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James B. Atleson and the World of Labor Law Scholarship

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On September 19, 2008, the University at Buffalo Law School in conjunction with the Baldy Center for Law and Social Policy presented a symposium to mark the twenty-fifth anniversary of the publication of James B. Atleson's *Values and Assumptions in American Labor Law*.[1] The twenty-fifth anniversary retrospective brought together a variety of scholars and practitioners in the field to discuss the book and its impact. The symposium sessions were divided into four panels, entitled Praxis, Ideology, History, and Transnational Norms, and the participants included current and former members of the National Labor Relations Board, labor lawyers, legal historians, labor historians, and labor law professors from the United States and Canada. Some of the papers and comments for the symposium are presented here in the pages of the Buffalo Law Review. But before the articles begin, we would like to provide a brief overview of the book, its origins, and impact.

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We are grateful for the excellent research assistance provided by David Shaffer, UB Law School class of 2007. We are also appreciative of the support in planning and administering the Symposium provided by Lynn Mather, former Director of the Baldy Center for Law and Social Policy, and her staff, particularly Ellen Kausner and Anne Gaulin.

1. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983). Jim has taught at the University at Buffalo Law School since 1964 and is currently a SUNY Distinguished Teaching Professor, Emeritus.

For a number of years the Law School's Alumni Association has been conducting a series of faculty oral history interviews, and in October 2007 it reached Jim in the queue. In the interview, Jim explains the genesis of his book:

> *Atleson:* It slowly became clear to me that labor was seen as a discrete area in the law, and whether employees were government employees or private sector employees, their rights were treated differently, whether we were talking about constitutional law, statutory law, or common law. . . . [I]f the legal question involved an employment relationship, a separate set of rules often applied . . . .
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> . . . Plus, it was very hard to understand the Supreme Court cases or the other court cases I had to deal with in Labor Law. They just didn't make sense. They were not consistent with the language of the [National Labor Relations] Act, the policies and goals of the Act, and the legislative history . . . . [T]here was some other game going on. Now, I . . . wasn't sure what it was, and I mentioned in the book[2] that there was this moment in class where a student said, "Well, you keep talking about the policies of the act. You can see what the language of the act is, but how then can you explain the outcome of this case?" Reed Cosper was his name. It was in the '60s—a long time ago, and I started to say, "Well . . . " I started giving him . . . the standard argument that . . . rights—statutory rights, constitutional rights—aren't necessarily restricted and [they're] balanced by other policies and so on. I started giving him the standard response about how you explain these cases and then suddenly I said, "You know, this doesn't make any sense." I don't know if I actually said that in class, but I said it to myself at least.
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> . . . [S]omehow I realized that the important part of each case was not the holding or the court's view of the facts, but usually a sentence that began, "Of course, blah, blah, blah."[3] And, I kept looking for those sentences because once you got the "of course," you knew where the court was going and that was a sign to me that there was a set of values that courts applied, although some tendencies could still be explained by class bias. I tried to discover

2. *Id.* at 1.

3. *Id.* at 10. Jim Pope wrote, "To paraphrase a veteran labor scholar, if you want to know where the corpses are buried in labor law, look for the 'of course' statements in court opinions." James Gray Pope, *How American Workers Lost Their Right to Strike, and Other Tales,* 103 MICH. L. REV. 518, 518 n.1 (2004) (citing ATLESON, *supra* note 1, at 24).

> the pictures [the judges] had about work.
>
> And, so I finally worked out four or five values that I thought helped explain the cases.[4] I mean, there [is] . . . political give-and-take in cases at the Supreme Court, so you can never intellectually come up with a scheme . . . to explain all of the cases. It simply doesn't work that way. But, I was looking for a way to make sense of the cases and then be able to say to lawyers and my students that if you want to be a lawyer, you have to understand what these values are. You can't simply talk about the formal rules of law. You may lose because you are not talking about what the underlying questions or values are.[5]

