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New Frontiers in Empirical Labour Law Research, Edited by Amy Ludlow and Alysia Blackham

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BOOK REVIEW

New Frontiers in Empirical Labour Law Research, edited by Amy Ludlow and Alysia Blackham (Bloomsbury Publishing, 2015, 203 pp).

reviewed by Matthew Dimick†

I. INTRODUCTION

It is possible to be misled by the title of this slim, edited volume of essays called *New Frontiers in Empirical Labour Law Research*.[1] With the rise of "big data" and the rapid coming-to-prominence of quantitative empirical methods in the social sciences, where new methods for drawing causal inferences seemingly proliferate daily, one can be forgiven for assuming that such a volume would feature plentiful applications of state-of-the-art methods employed in labor law research. Alas, this assumption is mistaken, but the realization of that error is, while somewhat deflating, also remarkably refreshing—again, because of the scholarly background against which this book appears. This review of the book will explain why.

Rather than a book about *new frontiers of empirical methods in labor law research*, this edited volume may more accurately be described as *new frontiers of labor law research in empirical methods*. For example, there is not a single regression analysis in the entire book. Upon reflection, this fact reminds us of some hard truths about the place of legal scholarship in the academy more generally and of the place of labor law scholarship within both legal scholarship and the academy more specifically. Speaking as a scholar in the United States, it is clear that within some areas of research (e.g., corporate law) and some subdisciplines (e.g., law and economics), what might be described as quantitative empirical research has become *de rigueur*. But research fashions are not wholly positive. For instance, much quantitative empirical research is often, sadly, a method in search of a research question, when it should be precisely the opposite.

One collateral casualty of this trend is that theory and theory development often take a back seat in quantitative empirical research. Even within quantitative empirical research, the "gold standard" is rapidly

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1. NEW FRONTIERS IN EMPIRICAL LABOUR LAW RESEARCH (Amy Ludlow & Alysia Blackham, eds., 2015) [hereinafter NEW FRONTIERS].

becoming microbehavioral and experimentalist (including not only "laboratory" settings, but also field experiments and natural experiments), while the adequacy—even credibility—of macrocomparative research is increasingly being called into question.[2] This is a challenge in particular for labor law research, since so much interesting variation occurs among countries. For example, at least two of the chapters in this book deal with what may be broadly categorized as labor union "recognition procedures."[3] Cross-national quantitative methods can be employed to study how different recognition procedures impact variables of interest (e.g., union density). But if countries are no longer reliable units of analysis, this would appear to foreclose an obvious and interesting way of testing expectations about different recognition procedures.

If the standards of quantitative empirical research are so constraining, does that mean that there is no room for labor law research in empirical methods? That depends on the definition of "empirical."

II. WHAT IS EMPIRICAL (LABOR LAW) RESEARCH?

What is empirical research? Consistent with my unreflective priors, one could adopt a narrow definition, which the editors describe "as that which 'uses statistical techniques and analyses.'" [4] In contrast, an intermediate definition might be "learning about the world using quantitative data or qualitative information." [5] Yet another, broader definition is: "the systematic collection of information . . . and its analysis according to some generally accepted method."[6] But as the editors Ludlow and Blackham observe, the broad definition would include traditional legal doctrinal research and, as other researchers have argued, "purely normative or theoretical legal research is not empirical."[7] Rather, as Ludlow and Blackham explain, "legal doctrinal research may be analogous to a social science literature review that typically *precedes* empirical work." [8] Comparing doctrinal research to a lit review might be harsh words for doctrinal scholars. But the intention is to distinguish doctrinal from empirical research and show how they can inform one another.

2. *See, e.g.*, Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131 (2015) (discussing at length the obstacles to drawing causal inferences from comparative data).

3. Sonia McKay & Sian Moore, *Collective Labour Law Explored, in* NEW FRONTIERS IN EMPIRICAL LABOUR LAW RESEARCH 107-20 (Amy Ludlow & Alysia Blackham, eds., 2015); and Tish Gibbons, *No Longer a 'Secondary Force ... in Labour Relations': A Mixed Methods Study of the Effect on Irish Trade Unions of the Industrial Relations (Amendment) Act 2001, in* NEW FRONTIERS IN EMPIRICAL LABOUR LAW RESEARCH 121-36 (Amy Ludlow & Alysia Blackham, eds., 2015).

