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# International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest<sup>†</sup>

MATTHEW W. FINKIN\*

We have been summoned on this happy occasion, honoring Professor Kenneth Dau-Schmidt, to address the “globalization” of labor law. I do so from the resolutely provincial perspective of the American Midwest, looking at the United States, to the potential of a body of labor law that governs *us*.

The summons incites consideration of two possible responses to “globalization”: one of international law, the other of comparative law. The first suggests the coming into being of a supranationally governing legal regime either with direct enforcement power or that plays out authoritatively in our domestic legal system. The second suggests something less dramatic, but more supple: a process of legal syncretism, a domestic borrowing and adaptation from other legal systems and so of at least a partial convergence with them.

I will address each in turn. Of the former, I should think it extremely unlikely that a body of international labor law governing the United States will come into existence in the foreseeable future. One cannot be quite so categorical of the latter; but, I remain rather skeptical nevertheless.

## I. TRANSNATIONAL LEGAL REGULATION

The employment relationship, we are told, is now embedded in a “global economy”: There is “hardly a village or town anywhere on the globe whose prices [are] not influenced by distant foreign markets, whose infrastructure [is] not financed by foreign capital, whose engineering, manufacturing, and even business skills [are] not imported from abroad.”<sup>1</sup> To some, the competition for mobile international investment enervates the regulatory capacity of the nation state lest it lose out. Consequently, they see it as to be expected, almost teleologically, that “transnational labor institutions will be developed, and transnational labor standards will be adopted that will replace a national labor regulatory regime with an international one.”<sup>2</sup> Proponents of this position could point to historical precedents where, out of commercial need, bodies of transnational law developed and achieved acceptance: The medieval *lex mercatoria*, which became a body of common commercial law

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\* Albert J. Harno Professor of Law, The University of Illinois, and General Editor, *Comparative Labor Law & Policy Journal*. The author wishes to express his appreciation to Clyde Summers and Sanford Jacoby for comments on the draft paper prepared for the Symposium and for the remarks of several of the participants in the Symposium on that presentation.

1. KEVIN H. O’ROURKE & JEFFREY G. WILLIAMSON, *GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY* 2 (1999).

2. Katherine Van Wezel Stone, *The Prospects for Transnational Labor Regulation: Reconciling Globalization and Labor Rights in the EU and NAFTA*, in *ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT* 83, 86 (Ton Wilthagen ed., 1998).

throughout Europe at the time;<sup>3</sup> the Rhodian law of antiquity governing the carriage of goods by sea that became a fixture even into modern times;<sup>4</sup> and, in employment, the common body of transnational law that developed surrounding the then singular category of international employment—of seamen.<sup>5</sup> This “law of the sea,”<sup>6</sup> as George Ticknor Curtis pointed out, “is ‘not the law of a particular country’, but the result of the usage, the tacit convention and the positive institutions of the great family of commercial nations.”<sup>7</sup> Indeed, proponents of an international *lex laboris* as inherent in the dynamics of world trade might well point to the detailed International Seamen’s Code promulgated under the auspices of the International Labour Office (“ILO”)<sup>8</sup> as the logical end of a globalized market and as a harbinger of the future.

The opening reference to the “global economy” cited above, however, actually adverted to the world economy circa 1914, after nearly a century’s run-up in the cross-border flow of capital, goods, and people. By century’s end, the export of Western European capital was enormous even by today’s standards: Foreign investment as a percentage of domestic savings in the period 1885 to 1889 was eleven percent for France, nineteen percent for Germany, and forty-six percent for the United Kingdom; in 1895 to 1899 these were twenty-three percent, eleven percent, and twenty-one percent respectively.<sup>9</sup> These financial resources were used to exploit natural, not human resources.<sup>10</sup> Cheap labor—that is, European labor—migrated to higher-wage labor markets. In the century following 1820, approximately 60 million Europeans set sail for the New World, three-fifths to the United States.<sup>11</sup> Lower transportation costs and developing information technology contributed to a world-wide convergence in commodity prices; and, the enormous export of labor raised wages in Europe and lowered them in the United States. “[M]ass migration prior to the Great War probably accounted for about 70 percent of the overall wage convergence observed in the Atlantic economy as a whole.”<sup>12</sup> Yet the emergence of the singular Atlantic economy at that time, characterized by both price and wage convergence, was not accompanied by anything like an international legal regime governing employment; and the “law of the sea” remained an exception limited to that unique category—where both the workplace and the workforce (an internationally motley crew) moved between nation states.

Since World War II, international regimes have grown up governing aviation,

3. See generally LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* ch. 1 (1983).

4. See generally REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 406-12 (Claredon Press 1996) (1992).

5. 1 MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 1:3 (4th ed. 1985).

6. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

7. GEORGE T. CURTIS, *A TREATISE ON THE RIGHTS AND DUTIES OF MERCHANT SEAMEN* ix (1841).

8. INTERNATIONAL LABOUR OFFICE, *THE INTERNATIONAL SEAMEN’S CODE* (1942); see also George Politakis, *Updating the International Seafarers’ Code: Recent Developments*, 12 INT’L J. MARINE & COASTAL L. 341 (1997).

9. O’ROURKE & WILLIAMSON, *supra* note 1, at 209 tbl.11.1.

10. *Id.* at 211.

11. *Id.* at 119.

12. *Id.* at 273.

commercial transactions, intellectual property, banking and insolvency, and a good deal more. But, as Harry Arthurs has pointed out, "the law of employment and industrial relations remains resolutely local in character,"<sup>13</sup> even in the face of the subordination of domestic law to regimes of international standards in other settings—those legally binding as well as the normative rules of nongovernmental bodies and the policies of transnational corporations themselves—when they facilitate business transactions:

In an era of globalization, the proliferation of such regimes seems desirable, attainable—even inevitable. Indeed, some observers contend that a new *lex mercatoria* already governs transnational economic activity; others even detect the appearance of a new *jus humanitatus*. But no knowledgeable observer claims that we are witnessing the emergence of a new *lex laboris*.<sup>14</sup>

Katherine Van Wezel Stone has pointed to several extant models operating to the contrary, that is, to evidence the potential for such a body of law eventually to ripen and flower, none of which is ideal in terms of the desiderata she discusses.<sup>15</sup> My focus differs from hers, however. My concern is of how any of the examples pointed to—of which I identify six below—might hold the potential for a legal regime governing the employment relationship here in the United States. They are (1) the European Union, which has transcended its role as a common market to set some common labor standards and to harmonize others; (2) international conventions, largely under the aegis of the ILO that has since its creation at the end of World War I attempted to set common standards on a wide variety of subjects; (3) the extraterritorial application of domestic law; (4) trade agreements that link the market or trade preferences to the observance of specified labor conditions; (5) trade agreements that link the market to international oversight of the jurisdiction's adherence to its own labor laws, of which the North American Free Trade Agreement ("NAFTA")<sup>16</sup> is the most notable; and, (6) corporate codes of conduct where, by nongovernmental action (and in response to organized consumer boycotts), multinational enterprises commit themselves to observe standards of labor fairness throughout their business empires.

Let us look briefly at each. First, the European Union has taken on the task of greater social and political as well as economic cohesion, but it is generally recognized that comprehensive legislation in the area of worker protection is most unlikely.<sup>17</sup> In effect currently are a European works-council directive requiring

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13. Harry Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law* 4 (June 17-19, 1999) (unpublished paper presented at a Conference on the Legal Culture of Global Business Transactions, International Institute for the Sociology of Law, Oñati, Spain). The author is grateful to Professor Arthurs for supplying and permitting quotation from this paper.

14. *Id.* at 8 (citations omitted).

15. Van Wezel Stone, *supra* note 2, at 86-96.

16. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289.

17. Manfred Weiss, *The Future Role of the European Union in Social Policy*, in *LABOR LAW AND INDUSTRIAL RELATIONS AT THE TURN OF THE CENTURY* 489 (Chris Engels & Manfred Weiss eds., 1998). For a more optimistic view, see Silvana Sciarra, *How 'Global' is Labour Law? The Perspective of Social Rights in the European Union*, in *ADVANCING THEORY IN*

information sharing and consultation with employee representatives in companies meeting the directive's jurisdictional requirements, subject to implementation by national legislation, and directives on collective redundancies, on transfers of undertakings, on posted workers, and on certain aspects of employment discrimination against women and on part-time work. Further, the Cologne meeting of the European Council commissioned the draft of a Charter on Fundamental Rights by December 2000, which draft is to "take account" of the Community Charter of the Fundamental Social Rights of Workers.<sup>18</sup> But, as Catherine Barnard points out, the vast bulk of labor law remains and is expected to remain in the hands of the member states.<sup>19</sup> Even if the forces for legal integration of labor law were stronger, the most visionary (and I do mean *visionary*) end of that process would be a federal state with more common labor standards (though no one takes seriously the prospect of a European minimum wage) and enormous local variation, resembling, perhaps, the United States.<sup>20</sup> In that respect, it would no more represent a harbinger of an international labor law speaking outside its collective border than does the United States itself.

Second, the ILO is a horse soon curried.<sup>21</sup> It has no power to enforce its conventions. Legal enforcement depends on the domestic law of the ratifying states, which ratification the U.S. has not been eager to accord. The International Seamen's Code is a good example. It now consists of thirty maritime conventions and eleven others governing dock work, fishermen, and the like.<sup>22</sup> Of these, only five have been

LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT, *supra* note 2, at 99, 113.

18. Press Release, Cologne European Council, Presidency Conclusions (June 3-4, 1999), <http://ue.eu.int/newsroom/main.cfm?LANG=1> (last visited Oct. 31, 2000). The report of the Expert Group on Fundamental Rights, leading up to the Cologne action, identified the following as "the most obvious examples" for inclusion in a charter: nondiscrimination in employment; "the right to determine the use of personal data"; the right to bargain collectively and to resort to collective action; and, "the right to information, consultation and participation, in respect of decisions affecting the interests of workers." EXPERT GROUP ON FUNDAMENTAL RIGHTS, EUROPEAN COMMISSION, AFFIRMING FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION: TIME TO ACT 24 (1999).

19. Catherine Barnard, *The Transnational Regulation of Employment Law: Evolution in the EU 9* (July 5, 2000) (unpublished manuscript, on file with the *Indiana Law Journal*). See generally ALAN KRUEGER, *FROM BISMARCK TO MAASTRICHT: THE MARCH TO EUROPEAN UNION AND THE LABOR COMPACT* (Nat'l Bureau of Econ. Research, Working Paper No. 7456, 2000).

