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IIT CHICAGO-KENT

FACULTY PERSPECTIVES

{Recent Scholarship Highlights}

SPRING 2014

In this issue:

Stephanie Stern • Nancy Marder
Ronald Staudt • Martin Malin



IIT Chicago-Kent College of Law
ILLINOIS INSTITUTE OF TECHNOLOGY

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FACULTY PERSPECTIVES

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About IIT Chicago-Kent Faculty Perspectives

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{Property}

THE DARK SIDE OF TOWN

THE SOCIAL CAPITAL REVOLUTION
IN RESIDENTIAL PROPERTY LAW

published in VIRGINIA LAW REVIEW, volume 99

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Stephanie M. Stern's research focuses on applications of social and cognitive psychology to legal regimes of property ownership, land use, and environmental law. Her recent articles have appeared in the *Michigan Law Review*, *Columbia Law Review*, *Cornell Law Review*, *Virginia Law Review*, and *Minnesota Law Review*, and have been reprinted and discussed in several books.

Professor Stern joined the IIT Chicago-Kent faculty in 2009 and teaches in the areas of land use, environmental law, property, and commercial real estate transactions. Professor Stern was previously an assistant professor at Loyola University Chicago School of Law and a Bigelow Teaching Fellow at the University of Chicago Law School. From 2001 to 2003, she was an associate at Kirkland & Ellis LLP, focusing on property and environmental litigation.

Following law school, Professor Stern clerked for Judge Kermit Lipez of the U.S. Court of Appeals for the First Circuit and served as a research fellow at the Yale Center for Law and Environmental Policy.

For more, visit her faculty webpage at www.kentlaw.iit.edu/faculty/sstern.

The Dark Side of Town

The Social Capital Revolution in Residential Property Law

BY STEPHANIE M. STERN

IN THE PAST DECADE, there has been a remarkable ascendance of social capital theory in property policy and scholarship, a trend that has not been examined to date. Scholars and policymakers have advocated laws and property arrangements to promote social capital and relied on social capital to devolve property governance from legal institutions to resident groups. My article, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, examines the prevailing legal view of social capital's salutary effects for local property law. In this paper, I present a more skeptical account of the dark side of residential social capital and its capacity to effectuate local factions, promote inegalitarianism, and close off property.

Social capital is an influential theory of the value of participation in associations and organizations, social ties and networks, civic engagement and voting, trust, and norms of reciprocity in economic and political flourishing. In theory, social capital operates as a group-level positive externality that promotes economic growth, better health and education outcomes,

and, more tautologically, collective action and democratic participation. Local social capital is principally a theory of social cohesion, or bonding capital, and the capacity of residential groups to produce public goods without the guiding hand of state or Keynesian intervention—a social science-infused theory of residential *gemeinschaft*. While not blind to the potential ill effects and negative externalities of social capital, Putnam and other social capitalists nonetheless advance social capital as a positive public good and indicator of community prosperity.

My article opens by examining how the underspecified and encompassing nature of social capital makes it simultaneously attractive and dangerous to property policy and theory—part of the appeal of social capital is that it is capacious enough to justify a breadth of agendas. In the legal scholarship, property scholars have become enthusiastic social capitalists, writing about how home mortgage reform, land use law, homeownership, block-level governance and neighborhood governance, school finance, process restrictions on eminent domain, and laws governing common interest communities can promote, and capitalize upon, social capital. Property law can affirmatively build social capital by encouraging interpersonal interaction, mutual reliance, or residential tenure and stability. Somewhat circularly, in much legal scholarship social capital also fuels successful property institutions and enables devolution of governance and public and private goods provision to resident groups. The unifying strand of these narratives is that social

capital, properly nourished, produces positive externalities in an acceptably, if not perfectly, egalitarian manner and decreases the need for legal institutions and the state.

In the policy arena, social capital has had far-ranging influence in both local and federal government. In cities, as funds have dwindled following federal devolution to the states and shrinking state disbursements to localities, low cost, communitarian-style ventures that claim

to produce social capital have proliferated. Subsidies for social capital-enhancing new urbanist residential developments, community gardens, gatherings, neighborhood block grants, and other efforts to

“The deep imprints of racial segregation and land cartels on residential property illustrate social capital’s pervasive dark side and call into question the view of a social capital deficit that law should remedy.”

socialize city residents now ostensibly further social capital goals in an era of shrinking city funds for social services. Social capital theory underlies recent experiments in neighborhood self-governance, such as the Minneapolis Neighborhood Revitalization Program (NRP), which devolved local planning and fiscal funding to neighborhoods. Social capital is also a growing feature of centralized land use planning, with some communities funding “Social Capital Assessments” to quantitatively measure their community’s social capital and describing social capital stock and goals in their comprehensive zoning plans. At the federal level, the government justifies homeownership subsidies in part on social capital goals, Hope VI public housing guidelines emphasize new urbanist features claimed to enhance social interaction and build social capital, and HUD has adopted the social capital-

related theory of “defensible space.”

