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STANDARDS FOR EVALUATING LABOR LEGISLATION

David Ziskind[†]

The author examines standards for evaluating labor legislation, as found in various disciplines, and offers attitudes helpful to their use. Standards of draftsmanship and devices for overcoming initial weaknesses; constitutional principles for screening out unreasonableness and governmental abuse; jurisprudential concepts of social engineering and situation-sense—are found in legal literature. Economic theories—laissez-faire, marginal utility, social welfare, and institutionalism—each contribute a little to an unfinished whole. Moral philosophy—ultimate goals like the attainment of a good life, and intermediate objectives like the elimination of poverty—offer logical points of departure and return. To utilize these standards in labor legislation, he suggests and illustrates (1) an historical perspective, (2) a problem-solution viewpoint and (3) a sophistication toward old argument.

When a federal statute regulating the internal affairs of trade unions is heralded by some as a liberation of captives from the grip of racketeers and by others as the enslavement of free men by bureaucrats, it should be obvious that we need better standards for evaluating labor law.¹ The need is not confined to partisans and politicians. Sincere students of public affairs have difficulty with an appraisal of labor law because the waters are muddied with controversy and there are few buoys or channel markers to guide them. Nonetheless, there are standards which if used conscientiously will aid in the evaluation of labor law.

Standards have been offered by several social science disciplines. We shall explore first the criteria of lawyers and jurists. Then we shall examine the standards of economists. These, we find, lead back to philosophical premises; hence we shall also consider moral values. In order to take advantage of those criteria of judgment which appear valid and most promising for the evaluation of labor law, three methods of approach are proposed—an historical perspective, a problem-solu-

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¹ Hearings on H.R. 3540 Before a Joint Subcommittee of Committee on Education & Labor, 86th Cong., 1st Sess. 286, 1095 (1959). John L. Lewis has called it "a cast iron chastity belt around the waists of 16 million men." Employer witnesses were less picturesque but equally emphatic to the contrary.

tion viewpoint, and a sophistication toward old argument. It would be more comforting if there were just a few simple touchstones to test the worth of labor law, but life situations are never that simple.

LEGAL STANDARDS

Legal standards are as devious as lawyers and the multifarious interests they represent. It is, therefore, not in legal briefs that one is apt to find reliable standards for the evaluation of labor law. The unique contributions of lawyers and jurists to standards of labor law are found in the philosophy of law, in constitutional principles, and in rules of legislative draftsmanship. In most other respects, lawyers have taken over and utilized nonlegal standards.

The popular role of the lawyer as an advocate has led to an unfortunate emphasis upon partisan interests in his treatment of labor legislation. Under our court system of adversary law, lawyers are expected to plead specially for the particular interests of their clients. Such dangers as may flow from their partisan presentation are supposedly overcome by reposing decision making power in an impartial judge. In the legislative process, however, there is rarely an impartial tribunal to counteract the bias of advocates. Party platforms may commit legislators to principle, and dependence upon constituents may have a moderating influence; but legislators are generally not expected to be impartial. In their legislative committees, they listen to lay witnesses plead for special interests (under the guise of the public good), and the partisan debate is usually more confounding than clarifying. Lawyers as witnesses are no exception. All too commonly they attempt a defense of clients' interests rather than an analysis of proposed legislation under professional criteria. They use legal standards as terms to conjure with rather than as helpful standards of judgment. We must look to other legal sources than the advocate for reliable standards of labor legislation.

In the area of technical competence or legislative draftsmanship, lawyers have developed helpful standards. They have made possible a widespread consensus on whether a statute is good or bad as a work of legal art.² Regardless of the subject matter of the statute and its social worth or lack of worth, the statute may be appraised as a sound or defective legal document. Some of the tests are whether it correctly expresses the intent of the legislature, whether it is understandable to the persons regulated, whether each duty required can be carried out, whether

² Freund, *Legislative Regulation* 159-426 (1932); Lenhoff, *Comments on Legislation* 1001-21 (1949); Read & MacDonald, *Cases on Legislation* 786-971 (1948); Read, MacDonald, & Fordham, *Cases on Legislation* 116-346 (2d ed. 1959).

proper administration is provided, and whether its penalties are deterrents to violations. These are tests for technical soundness and as such are standards for all legislation.

Certain weaknesses, however, are inherent in the legislative process. Chief among these is the need for political compromise and the ambiguous legislative language that results therefrom. This common defect is recognized by legal experts and can be offset by standard techniques. Labor laws, perhaps more than most other laws, embody political concessions. Adoption is often possible only on the basis of compromise language that is vague enough for everyone to assume it means what he would like to have it mean. Competent draftsmen seek to compensate for such deficiencies by placing the power to issue interpretations, rules, and regulations in the hands of an administrative agency. That permits lawyers and administrators in the regulatory agency to carry out the declared general purposes of the legislature through interpretations or regulations that hurdle some of the obstacles that might have held up the adoption of the law.

These techniques and standards for drafting legislation artfully have been supplemented by well known methods for improving legislation over a period of time. Inadequate laws have often been accepted with the hope of later improvement. The early hours-of-work laws were initiated as a hortatory statement of public policy; and only in time were they amended to set forth legally binding rules of conduct. Most labor laws in their inception have attempted to deal with only a portion of a broad problem in the anticipation that amendments would cope with more and more of the problem. Initial statutory exemptions have been gradually eliminated. The number of workers and occupations covered have been constantly increased. Domestic and agricultural workers, traditionally excluded from labor laws, have only recently been getting statutory protection.³

In certain areas of legislation, such as fair employment practices and full employment, the initial enactment has been for an investigation and a report, with the adoption of regulatory provisions at a later date. This process of growth has been deliberate and has followed fairly definite patterns.

