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Legal Rights and Interests in the Workplace

Clyde W. Summers
Jefferson B. Fordham
Professor of Law, Emeritus
University of Pennsylvania

Kenneth G. Dau-Schmidt
Willard and Margaret Carr
Professor of Labor and Employment Law
Indiana University-Bloomington

Alan Hyde
Professor of Law
and Sidney Reitman Scholar
Rutgers University-Newark

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Dedication

For Evelyn, who shares in my triumphs by right and my travails by grace.

C.W.S.

I dedicate this book to my parents, Barbara Bloom and Glenn Dau-Schmidt. Mom once borrowed $100 so we could have Christmas, even though she didn't know how she'd pay it back. In the course of raising three kids, she managed to get her PhD and became a Professor at the University of Saskatchewan. Watching her struggle, I learned that education was the key to success and that becoming a professor was the greatest accomplishment in the world. My Dad taught me that hard work was its own reward; your food tastes better, your bed feels better and you enjoy a deep sense of accomplishment as you fall asleep at night. Dad has retired three times and I'm not sure it's taken yet. Nevertheless Dad found the time to build a treehouse with me and my kids when I turned forty. Even though Mom and Dad were divorced when I was eight, my siblings and I have always felt well cared for and loved, and every sacrifice was made for our success.

K.D.S

For Ellen, Toby, and Laura, making the world more just and life more sweet.

A.H.
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Foreword

It was Clyde Summers' idea to organize a course on labor and employment law around the core values of that law. This has not been the only visionary idea in Clyde's extraordinary career. The values around which these materials are organized are so simple that they tend to disappear in less skillful treatments of the subject: contract, dignity, freedom of speech and association, participation, fairness, equality, and bodily integrity. In these materials, by contrast, they are always in the foreground. Their various meanings are each examined in the contexts of different statutes, lines of case law, and arbitrators' decisions, normally kept apart in separate law school courses. And of course, given such detailed examination, these simple concepts are not so simple at all. We will be left wondering why the dignity of the public employee is analyzed so differently from that of the employee in the private sector, why the arbitrator's concept of loyalty is so different from the judge's, when equality dissolves into a search for someone else's bad motive, how the body floats in and out of our legal consciousness.

Clyde laid out this vision over twenty years ago in What We Should Teach in Labor Law: The Need for Change and a Suggested Direction, in The Park City Papers: Papers Presented at the Labor Law Group Conference on Labor and Employment Law in Park City, Utah, June 29–July 1, 1984. He correctly predicted the declining role of collective bargaining, and the rise of courses on the disparate law regulating nonunion employment, lacking any "central core or integrating principle" and running "the risk of being a grab bag of miscellaneous problems which gain no coherence or illumination from each other." He continued: "For me, there is a broad theme of great appeal—the role of the law in aiding the weaker party." This value potentially lies in every case in this book (or any other casebook in labor or employment law). Sometimes it dominates. More often, perhaps, it yields to other values. Understanding these patterns provides coherence to what students often experience as trees without a forest. Only a year or so before these remarks, Clyde had (with one of us) published a new edition of his traditional casebook on Labor Law. Yet he had already grown restless with that approach, and set out to do something different.

Characteristically, Clyde spent two decades pursuing this goal, never distracted by academic fads. New casebooks have appeared for a course either in labor or employment law, or an à la carte sampling of the two. At least one is organized around the theme of law's search for economic efficiency. None adopts Clyde's organization, examining the fundamental values that cut across all these areas. A generation of law students has graduated with ever-increasing facility in sophisticated discussion of legal process or economic analysis—themes, by the way, that get a great deal of attention in these materials, too. Yet we have noticed no simultaneous improvement in their ability to discuss values. Law students today instead are often tongue-tied when asked to discuss values. So we think these materials are more timely than ever.
Clyde refined his materials in his combined course in labor and employment law at the University of Pennsylvania Law School, which he taught long after his nominal retirement from that institution. As he did, he examined and reexamined entire bodies of law to which he could claim parentage. Only due to Clyde’s research in the 1940s and 1950s did we know about the role of the law in guaranteeing union members the right to participate in their institutions. Only due to Clyde’s advocacy in the 1950s do we have a federal statute incorporating those principles. As this book shows, Clyde’s goal was never to celebrate these achievements, but constantly to probe their successes—and failures—to help us realize that same value of participation, in new venues, such as employee participation in management. Clyde’s path-breaking Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va.L.Rev. 481 (1976), helped spark one of the most extraordinary revolutions in the history of the common law, reviewed in Chapter II, in which court after court found ways in which discharged employees might challenge their dismissals. The courts responded to no organized movement for legal change, no coordinated litigation, no pressure groups. They bowed to the power of an idea, and that idea, in large measure, was Clyde’s.