My article advances a skeptical view of the benefits of local social capital in property law. My critique of social capital focuses on “bonding capital,” the more ubiquitous and theoretically central form of social capital. Such social capital is at the core of effectuating, and sometimes creating, local factions with interests contrary to the public interest and rights of other citizens that so concerned Madison. Networks, reciprocity, trust, tastes for participation, and social ties facilitate factional collusion to restrain residential property supply and to act on preexisting preferences for illiberal exclusion. Moreover, social capital can also create or heighten such preferences as collective action escalates individual commitments and dense, reciprocal ties lock in bad norms and stifle dissent.

In the first half of the article, I argue that rather than diminishing the role of law, abundant social capital may *increase* the need for legal safeguards and, in some cases, the desirability of formal institutions. The deep imprints of racial segregation and land cartels on residential property illustrate social capital’s pervasive dark side and call into question the view of a social capital deficit that law should remedy. For example, considerable social capital effectuated racial ouster in early to mid-twentieth century “sundown towns” across the United States that evicted black residents and visitors through threats, labor market exclusion, and violence. Today, social capital enables local citizens to lobby for exclusionary zoning laws that raise land prices by artificially constricting supply and to enforce these laws through citizen reports of violations and protests against higher-density development.

The latter part of the article explores

how the enthusiasm for social capital has obscured tradeoffs in the allocation of property governance to residential groups. Governing through social capital can deliver cost-savings and benefits of local knowledge, but it may also directly empower factions, confine social exchange, and increase the demand for homogeneity. Devolving governance and public goods provision to residents ratchets up the importance of cooperation in the face of inflated, but widely held, perceptions that those who are similar cooperate best (in recent years, promoting social capital has verged perilously close to engineering residential racial homogeneity). Social capital-mediated governance may also encourage illiberal internal distributions of property and governance roles when class- and characteristic-based social status serves as a “quick and dirty” allocation device to reduce the overwhelming coordination costs of collective action.

Implicit in my account is a more skeptical assessment of the claimed benefits of cohesive social capital to residential communities. After almost three decades of research, we know little about how to promote or extract positive social capital through property law or residential configurations—many attempts at social capital engineering have been fumbling and ill-fated. There is a sense, undoubtedly correct, that social ties, informal cooperation, and altruism within parent groups, congregations, extended families, and other groups can have social value. However, it is a leap from these voluntary, organic examples of social capital, often subject to thicker constraints or occurring in areas where government non-involvement is pivotal to social or personal identity, to relying on social capital’s beneficial effects to devolve property governance or structure property law.

In conclusion, in developed market economies with established legal institutions, relying on social capital to regulate residential property or sustain community-governed property institutions may be a second-best solution, at least in the absence of constraining laws and supportive institutions. The recent enthusiasm for social capital building and informal micro-governance may be a step backward to closed and private-minded societies—what Ferdinand Tönnies described as *gemeinschaft*—that limit social exchange and sacrifice social progress for insularity. This is not to dismiss the work of Elinor Ostrom, Bob Ellickson, or other property and natural resource scholars writing in the social capital tradition. Rather, in *The Dark Side of Town*, I contend that devolution from law and formal institutions to self-governing groups requires a fuller accounting, one that includes social capital's costs to residential life, property supply, liberalism, and inclusion.

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{Juries & Courts}

JURORS & SOCIAL MEDIA

IS A FAIR TRIAL STILL POSSIBLE?

forthcoming in SMU LAW REVIEW, volume 67

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Nancy S. Marder joined the faculty of IIT Chicago-Kent in the fall of 1999. Prior to beginning her teaching career at the University of Southern California Law School, Professor Marder was a post-doctoral fellow at Yale Law School (1992–93) and a law clerk to Justice John Paul Stevens of the U.S. Supreme Court (1990–92). She also clerked for Judge William A. Norris on the Ninth Circuit Court of Appeals (1989–90) and Judge Leonard B. Sand in the Southern District of New York (1988–1989). In 1987–88, Professor Marder was a litigation associate at the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison.