Four aspects of Jim's approach to the book emerge from this portion of the oral history interview.[6] First, Jim credits the origins of the book to what went on in the classroom, demonstrating his sense of fidelity to his students to help them make sense of their intellectual experience. He approached the problems that puzzled him first and foremost as a teacher, and it is that exercise of explaining matters to his students that informed his scholarship. Second, he believes that learning or grasping "the underlying questions," as he put it, whether they can be found in sociology, anthropology, economics, history, or political science, or wherever—the "values and assumptions"—is a special skill set, just as important a skill as legal analysis or reasoning, or mastering doctrine, or drafting, planning, or negotiating—that in reality, truly effective advocacy in whatever form is absolutely dependent on framing and understanding those attitudes first. Third, Jim is possessed of a kind of intense skepticism. He does not accept the conventional wisdom or the accepted canon in the field, or anywhere for that matter. Even in the most casual conversation, Jim always wants to know "why," and he conveys this to his students as well. Think on your own; you might be surprised at what you learn. And, finally, there is that unmistakable passion for social justice. There

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4. *See* ATLESON, *supra* note 1, at 7-9.

5. Interview by Alfred S. Konefsky with James B. Atleson, SUNY Distinguished Teaching Professor, Emeritus, University at Buffalo Law School, State University of New York, in Amherst, N.Y. (Oct. 22, 2007), at 32-35 [hereinafter Atleson Interview] (transcript on file with authors).

6. We will leave more substantive responses to the book to the contributors of the articles in this symposium.

are winners and losers, people take advantage of one another, and we have a democratic promise, including equality, about which Jim gets really annoyed when he senses that it is being violated. Jim wants to know how people can continue to get away with these violations and what we can do to correct these injustices.

Values and Assumptions was a clarion call for the rejection of traditional labor law scholarship, which Jim described as "overwhelmingly doctrinal, or rule oriented and analytical" and developed "within the context of a received wisdom."[7] Jim asserted that many labor law decisions, however, seemed incoherent,[8] "odd, irrational, or at least inconsistent with the received wisdom."[9] And so he set out to provide a method of interpretation for labor law cases, which he described in the book:

> The basic theme of the book, then, is that assumptions and values about the economic system and the prerogatives of capital, and corollary assumptions about the rights and obligations of employees, underlie many labor law decisions. Moreover, these assumptions permeate modern decision making just as they did prior to the passage of the Wagner Act. The presence of such values and assumptions, often only implicit or hinted at, helps explain many decisions . . . .[10]

In other words, the older common law attitudes about the employment relationship had survived to be applied anew in the brave new statutory world of New Deal and post-New Deal labor law. Old ideas die hard. But if one looked carefully enough, one could find those old values and assumptions alive and well, if not always explicitly stated. Jim identified five core values that were transported from the old regime to the new:

> (1) Continuity of production must be maintained, limited only when statutory language clearly protects employee interference.
> (2) Employees, unless controlled, will act irresponsibly.
> (3) Employees possess only limited status in the workplace and,

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7. ATLESON, *supra* note 1, at 1.

8. *See* James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 BUFF. L. REV. 435, 439 (1997).

9. ATLESON, *supra* note 1, at 10.

10. *Id.*

correspondingly, they owe a substantial measure of respect and deference to their employers.
(4) The enterprise is under management's control, and great stress is placed upon the employer's property rights in directing the workplace.
(5) Despite the participatory goals of the NLRA [National Labor Relations Act], employees cannot be full partners in the enterprise because such an arrangement would interfere with inherent and exclusive managerial rights.[11]

By dissecting some of the foundational cases of modern labor law—like *Mackay*,[12] *Fansteel*,[13] *Darlington Mills*,[14] *Jefferson Standard*,[15] and so on—Jim demonstrated how the courts applied these core values with a vengeance. Jim was not exactly suggesting that a bait-and-switch had occurred, but that, at the very least, a certain degree of unexamined complacency or satisfaction with the status quo was concealed behind a mask. This was not a pluralist, liberal, libertarian, or a progressive labor law, but perhaps a more radical account of the "received wisdom."[16] It highlighted a clash of cultural values, and it seemed to be rooted in differing perceptions of the impact or legitimacy of social class or class structure.

The first wave of reactions to *Values and Assumptions*

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11. Atleson, *supra* note 8, at 439-40 (summarizing the five core "values and assumptions" described in the book, ATLESON, *supra* note 1, at 7-9).

12. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

13. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

14. Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).