4. NEW FRONTIERS, *supra* note 1, at 3.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Accordingly, Ludlow and Blackham "explicitly exclude doctrinal research from our definition of empirical labour law scholarship."[9]

Does this mean that the editors embrace the intermediate definition? Not necessarily. "Empirical labour law research is, in our view," Ludlow and Blackham write, "best viewed as a subset of socio-legal enquiry. Socio-legal research examines law in its social context, often by utilising perspectives and research techniques from the social sciences."[10] They continue: "While the field of socio-legal research is easily able to accommodate empirical research methods, socio-legal enquiry is not necessarily empirical."[11]

This is an interesting and enriching way to define and approach empirical research. For, by defining empirical labor law research as a subset of socio-legal inquiry, they are placing the method in service of a larger project. As already stated, the research question should guide the method, not the other way around. A definition of empirical research that emphasizes its connection to a larger project helps to keep this proper ordering in mind. As long as that relationship is adhered to, empirical research is more likely to work in the service of labor law reform—in short, to actually having a meaningful impact on those whose lives and livelihoods are governed by labor law.

III. EMPIRICAL RESEARCH AND LABOR LAW

Even that definition of empirical legal (and labor law) research does not quite capture the breadth of the way the contributors to this volume engage with its subject. Bob Hepple writes a forward for the book entitled "Evidence and Ideology," which examines the role of evidence in policy-making. A premise of much empirical work in law, of course, is that policy should be "evidence based," founded on the naïve belief that policymakers are convinced by and actually make policy based on empirical research, even if it contradicts their ideological convictions. Although Hepple does not reject outright the project of empirical labor law research, the skepticism is palpable. He discusses two different relationships between evidence and ideology: "The first is where the objective evidence does not exist but ideology is more or less exclusively relied upon as the basis for supporting or opposing legislation. The second is where empirical evidence clashes directly with the ideology behind the policy or legislation."[12]

As examples of the first, the Conservative Industrial Relations Act of 1971 "opened the Pandora's box of individual rights and state control of

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 9.

trade unions which, despite the repeal of the Act in 1974, are now dominant features of British labour law."[13] This momentous piece of legislation, however, was based, at best, on "anecdotal evidence from cases of abuses of the closed shop and restrictive working practices. . . ."[14] Or, consider the Blair Government's Employment Act 2002, which claimed to be "evidence-based," but in practice was "heavily biased by a philosophy of labour law that concentrates upon the competitiveness of the employer and not the welfare of the human being at work."[15]

The second situation is illustrated when government is funding research. The pitfall here is that the government can deny funding, or require excessive access and confidentiality requirements. One specific example in the United Kingdom "is the suspension of the Social Science Research Council's (SSRC) Monitoring of Labour Legislation."[16]

These legitimate concerns about the conflict between evidence and ideology are enough to cause one to give up on empirical research altogether. From a more optimistic perspective, Zoe Adams and Simon Deakin write later in their chapter: "In order to be influential in policy-making, the analysis of labour law needs to engage with the empirical claims made by this new orthodoxy. . . . Work that is not empirically grounded runs the risk of being written off as 'pure theory.'"[17] They acknowledge that the limitations of empirical methodology cannot be ignored, but also claim that steps can be taken to mitigate them. Empirical research, they say, has proved to be far more influential at the policy level than complex legal argument.

In light of these experiences, Hepple offers some caution to empirical researchers: "research into labour law can be very politically sensitive"[18]; "at all times preserve the distinction between valid polemic and valid research"[19]; labor legislation can only be understood in the wider context of social control and the ideologues of the parties involved in its construction and implementation; the time-scale of monitoring legislation has to be long enough; and, finally, it is fruitless to measure the impact of legislation in terms of success or failure.[20]

Lizzie Barmes, in her chapter on "Individual Rights at Work, Methodological Experimentation and the Nature of Law" analyzed authoritative, precedential court decisions and interviews with senior lawyers and senior managers to investigate—and confirm—a basic

13. *Id.* at 11.
14. *Id.*
15. *Id.* at 12.
16. *Id.* at 14.
17. *Id.* at 33.
18. *Id.* at 15.
19. *Id.*
20. *Id.*

proposition in critical socio-legal studies, namely that while laws that seek to ensure equality and fairness at the workplace "have emancipatory effects, they also, to a greater or lesser degree, legitimate the basic power structures on which society is built."[21]

