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NATIONAL TRADITIONS IN LABOR LAW SCHOLARSHIP: THE CANADIAN CASE

H.W. Arthurs†

I. DEFINING LEGAL SCHOLARSHIP

In a characteristically learned and provocative essay, Professor Matthew Finkin, one of the organizers of this symposium, has raised the question of whether “legal scholarship,” properly understood, encompasses the contributions of such hybrid, dissident, and essentially non-doctrinal approaches as law and economics, critical legal studies, critical race theory, and feminism.¹ He concludes that it does not. This controversy is no less important to legal academics than, say, the Albigenian heresy to theologians (and not very different, either). However, it is unlikely to be resolved in the present context. Nor am I persuaded that it should be or that binary distinctions between law/non-law and scholarship/non-scholarship are either possible or useful. I will, therefore, resist any temptation to cast out and publicly execrate charlatans, sectarians, and schismatics and will treat “legal scholarship” as a broad church that welcomes all who choose to identify with it.

That said, I am grateful to Professors Sanford Jacoby and Matthew Finkin for their invitation to reflect on the existence of a Canadian “national tradition” in labor law scholarship. I was involved some years ago in an attempt to construct a general taxonomy of Canadian legal scholarship.² Much has happened since then to legal

† University Professor of Law and Political Science and President Emeritus, York University, Toronto, Canada. I am grateful to Asha Kaushal, Arghavan Gerami, Rob Dobrucki, and Freya Kodar for their research assistance; to Bernard Adell, Brian Etherington, Matt Finkin, and Sanford Jacoby for helpful suggestions; and to the Social Sciences and Humanities Research Council of Canada for its financial support.

1. Matthew Finkin, *Reflections on Labor Law Scholarship and its Discontents: The Reveries of Monseieur Verog*, 46 U. MIAMI L. REV. 1101 (1992).

2. In the early 1980s, I chaired an inquiry into Canadian legal research and education. Our report, SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA, LAW AND LEARNING: REPORT OF THE CONSULTATIVE GROUP ON LEGAL RESEARCH AND EDUCATION (1983) proposed that legal research might notionally be assigned to four non-exclusive categories—“conventional legal research,” “legal theory,” “law reform research,” and

scholarship (mostly good, in my opinion) and to labor law (mostly bad, I believe) and their invitation gives me the opportunity to reflect on both tendencies. Moreover, an inquiry into the persistence or otherwise of national labor law traditions strikes me as timely in this era of globalized economies and universal rights discourses, which is also an era in which national identities and localized resistances constantly reassert themselves.

II. DEFINING LABOR LAW

Of course, the question of what we mean by labor law is no less controversial than what we mean by legal scholarship. On the one hand, it obviously includes topics comprehended by the categories “labor” or “employment” in the appropriate legal databases, but such categories are rather arbitrary and time-sensitive. On the other, practical experience tells us that labor law overlaps immigration, Social Security, corporations, and race and gender discrimination law, not to mention human rights, administrative, and constitutional law. Few labor law scholars would wish to confine themselves to exegetical studies of statutes, decisional materials, and other authoritative texts. Especially in labor law—where we have long acknowledged the importance of the “web of rule” and “the law of the shop”—most of us would expect our research to include not only the other non-state normative regimes that operate in the workplace, but also information—in statistical, anecdotal, or narrative form—about law-in-practice, as well as law-on-the-books. Finally, in common with scholars in all disciplines (and thoughtful practitioners as well) we want to understand our discipline, comprehend where it has come from and where it is going, what is causing or preventing change, how to evaluate change relative to whatever qualitative criteria we may adopt. This necessarily involves us in legal theory—explicit or implicit, rooted in legal discourse or transplanted from other disciplines.

“fundamental research” (the labels proved more controversial than the categories themselves). These categories were produced by the intersection of two “predominating influences,” each of which itself represents a spectrum of possibilities. The first influence is methodology, with “ideal-type” interdisciplinary research and doctrinal research notionally at opposite ends of a spectrum, and much of what is actually written lying somewhere between. The second influence is the audience or constituency at which the research is directed, with an “ideal-type” professional audience at one end and an academic audience at the other and, again, with much of the corpus of research exhibiting the influence of both. A visual depiction of this analysis is found on page 67 of the Report and is reproduced in Appendix A.

The open-endedness of the category “labor law” becomes very important in describing and accounting for our “national traditions” of labor law scholarship. These traditions, if they exist and can be captured, obviously derive from complex interactions among many influences including, in no particular order:

- state legal systems, the legal-professional cultures that grow up around them, the organization of legal services, and the extent to which the field of labor law is dominated by professional as opposed to lay practitioners;
- the intellectual foundations of the legal and industrial relations systems as well as the distinctive substantive rules and formal institutions of labor law;
- the local, national, regional, and global political economies within which systems of industrial relations and labor law operate;
- the techno-social systems prevailing in key sectors of the economy that give rise to the paradigm of employment upon which law itself is constructed;
- patterns of class, religion, race, and gender relations, habits of deference or personal autonomy, cultural tendencies favoring individualism or group solidarity that are embodied both in formal laws and in negotiated employment relationships;
- social structures that determine the behavior of the principal industrial relations and labor law actors including workers, unions, management and government officials, labor lawyers, and tribunal members; and,
- the inherited or embedded cultures within the industrial relations system, including their epistemologies, ideologies, discourses, historical memories, and symbols.

It follows that industrial relations systems and regimes of labor law and the ways in which scholars have reflected on them vary over time, within and among nations, geographic locales, economic sectors, and epistemic communities. Is it possible, then, to describe the sum of those disparate systems and regimes, and the various traditions of labor law scholarship they embody and transmit, as “national”? In the Canadian case at least, the answer will be a qualified “no.”

III. CENTRIPETAL AND CENTRIFUGAL INFLUENCES IN CANADIAN LAW, LEGAL CULTURE, AND INDUSTRIAL RELATIONS

Centripetal forces, forces of consolidation and homogenization, are at work in labor law, as in most branches of Canadian law. From a purely legal perspective, the Constitution appears to assign the national government explicit jurisdiction over foreign and interprovincial trade, over fiscal and monetary policy, and over important elements of the country's infrastructure and institutions. Moreover, the legal system is integrated to the extent that the federal government appoints the judges of all superior courts, provincial courts are subject to the ultimate appellate jurisdiction of the Supreme Court of Canada, and those courts often draw inspiration from each others' judgments and from American and Commonwealth primary and secondary sources. The Supreme Court's decisions especially have had a homogenizing influence on common law doctrine and, arguably, have brought the common and civil law closer together. In terms of legal culture, too, lawyers, law professors, administrators, judges, and other professionals concerned with labor law tend increasingly to inhabit the same national and global domain of ideas and experiences. They are often graduates of law schools in other provinces, attend the same professional conferences, and interact with the same corporate executives, union leaders, IR/HR experts, and dispute resolution professionals. And finally, in terms of the principal parties of interest—management and labor—things seem to be tending towards the center and away from the periphery. This is especially true of management. The increasing consolidation of wealth and power in the hands of Canada-wide firms and of foreign-based transnationals might be expected to generate pressures for more homogeneous—or at least less heterogeneous—labor law systems. But labor, too, has been consolidating on a national basis. During the past ten or twenty years, Canadian locals have pulled away from their often neglectful U.S. parents and regrouped themselves into a smaller number of larger national unions.

Further, Canadian labor policy makers and legislators, union and employer advocates, and legal and industrial relations scholars are subject to common domestic and foreign influences. Canada has always been a net importer of legal ideas and institutions, and of legal-intellectual perspectives (sometimes in variant strains) from both America and Europe. In the policy disciplines especially, Canada is a

prime example of “globalization of the mind.”³ This is particularly true in matters relating to labor law and policy. Canada and its provinces imported the Wagner Act and anti-discrimination legislation from the United States, the English common law of labor torts and United Kingdom safety legislation, and oddments from France and Italy (Quebec’s labor courts and collective agreement extension statute), Sweden (“dependent contractors”), and Australia and New Zealand (unemployment and industrial accident insurance). And, needless to say, Canada is now increasingly influenced by the U.S. trend toward deregulation of the labor market through strategies ranging from the repeal of labor rights to the deliberate weakening of enforcement structures to the use of monetarist strategies to discourage inflationary wage demands by workers. In all these respects, then, while there are notable exceptions, most professionals and policy makers, members of influential lobby groups, their clients, and the governments they importune, advise, or control continue to adhere to something like a mainstream or consensus view concerning the form and content of labor law.

But if the mainstream is running wider, it is also running shallower. While one can identify powerful centripetal forces at work in Canada, which ought to be producing a national—if not a continental—system of labor law, centrifugal forces are more powerful yet. Consensus is attenuating, not intensifying.

Consider first constitutional doctrine and politics. Early—but seemingly irreversible—judicial interpretations read down the federal government’s residual, commerce, and treaty powers as the basis for labor legislation and thereby consigned 90% of the workforce to provincial regulation based on local jurisdiction over “property and civil rights.”⁴ The federal government’s power to deal with national emergencies was used during wartime to override provincial control over labor relations and to introduce a national system of collective bargaining based on the Wagner Act model.⁵ However, the emergency power lapsed after the war. The federal government did continue to use its powers to tax and spend in order to cajole and coerce the provinces into a series of intergovernmental agreements on progressive taxation, Social Security, public health care, and inter-

3. H.W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CAN. J.L. & SOC. 219 (1998).

4. F. Scott, *Federal Jurisdiction Over Labour Relations: A New Look*, in *ESSAYS ON THE CONSTITUTION: ASPECTS OF CANADIAN LAW AND POLITICS* 336, 336-52 (1977).

