

# Foreword

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The papers in this issue of the *San Diego Law Review* could be taken as reflecting widespread disarray at the current stage of the always evolving, now rapidly expanding, law of the employment relationship. Dealing with a variety of subject matter areas, the commentators' reactions to what they find range from exasperation to bewilderment to more restrained but nonetheless sharp criticism. If this is partly the custom of legal periodical literature, the general impression is left of more than ordinary confusion, uncertainty, and frustration of purpose in this body of law taken as a whole.

Professor Morris,<sup>1</sup> looking at what has been considered the nuclear area of labor law, protests vehemently the National Labor Relations Board's (NLRB) failure, cumulative throughout its existence but aggravated over the past twenty years, to effectuate the 1935 establishment by Congress of collective bargaining as the basic process for achieving effective and equitable employment relationships. Reaffirming that underlying principle, Morris ascribes the breakdown to faulty administrative procedures, particularly the Board's failure to assume a substantive rulemaking responsibility. The two most obvious reform approaches, congressional prescription of more effective rules, or, alternatively, the setting up of an article III federal labor court, seem to Morris quixotic or, on net, undesirable. Although he proposes that the Board exercise self-help by adopting a number of procedural practices, which he sets out in perceptive detail, his optimism about the likelihood of this being done is restrained.

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1. Morris, *The NLRB in the Dog House — Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987).

Professor Prince deals with the seemingly unrelated upheaval that has taken place suddenly, especially along the San Andreas Fault, in the age-old common-law concept that an individual hiring, absent some specific agreement, continues entirely at the will of the employer. Critical of the traditional wisdom, he concludes that the courts have replaced it with case law "increasingly devoid of any ascertainable focus or direction."<sup>2</sup> Prince proposes the legislative adoption of a No-Cause Discharge and Payment Act, which would permit the parties to avoid litigation. Instead, they would rely on the application of a kind of liquidated damages formula in which the key factor would be prescribed by the legislature, with any questions about its application being referred to arbitration.

Focusing in their separate papers on the specific question of how retired employees' health and welfare benefits should be protected, commentators Weckstein<sup>3</sup> and Gregory<sup>4</sup> both find what is perhaps more orderliness in the law's approach. Nonetheless, there exists here an incomplete and inconsistent set of results. Gregory's tracing of arbitral awards, court decisions, and statutory enactments suggests an almost haphazard weaving of different threads into no clearly identifiable pattern. Weckstein, concentrating on whatever conceptual and analytical principles the rulemakers and adjudicators have perceived, concludes that the consequences almost mock the effort. What seems a relatively plain and little-controverted purpose has been frustrated in a maze of questionable refinements and dubious distinctions. Taking different approaches, the authors come to agreement that further congressional action is necessary to straighten out and strengthen the law's handling of this problem.

The student Comment<sup>5</sup> on the handling of issues arising in connection with plant closings describes a tortuous series of reversals of NLRB rulings and apparent shifts in the pattern of judicial review. The author concludes that collective bargainers facing this problem "deserve a foundation of logical and consistent rulings so that they can predict bargaining responsibilities" and NLRB and court outcomes.<sup>6</sup>

Taking a broader vantage point in his overview of the past sixteen years of Supreme Court labor decisions, Professor Gould<sup>7</sup> reports

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2. Prince, *A Modest Proposal: The Statutory "No-Cause" Alternative to Wrongful Discharge in California*, 24 SAN DIEGO L. REV. 137, 166 (1987).

3. Weckstein, *The Problematic Provision and Protection of Health and Welfare Benefits for Retirees*, 24 SAN DIEGO L. REV. 101 (1987).

4. Gregory, *COBRA: Congress Provides Partial Protection Against Employer Termination of Retiree Health Insurance*, 24 SAN DIEGO L. REV. 77 (1987).

5. Comment, *The Spring Has Sprung: The Fate of Plant Relocation as a Mandatory Subject of Bargaining*, 24 SAN DIEGO L. REV. 221 (1987).