20. Astute European observers have recognized the enormous variation in American law and have doubted whether America serves as a model for European legal unification. See, e.g., Mathias Reimann, *Amerikanisches Privatrecht und europäische Rechtseinheit—Können die USA als Vorbild dienen?*, in AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT 132 (Reinhard Zimmermann ed., 1995). Reimann discusses the role of the American Law Institute, *id.* at 142-43, and another astute observer has argued for the creation of such a body in Europe, see Werner F. Ebke, *Unternehmensrechtsangleichung in der Europäischen Union: Brauchen wir ein European Law Institute?*, in FESTSCHRIFT FÜR BERNHARD GROßFELD 189 (Ulrich Hübner & Werner Ebkeeds eds., 1999).

21. See generally Breen Creighton, *The Internationalisation of Labour Law*, in REDEFINING LABOUR LAW 90 (Richard Mitchell ed., 1995).

22. See INTERNATIONAL LABOUR OFFICE, *supra* note 8.

ratified and are in effect for the United States.<sup>23</sup>

Third, the most common example pointed-to of extra-territorial application of labor law is the extension of some U.S. antidiscrimination in employment laws to reach decisions made by U.S. companies with respect to the hire, fire, and reward of U.S. nationals abroad.<sup>24</sup> These conditions are so limited as scarcely to pose a model for broader potential reach. A better example is the EU directive on data protection, which prohibits the transfer of personal information outside the European Union to countries that do not adequately protect privacy as measured by EU standards.<sup>25</sup> This directive reaches the transmission by U.S. multinational companies of certain personnel data from their European operations to the headquarters or other of their offices in the United States. In effect, these companies must observe European standards *here* if they wish to do business *there*. Even so, the directive can be seen as merely a kind of export control, which the United States has itself adopted for certain security-sensitive forms of intellectual property; and the potential for broadening such restrictions into a more comprehensive form of extraterritorial labor law is very limited politically, if not legally.

The fourth, the linkage of trade to the observance of labor standards, is the most widely debated—and hotly contested.<sup>26</sup> Suffice it to say, the labor conditions to which trade linkage is commonly sought concern “core” or fundamental matters, that is, child and forced labor, respect for freedom of association (and collective bargaining), and nondiscrimination.<sup>27</sup> These can be, and often are, viewed more as human rights than as labor-protective law, whence, I suspect, Arthurs’s reference to a *jus humanitatus*;<sup>28</sup> and even such seemingly obvious minima have been strongly resisted by developing countries as a protectionist means of stifling their development.<sup>29</sup> Suffice it to say, the domestic impact of such trade linkage is to be felt, if at all, in the

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23. INTERNATIONAL LABOUR OFFICE, MARITIME LABOUR CONVENTIONS AND RECOMMENDATIONS 262 (4th rev. ed. 1998). By contrast, Norway has twenty-six conventions in effect, Germany thirty-five, and land-locked Hungary ten. *Id.* at 259-60.

24. *E.g.*, Van Wezel Stone, *supra* note 2, at 90-91; Cynthia J. Robertson, Note, *Has the Age Discrimination in Employment Act Remained Effective in the United States as Well as Abroad in an Increasingly Globalized Economy?*, 6 ELDER L.J. 323, 325 (1998).

25. *See generally* PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE (1998); Spiros Simitis, *From the General Rules on Data Protection to a Specific Regulation of the Use of Employee Data: Policies and Constraints of the European Union*, 19 COMP. LAB. L. & POL’Y J. 351 (1998). For the status of negotiations between the European Union and the United States as of the time of writing, see Carol M. Morrissey, *The EU Privacy Protection Directive and the U.S. Safe Harbor*, at <http://www.llrx.com/congress/061500.htm> (May 15, 2000).

26. *See, e.g.*, Amanda Coulthand, *Minimum Labor Standards in Asia-Pacific Region: A Social Clause in APEC*, in *FACING THE CHALLENGE IN THE ASIA PACIFIC REGION* 48 (Richard Mitchell & Jesse Min Aun Wu eds., 1997).

27. *See* Christopher L. Erickson & Daniel J.B. Mitchell, *Labor Standards and Trade Agreements: U.S. Experience*, 19 COMP. LAB. L. & POL’Y J. 145, 153 (1998); Charles Tiefer, “Alongside” the Fast Track: *Environmental and Labor Issues in FTAA*, 7 MINN. J. GLOBAL TRADE 329, 360 (1998).

28. *Supra* text accompanying note 13.

29. *See supra* notes 25-26.

labor market,<sup>30</sup> not in law; that is, in corporate decisions on the relocation of work heretofore performed in the United States.

Fifth, the NAFTA model also attempts to promote certain basic labor principles; but this provision is only an aspiration, not a binding obligation. The "side agreement"—the North American Agreement on Labor Cooperation<sup>31</sup>—only binds each of the signatory governments to observe and enforce its own laws.<sup>32</sup> To be sure, it does supply an international oversight technique for that obligation; but the obligation is to abide by the state's own labor standards, not those of a supranational body.<sup>33</sup>

Finally, corporate codes are frequently designed to blunt the demand either for international regulation or for stricter enforcement;<sup>34</sup> and, on occasion, their provisions are not ones we necessarily would wish to endorse.<sup>35</sup> They present as much a challenge to regulation as an alternative to it.

In sum, the domestic concern driving consideration of most of these measures derives: first, from a desire to cabin an international "race to the bottom" on the basis of labor standards,<sup>36</sup> to preserve jobs that otherwise might be exported (and, as an ancillary consequence, to bolster the bargaining power of domestic unions); and, second, from humanitarian efforts to create incentives (for example, by the use of linkages to international lending or to trade preferences) for a "race to the top" or "upward sedimentation" of better, if not "best" labor practices in developing economies.<sup>37</sup> However effective or not in achieving those ends, such measures would have no impact upon labor law in the United States. Any more than this in terms of international regulation of U.S. labor standards is remote in the extreme in part due to a general American distaste for regulation and in greater measure to an abiding political commitment to the fullest play for U.S. sovereignty. The confluence of the two is amply evidenced in our unwillingness to ratify even the most "fundamental" of ILO conventions.

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30. See STEVEN DAVIS ET AL., *JOB CREATION AND DESTRUCTION* 49 (1996) ("[C]areful studies suggest that international trade accounts for only part—possibly a small part—of employment losses in low-skill manufacturing industries.").

31. North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1502.

32. See Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. SMALL & EMERGING BUS. L. 173, 179, 186 (1999).

33. Save insofar as these are made obligatory under the state's domestic law. *Id.*

34. See, for example, *Cruise Industry Adopts Work Rules*, N.Y. TIMES, Dec. 24, 1999, at A16, which followed the publication of a front-page exposé, Douglas Frantz, *For Cruise Ships' Workers, Much Toil, Little Protection*, N.Y. TIMES, Dec. 24, 1999, at A1.

35. Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 357-60 (1999).

36. *Id.*; see also Bob Hepple, *New Approaches to International Labour Regulation*, 26 INDUS. L.J. 353, 355-56 (1997); Jerome Levinson, *Certifying International Worker Rights: A Practical Alternative*, 20 COMP. LAB. L. & POL'Y J. 401, 406-07 (1999).

37. See generally Mark Barenberg, *Globalization and Labor Law: Legal and Extra-Legal Norms Across Multiple Regimes* (July 27, 1998) (unpublished manuscript, presented at Japan/U.S./E.U. Joint Research in Labor Law: Response to New Challenges in the 21st Century).

## II. BORROWING AND CONVERGENCE

If it is unlikely that the United States will be bound by an international labor-law regime, might the United States nevertheless look to, adapt, or even borrow from foreign labor laws when these supply potentially workable solutions to our situation or to inform our exercise of judgment? Might we not benefit from “upward sedimentation” of “best practices” in law just as we believe other nations might? Ideas in product design and marketing, for example, as well as ideas not only about how to make products or deliver services but also of how to manage the people engaged in those activities have been widely embraced in disparate cultural settings.<sup>38</sup> Our acceptance of the “law of the sea” as domestically applicable, albeit subject to such modification as suits our domestic needs, evidences ample historical precedent for the adoption and adaptation of “foreign” models.<sup>39</sup> Indeed, “our” law was borrowed initially more or less wholesale from the mother country as adapted to the needs of the New Republic.<sup>40</sup> The early nineteenth century decisional law of “master and servant” often referred to English and Scottish cases; and even later American treatises were drenched in such sources as well as to the legislation of English speaking and European peoples.<sup>41</sup>

Nor is reference to “foreign” practice limited to pre- and early industrializing America. As the historian Daniel Rodgers explains in his magisterial study, *Atlantic Crossings: Social Politics in a Progressive Age*, the run-up of the Atlantic economy in the last quarter of the nineteenth century and the first decade and a half of the twentieth was accompanied by the rise of a flourishing trans-Atlantic policy community.<sup>42</sup> An examination of that prior epoch of economic globalization illuminates what is different today, why a reciprocal interest in the labor law of our trading partners as sources of our own development is problematic.

The professionalization of academic disciplines in the last decades of the nineteenth century required aspiring academics in economics and the social as well as the “hard” sciences to study at the then more weighty centers of learning in Europe, especially in Germany.

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38. According to a recent study of employment systems in the automotive and telecommunications industries, this diffusion has produced as much divergence within countries as convergence among them. HARRY C. KATZ & OWEN DARBISHIRE, *CONVERGING DIVERGENCES: WORLDWIDE CHANGES IN EMPLOYMENT SYSTEMS* 263 (2000).

39. The federal maritime law of 1872, for example, expressly borrowed from the British Merchant Shipping Act of 1854 dealing with seamen’s certificates of discharge. *Compare* Act of June 7, 1872, § 24, 17 Stat. 262, 267, *with* The Merchant Shipping Act, 1854, 17 & 18 Vict. ch. 104, § 176 (Eng.).

40. Alfred L. Brophy, “*Ingenium est Fateri per quos profeceris:*” Francis Daniel Pastorius’ Young Country Clerk’s Collection and Anglo-American Legal Literature, 1682-1716, 3 U. CHI. L. SCH. ROUNDTABLE 637 (1996) (reviewing the literature on the reception of English law and the debates surrounding it).