5. J. FUDGE & E. TUCKER, *LABOUR BEFORE THE LAW: THE REGULATION OF WORKERS’ COLLECTIVE ACTION IN CANADA, 1900-1948*, 229, 230 (2001).

regional equity that laid the basis for the Canadian welfare state that, in turn, became intertwined with the project of forging Canada's national identity.⁶ These developments might, in principle, have created support for cooperative efforts to construct national labor policies, laws, and institutions. Unfortunately—with few exceptions⁷—the principal parties had little interest in a national system. Employers generally benefited from regulatory competition among the provinces, many of whose governments they dominated; unions were anxious to protect the labor jurisdiction of the few provinces where social democratic governments held office or seemed likely to do so, and the nationalist inclinations of both Quebec labor and Quebec business effectively closed the door to that province's participation in any such initiative.

Nonetheless, up to the 1970s, the federal government—with jurisdiction over 10% of the workforce, in federally regulated industries—was able to act as a role model or trendsetter in policy-making in the labor field, largely because of the technocratic and intellectual influence of its policy elites. However, provincial governments have increasingly resisted federal policy leadership in this field as elsewhere, partly because they are opposed to specific federal policies, partly because they diverge increasingly among themselves. At present, for example, “Quebec, Inc.” retains a strong solidaristic character; vestigial social democratic governments hold office in Saskatchewan and Manitoba; Ontario, British Columbia, and Alberta are in the vanguard of neo-liberalism; and the Maritime provinces are generally in transition from fatalism and dependency to more aggressive, business-friendly policies.

Arguably, the provinces' assertion of control over labor policy can be justified in practical as well as constitutional terms. Canada's population is geographically dispersed, but specific types of economic activities are relatively concentrated. Ontario is the center of auto manufacturing, finance, and information technology; Quebec's focus is on aerospace and bio-chemicals; the six Maritime and Prairie

6. J. Jenson, *Representations in Crisis: The Roots of Canada's Permeable Fordism*, 23 CAN. J. POLI. SCI. 653 (1990).

7. In a few sectors—notably meat-packing and auto manufacturing—the parties managed to construct informal national bargaining systems that embraced workers in two or more provinces, even though they remained legally under provincial jurisdiction. See Scott, *supra* note 4. Indeed, such arrangements even extended across national boundaries. See D. Blake, *Multi-National Corporation, International Union and International Collective Bargaining*, in TRANSNATIONAL INDUSTRIAL RELATIONS: THE IMPACT OF MULTI-NATIONAL CORPORATIONS AND ECONOMIC REGIONALISM ON INDUSTRIAL RELATIONS (H. Gunter ed., 1972).

provinces depend to varying degrees on timber, mining, fishing, and energy production; and British Columbia—also heavily dependent on natural resources—provides a gateway for Asia-Pacific trade. Thus, decentralization allows the provinces to develop policies and pass laws that respond to the employment paradigm of their local labor markets as well as to local political alignments—to function, in other words, as “social laboratories” conducting different experiments in labor policy.⁸ However, decentralization and differentiation also greatly complicate prospects for a national labor market strategy or for a national response to the effects of globalization on labor.⁹

Moreover, Canada is not only a federal state; it is one with a constitutionally guaranteed bi-systemic legal system comprising Quebec, a civil law jurisdiction, and nine common law provinces. As a result, interprovincial migration of law graduates was, until recently, rather difficult, to the point where provincial control of legal practice prevented the establishment of national law firms or the emergence of legal specialist firms with truly national practices.¹⁰ Consequently, legal-professional culture tended to fragment along provincial lines, and the market for legal services and legal information remained largely decentralized as well. Thus, the local preoccupations and experience of the legal profession—no less than the common law/civil law divide—impaired the informal spread of ideas, strategies, and practices among labor law practitioners. Not to overstate, especially in legal fields where the emergence of global and continental free trade has influenced substantive law and patterns of legal practice, differences have diminished, national law firms have been formed, national publications and specialist associations have come to dominate many fields of legal learning, and law graduates now move in greater numbers from one jurisdiction to another. But as I have argued elsewhere, substantive labor law remains resolutely local law¹¹ and labor law practice more so than most.

8. P. Weiler, *The Virtues of Federalism in Canadian Labour Law*, in *THE DIRECTION OF LABOUR POLICY IN CANADA* (Frances Bairstow ed., 1973); H.D. WOODS, *LABOUR POLICY IN CANADA* 20-30 (2d ed. 1973).

9. For example, Canada's accession to the North American Agreement on Labor Cooperation (NAALC) was made subject to a complicated formula designed to protect provincial primacy in labor matters. See, NAALC, Sept. 14, 1993, U.S.-Canada-Mexico, 32 I.L.M. (entered into force Jan. 1, 1994) Annex 46.

10. See R. Daniels, *Growing Pains: The How and Why of Law Firm Expansion*, 43 U. TORONTO L.J. 147 (1993).

11. H. Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law*, in *RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS* (R. Appelbaum, W. Felstiner & V. Gessner eds., 2001).

Quite apart from the centrifugal influence of constitutional and structural factors, certain substantive features of Canada's labor law systems also make for heterogeneity, if not incoherence. In almost all Canadian jurisdictions, the nineteenth-century values and social assumptions embedded in the labor torts coexist uneasily with the twentieth-century values and assumptions enshrined in collective bargaining legislation that, in turn, are often at odds with the values and assumptions that inform many aspects of labor policy, law, and administration in the twenty-first century. Similarly, collective agreements and the industrial custom that they incorporate and extend are, in essence, particularistic legal regimes administered by specialized institutions, but these are often difficult to square with the universalistic norms and procedural templates mandated by human rights legislation and the Canadian Charter of Rights and Freedoms. In the result, a supposedly self-contained and distinctive system of labor boards and arbitration tribunals, ostensibly protected by privative clauses ousting judicial review, is often—sometimes egregiously—confronted by reviewing courts of general jurisdiction, whose ambition is to pull labor law loose from its moorings in industrial relations and to tie it more securely to general legal principles.

For all of these reasons, then, although one can identify the provenance of specific doctrines and structures of labor law, can explain their operational success or failure, can tease out the influences that shape workplace normativity, it is very hard to say there is something called a Canadian system of labor law. Indeed, given the country's relatively small population and limited range of economic activities, Canadian labor law is remarkably heterogeneous in its origins, content, and ambitions. Centrifugal forces—doctrinal, functional, constitutional, ideological—have prevailed over centripetal forces to produce not one integrated Canadian system of labor law, but an extended family of systems. To be sure, like any family, its members share a common DNA and exhibit common characteristics. But as time goes by, as we move farther and farther away from the *ur*-system of the wartime and post-war periods, the differences seem to be increasing and the commonalities diminishing.

Nor are constitutional, structural, and substantive legal fissures bridged by cultural affinities or class solidarity among Canadian workers. Canada is a country of great and persisting cultural, ethnic, and social diversity. Apart from the First Nations, who were largely marginalized by European settlers, Canada was historically bi-racial and bi-religious, with the dominant groups being British Protestants

and French Catholics. However, the two (properly three) “founding nations” are now outnumbered by immigrants from Europe and the Asian and African diasporas. Multicultural policies have contributed to racial peace and social justice, no doubt, but it is difficult to discern a distinctive Canadian working class culture, whose members share a common history, values, language, or customs. This—no less than the structure of the Canadian economy—may help to explain the long delay in establishing a homegrown Canadian labor movement.

Most Canadian unions were offshoots of foreign-based labor movements, initially the British TUC, and from the late nineteenth century onward, radical and mainstream American organizations, especially the AFL-CIO. The dominating presence of American corporations and unions had a considerable influence on the structure, ideology, and strategy of Canadian unions, on their legislative and public policy aspirations and, therefore, on industrial relations and labor law. However, Canadian labor spoke in an increasingly distinctive voice in international labor fora, in domestic politics, and in the work-a-day world of collective bargaining. And finally, during the 1980s, Canadian-based organizations came to represent the majority of Canadian union members.¹² Ironically, the high-water mark of Canadian labor’s self-assertion coincided with a low ebb in its industrial and political power. In recent years, labor has only rarely been able to deliver significant bargaining victories for its members; its membership is in slow decline; it has little influence on federal or provincial legislation; it lost its fight against NAFTA; its political affiliate, the NDP, is in tatters and does not enjoy the support of most unionized workers; and it is internally divided. Labor, in other words, has no significant prospect of bringing about a *de facto* national system either by persuading provincial governments to adopt its agenda of legislative reform or by forcing employers to adopt uniform approaches to workplace standards.

Nor, finally, are pressures for a national system as strong on the management side of the equation as one might expect, given the earlier conjecture that, as business and production is increasingly organized on a national and global scale, localized labor and human resources practices might be displaced by standardized policies mandated by the head office. To an extent, this is indeed happening, but standard practices tend not to be made-in-Canada practices. Canada is heavily dependent on imported American capital,

12. D. MAINVILLE & C. OLINECK, *UNION ORGANIZATION IN CANADA: A RETROSPECTIVE* (1999).

managerial techniques, and legal strategies; many of its leading companies have been bought up by U.S. firms; others are wholly dependent on the U.S. market; a good number have imported U.S. executives or IR/HR professionals. The Canadian subsidiaries of U.S.-based transnational corporations are denied autonomy in IR/HR matters or, more typically, are forced to meet financial and production targets that require the adoption of U.S. style opposition to unions. Indeed, some U.S.-based subsidiaries operating in Canada have been extremely reluctant to comply with Canadian labor law and industrial relations practices,¹³ although others appear more willing to adapt their own policies and practices to the Canadian legal environment.¹⁴ Moreover, Canadian governments—especially since the advent of free trade—have been anxious to create a business-friendly atmosphere; consequently, they have become less inclined to adopt or maintain labor legislation that might discomfort major U.S. investors. Thus, the influence of U.S. head offices, international competitive pressures, and the new conventional wisdom of neo-liberalism have all shifted the Canadian corporate community in the direction of more adamant opposition to collective bargaining and labor market regulation and away from willingness to collaborate with labor and the state in constructing an integrated national regime of labor law. To the extent that there are pressures for convergence, they are pressures not so much to produce a common or harmonized regime of employment and labor law as to liberate labor markets so far as possible from the constraints of any such regime.