Enforcement aspects of labor legislation have likewise been improved

³ The slow process of including agricultural workers under labor law is recorded in Beyer, *Agricultural Workers Under State Labor Laws* (U.S. Division of Labor Standards, Dep't of Labor, May 1940); Ream, "Agricultural Workers and Workman's Compensation," *Bur. Labor Standards Bull. No. 206* (U.S. Dep't of Labor 1959). The coverage of domestics lags further behind. Progress under state workman's compensation laws is reported in Diamond, "State Workman's Compensation Laws," *Bur. Labor Standards Bull. No. 161*, at 17 (U.S. Dep't of Labor 1957).

with the passage of time. Investigation authority, subpoena powers, and enforcement by cease and desist order, not found in early statutes, have been added later.⁴

With due care, labor legislation can mature, become more sophisticated and more effective.

These matters of legislative draftsmanship and statutory improvement constitute a legal science. Though partisan debate often seizes upon them with fury and indignation, they properly belong to the judgment of legal experts concerned solely with the effectiveness of the legislation, not with its policy. An evaluation of labor law should carefully distinguish standards of policy from standards of effectiveness; and in the latter area, legal standards have reached a high stage of professional competence.

The search for standards of policy leads us to other areas of legal precept. Logic dictates that we look first to the standards of highest legal authority in our system of jurisprudence, namely the provisions of our federal and state constitutions. In the evaluation of labor law, unfortunately, these standards have been elusive, at times inconsistent, and until recently, inchoate.

All labor law has been weighed on the scales of constitutional principle. Every piece of labor legislation has been put to the triple test of due process of law, equal protection of the laws, and the separation of federal-state powers. At their inception, statutes on factory inspection, workmen's compensation, maximum hour, minimum wage, child labor, social security—practically all forms of labor legislation—were found unconstitutional.⁵ In time the same laws have been found consonant with the same constitutional doctrines.⁶ Labor legislation has slithered through a constitutional sieve.

⁴ For the improvement of early labor laws, primarily in the field of safety and health, see Andrews, *Labor Laws in Action* (1938). Abbott, *The Child and The State* (1938), shows the same technical advance with child labor laws. A comparison of the Railway Labor Acts of 1926, 1934 and 1936 will illustrate the gradual tightening of enforcement techniques. See 44 Stat. 577 (1926); 48 Stat. 1185 (1934); 49 Stat. 1189 (1936), 45 U.S.C. §§ 151-88 (1964).

⁵ Clark, "Labor Laws Declared Unconstitutional," *Burk. of Labor Bull.* No. 91, at 916 (U.S. Dep't of Commerce and Labor 1910).

⁶ The turning of the tide is found in numerous decisions of state supreme courts but the following Supreme Court decisions are better known and illustrative. On hour laws: compare *Bunting v. Oregon*, 243 U.S. 426 (1917), *Muller v. Oregon*, 208 U.S. 412 (1908), *Lochner v. New York*, 198 U.S. 45 (1905), *Holden v. Hardy*, 169 U.S. 366 (1898), with *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). On wage laws: compare *Morehead v. Tipaldo*, 298 U.S. 587 (1936), *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), with *Opp Cotton Mills, Inc. v. Administrator Wage Hour Div.*, 312 U.S. 126 (1941), *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). On child labor laws: compare *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), *Hammer v. Dagenhart*, 247 U.S. 251 (1918), with *United States v. Darby Lumber Co.*, supra. On workmen's compensation laws: compare *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), with *Mountain Timber Co. v. Washington*,

That is not to say that constitutional doctrines have served no beneficent purpose as standards of judgment. The due process clause has helped screen out arbitrariness, capriciousness, oppression, legislative dogma, judicial overbearing, and administrative dishonesty. The equal protection clause has helped screen out special personal privilege, arbitrary classification, race prejudice, class discrimination, and kindred evils. The reservation of states rights has guarded against over-centralization. These constitutional standards have stood as essential safeguards against tyranny and abuse and are still the basis of undying argument in defense of human liberty.

As standards for evaluating labor law, they have value but they are not sufficient. Questions of legislative policy—the virtue or wickedness of a labor law, its efficacy or impotence, or the need for it—are not answered by constitutional tests. Probably the Constitution was not designed for that purpose. At least one half century of litigation and legal argument over the due process and equal protection clauses leaves us just with tests for legislative purification, not with standards for selection.

The catharsis experienced by jurists and lawyers in applying constitutional doctrines to labor law has made them adept in certain techniques for keeping statutes within constitutional bounds. Argument over constitutionality has clarified and refined their legal perception. Although the Supreme Court for many good reasons has chosen not to constrict its opinions by a definition of due process of law, careful students of its decisions have learned to take advantage of the expanding latitude allowed by the courts. Labor legislation need no longer be confined, as formerly, to the protection of the weaker sex or the helpless individual. It may still be necessary to strain the effect of local action upon interstate commerce in order to invoke effective federal powers, yet most lawyers and legislators have learned the rules of that game too. The courts have tempered their social judgments with sweet reasonableness, and legislative draftsmen have learned how to phrase a statute that will pass judicial scrutiny unscathed.

Our difficulty with constitutional principles as standards of policy attests to a basic difficulty in the use of all standards for the evaluation of law. The standards in this instance—certain constitutional doctrines—are sound. At least we assume them to be. Yet their application has led

243 U.S. 219 (1917), *New York Cent. R.R. v. White*, 243 U.S. 188 (1917). On anti-union contract laws: Compare *Texas & N.O.R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930), *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), *Coppage v. Kansas* 236 U.S. 1 (1915), *Adair v. United States*, 208 U.S. 161 (1908), *Virginia Ry. v. System Federation 40*, 300 U.S. 515 (1937), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

to diametrically opposite results at different times. Why? The fault may be attributed to many factors—the shortcomings of judges or the inadequacies of lawyers or the lack of stable standards. If one seeks an explanation in the differences among judges, one finds differences of social viewpoint, personal philosophy, or worldly understanding. One discerns that judges have used extra-legal or undeclared standards of judgment. These call for discovery, exploration, and analysis. If one seeks an explanation in the difference of presentation made before the several courts, one finds differences in the accumulation of supporting economic and social data. Lawyers' briefs and judicial knowledge have both reflected a learning process. Facts, extraneous to the law, appear to influence the application of legal standards. Whether the ambivalence of constitutional doctrine is due to personal philosophy or objective data, both types of explanation appear valid and call for further analysis. They reveal a need for running through the standards used, back to basic premises, and a need for supplementing standards with an understanding of the facts of life.

