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INTRODUCTION: LABOUR, LAW, AND SOCIETY

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Labour law directly affects most people's daily lives, yet, except for Marxists and Marxians, scholars of jurisprudence and the philosophy of law have largely ignored it. This neglect might be due partly to labour law's variability from country to country and partly to its detailed and esoteric nature. However, labour law involves major issues of society and life. One can define labour law narrowly as the law pertaining to employer-employee relations, or one can define it broadly as all extant and possible law concerning work in society. The essays in this collection take a jurisprudential or philosophical approach to North American labour law in the broad sense. Obviously, in this small collection many important topics are not addressed. This introduction tries to place the papers in a general framework that includes some of the important topics not addressed.

I. RIGHTS AND WORK

To evaluate extant labour law, one needs a conception of the role of work and labour in society and a framework for evaluating it. This basically means that one needs a theory of society and labour as well as a political-legal philosophy—a very tall order indeed. The first three articles in this collection discuss some of the issues involved in developing such a basis for evaluation.

Work is a major factor in the lives of most normal adults. One can distinguish between work and employment, for many people who work, such as housewives, are not employed. 'Labour' can be used to refer to either work or employment. Although in their papers Richard De George and Adina Schwartz expound at some length on the importance of work and its social organization, it is useful to note briefly three aspects of the importance of work to most people's lives. First, work is economically important in most people's lives. Employment, whether by others or oneself, is the primary source of income

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for the vast majority of people. However, the work of people who are not employed is also economically important in their lives. The work of housewives or househusbands (undoubtedly together the largest group of persons who work but are not employed) is economically important to the family. Indeed, some women do not seek employment outside the home, because the costs of replacing their services in the home exceeds their potential earnings. In non-mechanized agriculture and some small family businesses, the work of children is also a significant economic benefit to the family.

Second, work is important simply due to the amount and kind of activity it involves. Any activity that occupies 35 or more hours a week must loom important in people's lives. The nature of any activity occupying so much of a person's waking life must also be important. Work can be physically difficult or easy, mentally difficult or easy, stressful or relaxing, boring or interesting, and so on. It can develop one's capacities and require using one's abilities to the fullest, or it can allow them to atrophy. Most work does both, developing some abilities and causing or allowing others to atrophy. Although people prefer different types of work, most people probably prefer work that requires them to use many of their abilities.[1]

Third, the type of work one does is important because of its effects on one's relations with others. At a simple level, most people develop friendships with some of their co-workers. Even the interpersonal relationships of people who work alone, such as housewives, are strongly influenced by their work; for example, neighboring housewives often form informal groups that meet for coffee. In a more complex way, people often identify themselves with their work. When strangers meet on airplanes or trains, one of the early questions asked of each other is what work they do. People identify themselves as politicians, car salespersons, business persons, teachers, engineers, and so forth, and such identification affects the way others interact with them. For example, to tell a stranger on a train that one is a philosopher is often to invite a puzzled look and an abrupt halt to conversation.

Although the nature and organization of work has never been stagnant, during this century they have been subject to change at an ever increasing rate. During the early part of the century, factory work changed to assembly-line work. Farm labourers have all but disappeared from the land, at first replaced by independent farmers with mechanized equipment, and now by large agribusinesses. Small

1. *See* J. RAWLS, A THEORY OF JUSTICE 426-28 (1971).

businesses took second place to large corporations and are now regaining importance, but often as franchises in large chains. The percentage of professionals in the labour force has increased greatly, and now even many of the previously independent practitioners—lawyers and doctors—are employees of large firms. Railroaders have given way to truckers. In mid-century industrial society, blue collar workers were the largest segment of workers. In the present North American post-industrial service economy, white collar workers form the largest segment. Yet, society and labour law may not have adequately altered to reflect these changes.