41. *See, e.g.*, C.B. LABATT, *COMMENTARIES ON THE LAW OF MASTER AND SERVANT* (1913) (in eight volumes).

42. *See generally* DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998).



In the *Political Science Quarterly*, which served as the combined outlet for Columbia University's political science and economics faculties, almost half the books reviewed between its founding in 1886 and 1890 were foreign language titles, about evenly split between French and German, with a smattering of Italian as well. Whatever else it did, the German university experience radically broadened the Americans' intellectual culture.<sup>43</sup>

These scholars (and their students) strove to overcome a regnant American exceptionalism: They stocked the staffs of public investigative commissions—the Industrial Commissions of 1898 and 1902 and the Commission on Industrial Relations of 1912 to 1915;<sup>44</sup> they preached to American backwardness in a wide variety of areas—health, housing, rural and urban reconstruction, and a broad range of wage-earners' risks—through a variety of organizations, notably the American Association for Labor Legislation (“AALL”).

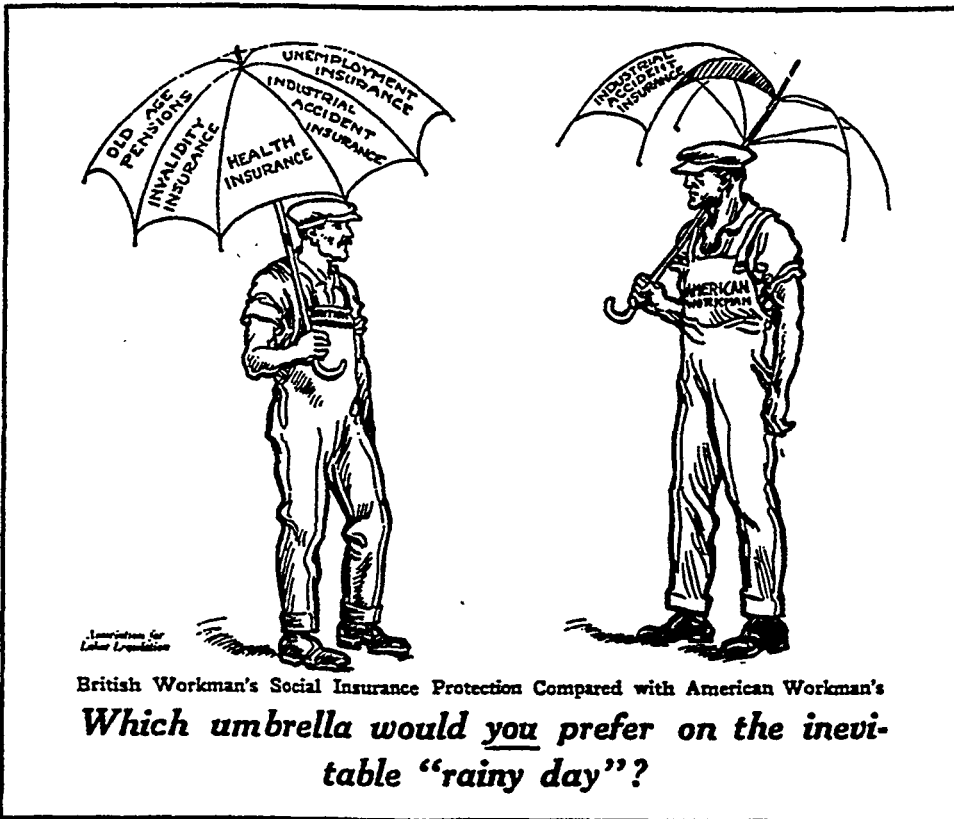
Set out below, as Figure 1, is an illustration from the AALL's *American Labor Legislation Review* of 1919. In this depiction, the American worker is bigger and seems physically more robust than his British counterpart. From what appears, he would have to be.

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43. *Id.* at 98.

44. *Id.* at 110.

FIGURE I. COMPARISON OF SOCIAL INSURANCE PROTECTION (1919)<sup>45</sup>



45. Illustration, 9 AM. LAB. LEGIS. REV. 64 (1919).

With the exception of health insurance, these exhaustive comparative policy and legal studies—and the agitation evidenced in Figure 1—bore fruit after the collapse of public confidence in laissez-faire and in the activism of the New Deal:

Whether the European measures served as working legislative models, as generalized forms to be remade for American circumstances, or as catalysts for preemptive legislative substitution, their cumulative impact was profound.

The polarity between the appropriated and the homegrown is . . . false and artificial. . . . The New Dealers lived within a world of social policy debate and social policy invention that for two generations had extended far beyond the nation's borders. Those sources had helped stock progressive imaginations with an agenda far larger than any one polity could have constructed in isolation. Seal the United States off from the world beyond its borders, and the New Deal is simply not comprehensible.<sup>46</sup>

But, by the end of the 1940s, the European-centered debate ended. "Having saved the world," Rodgers concludes, "it would not be easy to imagine that there was still much to learn from it."<sup>47</sup> America became and remains "smug and insular,"<sup>48</sup> even in the face of the intense globalization we are discussing here. It may be instructive that at the opening of the twenty-first century the United States is joined only by Liberia and Burma (or Myanmar) in refusing to mandate the metric system in daily life.<sup>49</sup>

In sum, the development of the singular Atlantic economy from the end of the Napoleonic wars until the outbreak of the First World War, while not accompanied by the development of an international labor law, was accompanied by an intense transatlantic policy dialogue that strongly influenced the content of American social policy vis-à-vis the working class. The run-up of the contemporary global economy and the international measures proposed in its wake have left American insularity in employment law unaffected.

Consider an American corporation that has a facility in Germany and a nonunionized facility in Indiana, a not unimaginable scenario. The company's German employees cannot be fired except for justifiable cause; they are entitled to be represented over a host of significant matters such as the content of plant rules by an elected works council; and they are entitled by law to medical and vacation benefits, to mandatory rest periods at work, to protection against summary plant closure, and to extensive protections for their right to privacy and dignity. Their Indiana counterparts are legally entitled to virtually none of these. Two diagrammatic sets of protections could be unfolded today over our Indiana company's two employees—one a Hoosier, one a Rhinelander—covering a host of workplace rights and protections and the stark depiction of Figure 1 would be much the same.

Attention turns accordingly to why that is so. The necessary preconditions for legal osmosis are (1) a policy elite that is willing to look to foreign experience as a source of domestic policy and law; (2) a body of work on these foreign approaches that makes them accessible to the political actors; and, (3) a sense in the relevant

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46. *Id.* at 427-28.

47. *Id.* at 508.

48. *Id.* at 473.

49. This according to the now computerized Grolier Encyclopedia, *The Metric System*, available at <http://www.uffda.com/~bink/metric.html> (last visited Nov. 9, 2000).

legislative, administrative, or judicial branch—and in the larger body politic—that it is legitimate and needful so to do.

The first would seem no less present and active now than in the 1930s. As Colin Bennett has explained, “[p]olitical motive is the principal determinant of the way that foreign policy experience is used,”<sup>50</sup> if not the only one. Referring to the European embrace of “privatization”—and, one might now add, of European fixation with U.S. “flexibility” in employment law—he notes that “[m]uch of the so-called fact-finding within the transnational policy community . . . can be attributed to a desire to reinforce conclusions already reached.”<sup>51</sup> One would not ordinarily expect conservative American politicians to look to Chile as a source of inspired policy, but that they did when it came to touting the privatization of social security.<sup>52</sup>

The second is more vexing. There is a good deal of specialized comparative scholarship in matters of employment *policy*. No comprehensive study of unemployment compensation,<sup>53</sup> worker disability,<sup>54</sup> rest time,<sup>55</sup> or work hours and earnings,<sup>56</sup> not to mention pension, welfare, or health-care<sup>57</sup> policies could be complete without a thorough engagement with the practices of the developed world. But as much cannot be said of comparative employment *law*. As Rolf Birk has explained:

[T]he knowledge of another foreign language besides English is absolutely necessary. Court decisions as well as leading academic publications are in general not available in English; French, Italian or German publications are, besides, more comprehensive than the literature on English and American labour law. . . .  
 . . . *The teaching of a foreign law in a language other than the one of that legal system distorts that very law.*<sup>58</sup>

The implications of this condition will be explored in a moment.

50. Colin J. Bennett, *How States Utilize Foreign Evidence*, 11 J. PUB. POL’Y. 31, 50 (1991).

51. *Id.* at 37. On the potential of European convergence with U.S. labor law, see, for example, REINHOLD FAHLBECK, *FLEXIBILISATION OF WORKING LIFE: POTENTIALS AND CHANGES FOR LABOUR LAW* (1998).

52. See Brian J. Kreiswirth, *The Role of the Basic Public Pension in a Retirement Income Security System*, 19 COMP. LAB. L. & POL’Y J. 393, 434 (1998).

53. See James R. Storey & Jennifer A. Neisner, *Unemployment Compensation in the Group of Seven Nations*, in *UNEMPLOYMENT INSURANCE IN THE UNITED STATES: ANALYSIS OF POLICY ISSUES* ch. 14 (Christopher J. O’Leary & Stephen A. Wander eds., 1997).

54. See Leo J.M. Aarts et al., *Convergence: A Comparison of European and United States Disability Policy*, in *NEW APPROACHES TO DISABILITY IN THE WORKPLACE* 299 (Terry Thomason et al. eds., 1998).

55. See MARC LINDER & INGRID NYGAARD, *VOID WHERE PROHIBITED: REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME* ch. 8 (1998).

56. LAURENCE MISHÉL ET AL., *THE STATE OF WORKING AMERICA 1998-99* ch. 8 (1999).

57. See, e.g., Camilla E. Watson, *Machiavelli and the Politics of Welfare, National Health, and Old Age: A Comparative Perspective of the Policies of the United States and Canada*, 1993 UTAH L. REV. 1337.

58. Rolf Birk, *The Teaching of Labour Law in a European Law School*, in *THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION* 443, 449 (Bruno de Witte & Catherine Forder eds., 1992) (emphasis added).

The third precondition is an even greater imponderable because it rests upon the current state of our sensed exceptionalism that makes foreign comparison seem invidious. As Rodgers shows, it took the Great Depression to jar the American Congress into a willingness to embrace the products of decades of international research theretofore only "on the shelf," so to speak. Whether or not the domestic impact of "globalization" could have a similar effect today will be discussed at the close.