Adams and Deakin's chapter, "Quantitative Labour Law," is primarily an introduction, explanation, and justification for the Labour Regulation Index (CBR-LRI), a longitudinal, cross-national dataset of labor regulations produced by the Centre for Business Research at University of Cambridge. The CBR-LRI is, in many ways, a response to preexisting labor law indices—the influential but flawed Organization for Economic Cooperation and Development's (OECD) index of employment protection laws and World Bank's *Doing Business Report* (DBR) indicators.[22] Adams and Deakin are skeptical of these indices because they appear to be premised on problematic assumptions. For instance, the DBR data "build on the claim that complex and costly legal regulation limiting property rights constitute obstacles to economic development."[23] The methods used to collect DBR data have been subjected to a number of criticisms.[24]

Adams and Deakin hope these problems are avoided with the CBR-LRI index. For the CBR-LRI index, data is developed using "leximetric" coding methods: (1) the law is endogenous, so an index should be longitudinal rather than cross-sectional; (2) legal rules are mutable, so binary coding is inappropriate; (3) there is a gap between law on the books and law in action, so enforcement becomes a critical variable to "add into the analysis."[25] Adams and Deakin discuss some of the quantitative analysis that has been conducted with the CBR-LRI, but the range of possible questions that can be explored with it remains wide open. Quantitative researchers, you are on notice.

Chapter 5 of the book, "Women in Labour Law: The Use and Implications of Empirical Methods," is written by Lydia Hayes and Roseanne Russell. The chapter discusses how women have been variously included and represented in academic work published in the UK's *Industrial Law Journal* from 1972-2013. They conclude: "Our analysis of 40 years of labour law scholarship in the *Industrial Law Journal* show that through their participation and engagement as research subjects, women are very much part of the labour law scholarship story in the UK."

In the next chapter, "Can Behavioral Psychology Inform Labour Law?", Ewan McGaughey contends that "the evidence proves beyond

21. *Id.* at 19.
22. *Id.* at 33-36.
23. *Id.* at 34.
24. *See id.* at 34 n. 10 and sources cited therein; see also generally Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?*, 41 L. & SOC'Y REV. 865 (2007).
25. NEW FRONTIERS, *supra* note 1, at 41.

reasonable doubt that the classic goals of labour law—to counteract inequality of bargaining power, improve security, and embed worker participation in economic institutions—do promote productivity and growth."[26] However, the authors of the studies McGaughey mentions would probably be surprised that such a definitive conclusion can be drawn from their work. For instance, McGaughey refers to an experiment that found that wage reductions precipitated a fall in labor productivity and that wage cuts for some workers (but not others) reduced productivity even more. McGaughey cites this study as conclusive justification that legal interventions in the labor market can not only remedy inequalities in bargaining power but also can enhance productive efficiency as well.[27] But the opponents that he contends with, Richard Posner and Oliver Williamson, have a ready-made answer. Since employers want to maximize profits and understand that wages affect productivity, they will choose a wage that *maximizes* productivity. Any other wage—a government-mandated minimum wage set above this productivity-maximizing wage—will *not increase* productivity. In other words, the cited study only shows that wages have productivity effects, not that a regulatory intervention into the labor market will increase productivity. This omission highlights another hazard of empirical labor law research: drawing unwarranted conclusions from the empirical results. In my experience, the policy conclusions one can draw from such studies are much more modest than initial impressions (and sometimes even the researchers' own statements) convey.

Amy Ludlow, one of the editors of the book, writes chapter 7, "Using Ethnographic Methods to Explore Labour Law Questions." This chapter is one of the more methodologically self-conscious of the book and links her chosen method (ethnography) with deeper questions about positivism, naturalism, and the philosophy of the social sciences. She makes the case for a natural affinity between ethnography and labor law research:

> My argument then is that in choosing qualitative methods, and particularly in choosing ethnographic methods, to explore labour law questions we are choosing a method that is rooted in a collective and relational ontology that seems to be well matched to some of the discipline's foundational presuppositions and orientations.[28]

I can only agree, but also point out the great potential for mixed-methods research. For instance, quantitative methods can identify correlations and causal relationships, while ethnography can identify "subjective meanings"[29] and the causal *mechanisms* at work.