To conclude, in Canada neither labor law on the books nor labor law in action can be described as either “national” or a “system.” No wonder, then, that it is very difficult to identify a Canadian “national tradition” of industrial relations policy, law, or scholarly discourse.

III. LABOR LAW SCHOLARSHIP IN CANADA: THE BASIC FACTS

I have suggested that special features of Canada’s geography, history, demography, legal system, and political economy have tended to produce diversity, even incoherence, within and among its industrial relations policies and labor law regimes. I now want to focus on labor law scholarship *per se*. In principle, if there is no single, distinctive “Canadian tradition” in labor law, there is unlikely to be a single, distinctive “Canadian tradition” in labor law scholarship.

13. Arthurs, *supra* note 11, at 284.

14. L.B. Nielson, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 L. & SOC. POL'Y 247 (1999).

However, a survey of published labor law scholarship shows that at least there is a dominant paradigm.

A reasonably diligent search covering the period 1980-2001 identified some 1200 published books or articles on Canadian labor or employment law—an annual average of about 60 publications.¹⁵ Most of these employ statutory exegesis and doctrinal analysis of administrative and judicial decisions as their dominant, if not sole, approach to the material at hand. This approach is often, but not always, accompanied by critique or evaluation of legal outcomes or the method of reaching them. In addition, a second significant group of publications addresses the implications for labor law of emerging industrial relations issues (e.g., technological change, non-standard employment, drug use in the workplace) or of general legal developments (e.g., the introduction of the Canadian Charter of Rights and Freedoms, the advent of free trade, Supreme Court decisions on the scope of judicial review). A third group—an estimated 5-10% of the total—deviates from this pattern in the sense that the books or articles are highly theorized, based on social or historical data, or deal discursively with some subject other than legislation and court decisions.¹⁶

Thus, if a common paradigm equates with a national tradition, Canadian labor law scholarship indeed has a modest and uncontroversial tradition. It has been constructed largely by legal academics, administrators, adjudicators, and practitioners writing about legal rules, processes, and institutions and by industrial relations scholars and other social scientists writing about the practical and policy implications of law-related developments. These publications are mostly analytical, exegetical, descriptive, or taxonomic; critique, when offered, seldom challenges the existing system of labor law or explores its fundamental assumptions and ultimate implications, nor is it much concerned with theoretical, methodological, or ideological controversies. Labor law scholarship is, then, almost characteristically Canadian in its self-effacement.

What explains this picture of labor law scholarship? In part, it reflects the relatively late emergence of a Canadian legal academic community. As late as the 1940s and 1950s, the legal profession,

15. The search included both English- and French-language publications that appeared in Canada or elsewhere, but with Canada as a subject or a known Canadian as an author. Statistical inferences based on the results of this search are, of course, somewhat suspect, given the relatively small number of publications, both annually and in the aggregate, and because many publications use multiple methodologies and adopt multiple perspectives.

16. Estimate derived from sampling one in five of the titles found.

rather than the universities, provided or controlled legal education in several provinces (including the largest, Ontario); "leading" law schools had full-time faculty complements of four or five, much of the curriculum was taught by lawyers in full-time practice, and there was little, if any, time for scholarly research and writing.¹⁷ Until the 1930s, when the first two university law journals were founded, the Canadian Bar Review was the only place for scholars to publish.¹⁸ Few practitioners' texts existed, even in subjects such as contracts or commercial law; most published scholarship addressed issues of doctrinal, black-letter law, and only rarely did writing appear that was directed to, or even informed by, legal theory or the insights of other disciplines.¹⁹

I will not dwell on the specific pre-war history of Canadian labor law scholarship: essentially there was none. Apart from a single book on "the Right to Trade"²⁰ and a very few law review articles and case-notes, little was published in the field until 1945 and the decade following. Only then was the first significant labor legislation adopted in most provinces; the first specialized series of labor reports appeared; a few academics began to specialize in labor law; the first collections of labor law teaching materials were published; the first graduate dissertation was written in the field; and slowly, scholarly writing on labor law began to accumulate.

The pioneers of labor law scholarship, as it happens, were both distinguished and versatile. They contributed not only to scholarship, but to industrial relations policy-making, public service, dispute resolution, legal practice, the judiciary, and academic administration.²¹

17. Even by 1954, when the Association of Canadian Law Teachers was founded, there were less than 50 full-time legal academics in the whole country.

18. For a historical and contemporary analysis of Canadian legal periodicals, see B. Ryder, *The Past and Future of Canadian Generalist Law Journals*, 39 ALTA. L. REV. 625 (2001).

19. SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA, *supra* note 2; A. JANISCH, PROFILE OF PUBLISHED LEGAL RESEARCH—REPORT TO THE CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW (1982).

20. W.P.M. KENNEDY & J. FINKELMAN, *THE RIGHT TO TRADE: AN ESSAY IN THE LAW OF TORT* (1933).

21. Jacob Finkelman (1907-) of the University of Toronto was the architect and administrator of Canada's first collective bargaining statute, chair of Ontario's first labor relations board, principal author of the pioneering federal Public Service Staff Relations Act, and the first chair of the agency charged with its administration. Carl Goldenberg (1907-1996), who taught economics, political science, and law at McGill, was one of Canada's most influential labor mediators and policy advisors, and ultimately he was appointed to the Canadian Senate. Bora Laskin (1912-1984), who taught at Osgoode Hall Law School and the University of Toronto, was an influential labor arbitrator who became Chief Justice of Canada. George McAllister (1919-1975) of the University of New Brunswick was both the dean of law and the chair of the provincial labor relations board. Finally, A.W.R. Carrothers (1924-1998), who began his labor law teaching career at the University of British Columbia, wrote extensively on

This varied pattern of activity was carried forward by the next generation of labor law scholars in the 1960s and 1970s; they too served as policy advisors, legislative drafters, administrators, arbitrators, and occasionally advocates. Involvement in active public and professional roles was a mixed blessing for these first generations of labor law scholars: it grounded their scholarship in the real world of industrial relations and provided them with challenges and satisfactions not always available to colleagues in other fields; but it also focused their energies on applied rather than fundamental scholarship; it made them stakeholders in a system from which, ultimately, they ought to have taken a critical distance; and it robbed them of the time and energy needed to pursue ambitious scholarship over the long term.²²

The paucity of labor law scholarship has had some undesirable results. While Canada drew on American models for its collective bargaining statutes and on English precedents for the law of industrial torts, neither American nor English writings could serve as an adequate substitute for local analysis of the interaction of the two systems. Conciliation and arbitration had been a feature of Canadian industrial relations since the early decades of the twentieth century, but these processes were infrequently recorded, seldom analyzed, and almost never acknowledged by the formal legal system.²³ Key constitutional decisions consigning labor law to provincial jurisdiction were not only highly conceptual, but also uninformed by reference either to Canada's economy or to a corpus of Canadian labor law scholarship.²⁴ Finally, when labor boards and arbitration boards first began to confront judicial review, there was a paucity of descriptive and analytical scholarship that might have helped the courts to understand what these boards were doing, why they were doing it, or how court-imposed formalism and hyper-legalism might jeopardize informality, non-adversarial procedures, useful interpretative conventions, and lay participation, all of which were, in fact, diminished or suppressed as a result. Thus, the early deficit of labor

labor law, founded the Institute for Public Policy Research, and served twice as a dean of law and once as a university president.

22. To make full disclosure: the *culpa* is also—perhaps especially—*mea*.

23. J. Webber, *Standards of Industrial Justice: Ideology and the Reports of Conciliation Boards Under the Industrial Disputes Investigation Act, 1907-1925* (unpublished LL.M. Thesis, 1988).

24. See *Toronto Electric Commissioners v. Snider*, 2 D.L.R. 5 (P.C.) (1925); *Canada (Attorney General) v. Ontario (Attorney General)*, A.C. 326 (P.C.) (Labour Conventions Reference) (1937). Until 1949, Canada's highest court was the Privy Council, a tribunal of British judges—technically a committee of the House of Lords, whose quaint tribal customs included the refusal to consider the works of any living author.

law scholarship—doctrinal, functional, and critical—may have had significant long-term effects.

However, as law faculties expanded and diversified, as the ambition of the legal academy grew, as its intellectual formation and credentials improved, as it absorbed the perspectives and methods of adjacent disciplines, Canadian labor law scholarship became both more plentiful and more varied. This does not imply that labor law scholars eschewed their traditional doctrinal preoccupations or abandoned their professional activities. On the contrary, as interdisciplinarity and ideology began to feature more prominently in legal-academic writing, the first standard treatises on labor law began to appear as well, as did monographs, edited collections, practitioners' handbooks, specialized journals of labor law and industrial relations, a rapidly growing corpus of law review articles and, as a long-term contribution to professional training, a casebook collectively edited by a significant proportion Canada's labor law teachers.²⁵ Moreover, as noted, some leading academic labor lawyers—including some of the most intellectually radical—continued to lead alternative lives as administrators, arbitrators, advocates, and consultants, while others opted to leave academe altogether and adopt these roles on a full-time basis. Finally, many Canadian labor law scholars have retained an ongoing, close, and mutually beneficial relationship with their academic colleagues in industrial relations.²⁶

To reiterate: Canadian labor law scholarship did not lose—has not lost—touch with practice. However, over the past twenty or thirty years, in common with other branches of legal scholarship, it has matured in a perfectly normal fashion by adding to the still-dominant mode of doctrinal analysis a variety of theoretical perspectives, some grounded in older legal traditions, some borrowed from other disciplines and discourses. The taxonomy proposed in the next section of this paper is designed to bring this variety of new perspectives into focus.