Thinking in that vein has been done by scholars of jurisprudence, particularly those in the schools of sociological jurisprudence and modern realism.⁷ Probably most helpful for our purposes have been Pound and Llewellyn.

Pound, in his early work, expounded the concept of social engineering in law.⁸ That was essentially the thought that once we acknowledge a social purpose or objective, the role and test of law are how well it engineers or accomplishes that purpose. That is a direct and pragmatic standard for evaluating the effectiveness of labor law, and whenever the social purpose is undisputed, it may serve well. We shall return to it in our problem-solution viewpoint developed below. The social engineering concept, however, falls short when we ask how social objectives are to be evaluated.

⁷ Not all writers on jurisprudence have attempted to cast light upon standards for legislation. Those of the so-called Analytical School, who see law as a body of rules based in custom and expanded by analogy, have explained primarily a method for developing case law. They have regarded statutory law as an area for innovation or departure from precedent, without offering criteria for such developments. Those writers of the so-called Historical School, who see law as an unfolding of principles in the historical growth of governments have usually been just analysts or recorders of the past. They have had a viewpoint conducive to stability but not to growth. Those writers of the so-called Philosophical Schools, who see law as the embodiment of ethical or metaphysical precepts, have offered philosophical standards for legislation, which are best dealt with as philosophical rather than legal notions. Attention is given such standards below.

⁸ 1 Pound, *Jurisprudence* ch. 6 291-358 (1959). In later years, Pound unfortunately neglected his sociological approach for an analytic viewpoint, particularly in dealing with union activities as restraints of trade. He advocated the application of antitrust laws to unions without careful consideration of the social objectives involved or the effectiveness of the regulatory techniques.

Llewellyn developed a view that he called modern American realism.⁹ He proposed finding a life-situation and accommodating the law to a sensible solution of that life-situation. He had confidence that in the long run, with that approach, legislators and jurists would accomplish the sensible solution. By way of assisting them, he analyzed their logical processes and indicated how they might think more accurately and arrive at "situation-sense." It was in the grand tradition of the common law, he maintained, to adapt law to make situation-sense. Only tangentially did he write on the social premises and objectives essential to situation-sense.

The formulation of standards for labor legislation requires attention to social objectives. That necessarily involves a consideration of economic data and moral and philosophical values, for which we must turn primarily to nonlawyers. Lawyers have contributed the standards of craftsmen in drafting and improving legislation; jurists have developed constitutional principles that prevent legislative abuse; and legal scholars have suggested attitudes and techniques for a proper development of law. Their standards are incomplete without an additional consideration of the contributions of other social scientists and philosophers.

ECONOMIC STANDARDS

Legislators are generally not expected to be economists, yet their thinking on labor legislation is influenced by prevailing economic theories. Of this they are frequently unaware. A more conscious analysis of their economic hypotheses might help explain their value judgments and aid us in formulating proper standards for labor legislation.

Let us consider the viewpoints of several prominent schools of economic thought as they have been reflected in popular thinking. Their usefulness in providing standards for the evaluation of labor legislation is our only immediate concern. These economic theories may be labeled (1) *laissez-faire*, (2) utilitarian, (3) social welfare and (4) institutional.

Laissez-faire. This framework of classical economic theory starts with the premise that our economic order functions best when free competition is allowed to prevail. Government labor regulation—except such controls and directions as may eliminate restraints on a free labor market—is fundamentally unsound and ultimately harmful. This theoretical viewpoint (though still defended in all its logical ramifications by some purists) is most commonly advocated as a desired goal, never fully attainable, but better partially realized than totally abandoned.¹⁰

⁹ Llewellyn, *The Common Law Tradition* 121-57, 200-12 (1960).

¹⁰ Von Mises, *Human Action* (1949); Simons, "Some Reflections on Syndicalism," 52 *J. Pol. Econ.* 1 (1944).

In historical retrospect, it is obvious that pure laissez-faire would condemn (in fact, did condemn) all child labor laws, all hour laws, all safety laws, practically all trade union activity. It is still resurrected from time to time to condemn any new piece of protective labor legislation. Most commonly today it is utilized as the basis for recommending a new antitrust law against "unreasonable" trade union activities.¹¹ Actually, all trade unions are combinations in restraint of individual employee contracts, and are therefore inconsistent with laissez-faire; but the theoretical logic of laissez-faire has generally been modified (in business relations as well as labor relations) so that it is now commonly confined to the realm of so-called "unreasonable" restraints on trade.

This modified laissez-faire position is a theoretical hypothesis that can be applied extensively or narrowly in evaluating labor legislation. It is heard, for example, in arguments to repeal all collective bargaining laws or in opposition to any extension of the social security laws.¹² It is basically a theory of opposition to labor legislation; it may be pressed strongly or lightly; but it does not lead to the initiation or advocacy of any labor law.

That does not prove nor disprove the theoretical correctness of the modified laissez-faire position. It should be noted, however, that the trend of legislative policy and judicial decision has been against this position. The multiplication of labor laws limiting individual free competition in the labor market is common history. The reasoning of the United States Supreme Court in finding such laws a reasonable exercise of police power—reasonably designed to achieve public health, safety, and general economic well-being—or a reasonable exercise of the commerce and taxing powers of Congress has been extended farther and farther into the field of labor regulation. Generally the Court has maintained that its own view of public policy is immaterial, as long as the legislature's intent is clear and defensible; but legislatures have increasingly abandoned the laissez-faire position and the Court has found that reasonable (or not unreasonable).

In our search for standards for the evaluation of labor law it is perhaps most significant that the laissez-faire theorists still leave unanswered the question of what is "reasonable" restraint.

Utility Theory. Another prominent group of economic theorists find value in utility—the market value of a commodity lies in its utility to

¹¹ A graphic expression of this policy was made by Thurman Arnold when he was Assistant Attorney General in charge of the Antitrust Division, in his letter to the Secretary of the Central Labor Union of Indianapolis, Nov. 30, 1939, on file in Cornell Law Library. See also Edwards, "Public Policy Toward Restraints of Trade by Labor Unions; An Economic Appraisal," 32 *Am. Econ. Rev. Papers & Proc.* 432 (1942); Meltzer, "Labor Unions, Collective Bargaining, and the Antitrust Laws," 6 *J.L. & Econ.* 152 (1963).