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26. *Id.* at 76.
27. *Id.* at 82.
28. *Id.* at 100.
29. *Id.* at 95.

The chapter by Sonia McKay and Sian Moore is titled "Collective Labour Law Explored." They evaluate the statutory trade union recognition procedure that was promulgated by the Employment Relations Act 1999 in the United Kingdom. Despite the procedure's intention to provide unions with a statutory path to recognition in the face of declining union density, McKay and Moore show that an analysis of its "operation over 14 years finds no evidence that it has either reversed such decline or increased collective bargaining coverage."[30]

On a related topic, Tish Gibbons writes about Ireland's trade union dispute resolution procedure in "No Longer a 'Secondary Force ... in Labour Relations': A Mixed Methods Study of the Effect on Irish Trade Unions of the Industrial Relations (Amendment) Act 2001." The 2001 Act "provides that unions may refer the issues in dispute to the Labour Court, which will issue a Recommendation that ultimately may be enforced by Circuit Court order."[31] Earlier research found the legal provision to be "ineffective in providing for union recognition; modest in terms of usefulness in union organizing and 'moderately successful' in delivering pay increases and better terms and conditions of employment to workers involved in the claims."[32] Weakening these previous findings, Gibbons demonstrates that out of seventy-one workplaces barely a third record any actual union membership, activism is even lower, and substantive benefits to workers are not much in evidence.

The final three chapters of the book are each about linking empirical labor law research back with the development of doctrinal law. In "Using the Delphi Method to Advance Legal Reform: A New Method for Empirical Labour Law Research?", Alysia Blackham explores the use of this method for collaboratively devising solutions to challenging problems in labor law.[33] Blackham defines the Delphi method as "a structured group communication process that allows individuals to deal with complex problems as a group."[34] She employed this method to engage experts representing government, trade unions, employer groups, lobby groups, the judiciary, and academia in developing consultative and collaborative solutions regarding older workers and age discrimination law.

Abi Adams and Jeremias Prassl, in "Labour Legislation and Evidence-Based Public Policy: A Case Study," explore the "role of empirical (and to a lesser extent, legal) evidence in recent governmental labour market policy and legislation."[35] To do that, they present a case study of the way evidence

30. *Id.* at 107.
31. *Id.* at 121.
32. *Id.* at 136.
33. *Id.* at 139.
34. *Id.* at 140.
35. *Id.* at 162.

was used in the UK government's consultation document that was prepared for the possible regulation of "zero hours contracts" (work arrangements that provide no guarantee of work to employees, nor obligate the latter to accept any assignments when offered). Their conclusions about the use of empirical evidence in policy-making are not encouraging. They state, "On each level, empirical evidence was instrumental in producing an undeservedly benign impression concerning the operation of zero hours contracts in the UK labour market."[36]

Finally, in "Creating a 'Virtuous Circle' Between Legal Empirical Research, Knowledge Exchange and Impact," Simonetta Manfredi and Lucy Vickers endeavor to show "how it is possible to form a virtuous circle from doctrinal research influencing the development of empirical projects, feeding to knowledge exchange, and also into the development of legal thinking in the area of age discrimination and retirement policies. . . ."[37]

IV. CONCLUSION

New Frontiers in Empirical Labour Law Research does not break any new ground either in terms of methodology or theory. But it does possess a healthy attitude of reflectivity about the role of empirical methods and research within labor law—and this provides a set of guidelines that all legal scholars can learn from. To summarize some of the conclusions in these essays:

1. Empirical research should be part of a larger project exploring law in its social context. Theory and data should be complementary, rather than alternative, approaches.
2. Empirical research should not be conducted for its own sake, but with a view to legal reform and maximizing its public impact.
3. That said, heavy caution should be exercised when engaging in these efforts, given the roles of power and ideology. Awareness of these pitfalls of should at least influence, and perhaps further enhance, the empirical project.
4. Researchers (producers as well as consumers) also need to be careful about what implications are warranted when drawing conclusions from empirical research.
5. The kinds of questions that are being asked in labor law should influence the kinds of empirical methods and strategies that are chosen.

The essays in this book make these points in various ways. Legal researchers in all fields would do well to heed this advice.

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36. *Id.* at 162-63.
37. *Id.* at 195.