One should add as well that the particular foreign model one might look to must be compatible with legal, social, and economic circumstance here.<sup>59</sup> Note that the comparative policy focus of the Progressive period centered on readily comparable matters of social welfare—unemployment, health, and housing; and even then, "path dependence" worked to change or blunt the applicability of the European experience. For example, the fact that the United States had a flourishing and politically active private insurance industry prevented (and continues to prevent) serious consideration of single-payer state-financed medical care. Far more intractable is consideration of foreign models of collective worker representation which draw on economic structures and political influences as well as legal frameworks far different from ours.<sup>60</sup> (Indeed, in almost none of the debate over the "Labor Question" in the United States in the Progressive period were foreign approaches to worker representation proposed.) However, as the Hoosier-Rhineland example set out above implies, as much cannot be said for a great many individual employee rights and protections.<sup>61</sup> Why, then, has there been no movement toward or even any demonstrable interest in, any sidelong glances at, foreign law in these areas? The answer might lie in the interplay of those factors—educational, attitudinal, and institutional—that influence our willingness to be informed by foreign law.

#### A. Education

As Rolf Birk pointed out, foreign language facility is an essential condition for the serious study of comparative labor law. The abolition of the classical curriculum in the high schools and the adoption of the elective system in American colleges and universities have eroded the assumption that an educated person would be fluent in one or more other modern foreign languages as a matter of course. It is true that in 1998, 1.15 million college students studied a foreign language, a record high.<sup>62</sup> But this represents less than eight percent of all college and university enrollment; and over 650,000 of these—fifty-five percent—studied Spanish.<sup>63</sup> Suffice it to say, few of Spain's former colonies would be considered notably advanced in their treatment of employment law; and though Spain has been doing interesting things of late, a broader knowledge of the mother tongue has not translated into a keener interest in

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59. See generally Bernhard Großfeld, *KERNFRAGEN DER RECHTSVERGLEICHUNG* (1996); Alan Watson, *Legal Transplants and Law Reform*, 92 *LAW Q. REV.* 79, 81 (1976); Christopher J. Whelan, *Labor Law and Comparative Law*, 63 *TEX. L. REV.* 1425, 1433, 1437 (1985).

60. Cf. Birk, *supra* note 58, at 445.

61. *Id.*

62. MODERN LANGUAGE ASSOCIATION, *FOREIGN LANGUAGE ENROLLMENTS IN UNITED STATES INSTITUTIONS OF HIGHER EDUCATION* (1998).

63. *Id.*

its employment law.

Further, contrary to the educational circumstances undergirding and giving salience to the transatlantic policy community of a century ago, Americans no longer need or look to foreign universities as essential to their academic preparation. To be sure, in 1997-98, approximately 114,000 university and college students from the United States studied abroad for academic credit; and this impressive number reflects their perceived need to prepare "for work in 'the new global economy.'"<sup>64</sup> But fewer than one percent of these were doctoral students; only five percent were at the master's level.<sup>65</sup> Sixty percent were college juniors and seniors studying for only a single semester or for a summer; and, as a whole, the group represents a tiny fraction of the millions of upper level and graduate students.<sup>66</sup> Moreover, of these 114,000, most studied in English-speaking countries (37,000) and in Spanish-speaking ones (25,000).<sup>67</sup> Thus, for the vast majority of American students who study abroad, in neither duration nor language is the educational experience meaningful in developing a future facility in continental European comparative labor law.

In sum, America's postwar educational dominance has changed the "intellectual culture." To Louis Brandeis, who had studied at the Annen-Realschule in Dresden for three terms, it was altogether natural to assemble academic studies from all the advanced countries in an effort to persuade the U.S. Supreme Court in 1908 to sustain a labor protective law for women;<sup>68</sup> and equally natural for him to rely on French law in developing an argument for *The Right to Privacy* in 1890.<sup>69</sup> Oliver Wendell Holmes, educated at Harvard at mid-century, treated German theorizing—the works of Savigny, Jhering, Puchta ("a great master"), and Winscheid, among others—from the original and in detail in his *The Common Law* of 1881.<sup>70</sup> Benjamin Cardozo, given a classical education at Columbia College in the 1880s, treated French and German writing extensively and throughout his Storrs Lectures of 1921, *The Nature of the Judicial Process*.<sup>71</sup> Even the other 380 pages of the 1890 *Harvard Law Review* in which Brandeis and Warren's famous article appeared are replete with foreign references in both the articles and the notes.<sup>72</sup> French sources are cited in James B.

64. Paul Desruisseaux, *15% Rise in American Students Abroad Shows Popularity of Non-European Distinctions*, CHRON. HIGHER EDUC., Dec. 10, 1999, at A60.

65. *Id.* at A61.

66. *Id.*

67. *Id.*

68. *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908). What flummoxed the Court was not that many of the materials were foreign, but that they were not legal. See generally PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE ch. 8 (1984).

69. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-18 (1890).

70. OLIVER WENDELL HOLMES, THE COMMON LAW Lecture VI (Mark DeWolfe Howe ed., 1963) (1881). For reference to Puchta, see *id.* at 164.

71. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

72. The inaugural volume of the *Yale Law Journal* two years later was more parochial; but even there a discussion of *Methods of Legal Education* was published prominently to feature an essay by Professor Christopher Tiedeman arguing for a borrowing from "German methods." Christopher Tiedeman, *Methods of Legal Education* (pt. 3), 1 YALE L.J. 150, 158 (1892). Tiedeman, "a prominent treatise writer and legal academic," WILLIAM M. WIECEK, THE LOST

Thayer's *The Burden of Proof*;<sup>73</sup> a note treats the legal aspects of hypnotism under French law—an inquiry triggered by a Swedish case;<sup>74</sup> French and German authorities are cited in Thayer's "*Law and Fact*" in *Jury Trials*;<sup>75</sup> another note discusses French law in treating the property right to a meteorite;<sup>76</sup> the laws of France, Germany, Belgium, Switzerland, and Italy are treated in J.B. Ames's *The Doctrine of Price v. Neal*;<sup>77</sup> French law is consulted in Grafton D. Cushing's *On Certain Cases Analogous to Trade-Marks*;<sup>78</sup> German authorities are considered in Oliver Wendell Holmes's *Agency*;<sup>79</sup> and, it goes almost without saying, the volume is drenched in references to and reporting on English authority, both primary and secondary, including the reprinting of an editorial from the *Law Quarterly* rebuking Lord Justice Fry's calling the growing practice of citing American authority in English courts a "waste of time."<sup>80</sup> A parallel perusal of the more than 1000 pages of the 1990 *Harvard Law Review* shows that, a century later, we have become, obviously, more prolix; possibly more sophisticated; indubitably more ideological; and less coherent.

One comes away with the sense that a century ago American legal scholars conceived of themselves as part of an Anglo-American legal community, certainly; but also as sharing in a larger Western legal tradition rooted in Roman law and finding expression in the laws of all the more developed commercial nations, especially France and Germany.<sup>81</sup> That larger sense of community has been lost.

### B. Attitude

Rodgers closes his study with America's return to exceptionalism in the postwar period:

Atlantic connections proliferated, but these did not function as before. Far

WORLD OF CLASSICAL LEGAL THOUGHT 89 (1998), spoke of the system he "had learned to admire while setting under the skillful instruction of the celebrated von Ihering of the University of Goettingen." Tiedeman, *supra*, at 150.

73. James B. Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45, 52 n.1, 58 n.1 (1890).

74. Note, 4 HARV. L. REV. 87, 88-89 (1890).

75. James B. Thayer, "*Law and Fact*" in *Jury Trials*, 4 HARV. L. REV. 147, 149 n.2, 155 nn.1-2 (1890).

76. Note, 4 HARV. L. REV. 236 (1890).

77. J.B. Ames, *The Doctrine of Price v. Neal*, 4 HARV. L. REV. 297, 306-07 (1890).

78. Grafton D. Cushing, *On Certain Cases Analogous to Trade-Marks*, 4 HARV. L. REV. 321, 328-30 (1890).

79. Oliver Wendell Holmes, *Agency*, 4 HARV. L. REV. 345 *passim* (1890).

80. Note, 4 HARV. L. REV. 38, 38 (1890) (quoting Note, 6 LAW Q.R. 122, 122 (1890) (quoting *In re Missouri Steamship Co.* 42 Ch. D. 321, 330 (Ch. 1889) (Fry, L.J.))).

81. This may well have been so even in the provincial Midwest of the time. In the fifteen year period, 1897 to 1912, twenty-four persons served on the faculty of the University of Illinois College of Law, half for three or fewer years. LAW IN THE GRAND MANNER: A POPULAR HISTORY OF THE COLLEGE OF LAW AT THE UNIVERSITY OF ILLINOIS 1897-1967 (1967). But of that transient faculty, one, the Dean from 1899 to 1903, had studied at Heidelberg and received a doctorate in Civil and Canon Law, one had received a B.C.L. at Oxford, and one had prepared at a Gymnasium in Bonn. THE SEMI-CENTENNIAL ALUMNI RECORD OF THE UNIVERSITY OF ILLINOIS (Franklin Scott ed., 1918).

more foreign news reached the United States, but domestically it now mattered less. Reports of other nations' social policies piled up in American research libraries, but they no longer moved the wheels of politics. Between the welfare state regimes in Europe and the United States, relationships became more and more attenuated. The entrance of the United States onto the international political stage was also an exit; the advent of the "American century" was also a closure.<sup>82</sup>

This attitude was anticipated by Issac Rubinow who observed in 1934:

We Americans, most of us anyway, hold these truths to be self-evident, that we are the greatest, richest nation and people in the world and by implication the wisest as well; that we are entrusted with the special historic mission to teach the old and effete world and not to learn from it.<sup>83</sup>

Are Rubinow and Rodgers right? How does one gauge a national attitude, a collective mindset? In the period 1870-1900, state supreme courts cited foreign (primarily English) case authority about fifteen percent of the time; by the period 1940-1970, foreign cases were cited in about three percent of state supreme court opinions.<sup>84</sup> That is one measure. Another is of what our opinion-makers say.<sup>85</sup> And yet another is of how what they say is received. In 1996, Derek Bok published *The State of the Nation: Government and the Quest for a Better Society*.<sup>86</sup> It compares the United States with Western Europe and Japan in seventeen categories that, in the aggregate, sum up the quality of a society including, inter alia, access to education and health care, the degree of violent crime, the protection of the environment, conditions of individual freedom, and conditions in the workplace—the protection and empowering of workers.<sup>87</sup> Overall, the U.S. didn't fare very well, the workplace not excluded:

Among leading nations, the United States has the smallest percentage of workers with any type of representative body to protect their interests, even though 90 percent of all employees say that they would like to have some form of organization to speak for them. In addition, American workers lack many of the protections commonly given to employees in other industrial democracies. They

82. RODGERS, *supra* note 41, at 488.

83. *Id.* at 480.