Professor Marder’s research and writing focus on the jury. She has written about many aspects of the jury, including peremptory challenges, jury instructions, jurors and technology, juror questions, jury nullification, post-verdict interviews of jurors, and jury deliberations. Her articles have appeared in such law reviews as *Northwestern University Law Review*, *Iowa Law Review*, *Texas Law Review*, *Southern California Law Review*, and *Yale Law Journal*, and she has organized four symposia in the *Chicago-Kent Law Review*: “The Jury at a Crossroad: The American Experience,” “Secrecy in Litigation,” “The 50th Anniversary of *12 Angry Men*,” and “Comparative Jury Systems.” Professor Marder is the author of the book *THE JURY PROCESS* (2005), and she has written several book chapters on the jury and on juries and judges in popular culture. Professor Marder regularly presents her scholarship at conferences in the United States and abroad.

Professor Marder reaches a wide audience with her work on the jury. She is the founder and director of the Justice John Paul Stevens Jury Center at Chicago-Kent, which informs scholars about new work on the jury and also undertakes special projects.

For more, visit her faculty webpage at www.kentlaw.iit.edu/faculty/nmarder.

Jurors and Social Media

Is a Fair Trial Still Possible?

BY NANCY S. MARDER

SLOWLY BUT SURELY the constitutional guarantee of a fair trial is being eroded as social media invades the jury room. Essential evidentiary rules control what jurors can learn about a case and what they can say about it during a trial. In just a decade, the rapid growth of easy online communication has threatened to dissolve the protective walls we have built around the jury. The key question is whether courts can now persuade jurors to resist the siren call of online communication when they serve as jurors. In this Article, I urge courts to take a “process view” of a juror’s education and to use every court-juror interaction as an opportunity to teach jurors that they need to avoid using the Internet and social media to communicate about the trial.

When jurors turn to the Internet or social media for information about the trial they violate key precepts of a fair trial. The decision-maker is supposed to decide the case based only on the evidence presented in the courtroom. One reason is so that the case will be decided based only on information that has met a certain threshold of reliability. Another reason is so that the

evidence is further tested through cross-examination, which will reveal its weaknesses. Yet another reason is so that all of the decision-makers—jurors and judge alike—work from the same information.

The juror who turns to the Internet or social media and either intentionally seeks or is inadvertently exposed to information pertaining to the trial will no longer rely just on the evidence presented in the courtroom. The juror who uses social media to express his or her views of the case will no longer appear to be impartial. Although some jurors in the past might have violated the judge's instructions not to discuss the case with family or friends, the juror who does so today using social media reaches a far wider audience and receives far more media attention than a juror who spoke to family members in the past. The juror who turns to social media today to reveal his or her views calls into question the fairness of the jury trial.

Although newspaper headlines recount some of the more egregious examples of jurors using social media or the Internet to obtain information that is unreliable or inappropriate for them to

“The juror who uses social media to express his or her views of the case will no longer appear to be impartial.”

consider, the scope of the problem is difficult to assess. The few empirical studies that have been done to date have serious limitations. One study, conducted by the Federal Judicial Center, asked participating judges for their perception of how often jurors used social media when they were in the courtroom or jury room. Not surprisingly, few judges observed jurors using social media in these settings. One

problem is that it is difficult for judges to observe this behavior because they have many responsibilities in the courtroom. Another problem is that jurors could use social media outside of the courtroom and judges would not observe it. Moreover, asking judges for *their* perception is not the same as uncovering actual juror use of social media. Another study involved two federal district court judges who asked jurors to complete a survey after they had served as jurors in their courtrooms. The survey did not reveal *any* instances of jurors' use of the Internet or social media. In fact, only 6 out of the 140 jurors who completed the survey admitted even a *temptation* to communicate about the trial using social media, and all six said that they had resisted the temptation. The authors concluded that this shows that jurors follow the judge's instructions. However, the problem with this small study is that it asked jurors while they were still in the courtroom to admit to the judge who had presided over the trial that they had disobeyed the judge's instructions. Jurors are unlikely to be forthcoming in those circumstances, even though they were permitted to complete the survey anonymously.