15. NLRB v. Local 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464 (1953).

16. For descriptions of the historical unfolding of various approaches to labor law scholarship, see Andrew Wender Cohen, *Business Myths, Lawyerly Strategies, and Social Context: Ernst on Labor Law History*, 23 LAW & SOC. INQUIRY 165, 169-70 (1998) (reviewing DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995)), and Daniel R. Ernst, *Picking Up the Pieces*, 23 REVS. AM. HIST. 502, 503 (1995) (reviewing MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA (1994)) (describing "the legal revisionists"). *See also* Daniel R. Ernst, *Taking Stock: New Views of American Labor Law Between the World Wars*, 23 SEATTLE U. L. REV. 481, 482 (2000) [hereinafter Ernst, *Taking Stock*] ("By 1980, . . . a major interpretive change was underway, as radical legal scholars and historians commenced an attack on the New Deal collective bargaining regime from the left.").

appeared in book reviews published between 1983 and 1986. There were fourteen all told, and some were in major law reviews like Stanford,[17] Texas,[18] Columbia,[19] and Michigan.[20] The reviews were mostly favorable. Some called it "rich, original, [and] provocative,"[21] "a significant milestone in the evolution of our thinking about law and the work relation,"[22] "thought-provoking,"[23] or a "thoughtful historical critical analysis [which] is undeniably fine labor law scholarship."[24] Others were less generous, finding that the book's arguments were "seriously undermined by [Atleson's] attempts to read his own views into the NLRA, legal precedents, and historical developments"[25] or that it was "polemical."[26]

All the reviews seemed to recognize that the book was a challenge to traditional readings of the contemporary labor law canon. Some found it invigorating; some found it threatening. Virtually everyone thought the work was identified with a new type of scholarly approach described more or less as "critical labor law jurisprudence."[27] The scholarship operated

> [b]y exposing the underlying belief system of the legal decisions in labor law, . . . demonstrat[ing] that the commonly accepted rules of

17. Staughton Lynd, *Ideology and Labor Law*, 36 STAN. L. REV. 1273 (1984) (book review).

18. David L. Gregory, *Labor Law and the Myth of a Value-Free Legal Doctrine*, 62 TEX. L. REV. 389 (1983) (book review).

19. David M. Rabban, *Radical Assumptions About American Labor Law*, 84 COLUM. L. REV. 1118 (1984) (book review).

20. Book Note, *Atleson: Values and Assumptions in American Labor Law*, 82 MICH. L. REV. 843 (1984).

21. Lynd, *supra* note 17, at 1273.

22. Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833, 857 (1983) (book review).

23. Douglas E. Ray, *Values and Assumptions in American Labor Law*, 6 INDUS. REL. L.J. 381, 385 (1984) (book review).

24. Gregory, *supra* note 18, at 402.

25. Rabban, *supra* note 19, at 1120.

26. Nick Salvatore, *Values and Assumptions in American Labor Law*, 4 LAW & HIST. REV. 484, 484 (1986) (book review).

27. Gary Minda, *Decoding Labor Law*, 52 GEO. WASH. L. REV. 474, 485 (1984) (book review).

> labor law are responsible for creating a legal consciousness that denies and betrays values and assumptions which are at the heart of the American labor movement and which were responsible for the enactment of the Wagner Act . . . .[28]

Atleson had engaged in "decoding the cluster of beliefs embedded within doctrine."[29] The "full-blown Atleson thesis" is that "Supreme Court and NLRB decisions interpreting the NLRA cannot be understood except by supposing that the decisionmakers used the same common law notions about management, property, and the like, that the NLRA is generally thought to have superseded."[30] Whatever it was, it displayed the heart of the Critical Legal Studies methodology, whatever that was.[31] The book had arrived at the height of the Critical Legal Studies movement and controversies,[32] and became an unwitting

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28. *Id.*

29. *Id.*

30. Lynd, *supra* note 17, at 1276.

31. For the book reviewers who identified Atleson's book with the Critical Legal Studies (CLS) movement, see Paul N. Cox, *On Debunking Labor Law Doctrine: A Review of James Atleson's* Values and Assumptions in American Labor Law, 1985 UTAH L. REV. 101, 102 (book review); Gregory, *supra* note 18, at 389, 399; Rabban, *supra* note 19, at 1120; and Book Note, *supra* note 20, at 845. In introducing a bibliography of CLS scholarship, two founders of the CLS movement wrote:

> We have made no attempt to define what CLS is. The CLS movement has been generally concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society. CLS scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect any agreed upon set of political tenets or methodological approaches.

Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461, 461 (1984). Several of Atleson's scholarly publications through 1983, including *Values and Assumptions*, are included in this bibliography of CLS works. *See id.* at 465.

32. *See generally* ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986). As Tomlins and King have noted:

> The Critical Legal Studies movement began in the mid-1970s among a group of young law school scholars who had become disenchanted with mainstream legal thought. Using techniques borrowed from neo-Marxist thought and from contemporary developments in literary and social theory, these scholars have developed a methodology of critiquing contemporary jurisprudence.

Christopher L. Tomlins & Andrew J. King, *Introduction* to LABOR LAW IN

warrior in the legal culture wars.[33]

In the years following the publication of *Values and Assumptions*, a broader audience of labor scholars began to take note of the book. In 1990, for example, one wrote, "Atleson's work remains the best single exploration of the importance of dominant social values in the interpretation and evolution of U.S. labor law."[34] In some quarters, however, citation counts are a measure of a scholar's impact on a field, and by this metric, Jim's book has had a significant and sustained impact on labor law scholarship. In 2007, a search in several electronic databases for citations to his book indicated that he had been cited in over two hundred law review articles, book reviews, review essays, and student notes and comments.[35] A similar search in 2008 of the Westlaw database of legal journals produced

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AMERICA: HISTORICAL AND CRITICAL ESSAYS 17 n.12 (Christopher L. Tomlins & Andrew J. King eds., 1992).

33. The publication of Atleson's book also coincided with the first stirrings of a modern scholarship on the history of labor law. *See* Tomlins & King, *supra* note 32, at 3 ("Monographic literature has begun to appear and is destined to grow rapidly."); *see also id.* at 18 n.17 (citing recent work in the labor law history field, including Atleson's book). According to Tomlins and King, the rise of a new history of labor law was influenced by

> first, the renewal in the 1980s of interest in institutions on the part of historians reacting to the limitations of a purely sociocultural approach to labor history; second, the critiques of determinism, functionalism, and positivism in the social sciences and the accompanying rediscovery of ideology, discourse, and hermeneutics; and third, in the law schools, the crucial stimulus given legal history and the critical investigation of legal phenomena by the Critical Legal Studies movement.

Id. at 3 (footnotes omitted).

34. Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 4 n.9; *see also* Michael H. Gottesman, *Whither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2767 n.3 (1991) (reviewing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990)) (including Atleson's book in a listing of "books and articles [that] are some among the many that are important in the field").

35. A Lexis search of law journals in January 2007 produced 189 citations. When this data was added to the results of searches of J-STOR and Hein Online, the total was over 200 citations or reviews of the book since its publication in 1983. Summarizing the 189 citations found in the January 2007 Lexis search by five-year increments, produces the following data: 1983-1888: 38 citations; 1989-1994: 64 citations; 1995-2000: 51 citations; 2001-2007: 36 citations (on file with authors).

over two hundred and fifty entries.[36] Nine law journal articles cite *Values and Assumptions* in the first footnote; twenty-seven cite the book in the first five footnotes; and in more than one-third of the law journals that cite his book, the citation appears in the first twenty footnotes.[37] Citations to the book appeared—and continue to appear—in a wide spectrum of law journals, wherever labor scholars publish, from law reviews at small private law schools and land grant universities, to major law reviews at elite private and public law schools,[38] and to specialty journals like the *Berkeley Journal of Employment and Labor Law*[39] and the *Michigan Journal of Law Reform*, as well as in books on labor law and labor history.[40]

Who cited Jim's book, however, is far more revealing than where or how often it was cited. The book was cited by scholars writing in labor law, labor history, legal history, labor economics, comparative labor law, and discrimination law. He influenced the writing and thinking of labor practitioners[41] and at least one federal judge.[42] After *Values*

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36. The 2008 Westlaw query—"Atleson /3 Values"—in the database "TP-ALL" produced 255 results; a search for "Atleson /2 Values" in the Westlaw "JLR" database of legal journals on January 22, 2009, produced a listing of nearly 250 citations to the book (on file with authors).

37. Based on the 2007 Lexis search of legal journals, between 1983 and 2007, Atleson's book was also cited forty-three times within the first ten footnotes, fifty-five times within the first fifteen footnotes, and sixty-six times within the first twenty footnotes (on file with authors).