84. Laurence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 799 (1981) ("In 1870-1900, there were thirty-five cases in our sample that cited eight or more foreign cases; in 1940-1970 there were none.").

85. Commenting on the collapse of the U.S. effort to connect labor standards to the World Trade Organization's regime, William Safire applauded the administration's effort:

I believe the United States should be a light unto nations by virtue of our example of enlightened free enterprise. That means not lowering our health and labor standards to let investors everywhere make a buck, but applying those standards to others who want to make a buck with us.

William Safire, *The Clinton Round*, N.Y. TIMES, Dec. 6, 1999, at A31. Do we not hear here Rubinow's echo? Or would Mr. Safire acknowledge that the United States could be similarly "enlightened" by German, French, or Italian law?

86. DEREK BOK, *THE STATE OF THE NATION: GOVERNMENT AND THE QUEST FOR A BETTER SOCIETY* (1996).

87. *Id.* at 359-89.



have very limited safeguards against being fired arbitrarily by their employer. They receive much less assistance when they are laid off for economic reasons. And they appear to experience greater risks of illness and injury in performing their work (although the data supporting this conclusion are hardly definitive).<sup>88</sup>

Yet of the hundreds of law reviews included in the *Index of Legal Periodicals & Books*, none saw fit to have Bok's book reviewed.

Our provincialism vis-à-vis foreign employment law may be seen as actually rather unsurprising once one contemplates our insularity at home. Set out below, as Table I, is a demographic snapshot of two trading states, their capitals barely 600 miles from one another, both part of the same federal structure allowing for the free movement of goods, capital, and people between them.<sup>89</sup> These states do not appear to be drastically different: though one could argue about the significance of the distributions of minority populations, these states are overwhelmingly white; the significance of the respective levels of educational attainment will be mentioned later. Set out as Table II is a comparison of their labor protective laws.

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88. *Id.* at 272. As this paper was in preparation, the following appeared: Elizabeth Olson, *Americans Lead the World in Hours Worked: The Workweek Grows Longer in the United States but Shrinks in Other Countries*, N.Y. TIMES, Sept. 7, 1999, at C9. American workers averaged 1966 hours in 1997, as compared to 1560 for German workers and 1656 for French workers, even as productivity gains in the United States lagged behind those in Germany and France. *Id.* But, since the end of World War II, work hours—one of the most contentious labor issues of the nineteenth and early twentieth century—ceased to appear on the political map. BENJAMIN K. HUNNICUTT, *WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK* 1-3 (1988).

89. I chose Minnesota to compare to Indiana because the contiguous Midwestern states—Illinois, Michigan, and Ohio—are much larger and demographically diverse than Indiana, and noncontiguous Iowa is much smaller and less diverse. Wisconsin would be as close a demographic match as Minnesota and the legal differences laid out in Table II would be just as stark; but, Madison doesn't rhyme with Indianapolis.

TABLE I. THE DEMOGRAPHICS OF TWO MIDWESTERN JURISDICTIONS

	INDIANA	MINNESOTA
POPULATION <sup>90</sup>	5,942,900	4,775,500
AGE DISTRIBUTION <sup>91</sup>		
17 and under	25.8%	26.6%
18-44	39.8%	39.7%
45 and over	34.5%	33.7%
RACIAL DISTRIBUTION <sup>92</sup>		
White	90.6%	93.4%
Black	8.2%	2.8%
Hispanic	2.3%	1.7%
Asian	0.9%	2.5%
American Indian	0.2%	1.2%
EDUCATIONAL ATTAINMENT OF ADULTS <sup>93</sup>		
Below High School	24.3%	17.6%
High School	38.2%	33.0%
Some College	16.6%	19.0%
2 or 4 Year College Degree	14.5%	24.2%
Advanced Degree	6.4%	6.3%
POVERTY RATE <sup>94</sup>	9.1%	10.0%
NON-FARM PAYROLL <sup>95</sup> (January 1999)	2.94 million	2.59 million
UNION DENSITY (1997) <sup>96</sup> % of Private Sector Employees Represented by Unions	12.8%	13.5%

90. Almanac Issue 2000-2001, CHRON. HIGHER EDUC., Sept. 1, 2000, at 75, 87 [hereinafter Almanac].

91. *Id.*

92. *Id.*

93. *Id.* at 75-76, 87.

94. *Id.* at 76, 87.

95. Bureau of Labor Statistics, U.S. Dep't of Labor, MONTHLY LAB. REV., May 1999, at 72 tbl.11.

96. BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP & EARNINGS DATA BOOK 29-30 tbl.5a (1998).

TABLE II. SNAPSHOT OF EMPLOYEE PROTECTIONS  
IN TWO MIDWESTERN JURISDICTIONS

*A. Economic Security*

	INDIANA	MINNESOTA
MINIMUM WAGE (the federal minimum wage became \$5.15/hr. in 1997)	Until 10/1/98: \$3.35/hr. 10/1/98-3/1/99: \$4.25/hr. After 3/1/99: \$5.15/hr. <sup>97</sup>	From 9/1/97: \$5.15/hr. ("large" employers) From 1/1/98: \$4.90/hr. ("small" employers) <sup>98</sup>
UNEMPLOYMENT INSURANCE:		
Earnings in the Highest Quarter of Base Employment Period to Qualify for Minimum Weekly Unemployment Compensation ("UC") (1994) <sup>99</sup>	\$2500	\$1250
Maximum Weekly UC Benefit (1996) <sup>100</sup>	\$217	\$303
Maximum UC Benefit as % of State Average Weekly Wage (1996) <sup>101</sup>	44.5%	57.9%
WORKERS' COMPENSATION (total disability) <sup>102</sup>		
% of Weekly Wage	66.66%	66.66%
Max/Week	\$468	\$615
Amount Limit	\$234,000 <sup>103</sup>	None.
INDEMNIFICATION	A corporation is authorized to indemnify employees to the same extent as corporate directors and may purchase insurance for liability incurred as an employee. <sup>104</sup>	Employers are required to defend and indemnify employees from liability for acting in performance of their duties unless the act was of intentional misconduct, in bad faith, or constituted willful neglect of duty. <sup>105</sup>
PLANT CLOSING PROTECTION	No provision.	Provision for worker adjustment services, dislocation grants, and retraining. <sup>106</sup>

97. IND. CODE § 22-2-2-4(b), (f), (g) (1998) (subject to numerous exceptions).

98. MINN. STAT. ANN. § 177.24(b) (West Supp. 2000) (subject to several exemptions).

99. Walter Nicolson, *Initial Eligibility for Unemployment Compensation, in UNEMPLOYMENT INSURANCE IN THE UNITED STATES* 91, 96 tbl.3.1 (Christopher O'Leary & Stephen Wandner eds., 1997).

100. *Id.*

101. *Id.*

102. U.S. CHAMBER OF COMMERCE, 1999 ANALYSIS OF WORKERS' COMPENSATION LAWS chart VI (1999).

103. Raised to \$254,000 effective July 1, 2000. IND. CODE § 22-3-3-22(e) (Supp. 1999).

104. IND. CODE §§ 23-1-37-13 to -14 (Supp. 1999).

105. MINN. STAT. ANN. § 181.970 (West Supp. 2000).

106. MINN. STAT. ANN. § 268.97 (West Supp. 2000).

*B. Physical Well-Being*

	INDIANA	MINNESOTA
MANDATORY REST BREAKS	No provision.	"Adequate time" for use of restrooms required. <sup>107</sup> Separate provision is made to allow for nursing mothers to nurse in privacy. <sup>108</sup>
MANDATORY MEAL BREAKS	No provision.	"Sufficient time" must be allowed for persons working eight or more continuous hours. <sup>109</sup>
OCCUPATIONAL HEALTH & SAFETY	Requires the maintenance of a safe and healthful workplace:	Requires the maintenance of a safe and healthful workplace:
Notice	Occupational Safety Standards Commission must adopt standards including "the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards," relevant treatment, precautions, etc. <sup>110</sup>	Commission of Labor and Industry is delegated the same authority to adopt standards in identical language employed in Indiana law. <sup>111</sup>
Retaliation	Prohibited for filing a complaint or participating in a proceeding. <sup>112</sup>	Same. <sup>113</sup>
Mandatory Training	No provision.	For workers "routinely exposed" to hazardous substances or harmful physical agents, training in statutorily required subjects must be conducted at least annually. <sup>114</sup>
Refusal to Work Under Dangerous or Harmful Conditions	No provision. <sup>115</sup>	Individuals may refuse dangerous or harmful work under conditions that the employee in good faith believes to present an imminent danger of death or serious physical harm, and may not be discriminated against for doing so. <sup>116</sup>
Safety Committees	No provision.	Joint labor-management safety committees required with employee selection of employee participants. <sup>117</sup>
EMPLOYEE HEALTH INSURANCE	No provision.	Subsidy provided for the working poor. <sup>118</sup>

107. MINN. STAT. ANN. § 177.253 subd. 1 (West 1993).

108. MINN. STAT. ANN. § 181.939 (West Supp. 2000).

109. MINN. STAT. ANN. § 177.254 subd. 1 (West 1993).

110. IND. CODE § 22-8-1.1-17.1 (1998).

111. MINN. STAT. ANN. § 182.655 subds. 10-10a (West 1993 &amp; Supp. 2000).

112. IND. CODE § 22-8-1.1-38.1.

113. MINN. STAT. ANN. § 182.654 subd. 9 (West 1993).

114. *Id.* § 182.653 subds. 4b, 4c, 4f.

115. IND. CODE § 22-8-1.1-39.1. The Commission is authorized to secure a court order rectifying such conditions; employees may seek mandamus against the Commission for an arbitrary refusal to initiate a proceeding to order correction of conditions that can reasonably be expected to cause death or serious physical harm.