Judges feel the need to take action, but in the face of limited empirical evidence, they have not been sure what to do. The most common response is to revise the cautionary instruction in an effort to make it clear to jurors that they need to refrain from using the Internet and social media during the trial. A few courts have gone so far as to ban jurors from having electronic devices in the courtroom and deliberation room, but this response does not address the problem that jurors will have access to these devices when they go home at night.

Having jurors refrain from using the

Internet and social media while they serve as jurors is likely to grow harder in the years ahead and will require taking what I call a “process view” of a juror’s education. A process view recognizes that at every stage that the court interacts with jurors there is an opportunity to educate them. From start to finish—from jury summons to jury verdict—there are opportunities for the court to educate jurors about the need to avoid online communication about the trial.

The education of a juror begins with the jury summons and ends when the jury announces its verdict and the judge polls the jury and dismisses it. The jury summons can include a question that asks prospective jurors if they can adhere to the judge’s instruction and avoid engaging in online communication about the trial. While prospective jurors are in the Jury Assembly Room, waiting to be assigned to a courtroom, they usually watch a jury orientation video that teaches them about the role of the jury. This video can also include a segment on the need to avoid online communication about the trial. Some states, such as Massachusetts, already include such a segment in their video. The voir dire, when prospective jurors are questioned to see if they can serve on a particular jury, provides another opportunity for the judge and lawyers to question prospective jurors and to elicit a public commitment from them that they can refrain from communicating online about the trial. In some states, such as Illinois, jurors have the opportunity to submit written questions to witnesses. Judges in such states can explain to jurors that they will be able to

submit their questions to witnesses; thus, they do not need to engage in online self-help to find answers.

The judge can also use the preliminary cautionary instructions, final instructions, and admonitions before and after every recess as opportunities to reinforce the point that jurors must refrain from conducting their own research on the Inter-

net and can only share their views with their fellow jurors during deliberations. In fact, one judge in the Northern District of Illinois asks jurors when they

return from a recess whether they have refrained from online communication during the break. He asks jurors to raise their hands to show that they have abided by the court’s instruction. In the public setting of the courtroom, jurors must take the affirmative step of raising their hands and publicly declaring that they have adhered to the prohibition. Of course, it is important that the instruction or admonition is specific and includes an explanation so that jurors understand exactly what they can and cannot do and why. At each of these stages in the trial process, the judge should make use of the opportunity to educate jurors about their need to refrain from online communication about the trial.

A process view of a juror’s education will be effective for most, but not all, jurors. A comprehensive education should transform “uninformed jurors” into informed jurors. Uninformed jurors want to do the right thing but do not know that online communication is prohibited. Once they understand that they cannot consult the Internet or social media,

“A ‘process view’ of jurors’ education recognizes that at every stage that the court interacts with jurors there is an opportunity to educate them.”

they will abide by the judge's instruction. Admittedly, this proposal will not reach "recalcitrant jurors," who will remain unmoved by any education. For recalcitrant jurors, who have no intention of following the prohibition, the best hope is for lawyers and judges to find new ways to identify and remove them during voir dire. If they do manage to avoid detection during voir dire, then it is up to other jurors to spot them when they violate the prohibition and report them to the judge.

Judges are likely to embrace this proposal because it is flexible and they can tailor it as they see fit. They might question whether so much repetition is necessary, but they can take shortcuts when appropriate. Most important, a process view of a juror's education is likely to be effective, and judges need an effective approach because it is their responsibility to ensure that the parties receive a fair trial. This Article explores what it means to take a process view of a juror's education in order to protect the parties' constitutional right to a fair trial. ■

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{Legal Education}

ACCESS TO JUSTICE & TECHNOLOGY CLINICS

A 4% SOLUTION

published in CHICAGO-KENT LAW REVIEW, volume 88

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Professor Staudt teaches Copyright Law, Intellectual Property Strategies, Internet Law, Public Interest Law & Policy, Justice and Technology Practicum, and Access to Justice and Technology. He is director of the Center for Access to Justice & Technology (CAJT)—a law school center using Internet resources to improve access to justice with special emphasis on building Web tools to support legal services advocates, pro bono volunteers, and pro se litigants.

Professor Staudt has written numerous articles and books on technology and law. His most recent book is a report co-authored with Charles L. Owen, Distinguished Professor of Design at IIT's Institute of Design, and Edward B. Pedwell, titled *ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS*.

Professor Staudt is a fellow, board member, and president of the College of Law Practice Management. He serves on many boards and committees that promote technology solutions to access to justice problems.