¹² Petro, *The Labor Policy of the Free Society* (1957).

the marginal purchaser. The test of utility then becomes a way of looking at all economic relationships—buying and selling, employment and wages, and laws affecting those economic relationships—from the standpoint of whether or not they reduce or increase utilities.

Such a standard is difficult to apply.¹³ There is no way to test or record the utility experienced by most people, or even to measure and compare the utilities experienced by any two persons. Utilities are psychological—peculiarly within the minds of individuals. They may determine how people act in the economic market. Buyers may select goods and services on the basis of the respective utilities they anticipate from those goods and services; and the payment of a price is a form of measurement of subjective utilities. However, laws are not purchased by an exchange of dollars, and we have no simple way of measuring the utilities people get or expect to get from them. Laws may be purchased by an exchange of votes; but there is no common denominator for votes. Legislators vote on their own conception of the utilities involved or on what they think are the utility notions of their constituents. Persons who may seek to evaluate laws on the standard of the respective utilities involved must rely on guesses as to what other people are thinking or will think in the future.

If we ask whether a law requiring secret elections for union officers or a higher minimum wage increases utilities, we have no ready way to determine its potential in utilities. We find ourselves asking merely how much will the law give people of the things they want, or how many people think the law will be useful to them, or how many people want the law. That gives us no independent standard of evaluation.

Social Welfare. A number of economists have maintained that economic life should not be viewed abstractly as an operation of supply and demand in a free competitive market, nor is it sufficient to add the psychological factor of utility; but it is necessary to look at the economic activities of human beings as an effort to satisfy all their wants and needs.¹⁴ To them, economics is the business part of the human struggle for individual and social well being. This viewpoint stresses the welfare objectives of economic laws. If labor law is to be evaluated according to its propensity to promote social welfare, we have another standard—a broad, all encompassing, moral or philosophical standard. Its strength is that it recognizes the fact that man does not live by bread alone, and it obliges us to consider and weigh his other motivations and satisfactions.

¹³ Buchanan, "Positive Economics, Welfare Economics, and Political Economy," 2 J.L. & Econ. 124 (1959).

¹⁴ 2 Haley, *Survey of Contemporary Economics* (1952); Hicks, "The Foundations of Welfare Economics," 49 *Econ. J.* 696 (1939); Stigler, "The New Welfare Economics," 33 *Am. Econ. Rev.* 355 (1943).

Its weakness is that it offers no objective or simple or universally acceptable method for ascertaining what specifically constitutes social welfare or specifically how it is promoted. That is the deficiency of all moral standards—more of which will be said below—yet the social welfare viewpoint emphasizes the unavailability of applying some moral standard.

Institutional Analysis. Other economic theorists have urged that the way to avoid unreality through abstract, laissez-faire, or utility theories and to supply meaningful content to social welfare theory is to study economic institutions specifically and concretely, to discover what they really are and how they really function.¹⁵ Then it may be easier to determine how or what the institutions should be. Applied to labor laws, this institutional viewpoint has produced detailed analyses of the economic problems in our society and of the effects of legislation on those problems. Such studies have been undeniably helpful in the evaluation of labor legislation. Still they have not always provided definitive answers to questions such as what do we want to accomplish and which of the many effects of a law do we desire most.

The economic standards vary considerably in their usefulness as standards for evaluating labor law. Laissez-faire has been essentially negative and at best leaves unanswered the question of what is a reasonable restraint of trade. Utility theories have been subjective and dependent on an analysis of what others regard as utility. Social welfare theories have demonstrated a need for social values without supplying a readily usable set of values. Institutional studies have furnished detailed and helpful analyses of specific labor law situations without general standards of evaluation. Some scale of social priorities, some moral objective, some policy goal must be combined with economic theories to produce adequate standards for the evaluation of labor law. Because moral judgment is inescapable, we shall direct our attention to some of the most common moral standards.

MORAL STANDARDS

The search for satisfactory moral standards has garnered many elixirs, appealing to many tastes. The choice is at times bewildering. Great moralists have sought to help us make a selection. Some have urged a

¹⁵ J. D. Brown, "Social Insurance; A Problem in Institutional Economics," 47 *Am. Econ. Rev. Papers & Proc.* 462 (1957); Copeland, "Institutionalism and Welfare Economics," 48 *Am. Econ. Rev.* 1 (1958); Witte, "Economics and Public Policy," 47 *Am. Econ. Rev.* 1 (1957); Witte, "Institutional Economics as Seen by an Institutional Economist," 21 *So. Econ. J.* 131 (1954). The contributions of institutional economists of course consist not only of theoretical discourses, but even more of a great multitude of factual studies made, some of them, and mostly by research workers, in government and out, whose work was prompted by the institutional viewpoint. For illustrative studies on the effects of minimum wage laws, see note 27 *infra*.

short cut in our labors by pleading for faith in divinely ordained standards; others have insisted that man evolve and apply his own standards in a humanistic process of self perfection. In all, the philosophers have proliferated a vast array of moral values. It would be foolhardy to attempt within the scope of this paper to proclaim and defend a single standard as the highest standard of moral judgment. It should suffice for our purpose in seeking standards for evaluating labor legislation to clarify the use of moral values and to suggest several values that may be helpful.

The real worth of moral values in labor law appears to be in their usefulness as a basic premise.¹⁶ Moral values are the point at which most people agree and on which laws may rest. If law is to provide stability in human relations, it must be founded on acceptable premises. Moral values are also a directive indicating to reasonable men how they can proceed to make a choice between possible alternative laws. They are the signposts to progress.

In this context we may list some of the most widely advocated moral standards:

1. Justice, truth and goodness;
2. The good life;
3. The golden mean;
4. Natural law;
5. The greatest happiness for the greatest number; and
6. The fullest development of man's capacities—in their individual and social aspects.