The remaining years of this century are likely to bring even greater changes, changes that raise significant issues for society and labour law. Perhaps the major source of changes is technological development bringing about an electronic information society. Developments in electronics are quickly changing the nature of work. It is certainly conceivable that by the end of the century, mail and books as we currently know them will disappear. Letters and letter-carriers will be relics of the past, replaced by immediate electronic communication between home computers over telephone lines. Books may also be stored in large central computer banks with people able to call them up by computers and print out a copy if they want one. (This introduction is being written on a computer, largely eliminating the need for a secretary and decreasing the amount of paper used.) In factories, electronic robots are beginning to displace workers.

These technological changes will significantly affect the nature of much work. The hope has been that the changes will eliminate the drudgery of work so that people will have jobs making greater use of their abilities. Yet, a recent study reported in the news suggests that the effect may be the reverse. In the computer industry, about 25 percent of the jobs are interesting, upper middle income ones, while 75 percent are uninteresting, low paying jobs, such as assembling computers. A large scale change of this sort would tend to eliminate the large middle class and split society into two groups of upper middle and low income. Such changes could have major effects on society.

Another major effect of these technological developments may be the elimination of many jobs. Although the effect of the new technology on employment is a matter of considerable dispute, the intermediate range outlook for employment in Canada is not bright. Some forecasts in the fall of 1983 predict average unemployment of 10 percent for the next five years. In some ways Canada is special because of its previously high proportion of workers in resource extraction, yet, at the same time data from Great Britain, whose labour

force is not heavily engaged in resource extraction, show unemployment at 13 percent. If work, usually employment, plays such an important role in the lives of most people, these unemployment rates will have a major effect on the lives of many people.

One response to the foregoing scenarios would be to recognize a right to work. Both Richard De George and David Beatty in their papers argue for such a right, but they provide quite different arguments for it. De George bases his argument on human rights, starting with the right to work recognized in the United Nations Declaration of Human Rights.[2] This right can be interpreted by, and derived from, other human rights. De George argues that the human rights to life, personal development, and respect support the human right to work interpreted as a positive right, that is, as one imposing an obligation on society to provide work, not merely prohibiting interference with people working if they can find employment. De George also notes changing social conditions that make the right to work more important to recognize now than in the nineteenth century. He discusses how North American (especially United States) ideology of free enterprise and collective bargaining have operated to prevent the recognition of a right to work. A right to work has not developed from collective bargaining, because it has not been in the interest of unions and union leaders to press for it.

De George does not discuss in detail how a right to work might be implemented. One method often discussed, one which De George does not strongly favor, is for the government to be the employer of last resort. An alternative or at least supplement is to provide workers tenure. Even if it might not be feasible to require companies to continue the employment of workers during a deep recession, it might be feasible to require them to retain or retrain workers who become obsolete or would otherwise be jettisoned into the sea of technological change.

Against this suggestion it might be argued that placing the burden of technological change on enterprises rather than society as a whole through government programs might be unfair. The total social costs and benefits of technological change are the same, whether the government or enterprises pay for the costs. Moreover, it is often not possible to predict what changes will affect an industry. For example, if biotechnologists develop a new strain of corn with nitrogen fixing properties, much of the chemical fertilizer industry would become irrelevant in a very few years. As this scientific breakthrough

2. G.A. Res. 217 A (III), U.N. Doc. A/23 (1948).

cannot be predicted and the costs of retaining employees would force many of the companies into bankruptcy, this solution would be unfair.

Yet, one might argue that enterprises should pay their true social costs; that worker displacement is a cost of the introduction of new technologies; so enterprises should have to absorb the costs of worker displacement. Doing so would lead to better judgments about the value of introducing new technologies. Although this argument might be appropriate for some technological changes, such as word processors, the above example of a nitrogen fixing strain of corn illustrates a difficulty with it. The technological change in one industry (farming) might have major impacts on enterprises in other industries (chemical fertilizer). In short, it is not technological change by the chemical fertilizer plants that would produce the worker displacement, so those enterprises should not have to absorb the costs. The costs should be spread among all those who benefit from the change, and eventually that is everyone in society.