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Andrew P. Medeiros is an Associate Legal Solutions Architect with the Legal Technology Innovations Office (LTIO) at Seyfarth Shaw LLP.

Access to Justice and Technology Clinics

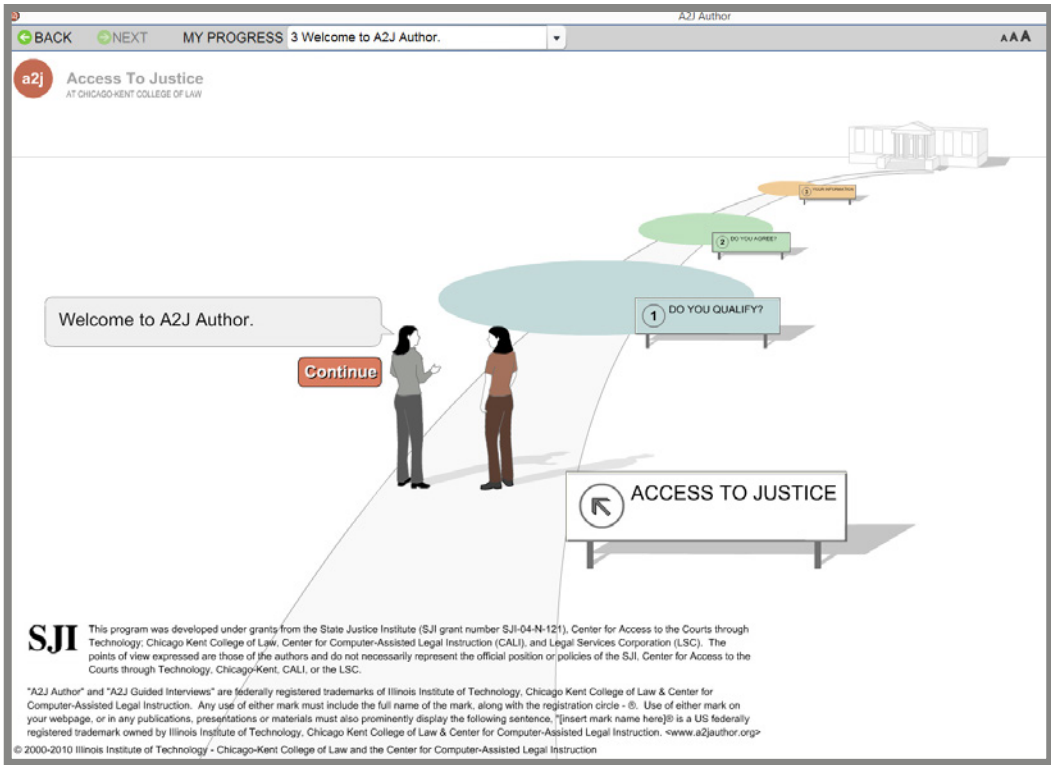
A 4% Solution

BY RONALD W. STAUDT AND ANDREW P. MEDEIROS

THE GREAT RECESSION OF 2008 caused widespread law firm layoffs, falling salaries, and hiring freezes and may leave a generation of young attorneys searching for work. The economic crisis included significant reductions in banking, finance, corporate restructuring and real estate transactions and reduced the need for high-priced legal services. As large law firm revenues fell, firms protected profits by reducing labor costs.

Large clients demanded discounts and fixed fee arrangements and sought efficiencies to reduce their legal spending. As the customers of lawyers demanded “more for less,” new technologies were introduced and old technologies revived to increase the effectiveness and efficiency of law practice. In our view, these new technologies are not the cause of disruption in legal markets, but rather the tools that creative lawyers and legal consultants are using to adapt to the demands of customers of lawyers at all market levels. These new efficiencies and new technologies are here to stay. Even if the gross domestic legal product returns to pre-2008 levels, the work will be forever changed.

Excerpted from Ronald W. Staudt and Andrew P. Medeiros, Access to Justice and Technology Clinics: A 4% Solution, 88 Chicago-Kent Law Review 695 (2013) (symposium).