116. MINN. STAT. ANN. § 182.654 subd. 11 (West 1993).

117. MINN. STAT. ANN. § 182.676 (West Supp. 2000) (of workplaces with twenty-five or more employees).

118. MINN. STAT. ANN. §§ 256L.01-18 (West Supp. 2000). In common with all states except Hawaii, Minnesota does not require employers to provide health insurance; but, it is one of a

## C. Individual Liberty

	INDIANA	MINNESOTA
ANTIDISCRIMINATION IN EMPLOYMENT	Follows federal categories. <sup>119</sup>	Adds prohibitions on discrimination due to sexual orientation and marital status. <sup>120</sup>
PARENTAL LEAVE	No provision.	Required <sup>121</sup> (including up to 16 hours per year for school conferences and child-related activity). <sup>122</sup>
TIME OFF TO VOTE	No provision.	Paid leave required. <sup>123</sup>
TIME OFF FOR POLITICAL ACTIVITY	No provision.	Required for specified political categories. <sup>124</sup>
WHISTLEBLOWING	Employees of private employers that are public contractors may report violations of law concerning the execution of the public contract subject to obligation to ascertain the correctness of the information. <sup>125</sup>	Retaliation for reporting in good faith any violation of law to an employer or governmental body is protected. <sup>126</sup>
OFF DUTY CONDUCT	Forbids employer prohibition of off-duty use of tobacco products. <sup>127</sup>	Forbids employer prohibition of off-duty use of any "lawful consumable products," for example, food, alcoholic beverages, and tobacco. <sup>128</sup>

very few states to subsidize health insurance for the working poor. See HEALTH POLICY REFORM IN AMERICA: INNOVATIONS FROM THE STATES 218 (Howard M. Leichter ed., 2d ed. 1997).

119. IND. CODE § 22-9-1-3.

120. MINN. STAT. ANN. § 363.021 (West Supp. 2000).

121. MINN. STAT. ANN. §§ 181.940 to .944 (West 1993 & Supp. 2000).

122. MINN. STAT. ANN. § 181.9412 subd. 2 (West Supp. 2000).

123. MINN. STAT. ANN. § 204C.04 subd. 1 (West Supp. 2000).

124. MINN. STAT. ANN. § 202A.135 (West 1993).

125. IND. CODE § 22-5-3-3 (1998). The Indiana courts have extended common-law protection to forbid discharge for a reason violative of public policy; but, this exception to the at-will employment rule has been narrowly construed. See, e.g., *Bricker v. Federal-Mogul Corp.*, 29 F. Supp. 2d 508, 511 (S.D. Ind. 1998) (discharging an employee for refusal to back-date inspection reports is allowed); *Wior v. Anchor Indus.*, 669 N.E.2d 172, 177-78 (Ind. 1996) (discharging manager for refusing to discharge an employee with a workers' compensation claim is allowed).

126. MINN. STAT. ANN. § 181.932 subd. 1(a) (West 1993).

127. IND. CODE § 22-5-4-1.

128. MINN. STAT. ANN. § 181.938 subd. 2 (subject to specific job related restrictions).

*D. Privacy, Reputation, and Dignity*

	INDIANA	MINNESOTA
DRUG TESTING	Disclaimer of any statutory prohibition or regulation of drug testing of nonfederally regulated employees. <sup>129</sup>	Detailed regulation of drug testing, including procedural safeguards, protections for privacy and confidentiality, and limits on discharge forbid any arbitrary requirement to submit to a test and limit random testing to employees in safety-sensitive positions. <sup>130</sup>
USE OF LIE DETECTORS	No provision.	Prohibited. <sup>131</sup>
ACCESS TO ONE'S OWN PERSONNEL RECORDS	No provision.	Required. <sup>132</sup>
SERVICE LETTER	Employers that require written recommendations of applicants must, upon the request of a terminated employee, give the employee a truthful statement for his or her termination (but no private action may be brought under this provision). <sup>133</sup>	Employers must furnish an involuntarily terminated employee a written truthful statement of the reason for termination; no statement so furnished is subject to an action for defamation. <sup>134</sup>
JOB REFERENCES	Prospective employers must give prospective employees any written communication from a prior employer that may affect his or her employability; but, prior employer is immune from civil liability unless it is proven to have known the information was false. <sup>135</sup>	Disclosure by prior employer of "information contained in" its personnel records concerning prior employee is not actionable in defamation if the corrective provisions of the employee access to personnel records law have been adhered to. <sup>136</sup>
EMPLOYER ELECTRONIC INTERCEPTION OF NONTELEPHONIC ORAL COMMUNICATIONS	No prohibition. <sup>137</sup>	Prohibited without the consent of one party. <sup>138</sup>

129. IND. CODE § 22-9-5-24(c).

130. MINN. STAT. ANN. §§ 181.950 to .957 (West 1993 & Supp. 2000).

131. MINN. STAT. ANN. § 181.75(1) (West 1993).

132. MINN. STAT. ANN. §§ 181.960 to .966 (West 1993 & Supp. 2000).

133. IND. CODE § 22-6-3-1.

134. MINN. STAT. ANN. § 181.933 (West 1993).

135. IND. CODE § 22-5-3-1(b), (c).

136. MINN. STAT. ANN. § 181.962 (West 1993).

137. See IND. CODE § 35-33.5-1-5 (1998) (prohibiting only recording of telephonic communications by a non-"sender").

138. MINN. STAT. ANN. § 626A.02 (West Supp. 2000).

One cannot but be struck by how differently these states treat the protection of employees: Minnesota was fast to extend the federal minimum wage to those not reached by federal law (though willing to experiment with a subminimum for small enterprises). Indiana took two years to do it. Minnesota requires greater generosity in worker compensation and unemployment insurance, that is, it affords a little better protection for those at the lower end of the economic scale, is more generous as well with public funds for those displaced by plant closing, and requires employers to hold employees harmless for acting within the scope of their employment—an obligation perhaps more meaningful for managerial and supervisory employees. In regard to workers' physical well-being, individual liberty, privacy and dignity, Minnesota is significantly more protective than Indiana. These differences may be explicable in terms of the particular political culture of each of these states,<sup>139</sup> but the point is that even as the Hoosiers employed by an American multinational corporation have not besieged the Indiana state house demanding legal treatment comparable to their German counterparts, neither have they besieged the state house to demand treatment comparable to their Minnesotan counterparts. In terms of labor protective law, the gulf between Indianapolis and Minneapolis is as wide as the Atlantic.

### C. Institutions

Louis Brandeis, who is sometimes credited with coining the “race to the bottom”<sup>140</sup> so often bandied about in the discussion of globalization, deployed another observation concerning the power of the states “to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”<sup>141</sup> There is no lack of comparative interstate compilations on labor protective law—workers' compensation, unemployment insurance and the like; what seems to be wanting is any agency publicly pressing the adoption of “best practices” among the states. That is, the states may well be an “experiment station” in employment law, but we seem to have scant institutional means of assessing the results and advocating change more broadly based on them. Business interests appear to be quite capable of commanding legislative attention:<sup>142</sup> In the six-year period between 1989 and 1994,

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139. The University of Nebraska Press is publishing a series on politics and government in the fifty American states. A work on Minnesota has been published, DANIEL J. ELAZAR ET AL., *MINNESOTA POLITICS AND GOVERNMENT* (1999), but, alas, not yet Indiana. For a comparative snapshot under a variety of heads, see *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* (Virginia Gray et al. eds., 7th ed. 1999).

140. What Brandeis wrote was that the incorporation laws of the several states made it possible for them to compete for the business of incorporation based on the least costly and restrictive features of their laws: “The race was one not of diligence but of laxity.” *Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting). But the phrase that has come down to us is of a “race for the bottom.” William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *YALE L.J.* 663, 705 (1974).

141. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

142. In terms of organized interests registered to lobby the legislature, the national average is 61.6 business interests registered per state and 4.2 labor interests. ELAZAR ET AL., *supra* note 139, at 54 tbl.4. These figures for Minnesota are 59.8 and 5.7, respectively. *Id.* “Labor interests” are the unions of private and public employees. *Id.* at 58.

twenty-four states and the District of Columbia legislated to prohibit employers from discriminating against employees for the use of tobacco, alcohol, or both, when off the employer's premises and on nonwork time.<sup>143</sup> These at the behest of the tobacco and alcohol interests, though often couched in the guise of protecting individual liberty.<sup>144</sup> In the five-year period between 1995 and 1999, twenty-nine states enacted legislation to facilitate a freer communication of job references by making it harder for employees to sue in defamation or to eliminate such actions altogether.<sup>145</sup> No employee voice seems to have been uttered or much heeded in these legislative processes. Apart from organized labor, now at an historic postwar low in the percentage of private-sector employees represented, there is no institutional presence legislatively to press the interests of the individual employee: By definition, no one speaks for the unrepresented.

In the Progressive period, as we have seen, the AALL was such a presence, albeit as a civic organization acting from a social-science perspective. It collected data, published articles, reprinted or noted the latest studies world-wide and graphically displayed the results, naming and shaming those jurisdictions that lagged behind "best practices" in employment law and policy. In other words, it functioned as an active agency for "upward sedimentation" within the United States as well as for borrowing from abroad; but it disbanded after the Second World War and that function ceased with it.

### III. "THE THOUGHT OF WHAT AMERICA WOULD BE LIKE"<sup>146</sup>

Both the fact of American legal insularity and the potential benefit of engagement with the law of employment elsewhere in the developed world can be illuminated by reference to an issue recently considered by the highest courts of both Indiana and Minnesota: Whether an employer may inform the entire complement of its workforce at a store, office, or other facility that an employee has been discharged for misconduct, as a means of communicating and emphasizing the seriousness the company attaches to the enforcement of its rules.<sup>147</sup> The legal question is framed in terms of the qualified privilege that obtains in the law of defamation (and privacy), that is, whether the social benefit of the communication outweighs the harm it might cause to the dismissed employee. Supervisors who effect the discharge, those involved in the investigation leading toward it, those involved in the management of personnel, and even the small circle of the discharged employee's immediate

143. The statutes are compiled in MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 322-40 (1995).

144. For example, Philip Morris published a newsletter entitled *Smoker's Advocate* and R.J. Reynolds Tobacco Company published a similar newsletter on smokers' rights, *Choice*, couching its appeal for grassroots support in terms of the individual's right to privacy.