As stated, nearly all of these are noncontroversial. Only when they are expounded and made more specific is there a serious difference of opinion over what they mean or how they should be applied. Problems arise when justice is defined to mean that each person should get what he deserves rather than what he needs; when the good life is interpreted to call for the giving of charity instead of the requirements of a contract; when the golden mean is said to be half way between certain extremes; when natural liberty is defended in action that is deemed dangerous by others; when the beneficiary is unwilling to accept what may be most conducive to his happiness; or when a choice must be made as to which human capacities are to be developed first. And in a host of other dilemmas, the usefulness of these moral standards becomes obscure. Nonetheless, they are good starting points, they offer some direction, they demand a justi-

¹⁶ A provocative discussion of the relationship between morality and law is found in Cohen, *Ethical Systems and Legal Ideals* (1933).

fication in terms generally acceptable, and they are a point of reference on which differences of opinion may be diminished. The important factor is that one of these moral standards is to be used. Labor laws are to be justified or condemned in terms of that standard. The mere process of scrutiny, under a commonly accepted moral standard, will help in the evaluation of any labor law, and is in practice indispensable to a satisfactory evaluation.

To reason from a specific labor law back to a moral end is a long, time consuming task. Consequently we seek more immediate goals—subordinate moral ends. In the field of labor law, we have generally established several intermediate points of moral justification. Some of these are the following:

1. The elimination of poverty;
2. The preservation of life, health, and safety;
3. The protection of those whose economic power is not sufficient to protect themselves;
4. The preservation of economic freedom.

These standards are also generally acceptable. In their application to specific economic situations, however, they receive many qualifications.

The objective of economic freedom is perhaps most subject to debate. Economic freedom in itself is basic to our way of life; but when economic interests conflict, the freedom to pursue one economic interest may not be consistent with the freedom to pursue another economic interest. In the field of labor law, the incompatibility of possible freedoms has become fairly obvious.

In early labor law cases the courts spoke of the correlative and equal rights of employers and employees and claimed to protect the freedoms of both equally.¹⁷ They balanced the freedom to hire and fire with the freedom to accept work or reject it; the freedom of access to a labor market with the freedom to seek work anywhere; the freedom of setting conditions of employment with the freedom of stipulating terms of work. Both employer and workers were said to be equally free to contract at will; and any interference with the exercise of that freedom was considered unlawful. In time it became apparent that all economic freedoms were limited by economic circumstances; and employer and employee were not equal in the exercise of their theoretical freedoms.¹⁸ The freedom

¹⁷ "In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." *Adair v. United States*, 208 U.S. 161, 175 (1908) (holding a federal law against yellow dog contracts unconstitutional).

¹⁸ In *Holden v. Hardy*, 169 U.S. 366, 397 (1898), it was said:
the proprietors of these establishments and their operatives do not stand upon an equality, and . . . their interests are, to a certain extent, conflicting. The former naturally

of the child to contract for hazardous work was absurd. The freedom of the employer to blacklist union members and the freedom to hire industrial spies and armed guards were incompatible with the freedom of the employee to seek work or to ask for improvement in his conditions of employment.

The moral standard of economic freedom is sound, but not absolute. It may be well to require a justification for each limitation of freedom; but it must be recognized that some limitation of freedom is implicit in every economic situation and the unrestrained exercise of freedom may be socially harmful. The important question has become not whether economic freedom is impaired, but how much economic freedom may be preserved without the sacrifice of other economic and social ends.

That process of reasoning, the weighing of pros and cons, the balancing of social interest, is the way in which all standards must be applied. There is no automatic nexus between goals and their attainment. Standards are tools that can be used skillfully or ineptly. To insure their optimum use in the evaluation of labor law, there are several helpful attitudes or methods of approach. These are (1) an historical perspective, (2) a problem-solution viewpoint and (3) a sophistication toward old argument.

AN HISTORICAL PERSPECTIVE

When viewed against a background of history the significance of a labor law becomes more apparent. At the time of its initial proposal, a statute is commonly associated with extraneous factors, such as immediate crises, sensational revelations, pride of sponsorship, and fear of the unknown. These distort the law's real character out of true proportion. In time the picture is corrected. Alleged facts are proved or disproved. Anticipations are confirmed or discredited. Unsound provisions are frequently amended or interpreted to produce better results. History is curative. It seems prudent, therefore, in evaluating labor laws to stand back and view them in historical perspective.

The development of labor law in the United States has been recorded in scholarly works.¹⁹ For our purpose it may suffice to point up a few

desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations . . . detrimental to . . . health . . . In such cases self-interest is often an unsafe guide . . .

In *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921), Chief Justice Taft wrote that "a single employee was helpless in dealing with an employer. . . . Union was essential to give laborers opportunity to deal on equality with their employer."

¹⁹ Commons & Andrews, *Principles of Labor Legislation* (1936); Millis & Brown, *From the Wagner Act to Taft-Hartley* (1950); Millis & Montgomery, *The Economics of Labor* (1945). The United States Department of Labor, Bureau of Labor Statistics and the Bureau of Labor Standards of the United States Department of Labor have published annually, and for special subjects at greater intervals, accounts of all labor legislation.

general observations and to illustrate the historical perspective in a sampling of recent legislative proposals.

Generally, labor law in the United States has reflected the state of our economy and its current problems. As we struggled to get more and more out of our physical and human resources, we made constant adjustments in our laws. We rarely stood still. Certain problems were recurrent, but our laws responded to them in ever changing context. To the extent that we have overcome problems such as poverty, excessive hours, occupational hazards, child labor, and the risks of old age, our remedial efforts have been facilitated by labor laws.

In our colonial period we were primarily concerned with a scarcity of labor, and we sought solutions in slavery and indentured servants. These required special laws. Trade-minded colonies with mercantilistic policies experimented with statutory wage fixing. Our population spread, took on new forms of trade and agriculture, and as we modified our colonial economy, we changed our labor laws.