6. *Id.* at 241.

7. Gould, *The Burger Court and Labor Law: The Beat Goes On* — Marcato, 24 SAN DIEGO L. REV. 51 (1987).

substantially less reflection at this level of seismic disturbance or tortured groping for firmer ground. Comparing the decisions of the Justices during Chief Justice Burger's stewardship with those of the Warren period, he finds no more than "a tilt toward management over labor on the issues of greatest import."<sup>8</sup> Gould emphasizes, at the same time, the increasing difficulty of finding in Supreme Court decisions a reliable basis for predicting the future handling of critical employment law issues. The characteristic pattern of divided conclusions, accompanied by a plethora of conflicting or divergent opinions, seems to buttress Professor Kenneth Culp Davis' recent commentary on the hazards of judicial lawmaking in an area in which legislative and administrative lawmaking would have significant advantages.<sup>9</sup>

Only a superficial reading of these symposium papers, however, would leave any impression of aimlessness regarding the current state of development of labor law, more accurately the law of the employment relationship. Valuable as these papers are for their careful detailing of the difficulties that have arisen in particular areas, their even larger significance is what they reflect, taken together, of the current stage in the evolution of a remarkably resourceful body of law responding with an unparalleled variety of "alternative dispute resolution" procedures to the demands of the constantly changing parameters in the most complex relational equation with which the law deals.

It is an appropriate reminder that up until 1935 (1926 in the railway industry), labor law was limited almost entirely to what courts should and would do about employee strikes and picketing and boycotting; whether such action constituted a criminal conspiracy, or an actionable tort; whether it should be enjoined; and whether it constituted a violation of the antitrust laws. For the next twenty-five years, "labor law" came to connote principally, though not exclusively, the interpretation and application of the union organization and collective bargaining provisions of the National Labor Relations Act; the rulings of an administrative agency and the awards made by private

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8. *Id.* at 52.

9. See Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1 (1986). Only eight of the 19 employment/labor law cases decided by the Supreme Court during the October 1985 term resulted in fully unanimous decisions. A total of 48 opinions were filed in the 19 cases; one group of three closely related cases produced 14 opinions. These cases and opinions suggest a corollary to Davis' thesis that the Court offers too little guidance to where it is going. Comparable difficulty arises when too many of the Justices feel compelled to develop nuances and fine distinctions that don't impress their colleagues but still contribute to the bar's perplexity.

arbitrators became as important as the decisions of courts. Today, the state and federal reports are increasingly being taken over by cases also involving equal employment opportunity, employee benefits, and other related legislation that was broadened substantially in the 1960's.

The symposium papers provide a basis for assessing whatever instruction experience offers the future regarding two distinguishing characteristics of this area of the law. It has developed a basic duality and a related procedural pluralism.

For fifty years now, on the one hand, substantial reliance has been placed on private lawmaking and adjudication of collective bargaining and arbitration, with the public function being limited in large part to adjusting the balance of bargaining power so that private compacts will establish terms and conditions of employment consistent with worker equity and enterprise effectiveness; courts have deferred broadly to arbitrators. On the other hand, the complementary approach has been to prescribe by statute more and more of these terms and conditions relating to employment.

The symposium papers all relate, directly or indirectly, to aspects or implications of the recent and current shift away from reliance on collective bargaining and toward increasing resort to statutory, and now common law, protections and enlargements of individual employee rights and benefits. Professor Gould finds in the evolving pattern of Supreme Court decisions relating to union organization and collective bargaining the reflection of an "increasingly hostile environment with which organized labor is confronted . . . the roots of which extend far beyond law itself."<sup>10</sup> In still broader perspective, encompassing the whole sweep of employment law, the reciprocal relationship between the apparent weakening of collective bargaining and the strengthening of individual employee guarantees becomes evident.