25. This casebook, which is now in its 7th edition, was inspired by the efforts of the U.S. Labor Law Group Trust. For a history and critique of the Canadian group, see D. Beatty, *Labour Law in a Nutshell: The Influence of a National Casebook*, 75 CAN. BAR REV. 35 (1996).

26. I am indebted to Prof. Bernard Adell for this point. He notes that many Canadian legal academics are active in the Canadian Industrial Relations Association, in industrial relations research centers and teaching programs, and in collaborative research with colleagues outside the legal academy.

IV. CANADIAN LABOR LAW SCHOLARSHIP: A TAXONOMY

Taxonomies are not decreed by nature. They seek to make “sense” of what is otherwise incomprehensible, impose “order” on what otherwise appears chaotic. But sense and order, it appears, are contingent. Taxonomies often have to be amended or abandoned because they fail to capture recalcitrant data within classifications and categories that prove to be over- or under-inclusive. In the end, then, taxonomies often tell us as much about the world-view of their authors as about the subjects to which that view is applied.²⁷

Thus, in an important paper, suggestively entitled “Perspectives of Power and Perspectives of Principle in Canadian Labor Law Scholarship,”²⁸ Bernard Adell seeks to capture a spirited debate among some of the main non-doctrinal tendencies of labor law scholarship by juxtaposing the two perspectives mentioned in his title. His taxonomy separates scholars whose theoretical stance assumes that (for good or ill) economic power will determine outcomes from those who assume that ideas will trump power. In the first category, he brings together devotees of “unchained entrepreneurship” (law and economics), “regulated countervailing power” (industrial pluralism), “unchained collective action” (Marxist and neo-Marxist perspectives), and “transcendental egalitarianism” (liberation theology); in the second category, he identifies two subcategories—those who work in the idiom of “egalitarian individualism” (liberal rights discourse) and those who focus on “universal joint governance” (rights discourse with an emphasis on institutional arrangements). While astutely judged in many respects, this opposition of perspectives of power and of principle does have one important drawback: it locates, in the first category, scholars whose views on collective bargaining—and everything else—are diametrically opposed; and, in the second, creates distinctions between scholars whose work is very similar, while failing to include others—say critical legal scholars—with a comparable faith in the transformative power of discourse.

The taxonomy that follows has more modest objectives. It borrows categories widely used in current debates over legal scholarship, it seeks to relate Canadian labor law scholarship to those

27. For example, as I have recounted elsewhere, the U.S. Library of Congress, which promulgates the taxonomy used by most law libraries and journals in the English-speaking world, adopted “globalization” as a subject only at the end of 1999. Prior to that time, it used “international economic integration.” See H.W. Arthurs, *Reinventing Labor Law for the Global Economy*, 22 BERKELEY J. EMP. & LAB. L. 271 (2001).

28. LABOUR RELATIONS INTO THE 1990S (I.B. McKenna ed., 1989).

debates, and it thereby allows Canadian scholarship to be compared to that in other countries, especially the United States.

A. *Doctrinal Scholarship*

For reasons already mentioned—the peculiar contradictions of Canadian labor law doctrine and the paucity of legal literature in the field—doctrinally minded labor scholars have never been short of useful work and, as noted, doctrinal analysis remains the dominant approach in labor law, as in other fields of Canadian legal scholarship.

However, doctrinal labor law scholarship has long been subjected to two critiques. An internal critique demonstrated without much difficulty the frequent doctrinal incoherence of judicial decisions. Judges often reached results that seemed at odds with the legal rules they were supposed to apply, they misstated or misapplied these rules, and they ignored inconvenient precedents or discovered new rules when the old ones produced unwanted results. An external critique—admittedly more controversial—emphasized that even when judges or labor tribunals could not be accused of doctrinal lapses, the outcomes mandated by their decisions were undesirable from the perspective of good industrial relations, social justice, or economic logic.²⁹

Both critiques can be very powerful and persuasive and, over time, both tended to corrode confidence in the whole project of curial adjudication and its characteristic exegetical form of reasoning. It is hardly surprising, therefore, that some legal scholars should begin to seek new ways of understanding, explaining, and evaluating labor law. Professor Finkin has argued, with some justification, that their search ultimately produced a “flowering of schools, movements and trans-disciplinary approaches,” led to the emergence of “meta-legal” theories at odds with the fundamental assumptions and values of law, and contributed to the opening of an intellectual and ideological gulf between the bench and bar on the one hand, and a significant part of the labor law academy on the other.³⁰ In Canada, as in the United States, this process arguably began with legal realism.

29. For example, a series of scholarly critiques focused on the industrial torts, see H. Arthurs, *Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship*, 38 CAN. BAR REV. 346 (1960); A.W.R. CARROTHERS, *THE LABOUR INJUNCTION* (1961); I. CHRISTIE, *THE LIABILITY OF STRIKERS IN THE LAW OF TORT* (1967); S. TACON, *TORT LIABILITY IN A COLLECTIVE BARGAINING REGIME* (1980).

30. Finkin, *supra* note 1, at 1150.

B. *Legal Realism*

Legal realism arrived in Canadian labor law a generation or so later than in the United States.³¹ Moreover, it arrived in a somewhat different context. Legal realism was suspect in the minds of many Canadian lawyers, judges, and scholars, not merely because it threatened their intellectual capital and professional status, but because it was American.³²

To cite one example, Frankfurter and Greene's 1930 realist classic, *The Labor Injunction*, documented the egregious behavior of judges in enjoining striking and picketing on dubious substantive and procedural grounds and prompted the dramatic reforms of the Norris-Laguardia Act three years later.³³ However, though their findings were obviously relevant to Canada, it would be more than thirty years before a Canadian scholar would replicate their study,³⁴ almost forty before a federal task force would recommend similar far-reaching reforms,³⁵ and longer still before a few provinces adopted even a modest version of those recommendations.³⁶ The persistence of the labor injunction in Canada predictably produced robust scholarly criticism that first pointed up the doctrinal incoherence of judge-made labor law doctrine (the internal critique) and ultimately attributed that incoherence to the determination of conservative judges to protect the property rights and business interests of employers against workers and unions (the external critique).³⁷ In other words, Canadian scholars did no more—and arguably less—than Frankfurter and Greene had done many years earlier.

A second manifestation of the lag in Canada's legal realist revolution is the late persistence of relatively unsophisticated and a-

31. The date at which legal realism arrived in Canada is somewhat contentious. See R.C.B. Risk, *Lawyers, Courts, and the Rise of the Regulatory State*, 9 DALHOUSIE L.J. 31 (1984); R.A. MacDonald, *Recommissioning Law Reform*, 35 ALTA. L. REV. 83 (1997).

32. As late as 1949, the governing body of the Ontario legal profession criticized law teachers for using American methods and materials in their classrooms. C.I. KYER & J.E. BICKENBACH, *THE FIERCEST DEBATE: CECIL A. WRIGHT, THE BENCHERS, AND LEGAL EDUCATION IN ONTARIO, 1923-57*, 203, 203-05 (1987).

33. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930); Norris-Laguardia Act, 29 U.S.C. 101 (1933).

34. CARROTHERS, *supra* note 29. See also A.W.R. CARROTHERS & E. PALMER, *REPORT OF A STUDY ON THE LABOUR INJUNCTION IN ONTARIO* (1966).

35. TASK FORCE ON LABOUR RELATIONS, *CANADIAN INDUSTRIAL RELATIONS* 177, 177-87 (1968).

36. See, e.g., H. Arthurs, *The Dullest Bill: Reflections on the Labor Code of British Columbia*, 9 U.B.C.L. REV. 280 (1974).

37. See *supra* note 29.

historical notions of the rule of law.³⁸ In Dicey's classic late Victorian exposition—still highly influential in Canada—the rule of law demands that everyone be subject to the same law. As Dicey himself noted, this principle precludes the granting to unions of immunity from damage actions for torts committed in the context of industrial disputes.³⁹ Moreover, as he memorably declared, the rule of law is inconsistent with the notion of special regimes of law administered outside the regular courts.⁴⁰ This aspect of the rule of law renders presumptively illicit the creation of specialized tribunals, such as labor relations boards, and conclusively precludes any attempt to immunize such bodies from judicial review.⁴¹ The persistence of these ideas and their approving mention by Supreme Court judges and leading scholars at the end of the twentieth century⁴² speaks for itself as evidence of the continuing dominance of legal doctrinal analysis.

Perhaps because Canada's realist revolution was so long delayed, perhaps because all that followed from that revolution has been so compressed in time, Canadian labor scholars may not yet have worked through the alternatives to doctrinal scholarship to the same extent as their American counterparts. However, they have certainly begun to apply themselves to the task.

C. From Realist Critique to Pluralist Proposals: Collective Bargaining and the Technocratic Management of Labor Conflict

From near the inception of Canadian realist labor law scholarship, a recurring theme was that the advent of collective bargaining signaled a fundamental change in the law of employment relations, that to look backward to the former common law regime was to “attempt to reenter a world that had ceased to exist,”⁴³ that collective employment relations were unique, that the legal regime regulating them ought to be distinctive, and that the purpose of such a

38. H. Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business*, 17 OSGOODE HALL L. J. 1 (1979).

39. A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 268, 268-9 (1962).

40. A.V. DICEY, THE LAW OF THE CONSTITUTION 203 (10th ed. 1965).

41. H. Arthurs, *Protection Against Judicial Review*, 43 REV. DU BARREAU 277, 277-90 (1983), reprinted in *Judicial Review of Administrative Rulings*, C.I.A.J. (1983).