In the period between the Revolutionary and Civil Wars, we increased commerce and started manufacture. Emergent unionization brought a clash between free competition and organized economic activity. The criminal conspiracy doctrine outlawed union activity, but later gave way to a popular insistence upon the lawfulness of self-betterment through peaceful means. Then followed a long series of empirical laws and court decisions as to what constitutes self-betterment and lawful means.

The Civil War culminated in the greatest labor upheaval of our history. The bulk of our agricultural working population and a substantial portion of our urban laborers were catapulted from slavery to freedom. Constitutional amendments were found necessary for this revolutionary transformation; and the legal repercussions are still in motion.

The industrialization of our country following the Civil War brought many new labor problems. Factory production posed questions of safety and health. The great influx of immigrant labor raised issues of wage collection and low wages. Woman and child labor were accentuated. The establishment of unions on a national footing presented a multitude of problems ranging from the rights of a single blacklisted employee to the overall restraint of trade in interstate strikes. Labor legislation and judicial doctrines were designed to cope with each of these many problems.

Each major economic development—the closing of our frontiers, the concentration of industrial ownership, the ups and downs of the business cycle, war, and peacetime readjustments, the expansion or contraction of foreign trade, the cold war with Russia, foreign aid programs, automation—each has had its impact upon labor law. Old labor problems have

taken on new forms; and old labor laws have been re-evaluated. Sometimes laws have been altered to meet new contingencies; sometimes the old law has been found sufficient and left untouched.

Certain trends can be noted as bench marks of progress. (1) We started our industrial era with labor laws designed to protect the weak worker. These were laws on safety and health, child labor, woman labor, hours, wage payment and collection. (2) We then enacted a series of labor laws designed to advance good labor standards. These were laws on minimum wages, maximum hours, workmen's compensation. We did this first on a state level and then on a federal level. (3) We later adopted laws designed to assure economic security. These were laws on employment exchanges, unemployment compensation, old age pensions, full employment, and equal employment opportunity. All of these trends and objectives have withstood the challenge of partisan debate and court contest.²⁰ They have survived changes in political administration. They have won the approval of historical experience. The only issues that seriously remain with these laws are how much further should they be extended or how can their administration be improved.

In the area of union organization and labor disputes, we have also charted trends, but not with the same historical consensus.

The law pertaining to labor disputes has been in a continuous state of flux. We have always sought industrial peace; but at the same time we have desired to preserve the right to strike. In our early history we raised one legal hurdle after another against strikes, picketing, and boycotts. The restrictive legal doctrines of criminal conspiracy, malice, interference with contract, and restraint of trade, each reigned for a while only to be dethroned by new court decisions or new legislation. New doctrines of lawful means and lawful purposes were subjected to unending interpretations—rarely consistent with each other. For a period, court injunctions against union activity, without a consideration of the merits of the dispute, became commonplace. Federal and state laws then curtailed the use of such injunctions. From time to time states passed laws against picketing and boycotts; but in most instances these have been held unconstitutional. Mediation and arbitration statutes were enacted in every jurisdiction; still they have never been regarded as completely adequate. The Wagner Act and the contemporaneous United States Supreme Court decisions on picketing gave the militant activities of unions their maximum protection. Then the trend was reversed in the Taft-Hartley Act.

²⁰ It may be early to state that equal employment opportunity laws have withstood the challenge of partisan debate and court contest, but the Supreme Court has approved the basic principles involved and even if events now unforeseen should produce counterlegislation, it is not likely to do more than modify existing remedies. Substantively, laws against racial and ethnic discrimination are unmistakably in the mainstream of history.

Similar ambivalence has existed with the law on unionization and collective bargaining. We have practically always affirmed the right to organize; but we have vacillated between protecting collective bargaining and restricting it. After some legal quibbling we outlawed blacklisting and yellow dog contracts and treated unions as voluntary, benevolent societies. Collective bargaining was gradually given the status of a contractual relationship. Then the New Deal created an affirmative obligation to bargain collectively. It prohibited antiunion activities and gave unions representative of a majority of the employees exclusive bargaining rights. That was a high point of union protection. The Taft-Hartley Act stopped the trend and started a counter-march.

The Taft-Hartley Act gave positive protection to antiunion employees as well as pro-union employees. It placed an administrative agency and court injunctions behind this policy. It also outlawed forms of boycott and picketing that had theretofore been lawful. For the first time in American labor law history a major policy trend was broken and a counter-march begun. State restraints upon unions—employment peace laws and right-to-work laws—followed. The Labor Management Reporting and Disclosure Act coupled regulations designed to ensure honesty and democracy in unions with new restrictions upon organizational picketing and “hot cargo” agreements. Whether this counter-march will endure historically, it is too early to determine, for it has not yet weathered a fundamental change in economic climate, and it has only recently encountered a change in political administration policy.

This historical perspective does not supply answers to many detailed questions concerning the validity of labor laws; but it does enable one to evaluate labor law in terms of its consistency with custom, its relation to long run needs, and its soundness under the test of experience. For certain labor laws, those designed to protect the weak worker, those designed to advance basic labor standards, and those designed to assure economic security, the historical demonstration is quite decisive. For other laws, those pertaining to labor disputes, union organization, and collective bargaining, the historical trends are not certain or settled. Historical perspective illuminates facts essential to an evaluation of labor law.

A PROBLEM-SOLUTION VIEWPOINT

The evaluation of labor law may be improved further by a proper inquisitorial attitude. That consists of asking what problem the law is designed to meet and how well it may accomplish that end.

The problem-solution test goes to the essential core of a labor law. It assumes that law has a purpose and should be reasonably designed to

serve that purpose. It examines the need for action and defines the scope of the problem. Implicit in this is a determination as to whether the problem is worth the trouble and expense of treatment; or perhaps more accurately, just what is or is not important and what is or is not urgent. Once having found and defined a problem requiring attention, the test weighs the likelihood that the proposed law will solve that problem. This is a reasoning approach and as such it is apt to lead to sound evaluation.

Interrogation about a problem and its solution eliminates immaterial questions. Who is the proponent or opponent of the bill? Is he sincere? What are his motivations? Such matters may be material to political horsetrading but do not affect the value of a labor law.