The ironic twist is that despite an oversupply of lawyers, we are failing to meet the legal needs of ordinary people, especially people with low or modest incomes. Legal Services Corporation funded legal aid offices turn away a million eligible prospective clients every year because they lack the capacity and the lawyers to serve these legal needs. In addition, millions of modest income people who are not eligible for legal aid cannot afford the fees charged by lawyers. The economic downturn starting in 2008 exacerbated this legal services gap, driving more modest-income people into poverty and more employed people into unemployment and foreclosure. Fully 21% of the U.S. population is now at or below the poverty line set by federal standards for free legal aid to the poor. More than 80% of the legal needs of low income people are not met by overstretched legal aid resources.

The oversupply of legal talent triggered attacks on law schools from all angles. Critics charged that law schools accept too many students, saddle them with massive amounts of debt, and do not adequately prepare them for a legal job. The reduction in job opportunities for law school graduates and negative publicity already have cut deeply into the number of law school applicants. If law schools maintain admissions standards, fewer applicants should cause a parallel reduction in the number of law students in the professional pipeline; the supply of new lawyers should “right size” to match legal industry needs.

These new lawyers will need new skills. The technology changes triggered by the economic shock have changed the tools lawyers use to deliver legal services. New lawyers entering the profession must be ready to practice in today’s more efficient and more technology-driven work-

place. For the most part, law schools are not currently equipped to teach these new skills and technologies.

This article responds to the criticisms of the quality of legal education, criticisms that law schools fail to prepare graduates to succeed in the profession. We propose a modest improvement to the law school curriculum that may make graduates more capable to serve their clients. Professor William Henderson of the University of Indiana Law School urges a 12% solution, arguing that law schools should begin to introduce competency-based courses at a rate of one course per year. We offer here a proposal for one of the three new courses, a 4% solution.

We propose that law schools add a new type of clinical course that teaches law students how to use and deploy technology to assist law practice. The changes we propose will affect about four percent of the average law school curriculum. If widely adopted, the changes we propose will help law students to learn core competencies needed in an increasingly technological profession, while they build tools and write content to help low-income, self-represented litigants overcome serious barriers in the pursuit of justice.

Specifically, we propose that law schools offer a new clinical experience—the Access to Justice Technology Clinic, or A2J Clinic for short. The Center for Computer-Assisted Legal Instruction (CALI®), in partnership with IIT Chicago-

Kent College of Law, has launched its Access to Justice Clinical Course Project to develop and refine A2J Clinics. In these courses, law students build web tools and other interactive content to help low-income people achieve their justice goals. Courses of this type have been taught by several law schools during the past decade. This CALI initiative builds on those efforts, organizes faculty across the country into a team of collaborators, and establishes a structured process to share new insights, tools, and curricula with all law schools.

Law school clinics are not the only feasible home for our proposed courses. Legal writing faculty and traditional podium teachers could also teach these courses if they were so inclined. But clinical educators are predisposed to focus on skills that go beyond legal analysis. Clinical educators are also deeply committed to access to justice and they, with

“We propose that law schools add a new type of clinical course that teaches law students how to use and deploy technology to assist law practice. The changes we propose will affect about four percent of the average law school curriculum.”

their students, already provide a huge contribution to help meet the legal needs of low income people. Like the clinical movement triggered by CLEPR in the 1960's and 1970's, we think that this new type of course will fit comfortably into the clinical curriculum of many law schools and that

such additions will improve legal education and simultaneously reduce barriers to justice for low income people.

There is no single, magical software or invention that is disrupting settled legal markets and labor practices. Instead, lawyers in corporate practices and lawyers

servicing personal legal needs have been forced to innovate by clients who refused to pay for outdated and inefficient labor practices. While legal costs are being wrung out of the high priced legal market and many young attorneys struggle to find legal work, we live in an age when access to affordable legal services is still impossible for many Americans.

Law schools have a unique opportunity to address the education deficiencies and the access to justice problem at once. The law school curriculum must adapt to produce new lawyers who are fluent with the technical tools that are becoming standard in law offices around the country. The Access to Justice Clinical Course Project will arm students with document assembly and automation tools, supply legal aid organizations with interactive content to help reduce barriers to justice, and trigger a reexamination of the core lawyering competencies that law schools need to teach. Now is the time for a renewed clinical effort focused on refining our methods of teaching traditional competencies, developing new models for teaching transactional approaches to personal legal services, and teaching the new competencies needed by the digital lawyer.