David Beatty's argument for a right to work at a decent wage is only part of a broader set of principles for labour relations. He argues from what he takes to be central elements of liberal theory of law for a regime of industrial democracy. The central principle of the liberal theory of law, according to Beatty, is the moral equality of persons. More specifically, each person has a right to equal respect for liberty. In the realm of civil and political rights, this principle implies certain substantive rights, such as freedom of speech, and certain procedural rights, such as one person, one vote. In the area of labour relations, the theory implies substantive rights, in particular, the right to work at a decent wage. It also has procedural implications, in particular, that workers have an equal right to participate in decisions that importantly affect them in their work. Collective bargaining, as practiced in North America, Beatty claims, does not secure the procedural rights in a liberal theory of labour relations and should be greatly modified to a system of industrial democracy. This would involve broader definitions of worker groups and a collegial rather than adversarial model of labour relations wherein workers participate with management in industrial decisions rather than bargain with management over a comparatively narrow range of issues.

In her paper, Adina Schwartz criticizes a common methodological approach which she claims De George and Beatty use. This approach rests on two principles. The principle of metaethical individualism is

that one first determines the justifiable rights and claims of individuals and then evaluates social institutions by their ability to recognize and satisfy those rights and claims. The principle of the priority of pure normative theory is that normative principles are universal—independent of time and social conditions. A pure normative theory is developed and then applied to particular social conditions.

Because the social organization of work relates to how people produce and reproduce social life, Schwartz claims, this approach will not work, and an alternative is needed. What is produced, the work process by which it is produced, and the distributional structure in society are all interrelated and affect other aspects of social life such as the family and friendships. Metaethical individualism requires that the claims of individuals be identified and justified without assuming work structures. But the main types of theory, Schwartz claims, presuppose certain social structures. Thus, their argument is circular. Instead, Schwartz contends, we should ask what types of work structures make sense for us in our historical and social context. We can then consider what changes in work and other social structures would be required, use a consistent set of values to evaluate the costs and benefits of changing society, and then decide whether the changes are worthwhile. Within limits, reasonable people might disagree about the appropriate changes, but at least there is a basis for reasonable argument.

Schwartz's methodological critique extends far beyond the area of labour relations and applies to the evaluations of all parts of law and other social institutions. However, it is important to examine evaluative theories closely to make sure that in practice, as opposed to theory, the methodological assumptions she criticizes are indeed made. For example, while Schwartz suggests that De George makes these assumptions, it is not completely clear that he does. He recognizes that a right to work will emerge only in certain types of social conditions. Similarly, although Beatty appears to make the assumptions, the liberal theory of law is one that has developed in Western societies during the last century or two. It certainly is not one that characterized ancient Athens. One might view it as a very general statement of what kinds of institutions "make sense to us."

II. RIGHTS AND COLLECTIVE BARGAINING

In North America, there are in effect two different coexisting regimes of labour law—the common law of contract governing people employed by individual contracts and the law governing collective

bargaining by unions. Superimposed on both are certain statutory conditions concerning such matters as minimum wages, employment of children, unemployment insurance, and social security. Most of the focus of labour law, at least as taught, is on collective bargaining. However, most employees in the United States and Canada are not covered by collective bargaining agreements.

One can approach collective bargaining by considering problems frequently encountered in individual contracts. First, usually these contracts are not written, so many of the terms are not clearly spelled out. Second, employers can terminate the employment without giving reasons. (In Canada, reasonable notice must be given, and the reasonableness of the notice is based on the length of time the employee has been employed by that employer.[3]) Third, the conditions of employment are determined by bargaining between the individual and the employer. Given a large supply of labour, an individual has relatively little bargaining power. Wages are usually set by market forces. With current and expected rates of unemployment (at least in Canada), individuals do not have much bargaining power and the market tends to keep wages low. In short, except for people with special skills in short supply, individuals have little ability to determine the conditions under which they work, because compared to employers they have little bargaining power.

Around the time of World War Two, collective bargaining laws were established in North America. Recognizing the unequal bargaining power of most employers vis-à-vis most employees, the aim of the laws was to permit workers to organize and bargain as a group with employers. Organized employees have more bargaining power than individuals and so the two parties then approach bargaining equality. The underlying normative principle is that the agreements of two equal parties are fair. Consequently, the laws were primarily designed to establish fair procedures for two such parties to work out an agreement.