This viewpoint also avoids irrelevant considerations. Is the law precedented or novel, progressive or conservative? Is it good for everyone? Does it treat employer and employee equally? Such questions usually have no reasonable bearing upon the proposal. The merit or lack of merit in a labor law rests upon other considerations.

The problem-solution viewpoint also discards mere name calling. Is the law American or Communist? Is it the social welfare state? Is it just the aberrant brain child of a do-gooder or a reactionary? Intelligent evaluation must rest on more than emotion.

The mental process employed in evaluating labor law can be kept on a rational plane through the problem-solution viewpoint. If a legal standard like the due process clause is being applied, questions about the problem and its solution go directly to the reasonableness of the government action. If an economic standard like optimum utility is being applied, questions about the problem and its solution point up the areas in which utility is to be sought. If a moral standard like the maximum development of individual capacities is being applied, the problem-solution questions pry out the individuals and their capacities that are involved. Whatever the standards on which an evaluation is to be made, the most pertinent facts will be elicited if the problem-solution approach is made.

THE SOPHISTICATED APPROACH

In the realm of labor law, it is extremely important to know what has been discovered by others. The subject is controversial. Relevant facts are numerous. Rationalization is easy. If we are to evaluate the law properly we should take advantage of the research and thoughtful analysis that have already been made. That is the essence of sophistication (which in the absence of omniscience serves very well).

The fund of available knowledge pertinent to labor law is much more

extensive than most persons think. There is practically no labor problem to which some serious study has not been given. This can be well illustrated with respect to recently enacted labor laws, the Labor-Management Reporting and Disclosure Act of 1959 and Title VII of the Civil Rights Act of 1964, as well as with a law scheduled for further debate, the extension of minimum wage regulations to agricultural labor.

The Labor Management Reporting and Disclosure Act of 1959 was designed to accomplish, among other ends, honesty in the handling of union funds and democracy in the conduct of union affairs. These objectives were not in dispute. Only the particular techniques and standards of regulation were debated. Thousands of pages of testimony were taken on the subject—most of it unsupported opinion. Under our representative form of government that is unavoidable and indeed proper. In sifting the material, however, a sophisticated attitude would ask what studies of union democracy and fiduciary responsibility have been made and how have similar problems been dealt with in our economy. Existing studies point up not only the absence of a vibrant democracy in many unions, but also some of the root difficulties—lack of personal communication within large groups, indifference bred by impersonal jobs, an unquestioning solidarity as protection against outside attack, inertia, and voter lethargy.²¹ These causal conditions have not been dealt with adequately by formal provisions in union constitutions. But can they be cured by legal rules of due process? Have the provisions of the Labor Management Reporting and Disclosure Act even been considered as dealing with such causes of union difficulty? With respect to fiduciary responsibility, there has been extensive experience with the safeguarding of money in banks, insurance companies, and business trusts and some study of the fiscal policies and practices of large unions. Whether the Labor Management Reporting and Disclosure Act is what Congress should have enacted can be answered best by a sophisticated analysis of the many facts that have been common knowledge among students of labor problems for years.

The equal employment opportunity section of the Civil Rights Act of 1964,²² presents many facets toward which a sophisticated viewpoint is essential. In the Congressional hearings on the measure, there was a

²¹ Leiserson, *American Trade Union Democracy* (1959); Lester, *As Unions Mature* (1958); Seidman, *Union Rights and Union Duties* (1943); Segal, "Some Efforts at Democratic Union Participation," 48 *Am. Econ. Rev. Papers & Proc.* 53 (1958); Seidman, "Some Requirements for Union Democracy," 48 *Am. Econ. Rev. Papers & Proc.* 35 (1958); Summers, "The Usefulness of Law in Achieving Union Democracy," 48 *Am. Econ. Rev. Papers & Proc.* 44 (1958); Taft, "Democracy in Trade Unions," 36 *Am. Econ. Rev. Papers & Proc.* 359 (1946); Taft, "Opposition to Union Officers in Elections," 58 *Q.J. Econ.* 246 (1944); Taft, "Understanding Union Administration," 24 *Harv. Bus. Rev.* 245 (1946); Wolfson, "Union Finances and Elections," 248 *Annals* 31 (1946).

²² 78 Stat. 253 (1964), 42 U.S.C. § 2000e (1964).

sharp contrast between the statements offering evidence of economic discrimination based on race and the unsupported pleas for self-determination in states that had no record of attention to the problem.²³ Reference to serious studies, however, was overshadowed by emotional, moral, and constitutional issues. Congressional debate reflected a great social cleavage. Both sides understood what they wanted and the time was not for objectivity.

In an effort to placate opposition or to attract doubtful votes, concessions were made. Instead of establishing an administrative agency with customary power to enforce cease and desist orders, enforcement was limited to conciliation and court action. Little public attention was given this avoidance of usual administrative procedures. In time, the act will need to be re-evaluated in the light of state as well as federal experiences with such procedures.

Another by-product of controversy was the extension of the law to sex discrimination. On the floor of the House, Congressman Howard W. Smith of Virginia, a man known for consistent opposition to social legislation, moved to add sex to race, color, religion and national origin.²⁴ Apparently intending to reduce the bill to an absurdity, he might have been voted down.²⁵ Instead, sex discrimination was recognized as an old problem (principally by the female representatives in the House), and it was caught up in the tide of civil rights. There now arise a multitude of perplexing policy questions. To what extent are state regulations, designed many years ago to protect women against hazards of night

²³ Compare testimony of Hon. W. Willard Wirtz, Secretary of Labor, with that of Hon. Albert Watson, U.S. Representative from South Carolina in Hearings Before Subcommittee 5 of the House Committee on the Judiciary on Miscellaneous Proposals Regarding Civil Rights, 88th Cong., 1st Sess., 1489-94, 1705-21 (1963). Pertinent economic data were incorporated into the Judiciary Committee report. H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. 26-30 (1963).

