Transnationalizing the Values and Assumptions of American Labor Law

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Three interconnected themes or issues lie at the heart of the transnational labor law project at the present time. The first—waxing and waning but persisting—is the ambivalence toward collective action and democratic expression by workers on the part of global policy makers. The second is the connection between labor law and the economic well-being and empowerment of workers and, by extension, to broader social goals and political values. The third is the enduring importance of domestic labor laws and institutions, those of the United States in particular, in a transnationally integrated world.

Ambivalence toward the empowerment and mobilization of workers is an old theme in labor law, North American labor law in particular.[1] If there is anything new here, it is that it has now "gone global," something that has occurred as much by way of the efforts of international economic and financial institutions, think tanks, and technocrats to promote "deregulated" labor markets, as through traditional forms of resistance to workers' rights exercised by employers. This ambivalence, sometimes verging on hostility, finds powerful expression in contemporary ideas about labor law and labor market regulation in the international order. As labor market flexibility has become the dominant regulatory objective, resistance toward labor market institutions and enhanced workers' rights, except at the most formal and abstract level, has become an entrenched part of the landscape. Labor unions and activists, academics, and anyone else with a mind to improve labor standards find themselves doing battle

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1. Karl 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)

against the belief that labor markets organized around the protection of employer interests and entitlements are the route to economic growth and the maximization of welfare gains for all. Much like the world described in James Atleson's *Values and Assumptions in American Labor Law*, international norms are pervaded by assumptions about the primacy of property and contract rights in "rule of law" respecting societies. This remains the case despite the evidence that the connection between "deregulatory" labor market policies and better rates of economic growth is contingent at best. Nor do the Anglo-American labor markets that most closely track the flexibility ideal necessarily provide superior levels of employment, let alone better wages and working conditions, for their populations.[2] Thus, we have skepticism about the value of collective action by workers, and by extension workers' freedom of association and right to bargain collectively, even though elsewhere in the international order the robust protection of civil and political rights is taken as a marker of both democracy and the presence of a regulatory order that supports economic development.[3]

But rowing in the opposite direction is the second theme: the importance of labor law to economic well-being as well as to social justice and democracy. James Atleson, in *Values and Assumptions in American Labor Law,* and Lance Compa, in his reflections on the impact of *Values and Assumptions* on his life and work as a union organizer, both put the following interconnected propositions at the center of labor law; they remain as germane to labor law in the transnational context as they are in the domestic. These propositions are: fairness at work as a central element of democracy; workers' rights as human rights; and workers' collective action as critical to the advancement of human rights. While few labor scholars would disagree with these propositions, it is worth underscoring dimensions of them

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2. Stephane Carcillo & David Grubb, *From Inactivity to Work: The Role of Active Labour Market Policies* (Organization for Economic Cooperation and Development (OECD) Social, Employment and Migration Working Papers No. 36, 2006). For a discussion, see Kerry Rittich, *Global Labour Policy as Social Policy*, 14 CANADIAN LAB. AND EMP. L.J. 193 (2008).

3. Ibrahim F. I. Shihata, *Law, Development and the Role of the World Bank*, *in* COMPLEMENTARY REFORM: ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK (1997).

that are now underplayed if not ignored entirely in public debate. One is that, because of the empowerment of workers and the collective action that they support and help enable, workers' rights are critical to the returns that workers see from their labor; thus, they are one of the keys to distributive justice in a globalized world. A second is that fairness at work—understood both in terms of economic justice and in terms of enhanced voice and empowerment at work—is critical to any conception of democracy beyond the purely formal.

If it has not already done so, the unfolding financial crisis will soon provoke reflection on a nested set of work-related issues to which it is connected, as well as on the question, what difference might it have made if those issues had been seen as harbingers of the problems that are now so clearly in evidence? One of those harbingers is surely the incredible growth in economic inequality visible in many countries around the globe, a development especially pronounced in the United States. Before it came to an end, the most recent economic boom was characterized by a staggering concentration of gains for those at the top of the income scale, accompanied by faltering financial returns, declining income security, and deteriorating economic status for the remaining ninety percent of the population.[4] Much of this growth in economic inequality is attributable to the flat or declining wages experienced by so many workers, itself part of a broader shift in the distribution of income which saw a marked fall in the returns to work matched by increasing income generated by those with capital. For workers, this unhappy turn of events was aggravated by declining access to pensions and benefits such as health care, as well as rising worker productivity that sometimes masked a troubling growth in work intensity and that, in any event, was largely detached from economic gains for workers.[5] How the overall picture—one of increasing maldistribution of economic wealth—could be read as anything but a bad sign is, in retrospect,

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4. Thomas Piketty & Emmanuel Saez, *Income Inequality in the U.S.: 1913-1998*, 118 Q. J. OF ECON. 1 (2003); Jared Bernstein, Updated CBO Data Reveal Unprecedented Increase in Inequality (Economic Policy Institute Issue Brief #239, Dec. 13, 2007), *available at* http://www.epi.org/publications/entry/ib239/.

