprehensive protective

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55 For a thorough description and analysis of the contemporary German system, see WEISS, *supra* note 53.

56 This protection came through the Betriebsrätegesetz [Works Councils Act] of February 4, 1920 [RGBl. S.147], which provided that an aggrieved employee could appeal a discharge to the Works Council (if one existed) and which detailed the parameters for just cause. As an alternative to reinstatement, the law permitted an employer to pay an unjustly discharged worker a statutorily set amount of compensation.

57 IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 18 (1950).

scheme. Instead, Congress in the Wagner Act deliberately opted for a system that would involve minimal state intervention in the employment relationship. Consequently, it sanctioned what is in essence a self-help arrangement, which permitted the enhancement of individual status through the defense and maintenance of autonomous, self-organized groups. There was remarkably little in the way of labor law in the United States in 1935, and for nearly a generation, the Wagner Act would keep it that way.<sup>58</sup> Rather than attempting to erect an articulated public-ordering framework by which to shape the employment relationship, Congress basically left the job to the parties themselves.

To reduce these complicated developments to the compactness of a motto: the more highly centralized German system would operate largely through formal structures, while the diffused and locally-focused American scheme predominantly rested on a series of habits. A habit constitutes a way of being. Two distinctive characteristics about the American way of being seem to have played a crucial part in supporting the employment-ordering scheme Congress had adopted. The first shows itself in the historically remarkable propensity of Americans to form associations.<sup>59</sup> The second is the pervasive, if often indirect, influence that religiously conditioned understandings have exercised over the imagination, feelings, and motives of Americans.<sup>60</sup> Both points typically are overlooked, especially the second. However, the diminution of our associational habits and related changes in religious conceptions and practices have had a far greater impact on our labor law schemes—and on nearly every other aspect of common life—than has commonly been realized.<sup>61</sup>

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58 It was not until the advent of the civil-rights era that Congress would begin to enact legislation that would affect the terms and status of virtually all employed persons. (On this point, see Aaron, *supra* note 33, at 555–56). Given its relatively light regulation of the employment relationship, one scholar has characterized the United States as essentially a “developing country” in field of employment law. DIETER REUTER, *FESTSCHRIFT FÜR MARIE LUISE HILGER UND HERMANN STUMPF* 586 (1983).

59 As a group, the Germans also have been known for their enthusiastic organization of voluntary associations. How much union organization was affected by the various legal prohibitions against the forming of workers’ organizations, and by views of the role of the state, is difficult to determine. For a general discussion, see NIPPERDEY, *supra* note 51, at 320–34.

60 For an overview of this point, see Thomas C. Kohler, *Labour Law and Labour Relations: Comparative and Historical Perspectives*, 12 INT’L J. COMP. LAB. L. & INDUS. REL. 213 (1996), and sources cited therein.

61 For example, Catholics and Jews traditionally have been far more hospitable to union organization than other portions of the population, in part because of the way both groups have understood community and their relations to others. See Thomas

Despite the differences between the German and American labor law schemes, collective bargaining lay at the heart of both. Similarly, both conceived of its practice as a flexible and autonomous method for ordering a relationship that had shifted from a largely family-based setting to one frequently grounded in and increasingly conditioned by large organizations. By the fourth decade of this century, labor law had become a vibrant and established category in two of the modern world's most studied legal systems. Although their development was interrupted by the events surrounding World War II, the American and German labor law schemes have become the world's most influential.

In Franz Wieacker's assessment, the development of labor law represents "one of the few indisputable achievements of our jurists in this century."<sup>62</sup> It also may represent one of the most evanescent. Within the space of a lifetime, labor law, as a scheme of employment ordering arranged around or closely tied to collective bargaining, virtually has disappeared in the United States and is under tremendous pressure nearly everywhere else. If the emergence or dissolution of a legal scheme signifies a fundamental change in the way we imagine ourselves and our relations to others, could a reflection on the transformation of labor law<sup>63</sup> have more to tell us about ourselves, and about the likely shape of our future, than we might at first think?

### III

Poor old labor law. Once one of the most discussed and debated of all fields of law, few today would see it as the cutting edge of either legal thought or practice. In the case of the United States, the same holds true of "employment law," which has developed in an unsteady, patchwork fashion as unionization and the influence of "traditional"

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C. Kohler, *The Overlooked Middle*, 69 CHI-KENT L. REV. 229 (1993). For better than a century, both in its membership and leadership, the American labor movement had been heavily—if not predominantly—Catholic. The Second Vatican Council (1962–65) changed many of the ways in which the understanding of community was mediated to Catholics, which affected (or in the case of younger Catholics, often entirely disrupted) the distinct "communal" attitudes and practices characteristic of Catholics. The implications of these attitudinal changes go far beyond the spectacular decline in Church institutions that has occurred since the mid-1960s, and play themselves out in the decline of unions as well as other forms of mediating bodies like families, fraternal and political groups, neighborhoods, etc. This link will be pursued in subsequent work.