The law of collective bargaining generally aims to ensure that the bargaining process is fair. It determines the size of the employee bargaining units, certifies bargaining agents, requires bargaining in good faith, broadly specifies the scope of issues to be determined by a contract, regulates the methods of exerting pressure on the other party (strikes, lockouts, etc.), and sets up procedures for handling

3. *See, e.g.*, Employment Standards Act, ONT. REV. STAT. ch. 147, § 13 (1970).

impasses in the bargaining. Many of these tasks are assigned to a labour board.

Although much of the detail of labour law is the same in the United States and Canada, there is a difference in the legal attitude toward collective bargaining. The U.S. position is one of neutrality towards collective bargaining, while Canadian law supports it.[4] This raises the question of the value of collective bargaining. Three plausible reasons can be offered to support the value of collective bargaining: its effects on renumeration; its effects on working conditions, particularly respect for, or fair treatment of, employees in the workplace; and the intrinsic value of participating in union and bargaining activities.[5]

None of these reasons presents an overwhelming argument for the value of collective bargaining. The economic benefits of collective bargaining are not so clear.[6] Some gain may be realized, but the acceptance of reduced compensation by many union employees of financially troubled businesses during the 1981-82 recession and the widespread layoffs of unionized employees indicate that unionization and collective bargaining are not absolute protections against wage rollbacks and unemployment. Second, it is not clear how much of the noticeable improvement in workplace fairness during the last quarter century has stemmed from collective bargaining and how much has stemmed from human rights legislation and other protections. Unionization does not appear to have done much to protect female employees from sexual harassment, especially from male employees in the same bargaining unit. Third, the value of participation can easily be exaggerated. For example, it is hard to take the following claims literally.

> . . .[C]ollective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. . . . [C]ollective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment rather than simply accepting what their employer chooses to give them. . . .[7]

4. *See* P. WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW 25 (1980).

5. *Id.* at 24-33.

6. *Id.* at 28-29.

7. *Id.* at 32, 33.

The participation of the average rank and file union member is hardly the momentous occasion these claims suggest. Consequently, skepticism about the value of collective bargaining is reasonable.

In view of the structure of collective bargaining law, five sets of issues arise. (1) Who should engage in collective bargaining? This issue involves questions of the definition and size of bargaining units and whether certain types of employees should be denied collective bargaining. (2) What matters or topics should be subject to collective bargaining? Besides wages and hours, many other matters might be the subject of negotiation, such as job tasks, safety conditions, and even the products and services of a company. (3) How should an agreement be interpreted and implemented? Should the usual standards of contract interpretation apply, or are there special principles for collective agreements? Usually, disputes are resolved by arbitrators with possible appeals to courts, but other methods are certainly possible. (4) What should be done or permitted if an agreement cannot be reached? This includes questions of strikes, lockouts, secondary boycotts, picketing, mediation, and arbitration. (5) What legal procedures and mechanisms should be used to oversee all of these matters? This includes courts, labour boards, and various other techniques. This set overlaps with (3) above, but it is broader in scope in covering the issues in (1), (2), and (4) as well.

The last two papers in this collection address some of these issues. In her paper, Susan Sherwin in effect considers an aspect of what should be the subject of collective bargaining. Her question is when should a substantive matter be imposed by the state rather than left to collective bargaining. She notes several reasons for the state to be reluctant to impose substantive conditions on agreements, such as the need to vary conditions for different workplace arrangements and the difficulty of obtaining compliance with conditions to which the parties did not agree. Taking affirmative action programs for women as an example of a substantive matter that might be imposed by the state, she sketches the arguments for affirmative action. She then argues that affirmative action programs are not likely to result from collective agreements, because, for a variety of reasons, it is rarely in the interest of either party to press hard for them. For example, when women constitute a minority of the bargaining unit, the majority is likely to be willing to sacrifice affirmative action for benefits for the majority, such as higher wages. Drawing on her analysis, Sherwin concludes that besides labour codes setting minimal standards for all employment, the state should substantively intervene only on behalf of minority groups subject to systematic discrimination.