No thoughtful analysis would attribute solely to coincidence the NLRB's dilution of the force of collective bargaining, which Morris criticizes so strongly, and the state courts' identification, described by Prince, of a latent common-law protection of individual employees against inequitable discharge. The timing aspect of the point should not be over-pressed; there is related relevance in the fact that most of the successful California plaintiffs have not been covered by collectively bargained guarantees to begin with. Broader significance lies in the fact that the progression of NLRB malpractice to which Professor Morris attributes much of the weakening of collective bargaining has been paralleled by Congress' enactment of far reaching prohibitions of particular types of employer discrimination and sig-

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10. Gould, *supra* note 7, at 76.

nificant enlargement of employee benefits.

This reciprocal relationship between reduced union bargaining leverage and enlarged statutory protection of individual employees emerges clearly from the Weckstein and Gregory tracing of recent developments regarding retired employee interests. In the 1950's and 1960's, collective bargaining seemed to be affording sufficient benefits, beyond those provided in the Social Security Act. Some statutory shoring up of this protection was added in the 1970's and early 1980's. This, however, was provided more for pension benefits than for health and welfare benefits. Now, with the balance of collective bargaining strength shifting and with economic pressures forcing current employees to consider concessions of one kind or another, the commentators conclude that Congress must exercise a larger surrogate function on behalf of retirees.

The symposium papers also bring into sharp relief the experience in this area of the law with an extraordinary variety of legal processes. Partly a function of the dualism of the substantive law, this procedural pluralism goes further. Professor Morris, pressing for a larger degree of rulemaking by the NLRB, adumbrates here the alternative that he has developed more fully elsewhere: that if the present working relationship between the Board and the courts continues to produce too much confusion and too little predictability, consideration must be given to establishing a federal labor court. He and others have considered whether this should be established as an article III or article I court, and whether its jurisdiction should extend to NLRB cases alone or should also cover those coming up from agencies administering anti-discrimination and employee benefit statutes.

A number of critical process questions, including some about the comparative propensities and predispositions of legislators, judges, juries, and arbitrators, are implicit in Professor Prince's no-cause discharge proposal. So far as retired employee rights are concerned, Gregory appears to accept broad reliance on legislative handling of the health and welfare benefit problem, with accompanying resort to the courts; Weckstein would continue to probe for more effective integration of privately bargained and legislative guarantees of retired employees' benefits, to be applied by both arbitrators and courts.

While the uncertainty described in the student Comment prevails, regarding how the Board and the courts will handle the question of whether plant closings are mandatory subjects of bargaining, increasing consideration is being given to alternative, broader, and

more constructive approaches to this problem. The 99th Congress considered last year a proposal to require employers to give sixty or ninety days notice of a prospective closing and to discuss with the affected employees' representatives possible means of lessening the impact of this action. When this bill was defeated by a narrow margin, in an atmosphere of polarized labor and management disagreement, the Secretary of Labor set up a private tripartite task force to consider the problem and make recommendations regarding its handling. The almost unanimous task force report transmitted in late 1986 by Chairman Malcolm Lovell to Secretary William Brock recommends, in meaningful detail, an Economic Adjustment and Worker Dislocation program. The recommendation included effective procedures and provisions for broad scale financing that appear to offer unprecedented promise for approaching and meeting this critical and exacerbating problem.

If ADR is an acronym for new adventure in other areas, these symposium papers reflect the significant extent to which procedural pluralism has become an authentic characteristic of employment law. The description and diagnosis in the several articles, when they are looked at separately, is of growing pains. The broader picture is of a body of law moving towards fuller recognition of the interrelatedness and essential integrity of its various parts.