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{Employment Practice}

COLLECTIVE REPRESENTATION & EMPLOYEE VOICE

IN THE U.S. PUBLIC SECTOR
WORKPLACE: LOOKING NORTH
FOR SOLUTIONS?

published in OSGOODE HALL LAW JOURNAL, volume 50

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Professor Malin is a former national chair of the Labor Relations and Employment Law Section of the Association of American Law Schools and is a former member of both the Executive Committee of The Labor Law Group and the Board of Governors of the National Academy of Arbitrators. He currently serves on the Board of Governors of the College of Labor and Employment Lawyers and is a Secretary of the ABA Section on Labor and Employment Law. During 1984 and 1985, Professor Malin served as consultant to the Illinois State, Local and Educational Labor Relations Boards and drafted the boards' regulations implementing the Illinois Public Labor Relations Act and the Illinois Educational Labor Relations Act. From 2004 to 2008, he served as reporter to the Neutrality Project of the Association of Labor Relations Agencies, which produced a mini-treatise on labor board and mediation agency impartiality. In 2009, President Obama appointed Professor Malin as a member of the Federal Service Impasses Panel, which resolves impasses in collective bargaining between federal agencies and unions that represent their employees.

Professor Malin has written extensively on all aspects of labor and employment law, including *PUBLIC SECTOR EMPLOYMENT* (West 2004, 2d ed. 2011), the leading casebook on the law governing public employees, and *LABOR LAW IN THE CONTEMPORARY WORKPLACE* (West 2009, 2d ed. 2014), a leading casebook on labor law.

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Collective Representation

And Employee Voice in the U.S. Public Sector Workplace: Looking North for Solutions?

BY MARTIN H. MALIN

THE ELECTION IN 2010 of conservative Republican legislative majorities and governors in many states led to a major retrenchment in public employee collective bargaining rights in the United States. The legislation enacted in these states following the elections aimed to strengthen unilateral employer control and weaken employee voice. This rebalancing of power occurred in the context of state public employee labor relations acts that are largely modeled on the National Labor Relations Act (NLRA), the federal statute that governs most private sector employers, employees and unions. The NLRA classifies subjects of bargaining as mandatory, permissive and prohibited. Only subjects classified as mandatory need be bargained. All others are left to the unilateral control of the party, typically the employer, with the decision-making power.

In the U.S. public sector, courts and labor relations agencies have defined mandatory subjects of bargaining much more narrowly than in the private sector. This is largely due to concerns that many terms and conditions of employment also raise issues of public policy which,

the authorities reason, should be resolved in the public political process rather than at a bargaining table to which only the union and employer have access. Issues such as class size, school calendar, teacher evaluation, layoffs, subcontracting, drug testing, and use of civilian police review boards that directly affect employee working conditions have, nevertheless, been held to not be mandatory subjects because they raise questions of public policy more appropriately left to the political process. The result of such a narrow scope of bargaining is to channel unions away from having a voice on matters that can improve the quality of public services and toward bread and butter issues of wages and benefits and protecting their members from the effects of decisions unilaterally imposed by management. Unions' efforts to protect their members from management's unilateral action may be seen as union obstruction to reform. Unions' success in the role to which they have been relegated has led to backlash, further narrowing the scope of bargaining and otherwise reducing worker voice.

The U.S. Supreme Court has recognized that public employees' First Amendment right to freedom of association includes a right to join a union but, reasoning that their governmental employer is not constitutionally required to listen to their union, has rejected the idea that freedom of association includes a right to collective bargaining. In contrast, the Supreme Court of Canada (SCC) has held that the Canadian Charter of Rights and Freedoms' (Charter) protection of the right to freedom of association include a

right to collective bargaining.

Although most Canadian labor law statutes are modeled on the NLRA, in

“The difference in approaches north and south of the border to collective bargaining and freedom of association may be traced to different treatment of property rights.”

Fraser v Ontario (SCC 2011), the SCC held that the Charter does not guarantee a right to an NLRA-model of collective bargaining. This Article suggests that the evolving law

under the Canadian Charter can inspire reform in U.S. public sector labor law.

The NLRA mandates that when a majority of a specifically defined group of an employer's employees select a union as their representative, the union becomes the exclusive representative of all employees in that defined group. The employer must negotiate in good faith with the union over mandatory subjects of bargaining and may not make unilateral changes unless and until it has negotiated to impasse. Both sides may resort to economic weapons—strike or other job action for unions, lock-out, replacement of strikers or unilateral change after impasse for employers—to pressure the other side in bargaining. Many public sector statutes prohibit strikes and lockouts and substitute arbitration of disputed issues or non-binding fact-finding to resolve impasses.