In the course of her analysis, Sherwin remarks on the vulnerability of public employees in bargaining with the government. One

may be puzzled to find Sherwin viewing public employees as particularly vulnerable in negotiations, while others claim that they have power not possessed by employee groups in the private sector. In part, this difference of opinion may be due to the different levels of government they consider. Sherwin primarily considers public employees at the provincial level where the government can legislate wages and override the bargaining process (as several Canadian provincial governments did in 1982 in the name of reducing inflation). Local governments lack such powers.

The paper by Morley Gorsky focuses on a particular question in the interpretation of collective agreements, namely, management rights clauses. These are general clauses purporting to retain rights for management to take actions not covered by other parts of the agreement. They come into question when matters such as the assignment of overtime are challenged as arbitrary or discriminatory. Although Gorsky emphasizes the interpretation of a recent decision of the Ontario Court of Appeal, the discussion has a much broader significance, going to the very root of the concept of collective bargaining. The broad issue concerns the impact of collective bargaining legislation on the relation between the parties. As noted above, the intent of the legislation was to make the parties to the employment contract more nearly equal. The fundamental question concerns interpreting the change in status brought about by the legislation. On the extreme management rights view, it leaves the common law intact except for altering the power of the parties; thus, management retains all the rights it had at common law, namely, to run the business as it sees fit, unless rights are explicitly bargained away. On an extreme union rights view, collective bargaining legislation changes all that and the parties became moral equals, so management is subject to all the requirements of fair dealing unless the union explicitly bargains away such rights. Gorsky argues that both the U.S. Supreme Court and the Ontario Court of Appeal have opted for a moderate position between these two possible extremes. Some minimal elements of fairness must be followed by management even if the agreement does not explicitly so provide. The discussion shows how broad philosophical views of labour relations are important in questions of interpretation and implementation of the details of agreements.

Underlying Gorsky's discussion is the usual method of enforcement of collective agreements in North America. The agreement provides for arbitration of grievances. Sometimes a single arbitrator is agreed to by both parties. Sometimes panels of three arbitrators are used, one from management, one from the union, and one supposedly neutral. However, arbitrators are restricted to interpreting a contract, and matters of law can be appealed in the courts. In the case Gorsky

discusses, the arbitrator was held to have acted beyond her authority.

Sometimes employees do not wait for arbitration but engage in wildcat strikes, which are illegal while an agreement is in force. Courts often issue back to work orders. An interesting side aspect of this has recently developed in Canada. A citizen of Montreal who held a monthly bus pass filed a class action suit against the bus drivers' union for the lost value of the pass due to an illegal strike. The Supreme Court of Canada refused the union's motion to have the employers named as co-defendants.[8] The possibility of such suits may drastically increase the costs to some employees of wildcat strikes.

None of the papers in this collection focuses on what happens when the parties fail to agree. In the first instance, at least in the private sector, the parties are left to their own resources. This means that they try to exert pressure on one another, perhaps by employees sticking strictly to the work rules and slowing production, but more usually by strikes or lockouts. Usually neither party is anxious to have work cease through a strike or lockout, because employees lose wages and employers lose income from reduced sales. However, in some circumstances, at least from the employer's point of view, a strike is not that damaging, for example, when there is a large stockpile of goods and falling demand for them. In other situations, when there is a strong demand for the product, a strike can be very costly to employers. In any event, the result of a strike or lockout is usually increased incentive on both parties to come to an agreement. Governments will often make mediators available to help the parties reach an agreement.

In the public sector, strikes are usually illegal and courts will issue back-to-work orders. However, if public employees are denied the right to strike, then their main bargaining weapon has been removed and their power decreased. This seems to undermine the foundation of collective bargaining—increasing employee bargaining power so that the parties are equal. Yet, governments are also unlikely to resort to a lockout, so in effect both are weakened. Despite legal prohibitions, public employees do go on strike, and rarely can or do governments take the action of President Reagan during the 1981 air controllers' strike and simply fire all striking employees.