42. For a critique, see Risk, *supra* note 31.

43. United Electrical, Radio & Machine Workers of America, Local 527, and *In Re*, Peterboro Lock Mfg. Co. Ltd., 4 Lab. Arb. Cas. 1499 (1953) (B. Laskin, Chair).

distinctive regime was to allow workers to enter the state of grace known as "industrial citizenship."⁴⁴

A generation of Canadian labor law scholars thus became devoted to building the model of industrial relations and labor law that had become known in the United States as "industrial pluralism"—the extension into the workplace of the due process rights and participatory rituals to which citizens had access in their non-working lives.⁴⁵ Its key elements were the protection and promotion of collective bargaining in order to allow employees to mobilize countervailing power against that of their employer, a distinctive *corpus* of labor law expertly administered by specialized tribunals that regulated the use of power by both sides, and to the extent necessary and possible, abstention by the courts so as to allow breathing space for the new regime.

This school of labor law scholarship reached its Canadian apotheosis in the mid-to-late 1960s, with the federal government's appointment of the Woods Task Force on Industrial Relations.⁴⁶ The Task Force enjoyed a broad mandate to inquire into the causes of and possible cures for the prevailing turmoil in relations among Canadian governments, employers, and unions. It enlisted as members, staff, and consultants almost the entire cadre of Canadian labor law and industrial relations academics; it commissioned and published several dozen interesting and influential research studies—a large and welcome addition to the scant literature; and it did much to launch and legitimate interdisciplinary legal scholarship in Canada by funding social scientific studies relevant to labor law issues and using the results to shape its conclusions and recommendations.⁴⁷ The Task Force ultimately proposed significant, but not revolutionary, changes in labor law and policy. Its proposals, in turn, became the point of departure for the reform of labor legislation in many Canadian jurisdictions, especially in British Columbia, which elected its first NDP (social democratic) government in 1973. British Columbia's new

44. H. Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, 45 CAN. BAR REV. 786 (1967).

45. H. Arthurs, *Understanding Labour Law: The Debate Over "Industrial Pluralism,"* 38 CURR. LEG. PROB. 83 (1985); FUDGE & TUCKER, *supra* note 5, ch. 8-11.

46. TASK FORCE, *supra* note 35.

47. H. Arthurs, *Understanding "Understanding": Industrial Relations Research and Policy in Canada from 1969 to 1984 . . . and Beyond*, 39 RELATIONS INDUSTRIELLES 753 (1984). In the mid-1980s, the Royal Commission on the Economic Union and Development Prospects of Canada (D. Macdonald, Chair, 1985) also commissioned a large number of socio-legal studies including several on labor themes. See *Labour Law and Urban Law in Canada*, in THE COLLECTED RESEARCH STUDIES/ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS OF CANADA 51 (I. Bernier & A. Lajoie eds., 1986).

state-of-the-art Labor Code⁴⁸ was brilliantly drafted and brilliantly administered by one of Canada's leading young labor law academics, Paul Weiler,⁴⁹ whose initial successes reinforced the conviction of many Canadian legal scholars that anything was possible given the right legislative tools wielded by an empowered tribunal led by an imaginative and skilled academic or technocrat—someone just like themselves.

Alas, many things were not possible. Industrial pluralism did not achieve industrial peace, social justice, or even an end to doctrinal incoherence and judicial intermeddling. Instead, it attracted considerable criticism from progressive or pro-labor commentators, much of which was directed at the twin Wagner Act principles of exclusivity and majoritarianism,⁵⁰ as well as periodic thrashings by conservatives, free-marketeers, and aggressive employers.⁵¹ The post-war fordist model of collective bargaining was, in fact, in serious difficulty by the 1970s in almost all advanced economies, including Canada. Social democratic governments, parties, and projects—such as the BC Labor Code—soon fell into decline as neo-liberalism became ascendant in much of North America and Europe. And ironically, the judiciary—widely and justly criticized by early realist labor law scholars—began to regain its credibility in the 1980s, first by adopting a less overtly dismissive attitude towards labor boards and arbitrators and their distinctive doctrines,⁵² then—after some initial

48. Arthurs, *supra* note 36.

49. Weiler, who was also a prominent arbitrator, captured his personal experience and the ethos of the decade in his book *RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW* (1980). He subsequently joined the faculty of Harvard Law School, and continues to contribute to labor law scholarship in both countries. As noted, a number of Canadian labor law scholars followed a similar career trajectory within Canada, moving from academe to arbitration to membership on labor boards or senior government positions and, ultimately, back to academe or onto the bench.

50. See, e.g., R. Adams, *A Pernicious Euphoria: 50 Years of Wagnerism in Canada*, 3 *CAN. J. LAB. & EMP. L.* 3 (1995); B. Adell, *Juridification Under Wagnerism: The Need for a Change in Direction*, in *PROCEEDINGS OF THE XXXIST CONFERENCE, CANADIAN INDUSTRIAL RELATIONS ASSOCIATION*, 1994 (A. Giles, A. Smith & K. Wetzel eds., 1995); D. Beatty, *Ideology, Politics and Unionism*, in *STUDIES IN LABOUR LAW* (K. Swan & K. Swinton eds., 1983); J. Fudge, *The Gendered Dimension of Labour Law: Why Women Need Inclusive Unionism and Broader-based Bargaining*, in *WOMEN CHALLENGING UNIONS: FEMINISM, DEMOCRACY, AND MILITANCY* (Briskin & McDermott eds., 1993).

51. See, e.g., B. Hirsch, *Unionization and Economic Performance: Evidence on Productivity, Profits, Investment and Growth*, in *UNIONS AND RIGHT TO WORK LAWS: THE GLOBAL EVIDENCE OF THEIR IMPACT ON EMPLOYMENT* (F. Mihlar ed., 1997); R. Hanrahan, *The Effect of Work Stoppages on the Value of Firms in Canada*, 6 *REV. FIN. ECON.* 151 (1997); J. Betts, C. Odgers & M. Wilson, *The Effects of Unions on Research and Development: An Empirical Analysis Using Multi-year Data*, 34 *CAN. J. ECON.* 785 (2001).

52. B.A. Langille, *Judicial Review, Judicial Revisionism and Judicial Responsibility*, 17 *REV. GEN. DU DROIT* 169 (1986); P. Cavalluzzo, *The Rise and Fall of Judicial Deference*, in *RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW* (N. Finkelstein & B. Rogers eds., 1987); B.

difficulty⁵³—by settling into its role at the turn of the century as custodian of Canada's new constitutional Charter of Rights and Freedoms.⁵⁴ Finally, these changes in scholarly attitudes, political economy, and juridical dynamics coincided with the advent of new approaches to legal scholarship that provoked a turn towards more rigorous theorization in labor law.

D. The Microphysics of Power: Legal Pluralism and Reflexive Labor Law

While industrial pluralism focused on the extension into the workplace of democratic values and institutions, legal pluralism drew on a somewhat different intellectual tradition. The central premise of legal pluralism is that law is not only enacted by the state, but that it emerges as well in every social field, every site of ongoing economic interaction.⁵⁵ In this sense, Dunlop's observation that a "web of rule" structures all workplace relations⁵⁶ can be encompassed within the general theory of legal pluralism, although legal pluralism in turn locates this specific industrial relations concept within a general socio-legal theory.⁵⁷ Reflexive labor law builds on legal pluralism. It

Etherington, *Arbitration, Labour Boards and the Courts in the 1980s: Romance Meets Realism*, 68 CAN. BAR REV. 405 (1989).

53. The Supreme Court's so-called "labor trilogy" comprised: Reference re Public Service Employee Relations Act (Alberta), 1 S.C.R. 313 (1987); Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Government of Saskatchewan, 1 S.C.R. 460 (1987); Public Service Alliance of Canada v. Canada, 1 S.C.R. 424 (1987). In each of these cases, the Supreme Court declined to use the Charter of Rights and Freedoms to protect the right of workers to bargain collectively or to strike. The literature criticizing the trilogy is extensive. See, e.g., D. Beatty & S. Kennett, *Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies*, 67 CAN. BAR REV. 573 (1988); J. Kilcoyne, *Developments in Employment Law: The 1986-87 Term*, 10 SUP. CT. REV. 183 (1988); P. Weiler, *The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law*, 40 U. TORONTO L.J. 117 (1990); B. Etherington, *An Assessment of Judicial Review of Labour Laws under the Charter: Of Realists, Romantics, and Pragmatists*, 24 OTTAWA L. REV. 685 (1992).

54. United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. Kmart Canada Ltd., 2 S.C.R. 1083 (1999) (holding that consumer leafleting was allowed); R. v. Advance Cutting & Corning Ltd., 205 D.L.R. (4th) 385 (2001) (upholding Quebec legislation requiring union membership for all construction workers); Dunmore v. Ontario (Attorney General), 207 D.L.R. (4th) 193 (2001) (striking down total exclusion of agricultural workers from collective bargaining); Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 208 D.L.R. (4th) 385 (2002) (striking down a common law prohibition of secondary picketing as illegal per se).

55. For a Canadian review of the literature of legal pluralism, see R. Macdonald, *Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law*, in THÉORIES ET EMERGENCE DU DROIT (A. Lajoie ed., 1998).

56. J. DUNLOP, THE INDUSTRIAL RELATIONS SYSTEM 7, 7-18 (1958).

57. H. Arthurs, *Understanding Labor Law: The Debate over "Industrial Pluralism,"* 38 CURR. LEG. PROB. 83 (1985); H. Arthurs, "Landscape and Memory": *Labor Law, Legal Pluralism and Globalization*, in ADVANCING THEORY IN LABOR LAW IN A GLOBAL CONTEXT (T. Wilthagen ed., 1997); Webber, *supra* note 23; P. VERGE & G. VALLEE, UN DROIT DU

stresses the adaptive capacity of labor law systems and focuses on their relative autonomy from the norms, processes, and institutions of the state legal system in general.⁵⁸

Obviously, it is not essential to subscribe to the central propositions of legal pluralism to take seriously the "law of the shop," which is generated through collective agreements, arbitral awards, custom, and usage, or to acknowledge that observable behavior patterns often provide a guide to the meaning that the parties assign to more explicit rules. But it can be argued that when legal scholars write about, say, arbitral jurisprudence or the significance of past practice in the interpretation of collective agreements, they are in effect using the idioms of legal pluralism. This is equally true when legal scholars write about judicial review of labor boards or arbitrators: the central issue for a reviewing court is the extent to which these specialized tribunals will be made to conform, or allowed to deviate, from the procedures, interpretative and evidentiary conventions, and substantive doctrines administered by the courts themselves.