145. The statutes are compiled in FINKIN, *supra* note 143, at 357-82 (Supp. 2000).

146. With a nod to the shade of EZRA POUND, *Cantico Del Sole*, in *PERSONÆ: THE SHORTER POEMS OF EZRA POUND* 182 (Lea Baechler & A. Walton Litz eds., New Directions 1990) (1926) ("The thought of what America would be like / If the Classics had a wide circulation / [T]roubles my sleep.").

147. *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 260-61 (Ind. 1994); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 377, 379-81 (Minn. 1990).



coworkers have long been held subject to a communicative privilege because of their position in the hierarchy, their personal involvement in events leading to the action taken, or their personal relationship to those involved. Thus, the question presented is whether the law should be broadened to privilege an employer's making an "object lesson" of those dismissed, better to chasten the working force.<sup>148</sup>

In the Minnesota case, the management of a Kinney Shoe store summoned all the store's employees to assemble and publicly fired three employees for theft.<sup>149</sup> The intermediate appellate court, citing Minnesota and other authority, held that for this communicative act to be privileged the employees who were made to witness the humiliating ceremony had to have a legitimate "need to know."<sup>150</sup> A communication made "for the purpose of punishment and [to] mak[e] an example to nonmanagerial coworkers" was not privileged as a matter of law.<sup>151</sup>

In the Indiana case, the company had posted on a bulletin board and disseminated to its 1500 employees at a facility the fact that six unnamed employees had been discharged for theft.<sup>152</sup> The intermediate appellate court held it for the jury to decide whether the privilege had been abused: Citing Indiana as well as other authority, the court opined that not everyone receiving the communication necessarily shared a common interest with the employer in sending it.<sup>153</sup>

Both decisions proceeded from the well-established law of communicative privilege; but, in both cases, the state's highest court reversed. The Minnesota Supreme Court held the communication to be privileged as a matter of law, subject to the employer's duty to fully investigate before acting: Because employees have a "common interest in operating a successful enterprise," the employer is privileged to deter theft by publicly punishing the perpetrators.<sup>154</sup> So, too, the Supreme Court of Indiana: The company was privileged to communicate its "core values," its insistence upon employee honesty, by its dissemination of the discharges.<sup>155</sup> In neither holding did either court discuss the jurisdiction's prior authority, nor *any* authority on the precise point.

These cases are of interest for two reasons. The first is what they say about state insularity. Despite the overlay of federal protective law (and the preemptive effect of federal law governing pension benefits and collective bargaining), our law of employment remains overwhelmingly state law, both legislative and judge-made. Under our system, the law of sister states is considered the law of "foreign jurisdictions."<sup>156</sup> Over time, state supreme courts have tended to cite in-state

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148. Matthew W. Finkin, *Discharge and Disgrace: A Comment on the "Urge to Treat People as Objects"*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 1 (1997).

149. *Wirig*, 461 N.W.2d at 377.

150. *Wirig v. Kinney Shoe Corp.*, 448 N.W.2d 526, 532 (Minn. Ct. App. 1989), *aff'd in part and rev'd in part*, 461 N.W.2d 374 (Minn. 1990).

151. *Id.* at 533.

152. *Schrader*, 639 N.E.2d at 260.

153. *Schrader v. Eli Lilly & Co.*, 621 N.E.2d 635, 642 (Ind. Ct. App. 1993), *vacated by* 639 N.E.2d 258 (Ind. 1994).

154. *Wirig*, 461 N.W.2d at 379-80.

155. *Schrader*, 639 N.E.2d at 263.

156. This is so in Indiana, *see, e.g.*, *Romack v. Pub. Serv. Co. of Ind.*, 499 N.E.2d 768, 777 (Ind. Ct. App. 1986) (Conover, P.J., dissenting); *Vehslage v. Rose Acre Farms, Inc.*, 474

decisional authority with greater frequency vis-à-vis out-of-state authority, reflecting, perhaps, the maturation of state law<sup>157</sup>—that state supreme courts feel the need to turn to out-of-state authority “only when in-state cases are absent or ambiguous.”<sup>158</sup> In employment law, once the courts have charted a course they seem impervious to “foreign” influence thereafter. However, no prior Indiana or Minnesota case had confronted the precise claim advanced by the employers or the situation presented in these cases; and had the Supreme Courts of Minnesota and Indiana considered accordingly the decisions of “foreign” jurisdictions, they would have had to acknowledge the fact that some states have rejected the very corporate claim they were quick to sustain.<sup>159</sup> In consequence of these decisions, a multinational company is privileged to deploy public humiliation as a device to discipline its employees in Indiana (so long as they are not named, though remaining readily identifiable) or Minnesota (so long as the facts have been adequately investigated), but it may not do so of its employees in Michigan or Illinois.

These cases are of interest, second, for how “globalization” might contribute to the erosion of that insularity. How would the same Indiana multinational company fare in deploying such a disciplinary technique in, say, Belgium, Sweden, the Netherlands, or Germany? A cursory survey<sup>160</sup> fails to reveal a reported case in the first three jurisdictions, suggesting that such managerial behavior is simply “not done,” perhaps because of the role of unions or of fair dismissal law obviates the perceived need to chasten the workforce in that fashion. But were our Indiana multinational company to behave abroad as it behaves at home, this much seems clear: In Belgium, the employer (1) would have had expressly to have reserved the power to use this disciplinary technique in its written work regulations, as the imposition of a “moral sanction,” save that the actual exercise of the power reserved would be additionally cabined by procedural rules governing discipline; (2) would be potentially subject to further regulation by data-protection law; and, (3) most important, would be subject to the rule of proportionality whereby any discipline imposed must be proportional in relation to the wrongdoing—all of which would have to have been met for judicial consideration. In Sweden, the employer’s announcement would be potentially subject to the criminal law of slander (falsehood not being a defense), save insofar as under certain circumstances of public health, safety or welfare the information can be made public, that is, it would be subject to showing some overarching public need in order

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N.E.2d 1029, 1031 (Ind. Ct. App. 1985), as well as Minnesota, *see, e.g.*, *Badger Equip. Co. v. Brennan*, 431 N.W.2d 900, 902-03 (Minn. Ct. App. 1988); *Klemetsen v. Sternberg Constr. Co.*, 415 N.W.2d 887, 888 (Minn. Ct. App. 1987), *aff’d en banc*, 424 N.W.2d 70 (Minn. 1988).

157. *Friedman et al.*, *supra* note 83, at 797-98.

158. *Id.* at 798.

159. *E.g.*, *Drennan v. Westinghouse Elec. Corp.*, 328 So. 2d 52 (Fla. Dist. Ct. App. 1976); *Welch v. Chicago Tribune Co.*, 340 N.E.2d 539 (Ill. App. Ct. 1975); *Sias v. General Motors Corp.*, 127 N.W.2d 357 (Mich. 1964). At the time, however, the Supreme Court of Wisconsin had adopted the position taken by the Indiana and Minnesota Supreme Courts. *See Zinda v. La. Pacific Corp.*, 440 N.W.2d 548 (Wis. 1989).

160. Inquiry was made of Professor Max Rood, the University of Leiden, Professor Reinhold Fahlbeck, the University of Lund, and Frank Hendrickx of the Institute for Labor Law, Catholic University of Leuven. I wish to express my appreciation for their responses, which I summarize in text; errors in summarization are entirely my own.

to justify the disclosure. In the Netherlands, a balance would have to be struck judicially weighing the egregiousness of the employee's conduct, the alleged employer need to disclose and the harm done to the dignity and well-being of the employee. In sum, *if* this disciplinary device were to be allowed at all, these jurisdictions would require a good deal more than Indiana or Minnesota, especially proof of actual business or even public necessity under all the circumstances of the particular case.

The law in the Federal Republic of Germany is more developed. As American courts struggled since the 1960s to articulate a workable protection of employee privacy, largely without success due to the want of an adequate legal theory, in the same period of time the German courts have engaged in a parallel struggle with greater success.<sup>161</sup> The judge-made law there extends to the respect of one's general right of personality (*allgemeine Persönlichkeitsrecht*).<sup>162</sup> Consequently, there are cases on point: An employer may not condemn an employee (identified as "Ina M") for her laziness and malingering in a company newsletter even though her alleged conduct would have been outrageous by any measure,<sup>163</sup> nor may it post on a company blackboard a list of employees warned for conducting an allegedly wrongful walk-out.<sup>164</sup> In Germany, an employer may not use the employee as an object for the better discipline of the workforce.

It may be that employers in America should be allowed such a disciplinary device. But would not the marshaling of these laws—much as Brandeis had marshalled foreign protective law in *Muller v. Oregon*<sup>165</sup>—suggest to the court a need to explain *why* the company's naked claim of efficiency should trump the individual's right not to be reduced to an object: Why, that is, the judicial respect of human dignity (even if of the miscreant) should be not only lower in Indiana than in Michigan or Illinois, but lower also than in Belgium, Sweden, Germany, or the Netherlands, for employees of the same company doing the same work? And if such comparisons are worth considering,<sup>166</sup> the next question is whether the force of globalization will press them

161. Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 261-62, 266-68 (1996). See generally Hans Stoll, *The General Right to Personality in German Law: An Outline of its Development and Present Significance*, in PROTECTING PRIVACY 29 (Basil Markesinis ed., 1999).

162. Finkin, *supra* note 161, at 261-62, 266-68.

163. Judgment of Feb. 18, 1999, Bundesarbeitsgericht [Supreme Labor Court], 8 AZR 735/97 (F.R.G.) (The newsletter began, "The laziest worker in Germany: Worked only 3 days in 3 months. She could be the Queen of Idlers.") (trans. by author). The court rejected the argument that the article was protected under the freedom of the press. *Id.* It should be noted that the case was not concerned with whether or not Ms. M could have been discharged for malingering. *Id.*

164. Judgment of July 7, 1989, Arbeitsgericht Regensburg [Labor Court of Regensburg], 3 BVGa 1/892, reprinted in ARBEITSRECHT IM BETRIEB, Nov. 1989, at 354. I am indebted to Professor Winfried Boecken of the University of Konstanz for bringing these decisions to my attention.

165. 208 U.S. 412 (1908).

166. The English writer, quoted approvingly in the 1890 *Harvard Law Review* for taking Lord Justice Fry to task, opined of reference to American opinions by English courts: "[I]f [American decisions] are relevant, they may be of the highest value . . . for the intrinsic excellence of the judgments . . ." 4 HARV. L. REV. 38, 39 (1890) (quoting Note, 6 LAW Q.

to the fore.