5. Steven Greenhouse & David Leonhardt, *Real Wages Fail to Match a Rise in Productivity*, N.Y. TIMES, Aug. 28, 2006.

mysterious. If nothing else, the increasing disconnect between incomes on the one hand and housing prices and other expenditures on the other may well have encouraged, if not compelled, the widespread resort to alternative sources of income—reliance on credit, withdrawal of home equity—that underpins the crisis as a whole. Whatever other factors and forces are at work, this degree of inequality is surely a sign of the inability of workers and unions to exercise effective political voices in policy and regulatory debates, as well as evidence of their declining ability to exert countervailing economic pressure at work.

During the symposium, Alfred Konefsky identified the significance of the small phrase "of course" in *Values and Assumptions in American Labor Law* in signalling the presence of governing assumptions about work; as it turns out, that phrase plays a similar role at the present time. Reflecting on the origins of the financial crisis, the *Times of London* tartly observed, "'[O]f course house prices could not forever outstrip the capacity of wage and salary earners to pay those prices."[6] How much is contained in that parenthetical comment. If only it were "of course!" For the labor movement, as well as the wider community, it is the very non-obviousness of the proposition, at least until now, that is the heart of the problem.

As the entrancement with unfettered markets wreaks havoc on Wall Street and beyond, it has become more difficult to maintain a celebratory attitude toward "unregulated" or "deregulated" markets. Yet the implications of these events for debates about workers' rights are yet to be determined. Will the promotion of labor market flexibility continue unabated? Will it even intensify, supported by the belief that firms and employers require yet more relief and room to maneuver in times of crisis? Or will we see renewed attention to questions of bargaining power and to the "externalities" or effects, both social and economic, of sub-standard labor contracts? If the latter concerns are part of the landscape in the future, perhaps we can look forward to a recalibrated attitude toward labor market regulation and greater receptivity to the positive, rather than simply the negative, possibilities of labor

6. *After the Lehman Brothers Disaster*, Op-Ed, TIMES OF LONDON, Sept. 16, 2008.

market institutions.[7] And if so, it may open new avenues for empowering workers both at the domestic level and across national boundaries, avenues that until now have seemed blocked.

The third proposition is one that links all of the papers on this panel; it is also something that is given one of its most complete illustrations in James Atleson's recent work on transnational union organizing. This is the continued salience of domestic law in a transnationally integrated economy. To those of us who spend time thinking and writing about the possibilities of international labor law[8], it is clear that what does, and does not, occur at the level of domestic regulation remains a crucial part of the equation of securing workers' rights at the transnational level. As Lord Wedderburn observed as early as 1973, it is not the ability to physically move across borders that necessarily matters most for workers in a world of transnational production; instead it is the ability to act, and to exert pressure, collectively across borders that is the critical issue. And as labor lawyers know, many of the current barriers to workers' collective action are not imposed by distances of space or time, nor are they simply a function of the organization of work in the new economy. Very often they are located in the labor laws of the states in which workers reside.

Lance Compa has described the incredible *tour d'horizon* of international labor instruments contained in Atleson's multi-faceted study of *The Voyage of the Neptune Jade* and the burgeoning and creative uses to which those instruments are now being put.[9] Yet the study of transnational union organizing also illustrates a central proposition about the role of domestic labor law in the

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7. For a defense of labor market institutions in the context of trade, see CHRISTIAN BARRY & SANJAY REDDY, INTERNATIONAL TRADE AND LABOR STANDARDS (2008).

8. James Atleson, Lance Compa, Kerry Rittich, Calvin Sharpe & Marley Weiss, INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY (2008).

9. James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law* 379, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002); James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004).

global economy: far from irrelevant in a globally interconnected world, domestic law *is* transnational law. Sometimes it is the most important part of transnational law if, for workers, law of a distinctly perverse type. In the United States, this is visible at the most basic level—facilitating or blocking workers' ability to associate. Despite what would seem to be a clear right to associate and bargain collectively under the National Labor Relations Act (NLRA), American workers continue to face formidable barriers to realizing that right in practice. The persistent failure to amend the NLRA to remedy the blockages that workers face in organizing has lead to a panoply of alternatives, from the privatization of the representation process, through voluntary recognition agreements, to the proposed *Employee Free Choice Act* that would enable card-check certification.[10]

But this is only the beginning of the story. One of the paradoxes of North American collective bargaining law is that it locks workers into firm-specific and place-based organizing at the very moment when corporations have undergone a process of vertical disintegration, morphing into networks of firms and contractors whose constituent parts change as frequently as do the workers that they employ.[11] The injustice of this law is that, under the imagined compulsion to contain anarchy and industrial strife—something that *Values and Assumptions in American Labor Law* probes so well—workers may be prevented from legally acting together outside their own workplaces to advance their interests. This remains the case even as firms and capital holders have benefited from myriad regulatory changes that grant them more unfettered range of motion both within and across states which, as we now know, may enable them to engage in ventures that produce anarchy of their own! For these reasons, addressing a range of barriers in domestic labor law—from the rules determining the structure of the bargaining unit to those governing secondary action—is a central element of rebuilding workers' power in a transnational world.