38. For example, the law reviews represented include the major law reviews at Harvard, Yale, Columbia, Stanford, Georgetown, Michigan, Texas, and Virginia, among others.

39. Between 1986 and 2005, Atleson's book was cited over twenty times in the *Berkeley Journal of Employment and Labor Law* (including its predecessor in name, the *Industrial Relations Law Journal*).

40. Readily accessible citation counts in electronic databases of course do not include citations that appear in books. Citations to Atleson's book in monographs are too numerous to compile, but see, for example, ELLEN DANNIN, TAKING BACK THE WORKERS' LAW 173 n.27 (2006); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 165 n.158 (Harvard Univ. Press 1991) (1989); and ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 200 n.1, 243 n.31 (1991).

41. *See, e.g.*, Virginia A. Seitz, *The Value of* Values and Assumptions *to a Practicing Lawyer*, 57 BUFF. L. REV. 687 (2009).

42. *See* Harry T. Edwards, The Kenneth M. Piper Lecture, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception*

and Assumptions appeared, it seemed that no one could ever again write about *Mackay,* in particular, as well as many of the other major cases he analyzed in the book, without acknowledging the significance of his work.[43]

Scholars of all persuasions immediately grasped the book's import,[44] and the race was on to characterize or pigeonhole its true place in labor law scholarship. Jim was variously labeled as a Critical Legal Studies scholar,[45] a

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and the Duty to Bargain, 64 CHI.-KENT L. REV. 3, 5 n.9 (1988).

43. For *Mackay*, see, for example, William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" Than the Workplace Fairness Act*, 72 N.C. L. REV. 813, 838 (1994); Ross E. Davies, *Strike Season: Protecting Labor-Management Conflict in the Age of Terror*, 93 GEO. L.J. 1783, 1827 n.221 (2005); Seth D. Harris, *Coase's Paradox and the Inefficiency of Permanent Strike Replacements*, 80 WASH. U. L.Q. 1185, 1196 n.46 (2002); Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 HOFSTRA LAB. L.J. 97, 119-20 (1993); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 388 & n.120 (1984); Charles E. Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 OHIO ST. L.J. 639, 644 & n.45, 649 & n.80, 651 & nn.94, 96 (1985); Deborah C. Malamud, *Of Voice, Charisma, and the Bottom Line*, 88 GEO. L.J. 691, 709-10, 710 n.102 (2000) (reviewing JULIUS GETMAN, THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS, AND PERMANENT REPLACEMENTS (1998)). For *Fansteel*, see, for example, Craig Becker, *"Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 365 n.60 (1994); Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 311 n.36 (1994). For *Darlington Mills*, see, for example, Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 937 nn.51 & 53 (1993); Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1724 n.124 (2004). For *Jefferson Standard*, see, for example, Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 930 n.40, 963 n.178 (1992); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 404 n.255 (1995).

44. For example, in 1984, both Alan Hyde on the left and Charles Fried on the right cited the book. *See* Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1012 n.1 (1984); Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 829 n.124 (1984).

45. *See, e.g*, Cohen, *supra* note 16, at 169 n.1; Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 528 n.74 (1987); Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245, 255; Gregory, *supra* note 18, at 389, 399; Minda, *supra* note 27, at 485-86; Rabban, *supra* note 19, at 1120; Theodore J. St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TUL. L.

leftist,[46] a Marxist,[47] a radical,[48] a democratic socialist,[49] and a legal realist.[50] Moreover, scholars that identified themselves with the Critical Legal Studies movement cited his book and claimed him as one of their own.[51] His work was often cited alongside two influential Critical Legal Studies scholars of labor law, Karl Klare and Katherine Van Wezel Stone,[52] who began publishing in the field shortly before the appearance of Jim's book.[53] For better or worse, the three were often linked together as the critical labor law triumvirate.

Jim's oral history interview offers some revealing and instructive insights about his reaction to the attempt to

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REV. 1301, 1319 & n.81 (1984); Book Note, *supra* note 20, at 845.

46. *See, e.g.*, Fried, *supra* note 44, at 1012; Gregory, *supra* note 18, at 400-01; David L. Gregory, Book Review, 53 GEO. WASH. L. REV. 680, 684 n.20, 688 & n.46, 689 n.55 (1985).