The answer is that such questions are unlikely to be addressed: The thought of what America would be like were it to see itself as part of a larger Western legal tradition (and the common values it might share) is most likely to remain only that, a thought. This is not because the state is disabled by the force of "globalization" from affording stronger protections. Such a claim has been essayed, as noted at the outset of this lecture. Proponents of this view, in the words of prominent critics of it,<sup>167</sup> "envisage a world where gigantic corporations are truly global, and where the state is in retreat. For them the relocation of authority to either the supranational or subnational levels offers the only realistic hope for regaining political control over a dynamically changing economy."<sup>168</sup> One need not enter this debate because, as emphasized above, labor policy and law in America is often made at the subnational level, by state and even municipal legislatures and courts.<sup>169</sup> Paul Osterman, for example, who sees the shift in power from public to private actors to demand more of public regulation,<sup>170</sup> expects that role to be performed by the states, in the "classic role of state-level experimentation."<sup>171</sup>

At the state level, the "race to the bottom" in labor protection plays out on a landscape of existing and sometimes intense interstate competitive pressure into which global competitive pressure fits as a further feature.<sup>172</sup> The competition for foreign investment in greenfield development, for example, is not qualitatively different from competition for domestic investment in such projects.<sup>173</sup> To be sure,

REV. 122, 122 (1890)). This, to be sure, is in terms of the common law.

167. PAUL DOREMUS ET AL., *THE MYTH OF THE GLOBAL CORPORATION* 148 (1998) ("If certain domestic structures in advanced industrial states are evolving in ways that make it more difficult to constrain corporate power, they should be adjusted internally.").

168. *Id.* at 138.

169. Note Alan Krueger's treatment of the United States in his discussion of the European Union, KRUEGER, *supra* note 19.

170. PAUL OSTERMAN, *SECURING PROSPERITY* 183 (1999) ("The power of the market does not delegitimize policy; rather, it makes policy all the more important to a healthy economy and society.").

171. *Id.* at 188-89.

172. Martin Saiz and Susan Clarke argue that globalization significantly alters the traditional interstate competitive landscape: "The traditional interjurisdictional competition for investment takes on a new dimension when the costs of production are lower outside the United States and all states are potential losers." Martin Saiz & Susan E. Clarke, *Economic Development and Infrastructure Policy*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS*, *supra* note 139, at 477. California, they point out, may now compete for investment with "Latin America rather than other states in the United States." *Id.* at 499.

If Bakersfield loses out to Lima for foreign investment, the direct impact on Bakersfield seems indistinguishable from losing out to Baltimore. No doubt there is an indirect negative effect insofar as the U.S. economy as a whole has lost out; but, the specific effect on California would be difficult to discern, which makes local labor conditions amenable to local political forces. Indeed, Saiz and Clarke, after surveying various state responses to global competitiveness, remark that "the state context is more politicized and the organization of state politics is more amenable to political negotiation in regard to economic development issues than previously assumed." *Id.* at 500.

173. Two examples Saiz and Clarke give of interstate competition for investment are the

some state courts have expressed a robust policy of laissez-faire toward business in framing a less than robust scope for the common-law protection to be accorded employees,<sup>174</sup> but, the ability of the courts to calibrate the law along that scale is as dubious as the assumption on which the policy proceeds. Set out as Table III is a snapshot of the economic status of workers in Indiana vis-à-vis Minnesota.

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state concessions given for the location of Daimler-Benz's sports-utility plant and for the location of General Motor's Saturn plant. Thirty-five states bid for the former, thirty for the latter. *Id.* at 476-77. To the losing states it would seem irrelevant that one was a foreign and the other a domestic investment. The possibility that either might choose to be situated instead in Mexico may moderate employee wage and benefit demands here, but it is not likely that American states will lower their labor protections to Mexican standards. Sanford M. Jacoby, *Social Dimensions of Global Economic Integration*, in *THE WORKERS OF NATIONS* 3, 17-18 (Sanford M. Jacoby ed., 1995) ("To maintain living standards, the advanced workers are forced to compete on factors other than cost: product quality, time to market, stylishness, and speed of innovation.").

174. In *Kurtzman v. Applied Analytical Industries*, 493 S.E.2d 420 (N.C. 1997), the Supreme Court of North Carolina refused to imply a requirement of just cause to terminate a business executive by reason of oral assurances of permanence coupled with the employee's relocation from Rhode Island to North Carolina. *Id.* at 422. "North Carolina is an employment-at-will state," the court opined. *Id.* "[T]he [at-will] rule remains an incentive to economic development, and any significant erosion of it could serve as a disincentive." *Id.* at 423 (emphasis added). So, too, did the Supreme Court of Wyoming reject the availability of prima facie tort to contest the discharge of an at-will employee:

Our jurisprudence in the employment context has developed from the premise that the stability of the business community is our primary consideration and that stability is best served by applying contract principles [in contrast to tort principles] in the employment context. . . . The at-will employment rule offers no remedy to an employee who has been arbitrarily or improperly discharged and has suffered adverse effects on his or her economic and social status regardless of how devastating those effects actually were. Stability in the business community is preserved because, at least at the state level, employers' and employees' decisions remain subject only to the express or implied contracts into which they have voluntarily entered or subject to statute.

*Townsend v. Living Centers Rocky Mountain, Inc.*, 947 P.2d 1297, 1299 (Wyo. 1997) (emphasis added).

TABLE III. SNAPSHOT OF WORKFORCE ECONOMIC STATUS

	INDIANA	MINNESOTA
Per Capita Personal Income (2000) <sup>175</sup>	\$26,092	\$30,622
Average Weekly Wage (1996) <sup>176</sup>	\$509	\$555
Median Hourly Wage (1997) <sup>177</sup>	\$10.30	\$11.75
% Earning Less than \$7.79/hr. (1997) <sup>178</sup>	27.0%	23.87%
% Earning More than \$10/hr. (1997) <sup>179</sup>	55.7%	61.3%
Unemployment (January, 1999) <sup>180</sup>	3.1%	2.4%

Note that Minnesota enjoys both a per capita income and a median weekly wage about fourteen percent higher than Indiana, has a more favorable display of workers earning more than ten dollars per hour and fewer earning less than a livable wage, and has a lower rate of unemployment. The economic performance of Minnesota vis-à-vis Indiana, while maintaining a significantly more protective labor law than the latter, evidences that the factors affecting competitiveness—in levels of education, job skills, and the nature of the jobs the state's economy has generated, to name but three—are far too complex for a simplistic assumption that greater employee legal protection means fewer good jobs.<sup>181</sup>

The European comparisons will not be made for a reason having nothing to do with the inability of the state to act on it, for the paradox of our subnational legal insularity is that it works simultaneously to attenuate the anti-regulatory force of "globalism" and to constitute a major obstacle to "foreign" legal engagement. The Supreme Court of Indiana, from what appears, is likely to be no more persuaded by, or indifferent to, German than to Michigan decisional law.

Nor is German law likely even to be brought to the courts' attention for the further reason that nothing in our experience or our education suggests that our lawyers ought to do so. On the former, experience, it is at the national level that the actors are most likely to deal with foreign systems. Confrontation with the European Union's

175. Almanac, *supra* note 90, at 75, 87.

176. LAURENCE MISCHELET AL., THE STATE OF WORKING AMERICA 1998-1999, at 315, 330 tbl.7.7 (1999).

177. *Id.* at 332 tbl.7.8.

178. *Id.* at 338 tbl.7.10.

179. *Id.*

180. Bureau of Labor Statistics, *supra* note 95, at 72 tbl.10.

181. In 1994, Indiana's Gross State Product ("GSP") was \$138.2 billion and Minnesota's was \$124.6 billion ranking them fifteenth and twentieth in the nation respectively; but thirty-one percent of Indiana's GSP derived from manufacturing while only twenty percent of Minnesota's derived from manufacturing. Virginia Gray, *The Socioeconomic and Political Context of States*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS*, *supra* note 139, at 18 tbl.1-3.

data protection directive<sup>182</sup> and even participation in the machinery of NAFTA's side agreement<sup>183</sup> require the U.S. participants to become fully conversant with the relevant body or bodies of foreign law. Silvana Sciarra has pointed out that as much is so also of the centripetal forces at work in Europe: "Facing globalization from the perspective of a very significant 'partial global culture,' such as the European one, forces labour lawyers to rethink their own identity, either as inherent to a national legal culture, or as a fragment of a supranational legal order, or both."<sup>184</sup> No such engagement is triggered at the subnational level here. On the contrary, the lawyers and human resource managers who become conversant with foreign systems—for example, in the administration of European-wide works councils—do so by virtue of representing American multinational corporations abroad; their clients and employers are unlikely to be keen on having them transpose that experience here.<sup>185</sup>

On the latter, education, we are not producing lawyers knowledgeable about continental European employment law for whom such references in legal argument would be part of their ordinary professional vocabulary.<sup>186</sup> In fact, as Lance Compa and Harry Arthurs have pointed out, elite American law schools seem increasingly disinclined to devote full-time faculty resources even to the area of domestic labor law,<sup>187</sup> this at a time when the whole employment relationship, legally as well as economically and sociologically, is undergoing significant change worldwide.<sup>188</sup> Barring an educational revolution, lacking an institutional presence persistently to press often an unflattering comparative engagement and absent a continental shift in attitude we shall continue, as now, "smug and insular."<sup>189</sup>

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182. See *supra* text accompanying note 25.

183. See *supra* text accompanying note 32.

184. Sciarra, *supra* note 17, at 101.

185. See Arthurs, *supra* note 13.

186. There are, for example, no published teaching materials in the United States dealing with comparative employment law.

187. Harry Arthurs, *Landscape and Memory: Labour Law, Legal Pluralism and Globalism*, in *ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT*, *supra* note 2, at 21, 25 n.5; Lance Compa, 20 *COMP. LAB. L. & POL'Y J.* 125, 126 (1998) (book review).

188. Arthurs, *supra* note 187, at 25 n.5; Compa, *supra* note 187, at 126. See generally, e.g., OSTERMAN, *supra* note 170, at 20-68; STEPHEN A. HERZENBERG ET AL., *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA* (1998).

189. RODGERS, *supra* note 42, at 473.