It has long been accepted that labor standards and good working conditions within states are also of interest outside

10. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007).

11. This process is described in MANUEL CASTELLS, 1 INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE (2d ed. 2000).

them.[12] The weakness or absence of labor standards in one location may exert downward pressure on labor standards elsewhere, and the havoc of substandard work and the excessive inequality and risk which so often accompany the disempowerment of workers can be economically and politically destabilizing beyond borders as well as within them. Because of the new avenues by which domestic labor law may have a transnational impact, it is only a small step to link the effort to remake domestic labor law for a transnational world to the issue of economic and social justice on a global scale. Moreover, there are reasons to think that the fate of U.S. labor law may be unusually important to workers, and to states, elsewhere.

In his discussion of continental integration in the wake of NAFTA and its effects on the corporate sector, workers, and the state of labor law in Canada, Harry Arthurs suggests that corporate behavior and corporate decision-making are inadequately accounted for by explanations that place the maximization of economic returns at the center of the calculus. Rather, we can observe the operation of a set of specific assumptions about the both firms and workers, as U.S. national culture, traditions, linkages, education, and legal norms about work all influence the decisions of corporate managers beyond U.S. borders.[13] The result is (sometimes) a tension between "delocalized" narratives about good labor market policy and practice and the situated judgments that corporate decision-makers might otherwise have made about the management of workplace relations. This tension is increasingly reconciled in Canada by the presence of chastened and disempowered national managers who are simultaneously absorbing and reflecting the current international consensus about good labor market governance—read "deregulated" and flexible—which, helpfully, is also the position of the head office in the United States. However, this displacement of Canadian management experience and intelligence about labor issues, especially when combined with the declining power and presence of unions, makes it progressively harder to either maintain old or institute new worker-friendly labor laws,

12. INTERNATIONAL LABOR ORGANIZATION CONST., pmbl., *available at* http://www.ilo.org/ilolex/english/constq.htm.

13. Harry Arthurs, *The Hollowing Out of Corporate Canada: Implications for Transnational Labor Law, Policy and Practice*, 57 BUFF. L. REV. 781 (2009).

however compelling the broader social and economic case for them might be. This creates a problem for Canadian workers and the communities in which they live. But the added irony is that, having gotten what they, or at least their U.S. superiors wanted—an erosion of collective bargaining and union power and presence, and the introduction of regulatory standards and business practices more like those that operate south of the border—not only Canadian but U.S. corporate elites are now at risk from the larger forces to which those changes are attached.

This brings us full circle. At the end of the day, the fate of labor law, workers, and corporations is inseparable from general questions of economic well-being and democracy. There is reason to be concerned about the concentration of corporate and financial power and the simultaneous "hollowing out," whether of corporate Canada or Buffalo, that results as well as the erosion of distinctive national and local labor laws and industrial relations practices that those processes so often set in motion. We are all situated somewhere on the corporate food chain, and it may well be impossible to contain the damaging and pernicious effects of these developments once they are unleashed.

Perhaps we can speculate about the revival or recreation of some type of social contract, one akin in aspiration if not form and scope to the post-war model under which, for the most part, corporations and workers in the industrialized world both thrived. One route, difficult to imagine even if it were desirable, involves pulling back from the project of continental and global economic integration. But another route, more likely and in my view more pertinent, may be a change in the norms that economic integration has so far and so effectively diffused. The bloom is now off the deregulatory rose; perhaps one consequence is that just such a regulatory reorientation has now become a little more likely.

Lance Compa observed the fusion of idealism with cold-eyed realism that is so characteristic of *Values and Assumptions in Labor Law*. It may be cold-eyed realism that is most relevant to debates about labor law and workers' rights today. If the financial crisis demonstrates anything, it is first, that we are in this together, nationally as well as internationally. Second, we ignore questions of equity for workers at our peril for, at the end of the day, they are also questions about the well-being of consumers, householders, and citizens. Third, labor law is no more a project of "special

interests" than is prudential financial regulation. It seems highly likely that workers will pay for much of the fallout of the fiscal crisis in the form of lost or foregone jobs, bankruptcies, foreclosed homes, higher tax burdens, and a lower standard of living. However, it is worth remembering that for many workers, the crisis has been underway since the erosion of worker entitlements and power became normalized in the name of greater labor market flexibility. At this point, we all look forward to the presence of collective pressure and change to settled understandings of what we know "of course" about workers' rights and voice, labor market institutions, and the contribution of both to collective well-being, both domestic and international.