In *Fraser*, the SCC upheld the Ontario Agricultural Employees Protection Act (AEPA). The AEPA granted agricultural employees rights to form, join and participate in employee associations, to assemble, and to make representations, orally or in writing, to their employers concerning terms and conditions of employment. It imposed a duty on employers to listen to the representations and, when representations are made in writing, to read them and to provide a written acknowledgment

that it has read them. The SCC interpreted the AEPA as imposing on employers a duty to consider employee representations in good faith. So interpreted, the SCC held that the AEPA was consistent with the Charter's right of freedom of association.

The difference in approaches north and south of the border to collective bargaining and freedom of association may be traced to different treatment of property rights. Whereas the Constitution expressly protects property rights, the Charter omits mention of them and this omission was deliberate. It reflected concern that protection of property rights would invalidate economic regulation and disturb the recognition that had evolved in Canada of the primacy of democratic will over property rights with respect to such regulation.

In the U.S. private sector, property rights drive labor law. The limitation that the duty to bargain extends only to mandatory subjects recognizes that some matters, although directly affecting job security or other conditions of employment, lie at the heart of entrepreneurial control. Compelling bargaining on these matters would intrude on employer unilateralism, that is, on employer control over what it may do with its property.

The different approaches to property rights may justify dismissing the evolving jurisprudence under the Charter when considering private sector labor law in the U.S., but the same may not be said with respect to the U.S. public sector. Public employers do not have private property rights. Their premises are public property.

Moreover, the NLRA is premised on, among other things, a congressional finding of a need to equalize bargaining power between employers and unions, that is, a need to place limits on otherwise unlimited employer property rights. In contrast,

most public sector labor relations acts are premised on legislative findings that collective bargaining is in the public interest. The differences between the public and private sectors in the U.S. suggest that the evolving jurisprudence under the Charter should not be dismissed out of hand in considering public sector labor law.

The decision in *Fraser* is ambiguous. It is not clear what the SCC means when it speaks of agricultural employers' duty to consider employee associations' representations in good faith. As I read *Fraser*, there cannot be good faith consideration of employee representations without meaningful discussion with the employees' association. Furthermore, where there is an established employee representative, a statutory regime that enables an employer to act unilaterally without providing the representative notice and an opportunity for the making of representations and the conduct of meaningful discussion effectively renders worker associational activity meaningless.

“We must broaden the range of subjects on which workers have a voice, although not necessarily under a traditional NLRA model.”

The expansion in the U.S. of increasing employer power channels unions into doing whatever they can to protect their members from the consequences of decisions imposed unilaterally by their employers. Over the long term, it is not sustainable as it channels worker voice away from contributing to the effective delivery of public services. Instead, we must broaden the range of subjects on which workers have a voice, although not necessarily under a traditional NLRA model.

The evolving Canadian jurisprudence mandates avoiding measures that render worker associational activity meaningless and employing measures that provide for meaningful discussion of worker representations. The presentation of decisions that significantly impact workers' workplace lives as *fait accompli* renders workers' associational activities meaningless. Critical to any reform that broadens the subjects on which workers have a voice is a requirement of advance notice and an opportunity for pre-decisional involvement.

A failure to supply relevant information bears a high risk of rendering worker associational activity meaningless. Without adequate information, workers and their unions are in no position to make representations to their employers and it is difficult to see how a good faith dialogue can occur in an information vacuum. The exchange of information facilitates good faith dialogue because it engenders trust and allows the exploration of mutually beneficial solutions. Any right to engage in meaningful dialogue must include a duty to exchange relevant information.

The right to represent the workers must remain with their exclusive bargaining representative. By-passing the union to negotiate directly with individual employees must, as it is under traditional labor law with respect to mandatory subjects of bargaining, be a *per se* indicator of bad faith.

When employees through their unions make representations to employers, employers must offer their reasons for declining the unions' proposals. Providing such reasons facilitates further engagement by inviting the union to refine its

proposals and can lead to cooperative discussions about mutual and competing interests. "We won't do it because you can't make us," is not an acceptable response.

The above analysis does not provide a magic formula for crafting reforms that expand the scope of workers' rights to a voice in workplace decision-making through alternatives to NLRA-style collective bargaining, but it does provide a framework for evaluation of specific reforms. Inspired by the evolving jurisprudence under the Canadian Charter, we can expand public employee collective voice in ways that are beneficial to employees, employers and the public at large. ■

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