Labor law scholarship in the legal pluralist vernacular has gained some popularity over the past ten or fifteen years in Canada. Given that neo-liberalism is slowly deregulating domestic labor markets via the political process, and that globalization is taking labor issues into transnational spaces where state law cannot reach, "labor law without the state" may indeed be an idea whose time has come.⁵⁹

E. Law and Economics

Despite the rightward shift in Canadian politics, the discourse of law and economics has assumed a kinder, gentler aspect in Canada than in the United States and has attracted a rather small, though very

TRAVAIL? ESSAI SUR LA SPÉCIFICITÉ DU DROIT DU TRAVAIL (1997); R. Buchanan, *1-800 New Brunswick: Economic Development Strategies and the Local Production of "Global Services,"* in GLOBALIZING INSTITUTIONS: CASE STUDIES IN SOCIAL REGULATION AND INNOVATION (J. Jenson & B. Santos eds., 2000); A. Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001).

58. See D. Kettler & P. Warrion, *American and Canadian Labour Regimes and the Reflexive Labour Law Approach*, in REFLEXIVE LABOUR LAW (R. Ragowski & T. Wilthagen eds., 1994); H. Arthurs, *Corporate Self-regulation: Political Economy, State Regulation and Reflexive Labour Law*, in REFLEXIVE LABOUR LAW: STUDIES IN INTERNATIONAL AND EUROPEAN EMPLOYMENT LAW AND LABOUR MARKET POLICY (T. Wilthagen & R. Ragowski eds., forthcoming 2004).

59. H. Arthurs, *Labour Law Without the State?*, 46 U. TORONTO L.J. 1 (1995).

distinguished, legal-academic following.⁶⁰ However, there is virtually no deep-dyed Chicago-school “law and economics” scholarship on Canadian labor law comparable to that found in the United States.⁶¹ Only in discussions of labor contracts and standards⁶² and of the interface between international trade and labor has this particular perspective been influential.⁶³ Nonetheless, as I will indicate next, the logic of markets has waxed in legal academic circles as in the world of politics, even as the logic of state regulation has waned.

F. *Neo-liberalism, Globalization, and Continental Integration*

Neo-liberalism has been closely intertwined with globalization which, in turn, has helped to accelerate and formalize Canada’s integration into a U.S.-led hemispheric free trade system. In this context, three major themes in labor law scholarship have emerged. First, labor law scholars (and others) have expressed the concern that globalization and hemispheric integration not trigger a “race to the bottom,” and specifically, that the unfavorable climate for trade unions in the United States not be allowed to prejudice Canada’s relatively healthy welfare state and collective bargaining system.⁶⁴ Second, several scholars have written extensively on the relationship between trade and labor standards with a view to ensuring that free trade is also fair trade.⁶⁵ And third, a few legal scholars have begun to

60. See especially the work of Michael Trebilcock of the University of Toronto Faculty of Law.

61. See, e.g., R. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); R. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984); T. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991 (1986).

62. See, e.g., C. TUOHY & M. TREBILCOCK, POLICY OPTIONS IN THE REGULATION OF ASBESTOS-RELATED HEALTH HAZARDS (1982); M. TREBILCOCK, POST-EMPLOYMENT CONTRACTUAL RESTRAINTS (1986); R. Howse & M. Trebilcock, *Protecting the Employment Bargain*, 43 U. TORONTO L.J. 751 (1993); M. GUNDERSON & C. RIDDELL, LABOUR MARKET ECONOMICS: THEORY, EVIDENCE AND POLICY IN CANADA (3rd ed. 1993); K. Hylton, *A Theory of Labour Anti-Trust*, in UNIVERSITY OF TORONTO LAW AND ECONOMICS WORKING PAPER SERIES (1993).

63. See, e.g., M. Gunderson & A. Verma, *Canadian Labour Policies and Global Competition*, 20 CAN. BUS. L.J. 63 (1992); D. Gifford, *The Interplay Between Free Trade and Opportunity in the Labour Market: Implications for Labour Policy*, in UNIVERSITY OF TORONTO LAW AND ECONOMICS WORKING PAPER SERIES (1996).

64. See G. TRUDEAU & G. VALLÉE, ECONOMIC INTEGRATION AND LABOUR LAW POLICY (1994); B.A. Langille, *Competing Conceptions of Regulatory Competition in Debates on Trade Liberalization and Labour Standards*, in INTERNATIONAL REGULATORY COMPETITION AND CO-ORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES (W. Bratton, J. McCaheny & S. Picciatto eds., 1996); M. Gunderson, *Harmonization of Labour Policies under Trade Liberalization*, 53 RELATIONS INDUSTRIELLE/INDUSTRIAL RELATIONS 24 (1998); P. Verge, *Mondilisation et Fonctions du Droit du Travail National*, 40 CAHIER DU DROIT 437 (1999).

65. R. Howse & M.J. Trebilcock, *The Fair Trade—Free Trade Debate: Trade, Labour and the Environment*, in UNIVERSITY OF TORONTO LAW AND ECONOMICS WORKING PAPER SERIES

investigate a possible transnational regulatory architecture that might address negotiations and disputes associated with continental or hemispheric markets for goods and services, production chains, corporate structures, legal and consulting firms, and social and labor movements.⁶⁶ The North American Agreement on Labor Cooperation can be understood as the first attempt by states to construct such a regulatory regime;⁶⁷ it is unlikely to be the last.

G. *Liberal Rights Discourse: The Constitutionalization of Labor Law*

Several Canadian legal scholars have explored the potential for “putting the Charter to work”—for using constitutional litigation to advance liberal values in the context of employment relations.⁶⁸ While their work has been ambitious, it has confronted two problems. The first is the concern—both pragmatic and principled—that Canadian legislators ought to be able to reconceptualize and reconfigure the industrial relations system from time to time, without constitutional constraints that might fix it in its present form despite great changes in the surrounding political economy.⁶⁹ The second is the considerable skepticism expressed by critics on the left concerning the inclination of judges to develop a pro-labor jurisprudence and concerning the efficacy of any judge-led strategy of fundamental social change.⁷⁰ As predicted by these critics, the Supreme Court of Canada was initially disinclined to provide constitutional safeguards for freedom of association or expression in the labor context.⁷¹ However, the Court has recently delivered several judgments more favorable to workers

(1994); B. Langille, *Labour Standards in the Globalized Economy and the Free Trade/Fair Trade Debate*, in INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE (W. Sengenberger & D. Campbell eds., 1994).

66. Arthurs, *supra* note 59; B. Langille, *Eight Ways to Think about International Labour Standards*, 31 J. WORLD TRADE 27 (1997); Blackett, *supra* note 57; P. Verge & S. Dufour, *Enterprises Transnationales et Droits du Travail*, 57 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 12 (2002); P. Macklem, *Labour Law Beyond Borders*, 5 J. INT'L ECON. L. (2002).

67. J.S. McKennirey, *Labour in the International Economy*, 22 CAN.-U.S. L.J. 183 (1996).

68. D. BEATTY, PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE (1987); T. Kuttner, *Constitution as Covenant: Labour Law, Labour Boards and the Courts from the Old to the New Dispensation*, 13 QUEENS L.J. 32 (1988); R. McCallum, *Domestic Constitutions, International Law and the International Labour Organization: An Australian and Canadian Case Study*, 20 QUEENS L.J. 301 (1995).

69. Weiler, *supra* note 53; Etherington, *supra* note 53.

70. J. Fudge, *Labour, The New Constitution, and Old Style Liberalism*, 13 QUEENS L.J. 61 (1988); H. Glasbeek, *Some Strategies for an Unlikely Task: The Progressive Use of Law*, 21 OTTAWA L. REV. 387 (1989); J. Fudge & H. Glasbeek, *The Politics of Rights: A Politics with Little Class*, 1 SOC. & LEG. STUD. 45 (1992); M. MANDEL, THE CHARTER OF RIGHTS AND LEGALIZATION OF POLITICS IN CANADA (1994).

71. See *supra* note 53.

and unions.⁷² This may rekindle the faith of those who believe in the transformative potential of litigation strategies. But transformations, once let loose, are unpredictable if not perverse, and it is by no means clear that the Court's new jurisprudence signals an improvement in the fortunes of the labor department. For example, the recent, much-heralded *Pepsi* decision characterizes secondary picketing as *prima facie*, deserving of constitutional protection as freedom of expression. But it also invites both legislators and common law judges to strike a balance between protected expression and other public goods such as confining the scope of industrial conflict—subject of course to subsequent judicial review.⁷³ This invitation has been taken up by at least one Conservative provincial government that is apparently considering new, explicit, and far-reaching statutory restrictions on picketing.⁷⁴ Similarly, the recent *Dunmore* decision strikes down a statutory prohibition on collective bargaining by agricultural workers as a violation of their freedom of association. However, it leaves the door open for a legislative response that involves something different for these workers than full coverage under standard collective bargaining legislation.⁷⁵ How legislatures will, in fact, respond and whether agricultural workers will be able to make much use of any new statutory regime remains to be seen.

H. Social Democratic and Solidaristic Perspectives

Observers have noted that Canadian labor policy constitutes a partial exception to American exceptionalism;⁷⁶ they might well have gone on to suggest that Quebec represents a partial exception to the Canadian exception. The crucial factor differentiating the Canadian from the U.S. case and that of Quebec from most other Canadian jurisdictions is support for state intervention in the labor market. Intervention has a peculiarly Canadian pedigree. From the first decade of the twentieth century, the Canadian state provided elaborate peacekeeping procedures to avoid or resolve industrial conflict.⁷⁷ These procedures involved a significant normative

72. See *supra* note 54.

73. *Supra* note 53, at 416, 473.