A variety of techniques can and have been used to resolve public sector disputes when the parties cannot agree. The dominant method is interest arbitration; an arbitrator simply settles the terms of the

8. *Riders Free to Sue Union in Montreal*, THE GLOBE AND MAIL, Sept. 29, 1983, at 11.

contract. However, because such arbitrators are likely to split the difference, this method does not provide the parties a strong incentive to moderate their positions in hopes of reaching a negotiated settlement. If an agreement is not reached and the arbitrator splits the difference, an extreme position will prove more beneficial than a moderate one. To avoid this problem and encourage settlement by negotiation, sometimes 'final-offer' arbitration is used. Here, each side makes a final proposal, and the arbitrator is limited to choosing one or the other. As one might lose, there is a stronger incentive to settle. A defect of this approach is that both offers might have elements totally unacceptable to the other party, elements that would never have survived a negotiated settlement, and the arbitrator must choose one or the other. Finally, limited strikes by public employees might be permitted. The strikes can be limited as to who may strike. For example, striking nurses might be required to keep some beds open, such as intensive care beds, and to assist in nonelective surgery. Alternatively, strikes can be limited in duration. For example, Ontario physicians have used rotating limited strikes. Physicians in different localities would cease work for one day a week, with the possibility of escalating to ceasing work for two days, three days, and so on and in more localities.

III. ADJUDICATION, ADMINISTRATION, AND COLLECTIVE BARGAINING

The final question raised above was what type of procedure should be used to oversee collective bargaining. As has been indicated, a mixture of adjudicative and administrative methods are used. Labour boards are administrative agencies, but some of them, such as the National Labor Relations Board in the United States, operate much like courts. Courts are also involved in various aspects, such as handling appeals on matters of law from arbitrators' decisions and issuing back to work orders for illegal strikes. Alternatively, the British Columbia Labour Relations Board has broad jurisdiction over the whole range of issues and normally works in an administrative fashion.[9]

Collective agreements are a form of what have been called relational contracts.[10] These contracts are not one time transactions between strangers, such as buying a bottle of pop at a refreshment

9. WEILER, *supra* note 4.

10. *See* I. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980).

stand while visiting a park. Rather, they regulate ongoing relations between the parties. Both workers and management expect to continue their relationship, though in somewhat modified form, beyond the expiration of the current agreement. Indeed, industrial relations are often compared with family relations, another primary example of a continuing relationship. Yet this analogy may not bode well for an adjudicatory approach to collective bargaining and industrial relations, for the law and courts have been notoriously inept in familial relations. Indeed, the general trend has been to take courts out of family disputes as much as possible by allowing no-fault divorces, domestic agreements, and using family counselors. One might view these changes as applying elements of the more successful labour law to family relations by setting a framework and allowing the parties to reach their own agreements.

More radical approaches to labour law involve abolishing collective bargaining as it has been practiced in North America. One alternative is to turn to government regulations, which might involve a regulated economy. The other alternative is some form of industrial democracy, as advocated by Beatty. To complete the divergence of views in this collection, Sherwin generally supports continued collective bargaining with minor modifications in both the private and public sectors.

Thus, the papers in this collection represent a wide spectrum of views on a number of topics in labour law broadly construed. They also illustrate the relevance of jurisprudential and philosophical views to general and specific issues in labour law. A number of directions for reform are suggested. Both De George and Beatty call for recognition of a right to work, and Beatty also recommends a major restructuring of labour law towards industrial democracy. These are general suggestions for reform requiring many details to be worked out. More specific reforms—government required affirmative action programs in Canada—are suggested by Sherwin. During the next decade, labour issues are likely to loom large on the social scene as unemployment remains high and technological change alters the nature of work. Analyses such as those in this collection, whether or not one agrees with them (and the authors do not agree with one another), are needed to contribute to resolving the challenges that lie ahead.