62 WIEACKER, *supra* note 48, at 435.

63 In the case of the United States, this transformation includes the unsteady rise of individual employment rights.

collective labor law has waned. Labor law may represent a true achievement. But like a once-grand yet now untended formal garden, meandering new growths have disguised the old designs and obscured their symbols, while assuming no clear arrangement of their own. This state should come as no surprise. The social, intellectual, economic, moral, and cultural schemes that sustained the old patterns of employment ordering have radically shifted in the United States and are in the process of doing so everywhere else. In the meantime, new patterns at all of these levels are seeking to coalesce, but have yet to emerge. In short, we stand at the edge of a new world, one that will entail new ways of being for all its inhabitants. The question facing us is whether the schemes that will emerge will be the result of accident and force, or of conscious, clear-eyed deliberation and sober, democratic choice.<sup>64</sup> The stakes are as fantastic as the problems are complex.

Briefly stated, history has backed us into something of a corner. In light of the events surrounding 1989, we enjoy a nearly unprecedented freedom to determine the conditions for our common existence. As a result, we are accountable in an unparalleled way for the consequences our choices bring. As self-constituting beings, we are not simply the helpless hostages of blind fortune. Acting responsibly in our new context requires us to acknowledge that good outcomes do not emerge magically through some extrinsic force or as the result of invariant necessity. Each of our decisions in some large or small way shifts the schedules of probabilities. Consequently, there are trends of development and of decline. Like it or not, each of us has been conscripted to act as a co-author of history.

To go further and propose that a sustained analysis of labor and employment law issues could provide important perspectives on the ordering questions facing us may at first glance appear preposterous. We are accustomed to pursuing such important matters in the lofty halls of constitutional theory and through the exquisite models of economic and financial analysis. But, as seen, this proposition hardly struck our predecessors as odd. Their answers could hardly be ours, and an adequate approach to the problems involved must proceed on a far wider intellectual front, and on a much sounder methodological basis, than did theirs. Nevertheless, is it possible that in their questioning they were on to something that we have forgotten, and that

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64 Cf. THE FEDERALIST NO. 1 (Alexander Hamilton) ("[w]hether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.").

the now frequently opaque categories in which they thought conceal understandings and suggest insights that may be of real significance to us?

Tellingly, labor law scholars have understood their field as a "vocation"<sup>65</sup> or as "a legal discipline with heart."<sup>66</sup> So it is. No other branch of the law deals more intimately, nor more broadly, with the conditions of daily human existence. Few, if any, must confront and deal more directly with the economic, familial, and related social schemes by which a society organizes itself. It is no mistake that the founders of the field conceived it as a method for dealing with the "social question." Among the matters basic to labor law are the nature of our ties to others and the sorts of obligations that cooperative relationships entail. Issues concerning the character of human personhood never lie far from its surface. Thus, while one can speak of labor and employment law as a discrete legal field, that is misleading. It is by nature an interdisciplinary and cooperative endeavor. Those who pursue it must be true generalists and willing to pursue insights from areas that initially seem far removed.<sup>67</sup> Similarly, given the internationalization of business and the trans-border and multi-cultural nature of modern business organizations, any adequate reflection on employment and its ordering demands a comparative approach.

Established employment ordering systems have become unstable at a time when employment has become a—if not the—ubiquitous preoccupation of the age. This instability has also occurred at a time when, for better or for worse, people are tied to the workforce and to the market in a way never before seen. The curious fate of labor law poses a sort of limit case for the future of ordering generally. As technology increasingly demonstrates, work is ever more portable, and to the extent that it becomes "virtual," much of it will have no location whatever, at least in the sense that people, including lawyers, tend to think of it. Likewise, there is a slowly growing trend toward employment as a "spot" or "just-in-time" relationship. In short, like marriage

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65 See Hugh Collins, *Labour Law as a Vocation*, 105 L.Q. REV. 468, 468–70, 472–73 (1989). "What I suggest brings coherence to Labour Law as a distinct field of legal studies is a sense of vocation. . . . The sense of vocation marks out a field of inquiry . . . ." *Id.* at 473.

66 Bernd Rüthers, *35 Jahre Arbeitsrecht in Deutschland*, 1995 RECHT DER ARBEIT 326 "Indisputably, labor law has its peculiarities. It is a legal discipline with heart."

67 As Bernd Rüthers observes, in the eyes of their colleagues in more prestigious areas such as constitutional or corporate law, labor scholars are "like vagabonds without a permanent home, bordercrossers without papers or residence permits, an impudent, pushy group, who gladly graze in foreign fields, or harvest in someone else's garden." *Id.*

and increasingly parenthood, employment—at least in the American context—may be on the way to becoming a “serial event.”

For those wishing to assume the tasks of a Sayre or a Sinzheimer today, at least part of the way ahead is clear. The transformation of labor law literally reflects the transformation of our way of being. In the past, much of the scholarship on work and its ordering has been taken up with themes like dependence and domination. This preoccupation reflects the enormous influence of Hegel's dialectic of master and slave, the echoes of which reverberate through the writings of the three thinkers whom Paul Ricoeur called the “masters of suspicion”: Marx, Nietzsche, and Freud. Although not without interest, concentration on these themes has distracted attention from more crucial inquiries into the way work and its ordering constitutes humans and their relations to others. The new situation requires the development of a new culture of work, which in turn requires a new appreciation of human character.

At first sight, employment ordering may appear to be a grindingly mundane subject. Few topics, however, bring the human to the center in a more forceful or complete way. A study along the lines suggested here would not only recontextualize our understanding of a field of law, but would be a significant step toward a reforming of the way we understand the human sciences as well. Such a reorientation involves a change in meanings, which will not be without controversy. Avoiding the questions, however, will not make them disappear.