74. R. Brennan, *Tory Cabinet Discusses Picketing Curbs*, TORONTO STAR, May 7, 2002, at A3.

75. *Pepsi Cola*, *supra* note 54, at 285 (per Bastarache and L'heureux-Dubé, JJ).

76. Notably, S.M. Lipset, *Trade Union Exceptionalism: The United States and Canada*, 538 ANNALS AM. ACAD. POL. & SOC. SCI. 115 (1993).

77. FUDGE & TUCKER, *supra* note 5; P. CRAVEN, "AN IMPARTIAL UMPIRE": INDUSTRIAL RELATIONS AND THE CANADIAN STATE 1900-1911 (1980); J. Webber, *Compelling Compromise: Canada Chooses Conciliation over Arbitration, 1900-1907*, 28 LABOUR / LE TRAVAIL 20 (1991).

element—a public (but non-binding) recommendation for settlement by a conciliation board—that, in modified form, has remained embedded in Canada's labor legislation despite the adoption of Wagner-style collective bargaining legislation in the mid-1940s.

During the post-war period, moreover, Canada began to put in place elements of the framework of a modern welfare state, a project pushed forward by provinces with strong social democratic parties—initially the CCF, laterally the NDP. True, these parties governed only here and there, now and again, but their presence exercised a gravitational pull on both the nationally dominant Liberal Party and the perennially aspiring Progressive Conservatives, both of which—like the Canadian electorate in general—have tended to be more progressive than mainstream American political parties or voters.⁷⁸

As a result, Canadian labor policy and legislation during the postwar period differed from that of the United States in two crucial respects. First, though the claim will be vigorously contested by critical scholars,⁷⁹ Canada's industrial relations policies continued to evolve up to the 1970s in a more progressive fashion than in the United States—a tendency that finally ran its course only in the 1990s.⁸⁰ Second, industrial relations policy was complemented by

78. See generally, S.M. LIPSET, *CONTINENTAL DIVIDE* (1990); *SMALL DIFFERENCES THAT MATTER: LABOR MARKETS AND INCOME MAINTENANCE IN CANADA AND THE UNITED STATES* (D. Card & R. Freeman eds., 1993); M. ADAMS, *BETTER HAPPY THAN RICH? CANADIANS, MONEY AND THE MEANING OF LIFE* (2000); see also, C. Doran, *Convergence or Divergence*, in 8:4-5 SPECIAL DOUBLE ISSUE ON CANADA-U.S RELATIONS IN THE NEW MILLENIUM, CANADA WATCH (York Univ. Centre for Public Law & Public Policy and the Robarts Centre for Canadian Studies, Toronto, Ontario, Canada) 61 (2000); D. Drache, *Integration without Convergence? The North American Model of Convergence*, in 8:4-5 SPECIAL DOUBLE ISSUE ON CANADA-U.S RELATIONS IN THE NEW MILLENIUM, CANADA WATCH (York Univ. Centre for Public Law & Public Policy and the Robarts Centre for Canadian Studies, Toronto, Ontario, Canada) 63 (2000); M. Adams, *Canadian and American Social Values*, in 8:4-5 SPECIAL DOUBLE ISSUE ON CANADA-U.S RELATIONS IN THE NEW MILLENIUM, CANADA WATCH (York Univ. Centre for Public Law & Public Policy and the Robarts Centre for Canadian Studies, Toronto, Ontario, Canada) 66 (2000); K. Weaver, *Are Canadian and U.S. Social Policies Converging?*, in 8:4-5 SPECIAL DOUBLE ISSUE ON CANADA-U.S RELATIONS IN THE NEW MILLENIUM, CANADA WATCH (York Univ. Centre for Public Law & Public Policy and the Robarts Centre for Canadian Studies, Toronto, Ontario, Canada) 71 (2000).

79. J. Fudge & H. Glasbeek, *The Legacy of PC 1003*, 3 CAN. LAB. & EMP. L. J. 357 (1996); H.J. Glasbeek, *Agenda for Canadian Labour Law Reform: A Little Liberal Law, Much More Democratic Socialist Politics*, 31 OSGOODE HALL L.J. 233 (1993); L. PANITCH & D. SWARTZ, *THE ASSAULT ON TRADE UNION FREEDOMS: FROM WAGE CONTROLS TO SOCIAL CONTRACT* (1993).

80. See, e.g., Bill 40, *An Act to Amend Certain Acts Concerning Collective Bargaining and Employment*, 2d Sess., 35th Leg., Ontario, 1992 (assented to Nov. 5, 1992) passed by the newly-elected NDP government that introduced state-of-the-art amendments to the Ontario Labour Relations Act. These amendments were repealed very shortly thereafter when the Conservatives returned to power and enacted Bill 7, *An Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity and to make Consequential Changes to Statutes Concerning Labour Relations*, 1st Sess., 36th Leg., Ontario, 1995 (assented to Nov. 10,

various Keynesian and social welfare strategies, such as employment stimulus, unemployment insurance, public health care, social housing, and an expanding public sector, all of which created relatively positive labor market conditions and helped to shape labor's collective bargaining agenda. However, as an ironic consequence, when Canadian labor ultimately discovered that social democratic governments confronted with rising public debt and program costs would adopt policies as unacceptable to unions as those of centrist and right-wing governments, both the movement and the party fell into considerable disarray.

What has all this to do with labor law scholarship? First and foremost, it ensured that Canadian labor scholars continued to believe in and write about the possibility of progressive change and, in their incarnations as administrators, advisors, advocates, and arbitrators, to work to implement such change. Second, it marginalized neo-liberal scholarship and denied it the virtual stranglehold it has achieved in American academic, policy, and political circles. Third, it ensured that the legislature and administrative agencies would remain a primary focus of scholarly research. And finally, not least, it provided a plausible, progressive alternative to critical post-modern scholarship. As will be seen below, such scholarship is not in short supply. But in contradistinction to its U.S. manifestations, the critical left in Canada is more often associated with the Marxian, rather than the neo-Marxist, tradition; it is more empirical and less preoccupied with discourse analysis; and it continues to maintain a (sometimes heated) dialogue with the social democratic or progressive wing of legal scholarship.

Quebec, as noted, is a special case. From at least the 1930s through the 1950s, some elements of its labor legislation drew on European Catholic and corporatist models,⁸¹ although it, too, adopted a Wagner-style statute in the 1940s.⁸² However, from its "Quiet Revolution" of the 1960s onward, labor policy became part of a larger project of Quebec's modernization, emancipation, and national self-assertion. Indeed, Quebec's particular social democratic version of nationalism defined a leading role for the state in the economy and a major role for both labor and capital—as stakeholders in a notional

1995). See, H.C. JAIN & S. MUTHUCHIDAMBARAM, *ONTARIO LABOUR LAW REFORM: A HISTORY AND EVALUATION OF BILL 40* (1995).

81. See, e.g., J-G. Bergeron & D. Veilleux, *The Quebec Collective Agreement Decrees Act: A Unique Model of Collective Bargaining*, 22 *QUEENS L.J.* 135 (1996).

82. R. BLOUIN, *LES RELATIONS INDUSTRIELLES AU QUÉBEC: 50 ANS D'ÉVOLUTION* (1994).

“Quebec, Inc.”—in the building of state institutions and national consensus. Thus, in many respects, Quebec labor legislation was more pro-union, or at least more pro-collective bargaining, than legislation elsewhere on the continent. To cite but two examples, union membership is compulsory for all Quebec construction workers, who participate through their unions in sectoral negotiations that define conditions for the whole industry;⁸³ and Quebec was one of the first North American jurisdictions to ban the use of strikebreakers.⁸⁴

Finally, because Quebec’s “Quiet Revolution” also involved a considerable commitment to education, research, and the reinvigoration of intellectual and cultural life, Quebec scholars have been important contributors to thinking about the role of labor in society. While many received their graduate training in Anglo-American or Canadian universities, many studied in France, a fact that has encouraged Quebec legal scholars to draw upon continental socio-legal thought. Thus, Quebec labor law scholarship has been particularly interesting over the past thirty years, comparative in its inspiration and greatly influenced by the related projects of national renewal and solidarity. In its turn, it has contributed a great deal to labor law scholarship in anglophone, common law Canada.

I. Marxist, Critical, Feminist, and Other Transformative Perspectives

Not all progressive Canadian labor law scholarship is social democratic or solidaristic. Like their colleagues in other countries, many Canadian labor academics are motivated by a deep concern for the injustices they see in society, by the conviction that radical social transformation is necessary both in the workplace and more generally. These scholars have used critical theory—Marxism, feminism, critical race theory—to try to reveal the hidden contradictions in labor law as conventionally understood. Some of the most important recent historical work in the field has recently come from critical scholars,⁸⁵

83. See *R. v. Advance Cutting & Coring*, *supra* note 54.

84. P. Weiler, *Striking a New Balance: Freedom of Contract and Prospects for Union Representation*, 98 HARV. L. REV. 351, 413 (1984). While Quebec adopted this legislation in 1977, Mexico had adopted similar legislation in 1931, see C. Jain & P. Singh, *Beyond Rhetoric: An Assessment of the Political Arguments and Legal Principles on Strike Replacement Laws in North America*, 421 WORKING PAPERS, INDUSTRIAL RELATIONS CENTRE, MCMASTER UNIVERSITY 4 (1997).