²⁴ For 46 years, the National Women's Party and a long list of conservative women's organizations, sought the amendment of the Constitution to prohibit the denial or abridgment of equality of rights on account of sex. Senator Hayden repeatedly blocked adoption by an exception for laws enacted to protect women. The National Consumers League, the League of Women Voters, and other liberal groups campaigned instead for protective legislation, from safety laws in the first decade of the century to the equal pay law of 1963. The Supreme Court accepted the biological disabilities of women as well as their economic weaknesses as a basis for the reasonable exercise of state police power. Circumstances have changed. Women now perform functions traditionally considered beyond their ability. The roles of the family and women in society have been altered. A sophisticated approach to present laws calls for the same kind of reliance upon factual research as was demonstrated in the Brandeis briefs in the early cases.

²⁵ In introducing his amendment, Congressman Smith said "I do not think it can do any harm to this legislation; maybe it can do some good." He went on to read a letter from a woman asking him to correct the imbalance between married males and females and to protect the spinster in her right to a nice husband and family. 110 Cong. Rec. 2577 (1964). Congressman Celler, the floor leader on the civil rights debate, sought to void the amendment by indicating that a Presidential Commission on Women had suggested separate legislative treatment, and he asked the members of the House to "wait until mature studies have been made" of the subject, to no avail. *Id.* at 2578.

work and weight-lifting, now hobbling their economic opportunity? Does the law protect men against preferential treatment accorded some women? Without the guidance of a Congressional committee report or a clear showing of legislative intent, it will be necessary to evaluate the letter of the law through a sophisticated analysis of industrial practices.²⁶

The current session of Congress, and possibly others to follow, will consider the enactment of a minimum wage law for agricultural workers on large corporate farms. Many of the arguments advanced time and time again in minimum wage hearings of the past will be repeated. A sophisticated attitude toward those arguments will take advantage of the large number of studies made on the effects of past minimum wage laws.²⁷ Those studies show that minimum wage laws have not driven the marginal producer out of existence, have not made the minimum the maximum, have not supplanted women and children with men, and have not resulted in corresponding price increases or substantial price increases. They show that minimum wage laws have often forced marginal producers to increase their efficiency and that minimum wage laws have generally eliminated unconscionably low wages. Those studies will not deter partisans from reiterating contentions that should have been laid to rest by the accumulated research. But persons seeking to evaluate the proposed law on the basis of generally acceptable standards will find their task considerably lightened by a sophistication that embraces existing research on the subject.²⁸

SUMMARY

Our inquiry into standards for evaluating labor law has scanned the skies, and sought to chart a few lode stars.

In the realm of legal principle, we have noted that the constitutional

²⁶ The Guidelines on Discrimination Because of Sex issued by the Equal Employment Opportunity Commission, 30 Fed. Reg. 14926 (1965), announces that the Women's Bureau of the Department of Labor is to report on the relevance of the law to current technology and women's increasingly important role in society.

²⁷ U.S. Dep't of Labor, Report of the Secretary of Labor to Congress Under Section 4(d) of the Fair Labor Standards Act (1963); U.S. Bureau of Labor Statistics, Dep't of Labor, Effect of the Minimum Wage Repeals, 116-17, 124, 126-27, 129-30, 132, 136, 176 (1955-57), summarized in Schaffer, "Effects of the \$1.00 Minimum Wage in Six Areas, 1956-59," 83 Monthly Labor Rev. 472 (U.S. Bureau of Labor Statistics, Dep't of Labor 1960); Douty, "Some Effect of the \$1.00 Minimum Wage in the United States," 27 *Economica* 137 (1960); Tolles, "Purposes and Results of United States Minimum Wage Laws," 83 Monthly Labor Rev. 238 (U.S. Bureau of Labor Statistics, Dep't of Labor 1960). Peterson, "Employment Effects of State Minimum Wages for Women," 12 *Ind. & Lab. Rel. Rev.* 406 (1959), attempts to demonstrate that earlier reports minimizing the effect of such laws on employment are not conclusive.

²⁸ A very fine study of data pertinent to minimum wage law for agricultural workers has been published recently. Kantor, Cronemeyer & Hauser, *Problems Involved in Applying a Federal Minimum Wage to Agricultural Workers* (U.S. Dep't of Labor 1960). The executive departments of the federal government usually have available or are able to make available to Congress similar research on all major pieces of labor legislation.

standards of due process, equal protection and federal-state separation help to decontaminate man-made laws, but do not provide them with a spirit of vitality. Legal expertness does offer techniques for drafting laws that can function well. Writers on jurisprudence have suggested helpful approaches to good law.

In the area of economic thought, additional standards are available. *Laissez-faire*, though inconsistent with nearly all regulation, has been modified to permit "reasonable" economic restraint; utility theories stress the psychological aspects of evaluation; social welfare theories emphasize the moral aspects; and institutional theories offer pragmatic studies of economic situations. Each contributes a little and leaves a little undetermined.

The galaxy of moral values presents some planetary and some satellite standards. Whether we accept as our ultimate goal the good life or the highest development of individual capacities or one of many other moral ends, we have a sound starting point for evaluation. Men generally will accept the same premise and will proceed from there to any conclusion that can be demonstrated to flow logically therefrom. Without such a basic point of agreement, most argument is futile. The process of logic may be shortened by adopting an acceptable intermediate moral end like the elimination of poverty or the preservation of economic freedom. Such standards usually require more qualification. Moral values, nevertheless, are essential pole stars, fixed points of departure and return. In the evaluation of labor law they are the only reliable standards for ultimate conclusions.

These various standards can be used well or poorly, and to assure their optimum utilization in the evaluation of labor law, it is highly desirable to assume (1) an historical perspective, (2) a problem-solution viewpoint, and (3) a sophistication toward old argument. The historical perspective removes from needless cavil the basic laws on safety, wages, hours, child labor, social security, and full employment, and it brings the benefit of experience to evaluations of legislation on union organization and labor disputes. The problem-solution viewpoint directs and confines attention to specific needs and weighs alternative proposals in a reasoning process. Sophistication in argument takes advantage of prior research and avoids much of the disingenuous repetition of old canards.

These proposals may lack the certainty of scientific propositions or popular dogma. They are not simple or self-executing. Yet they offer a sound and effective basis for the evaluation of labor legislation.