Around 2002, Clyde asked the two of us to help him ready his materials for publication. We anticipated working with Clyde to add newer readings from our own areas of research, and also anticipated the intellectual treat of working with Clyde. We did not anticipate that Clyde’s health would not permit him to participate in the project. The values around which the book is organized are Clyde’s, and so are the legal topics used to illustrate them, but he is not responsible for the final form of some of the cases selected and edited, or the notes and questions.

We acknowledge with gratitude the research assistance of Julie Jones of the Cornell Law Library, Timothy A. Haley of Indiana University-Bloomington and Ryan H. Vann of Indiana University-Bloomington. We also are thankful for the skilled secretarial assistance of Silvana Burgese of the University of Pennsylvania and Teresa Barnett of Indiana University-Bloomington.

K.D.S.
A.H.
February, 2006
The purpose of this book is to provide teaching materials for a course merging two areas of law governing the labor market—collective labor law and individual employment law—which have historically been taught as separate courses. Indeed, “Labor Law,” particularly as taught in law schools for the last fifty years, has dealt entirely with collective labor law, the law governing union-employer relations and collective bargaining. Only in the last fifteen years has any substantial attention been given to individual employment law. This has been prompted by the fact that the proportion of the private workforce covered by collective agreements dropped from 40% in 1955 to 9% in 2004. Individual employment law has now become as important, if not more important, than collective labor law.

These two bodies of law are two different methods of regulating and structuring the labor market. They may operate separately or in tandem in performing this function, but they both play important roles. These materials represent an effort to interrelate or tie together these two bodies of law into a common framework.

The broad premise of this course is that historically and functionally the predominant purpose of labor law has been to protect workers from market forces in the individual labor market. The articulate assumption is that individual bargaining in the labor market will lead to socially undesirable results and that the law here, as in many other areas, should come to the aid of the weaker party. It may do this in two ways: first, employees may be protected by direct regulation of terms and conditions of employment with laws such as minimum wage laws, health and safety laws and prohibitions against discrimination; second, employees may obtain a measure of protection by restructuring the labor market so as to replace individual bargaining with collective bargaining in the belief that the collective labor market will produce more acceptable social results.

If the function of labor law is to protect the interests of workers, then a central question must be “What interests of workers should the law seek to protect?” Government intervention in the market has political, social and economic costs, so the law should intervene to protect only those interests which have significant social values. This then leads to the question which is the focus of this course—“What are the social and economic values which the law seeks to protect and to what extent are those values protected?” Along with this inquiry as to what interests the law does protect, must be consideration of what interests the law should protect.

The structure of the materials is to consider the various social and economic values in separate chapters, examining those values in both individual employment law and collective labor law. Thus, Chapter II examines the role of freedom of contract, in both areas of the law; Chapter IV examines the role of freedom of speech and association; Chapter V focuses on the social value of worker participation in decisions affecting their
working life. Other chapters deal with the social values of privatization of industrial government; the right to fair and equal treatment; the right to safety and health in the workplace; and the right to dignity.

In all of these, the inquiry is the role of the law and collective bargaining in protecting and promoting these values in the workplace; what the law and collective bargaining does and what it should do. The study focuses largely on the protection law and collective bargaining provides the various interests of workers, but we will at the same time consider the interests of employers, and the impact of regulation on the productivity and profitability of the enterprise. The study must constantly be measuring, implicitly or explicitly, the political and social values of the free market, how well it functions, and the costs, in political as well as economic terms of legal intervention. This is the central focus of Chapter II, Freedom of Contract and Its Limits, for freedom of contract is the lawyer's formulation of freedom of market forces. In collective bargaining relations freedom of contract carries the flag of “management prerogatives.” In the individual labor market, it carries the assertion of the employers’ property rights.

The materials are designed to examine the substantive law in both individual and collective labor law, and to open for criticism and evaluation important cases and writings in the field. It provides an overview of the major legal rules and doctrines as developed by the courts and legislatures and examines the practical effectiveness of the legal remedies. The purpose, however, is to examine the substantive legal rules and remedies in the broader context of the values involved. The purpose is to go beyond Justice Holmes’ pedestrian definition of the law:

“The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by law.” Path of the Law (1887)

We may aspire to reach toward Holmes’ more noble vision:

“The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master of your calling but connect your subject to the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of universal law.” Path of the Law (1887)

C.W.S.