85. See, e.g., FUDGE & TUCKER, *supra* note 5; P. CRAVEN & D. HAY, MASTER AND SERVANT IN BRITAIN AND THE EMPIRE: USES OF LAW (forthcoming); C. Backhouse, *The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada*, 14 L. & HIST. REV. 315 (1996); G. KEALEY, TORONTO WORKERS RESPOND TO INDUSTRIAL CAPITALISM, 1867-92 (1980); C. HERON, THE WORKERS' REVOLT IN CANADA, 1917-1925 (1998).

although by no means all.⁸⁶ They have made a particular contribution in mounting a coherent ideological critique of the assumptions underlying industrial pluralism, and have raised disconcerting questions about the fairness and effectiveness of important labor market institutions.⁸⁷ And above all, they have brought into focus important issues ranging from the plight of immigrant and part-time workers to the self-limiting effects of a decentralized system of collective bargaining to the implications of neo-liberal attacks on social programs and on public sector unionism. Of all of these critical perspectives, none has more been extensively applied to labor law than feminism,⁸⁸ not surprisingly given that many of the most bitter battles of the gender wars have been fought around workplace issues, and that feminist discourse has become so widespread in academic disciplines generally.

*J. The Post-industrial, Post-collective Bargaining Model:
Employment Law*

Over the past twenty years or so, Canadian legal scholarship has shifted from a virtually exclusive preoccupation with collective labor law to a significant concern with issues of individual labor law. Why has this happened?

First, it has become increasingly clear that many workers will never participate in collective bargaining. The industries in which they work are resistant to penetration by unions, their own positions are too precarious, or their particular problems are ones that unions are not well-equipped to address. Second, even for unionized employees, many issues are not resolvable within the logic of

86. R.C.B. Risk, *This Nuisance of Litigation: The Origins of Worker's Compensation in Ontario*, in 2 *ESSAYS IN THE HISTORY OF CANADIAN LAW*, 418 (D.H. Flaherty ed., 1983); J. Webber, *The Mediation of Ideology: How Conciliation Boards, Through the Mediation of Particular Disputes, Fashioned a Vision of Labour's Place within Canadian Society*, in *CANADIAN PERSPECTIVES ON LAW AND SOCIETY: ISSUES IN LAW AND HISTORY* (W. Pue & B. Wright eds., 1988).

87. See especially, FUDGE & TUCKER, *supra* note 5.

88. See, e.g., C.J. CUNEO, *PAY EQUITY: THE LABOUR-FEMINIST CHALLENGE* (1990); J. FUDGE, *LABOUR LAW'S LITTLE SISTER: EMPLOYMENT STANDARDS LEGISLATION AND THE FEMINIZATION OF EMPLOYMENT* (1991); *WOMEN CHALLENGING UNIONS: FEMINISM, DEMOCRACY, AND MILITANCY* (L. Briskin & P. McDermott eds., 1993); P. SUGIMAN, *LABOUR'S DILEMMA: THE GENDER POLITICS OF THE AUTO WORKERS IN CANADA, 1937-1979* (1994); M. STEEDMAN, *ANGELS OF THE WORKPLACE: WOMEN AND THE CONSTRUCTION OF GENDER RELATIONS IN THE CANADIAN CLOTHING INDUSTRY, 1890-1940* (1997); B. Baines, *Occupational Sex Segregation and Employment Equity: Lessons from Canada*, 8 *CAN. LAB. EMP. L.J.* 291 (2000); K. Rittich, *Feminization and Contingency: Regulating the Stakes of Work for Women*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* (J. Conaghan, K. Klare & M. Fischl eds., 2002).

collective bargaining. They result from structural concerns, such as technological change, the flexibilization of employment, and globalization. Third, for some workers, collective bargaining has proved to be the problem rather than the solution. Unions—despite their principled commitment to equality—have sometimes become committed to workplace practices that favor their traditional constituencies over new recruits, with resulting prejudice to women, the disabled, and members of visible minority groups. Fourth, this period has coincided with a prolonged neo-liberal political ascendancy, deregulation of the labor market, and a slow but steady decline in union strength.

All of these developments—as the academic literature makes clear—argue for greater attention to the protection of individual rights rather than collective rights. However, neo-liberal deregulation has adversely affected pay equity and employment equity initiatives designed to address structural or systemic discrimination, while human rights commissions are also rapidly being delegitimated, defunded, or dismantled. Labor standards legislation and workplace health and safety laws—while seldom directly attacked in the new political dispensation—are, in effect, being repealed by stealth, as enforcement agencies are being denied adequate resources for inspection and prosecution and as the burden of enforcement shifts to individual employees who are ill-situated to shoulder it.

Thus, the prospects for greater individual protection seem to be declining just as an awareness of their importance seemed to be growing among labor law scholars. However, two recent developments represent a counter-tendency, as well as a fertile source of scholarly inspiration.

The first, already alluded to, is the advent of the Charter of Rights and Freedoms in 1982 that, in principle, mandates special protections for some of the most vulnerable workers. As noted, the full potential of the Charter has yet to be demonstrated, but it has led to legal recognition of the equality claims of the disabled, gays and lesbians, members of visible minorities, and women. The second is the rise of claims for wrongful dismissal. These claims, in principle, can be brought by any employee, though in fact a disproportionate number are made by middle managers and senior executives who, unlike ordinary workers, can afford to sue for wrongful dismissal. Whether as cause or effect, changes in the political economy of the legal profession have produced a supply of litigators eager to respond to this new market in individual employment law, not to mention a plethora of authors writing on the subject. There has also been a

modest legislative response to the plight of less affluent, non-union individual workers in the federal jurisdiction and in two provinces, in the form of a statutory tribunal with power to adjudicate upon and remedy wrongful dismissal claims. Many provinces, moreover, provide in their labor standards legislation for mandatory notice periods in the event of layoffs and, in the case of larger employers, for severance pay as well. Finally, labor relations legislation generally imposes a duty of fair representation on unions. Many of these positive developments have resulted from advocacy by Canada's labor law scholars, and are the subject of a considerable body of research and writing.⁸⁹

V. CONCLUSION

As this account makes clear, there really is no one national tradition in Canadian labor law scholarship. There are many. In fact, Canadian labor law scholarship displays most of the schismatic and sectarian tendencies that Professor Finkin has identified in the United States. But Canada is a peaceable kingdom and, in terms of labor law scholarship, a young and small one as well. Its scholars seem to coexist on a reasonably collegial basis, despite fundamental ideological and epistemological differences about the nature of law, its relationship to the state and society, its appropriate contribution to workplace relations, and the proper direction of Canada's labor policy.

To be sure, in Canada as in the United States, judges sporadically admonish academics about the need for greater restraint and more relevance; and academics respond in appropriately disrespectful rejoinders.⁹⁰ To be sure, practitioners sometimes trot out the old cliché that “those who can do. . .,” disparage “ivory tower” academics, and deplore the lack of attention to “basics” in law school curricula; and academics reciprocate with dismissive commentaries on the increasing incoherence of legal knowledge and taunts about the

89. See, e.g., B. COTTER, *EMPLOYMENT LAW IN CANADA* (1993); I. CHRISTIE & G. ENGLAND, *EMPLOYMENT LAW IN CANADA* (3rd ed. 1998); G. Eden, *Industrial Discipline in the Canadian Federal Jurisdiction*, 48 *RELATIONS INDUSTRIELLES* 163 (1993); G. England, *Recent Developments in the Law of the Employment Contract: Continuing Tension between the Rights Paradigm and the Efficiency Paradigm*, 20 *QUEENS L.J.* 557 (1995); FUDGE, *supra* note 88.

90. See, e.g., M. Bastarache, *The Role of Academics and Legal Theory in Judicial Decision-Making*, 37 *ALTA. L. REV.* 739 (1999); A. Hutchinson, *The Role of Judges in Legal Theory and the Role of Legal Theorists in Judging (Or Don't Let the Bastaraches Grind You Down)*, 39 *ALTA. L. REV.* 657 (2001).

imminent demise of the profession.⁹¹ But strangely, these controversies seldom surface in the context of labor law. Perhaps the multiple roles of Canadian labor law scholars immunize them somewhat from complaints about excessive intellectuality and remoteness from the “real world”; perhaps they are given a degree of latitude because they have so evidently contributed not only to the academic literature but to practical reforms in public policy and to professional formation; perhaps academic labor law is such a young and intimate sub-discipline that the current generation of Canadian judges and practitioners retain personal respect or affection for their former teachers.

Or perhaps—sobering thought!—labor law as an academic discipline, as a field of professional practice, as an influence on social and economic development is not terribly relevant. This is not to say that legal rules have no consequences, especially for litigants involved in specific cases; it is not to say that academic theorizing, analysis, and critique of whatever provenance is in any sense out of place in the academy; and it is certainly not to say that lawyers, judges, and legal academics cannot profit from spirited dialogue with each other. But it is to say that great changes in Canada’s political economy are disempowering workers and unions; that those same changes are making the future more precarious for corporations, law firms, and universities along with everyone else; that new ways of thinking about technology, government, law, social relations, and markets are giving rise to troubling debates and nasty controversies in all circles where people have the luxury of indulging in them; and, that all of these traumas are felt particularly in Canada that notoriously has “too much geography and too little history” to feel confident about the future.⁹²

To conclude: in a country, in a legal system, in universities experiencing profound and unsettling transformations, judges, practitioners, and academics all have worthier work than attacking each other because they happen to play different roles, embrace

91. I acknowledge my own tendencies in this direction: see H. Arthurs, *A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?* 18 DALHOUSIE L.J. 295 (1995); H. Arthurs *Lawyering in Canada in the 21st Century*, 15 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 202 (1996).

92. H. Arthurs, *Constitutionalizing Neo-conservatism and Regional Economic Integration: TINA x 2*, in ROOM TO MANOEUVRE? GLOBALIZATION AND POLICY CONVERGENCE 17 (T.J. Courchene ed., 1997).

different intellectual paradigms, or affect different styles of legal discourse.

APPENDIX ONE

TAXONOMY OF LEGAL RESEARCH