When the symposium papers are viewed in this broader context, they prompt a reconsideration of the "labor law" segment of the legal curriculum. In most law schools today, the subjects covered here would be taken up in three different courses. The "basic labor law course," which it is assumed most students interested in the general area will take, covers the subjects considered by Morris, Gould, and the student note. The recently emergent employment at will issue is apparently going to fit into the course devoted principally to federal statutory proscriptions of employment discrimination. The protection of retired employees' pensions and health and welfare benefits comes up in the course in social legislation. In only a handful of schools, including the University of San Diego, is consideration being given to constructing a course that would permit exploring the interrelationship between developments in these several areas and in others (internal union affairs, for example) that offer comparable challenge.

Pressing this possibility too strongly risks suspicion of unintended heresy regarding what should be considered "basic" in this area of the law. To have been present almost at the creation of the course centered on the law of union organization and collective bargaining is to retain a deep conviction that this is a subject law students ought to know about and that it provides superior opportunity for their training as both advocates and architects. This remains true today despite the relevant but not controlling facts that fewer than one-

fifth of American employees are organized and that most lawyers practicing in this area spend a good deal more time on equal employment opportunity and employee benefit cases than on collective bargaining and grievance arbitration. There is increasing prospect that a reinvigorated trade unionism (suggested in the 1985 report of the AFL-CIO Committee on the Evolution of Work, entitled *The Changing Situation of Workers and Their Unions*)<sup>11</sup> will become an increasingly positive force in the American economy and polity. New patterns of constructive bargaining are emerging.

The important pedagogical point is that as the broader law of the employment relationship has grown, particularly during the past twenty-five years, another at least equal opportunity has developed for constructing a law school course that challenges students' understanding: not only of a set of institutions and processes, but of the elements of a uniquely protean relationship. Labor is a unit of production, a factor in economic equations; work is also a human value, essential to meaningful life. No other balancing of interests required of the law is so strongly affected by any similar combination of changing social, economic, political, and technological forces: by the ending, for example, of two centuries of bigotry about race and human gender, by the advance of robots, by the movement of the United States trade balance from a surplus to a deficit position.

A course on The Law of Work might start from materials permitting an analysis of the elements of the employment relationship. It would go on to explore the informative experience of the law in trying to balance the interests that are involved by resorting to an extraordinary variety of rulemaking and dispute resolution procedures. The historical and currently troublesome issues relating to union organization and collective bargaining would be included, perhaps as a centerpiece but not as the sole offering, of the course. The various approaches to protecting employee rights and interests — through federal and state statutes administered by a variety of administrative agencies; through the private establishment of grievance procedures leading to arbitration; through federal courts interpreting congressional enactments and searching for an elusive federal law of contract enforcement; and through state courts revisiting common-law doctrine — would be analyzed as an interrelated body of inquiry. A companion, possibly integrated, unit would be built around the law's recognition of the critical productivity element in the employment

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11. *The Changing Situation of Workers and Their Unions*, Report of the AFL-CIO Committee on the Evolution of Work (1985).

relationship. The course would look necessarily, in view of the constantly changing influence of various factors on the employment relationship, at where the law is going as well as at where it has been and is today.

The architects of such a course, recognizing that the risk of superficiality increases as the coverage of any subject matter area is broadened, would draw on the experience of administrative law scholars and teachers in avoiding this danger. They would resist the temptation to rely on secondary materials that provide easy but intellectually enervating summarization. The course would be constructed around carefully selected and arranged cases and statutes and compacts that both instruct the future about what the experience in this area of the law has been, and push students to the limits of their developing capacities to think. If the function of lawyers were to be conceived of narrowly as "predicting what courts will do in fact," it would reasonably be argued that in this field the quality of their foresight will depend particularly on an informed sense of contemporary and prospective movements in social and economic currents.

Nothing in the symposium papers would be fairly taken as supporting directly this curricular footnote. The commentators proceed in the main from analyses of particular problems that have arisen to the prescription of specific remedies. Yet the suggestion seems implicit here that it would be an appropriate function of legal education to probe for the sustaining and strengthening roots of a body of law whose currently spreading branches appear, wrongly I think, to lack order or symmetry.