Michigan Law Review

Volume 82 | Issue 4

1984

Values and Assumptions in American Labor Law

Michigan Law Review

VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW. By *James B. Atleson*. Amherst, Mass.: University of Massachusetts Press. 1983. Pp. x, 240. Cloth, $25; paper $12.

Supreme Court interpretation of the National Labor Relations Act (NLRA) has resulted in a morass of seemingly contradictory doctrines and decisions. According to James Atleson,[1] the Court's decisions appear inconsistent or even irrational because commentators wrongly analyze them under the notion that judicial decisions are based on consideration of the rational implications of statutory policy. Atleson claims that labor law doctrine can best be explained by the presence of underlying "assumptions and values about the economic system and the prerogatives of capital, and corollary assumptions about the rights and obligations of employees . . ." (p. 10), all of which consistently influence judicial decisionmaking.

Values and Assumptions in American Labor Law fits neatly into the four elements of the Conference on Critical Legal Studies as defined by David Kairys in *The Politics of Law: A Progressive Critique*.[2] The first element is a rejection of the idealized model that a distinctly legal mode of reasoning characterizes the legal process. Social and political judgments, rather than legal analysis, guide legal choices. Second, the "Critical Legal School" stresses democracy and an accompanying shift away from private rights, most notably in the corporate economic sphere. Third, the view of the law as neutral and value free is rejected as a myth. Finally, the law is seen as a legitimating tool for society's dominant value system. Atleson's book may be the most thorough treatment of labor law by a proponent of the "critical labor jurisprudence,"[3] but his conclusions flow naturally from the principles enunciated by Kairys.

The crux of Atleson's work appears in his Introduction, where he seeks to articulate the five unstated assumptions that underlie labor law doctrine. First, legal decisionmaking is guided by the need to maintain continuity of production (p. 7). Second, courts assume that employees will behave irresponsibly unless controlled (p. 7). Third, courts view the workers as a relatively minor part of a business and as people who owe a certain degree of loyalty to their employers (pp.

1. Professor Atleson is currently a professor of law at the State University of New York, Buffalo.

2. Kairys, *Introduction*, in THE POLITICS OF LAW 3-6 (D. Kairys ed. 1982) (reviewed in this issue). For the view that Kairys' formulation oversimplifies a heterogeneous movement, see Levinson, Book Review, 96 HARV. L. REV. 1466 (1983) (reviewing THE POLITICS OF LAW, *supra*). *See also* Klare, Colloquium Response, 11 N.Y.U. REV. L. & SOC. CHANGE 118, 120 (1983) (identifying Atleson as one of the writers in the developing "critical labor jurisprudence" while commenting on Atleson, *Management Prerogatives, Plant Closings and the NLRA*, 11 N.Y.U. REV. L. & SOC. CHANGE 83 (1983)).

3. For a list of other critical labor writings, see Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 450 n.1 (1981).

8-9). Fourth, the business enterprise is seen as the property of management and thus as something that should be under exclusive management control (p. 8). Finally, courts implicitly recognize an employer's right to manage, which takes precedence over industrial democracy (p. 8). The Court has adhered to these assumptions despite the 1935 passage of the NLRA, which in Atleson's view was intended to work a radical shift away from the pre-eminence of capital and toward industrial democracy.

The remainder of *Values and Assumptions in American Labor Law* applies the theory enunciated in the introduction. Atleson ambitiously takes on a broad spectrum of labor-management issues in an attempt to demonstrate that the five assumptions permeate the entire field of labor law. The book's brevity prevents the author from dealing in depth with any of the numerous issues that he raises, but considerable time is devoted to certain cases that Atleson cites as egregious examples of judicial modification of the values underlying the NLRA. The most important of these are the decisions in *NLRB v. Mackay Radio & Telegraph Co.*[4] and *Textile Workers Union v. Darlington Manufacturing*[5] Because these decisions are weak in terms of statutory support, Atleson can rely on them to show an absence of legal reasoning. These two cases, along with approximately a dozen others that are examined at length, support the theory that Atleson has developed.

They do not, however, constitute a sufficiently extensive cross-section of labor law to support the conclusion that most major decisions are aberrations from the usual process of legal reasoning (p. 170). For example, a notable exclusion from Atleson's discussion is the "Steelworker's Trilogy."[6] This trio of cases established the national policy in favor of arbitration, thus demonstrating the Court's willingness to defer to the bargaining process instead of intervening. If the courts have traditionally protected the preeminence of capital, the abandonment of this function to allow arbitration can be viewed as an important shift: Rather than preserve "management prerogatives," the Court made them subject to arbitration.

Atleson's thesis that judicial decisions constitute the "construing and constructing of status or contractual relationships" (p. 171), at the expense of the NLRA's alteration of these relationships, turns on the notion that the NLRA marked a radical change from pre-1935

4. 304 U.S. 333 (1938) (providing that an employer, while not able to discharge striking employees, can hire permanent replacements). In Atleson's view, this case circumvented the right to strike guaranteed by § 7 of the NLRA.

5. 380 U.S. 263 (1965) (demonstrating the preeminence of capital by allowing an owner to close his plant for anti-union reasons as a prerogative of capital).

6. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

labor law. While the NLRA was certainly a watershed, it is not clear that the Act was designed to alter extensively pre-1935 notions about the preeminence of capital. To show that the NLRA was intended to work a fundamental change in the labor-management balance of power, Atleson points to the broad language of sections 7 and 8(a) of the Act. Specifically, Atleson notes that the Act does not mandate that the relative interests and power of labor and management be balanced, although the courts have undertaken to do so (p. 24). This point is true but does not necessarily support Atleson's assertion that the NLRA was intended to alter *fundamentally* the relative strength of labor and management. Congress' concern for limiting the relative power of labor unions can be viewed as support for judicial balancing of interests and a mandate for some protection of managerial prerogatives. A further weakness in Atleson's argument is the lack of any systematic discussion of the Taft-Hartley amendments to the NLRA. In reading Atleson's analysis, one cannot help but feel that his major concern is not that courts are being guided by values and assumptions but that the values and assumptions being used are not his.

Despite these shortcomings, *Values and Assumptions in American Labor Law* is a well-written and interesting work. Atleson's analysis, particularly with respect to the cases he has selected, is valid. However, the book's contribution to legal scholarship is limited. First, it is not surprising that courts reflect the values of a society that has traditionally stressed the preeminence of capital. Nor is it terribly surprising that court interpretations of the NLRA have not shifted these values radically in favor of industrial democracy, particularly when it is not clear that the Act was intended to accomplish such a result. The primary value of Atleson's work lies in its unmasking of the "myth of legal reasoning." In this sense, *Values and Assumptions in American Labor Law* is a detailed extension of the work of the Conference on Critical Legal Studies.

Second, like many critical legal scholars, Atleson fails to provide an alternative to existing implicit values.

> Radicals too often think that once they have exposed the politics underlying the existing order, they have accomplished worthwhile analysis. Perceptive analysis is important, but stating the truth is not always profound. . . . Of greater interest, though, would be a discussion of how political struggle might be better conducted and result in better ends than a satisfaction of private *property*.[7]

Values and Assumptions in American Labor Law is a well-written application of critical legal jurisprudence to labor law. Unfortu-

7. Bachmann & Weltchek, Book Review, 30 UCLA L. REV. 1078, 1091 (1983) (reviewing THE POLITICS OF LAW, *supra* note 2). For similar arguments, see Levinson, *supra* note 2.

nately, Atleson's work offers little more than application; the book contributes no new theories, frameworks, or solutions that cannot be derived from previous critical legal work.