47. *See, e.g.*, Gregory, *supra* note 18, at 401.

48. *See, e.g.*, Ernst, *Taking Stock*, *supra* note 16, at 482; Fried, *supra* note 44, at 1012; Gregory, *supra* note 46, at 684 n.20.

49. *See, e.g.*, Rabban, *supra* note 19, at 1121.

50. *See, e.g.*, Keith N. Hylton, *A Theory of Minimum Contract Terms, With Implications for Labor Law*, 74 TEX. L. REV. 1741, 1757 & n.63 (1996).

51. *See, e.g.*, Kennedy & Klare, *supra* note 31, at 461, 465; Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 735 & nn.13-14 (1985); Katherine Van Wezel Stone, *Re-Envisioning Labor Law: A Response to Professor Finkin*, 45 MD. L. REV. 978, 979 n.8 (1986).

52. *See, e.g.*, MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA 241 n.17, 270 n.45, 274 n.8 (1994); CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 208 n.24 (2003); JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962, at 238 n.10 (2004); ANTHONY WOODIWISS, RIGHTS V. CONSPIRACY: A SOCIOLOGICAL ESSAY ON THE HISTORY OF LABOUR LAW IN THE UNITED STATES 5 (1990); Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y J. 789, 797 n.37 (2002); Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 102 n.8 (1998); Tomlins & King, *supra* note 32, at 17 n.12; Craig Becker, *Individual Rights and Collective Action: The Legal History of Trade Unions in America*, 100 HARV. L. REV. 672, 673 (1987) (reviewing CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS LAW AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985)); Cohen, *supra* note 16, at 181-83.

53. *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

brand him:

> *Konefsky:* [L]et me ask you a question about your reaction to the reaction to the book. I remember there were a couple of times you said to me out of frustration, "Well, they think this book is emblematic of Critical Legal Studies." You said, "I wrote this book way before Critical Legal Studies was even born."
>
> *Atleson:* Yes. There was often a footnote referring to publications by Critical Legal Studies people—Karl Klare, Katherine Stone, and James Atleson. And I would say, "No. This isn't Critical Legal Studies." I mean, Critical Legal Studies helped in lots of ways, but I kind of knew where I was going before there ever was a CLS. I wasn't perturbed to be a member of that great group, but historically it was wrong. But, that was very common to see this as some kind of radical book,[54] which I never thought it really was. I think there were a number of people who missed what the book was about. It was actually a critique of legal writing.[55]

Authors are not necessarily the most perceptive critics of where their contributions might stand in the literature of a field, particularly an emerging field. But Jim is adamant that he was not a "crit." Though it is certainly possible that one can write unselfconsciously either in anticipation of, or participation in, a movement, even if it is as amorphous or broadly defined as Critical Legal Studies, Jim chafes at the charge of radicalism. He may be right. The book appears in some ways derived from Beardian Progressivism[56] or progressive historiography. The ideology that Jim uses to frame the legal cases in *Values and Assumptions* emerges from competing views about material interests and economic conflict in the marketplace. He asserted: "In the world of labor relations, power and economic realities are often as, or even more, relevant and informative than legal rules."[57] In Jim's view, the invisible hand seems to be social

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54. Ironically, in 1998, after citing works by several critical labor law scholars, including Atleson's book, Alan Hyde commented, "It is amazing that this work was ever seen as radical." Hyde, *supra* note 52, at 102 n.8. This just goes to show that you can't please everyone all the time.

55. Atleson Interview, *supra* note 5, at 39-40.

56. *See generally* RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON (1968). In this regard, the methodology of Atleson's book is reminiscent of MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

57. ATLESON, *supra* note 1, at 31.

class. He was writing about legal doctrine and ideology as episodes in the history of ideas, but the ideas were clearly tied to and grew out of underlying social and economic attitudes. And, characteristically for Jim, he wanted his students to understand the backdrop of those values and assumptions because he had a very practical reason—it would make them more successful practicing lawyers, make them understand better the world they were about to enter, and perhaps, therefore, have an impact on the larger world of labor law. In the end, his most striking contribution to his students and to the labor law world was insisting that the available and acceptable ideas in the field were broader than usually constructed, and that, in the end, wherever they came from, ideas mattered. Theory informed practice. We believe that this symposium demonstrates that a quarter century later, Jim's book still makes people think.