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Reinventing Labor Law For The Global Economy: The Benjamin Aaron Lecture

Harry W. Arthurs

Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca

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† The Benjamin Aaron Lecture is presented annually by the Labor Law Section of the Los Angeles County Bar Association and the Institute of Industrial Relations, University of California, Los Angeles in honor of Prof. Benjamin Aaron, Emeritus Professor of Law and Industrial Relations at UCLA and, from 1960-1975, Director of the Institute. The text of these remarks has been altered slightly and footnotes have been added for publication, but remains substantially as presented on October 11, 2000.

†† University Professor of Law and Political Science and President Emeritus, York University, Toronto, Canada. I should like to express my thanks to my research assistants, Matina Karvellas, Freya Kodar and Albert Wallrap, for their able assistance; to the Social Sciences and Humanities Research Council of Canada for its support for my work; to the sponsors of the Benjamin Aaron Lecture for their invitation; and to the editors of BJELL for their interest and guidance.

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I.

INTRODUCTION

Of all the challenges of academic life, few are equal to giving the Benjamin Aaron lecture in the presence of the man himself. As it happens, however, I am well prepared. Not only was I weaned on the voluminous writings of the eponymous Aaron; I once had the honor of helping to edit a collection of them. And not only have I spoken in Ben's presence before; I once did so under the sponsorship of this very Institute.

That occasion introduced me to Ben's sense of humor. In 1975, the Swedes were arguing, with uncharacteristic rancor, over a law that would expand labor's right to participate in shop-floor decisions. Ben decided that he would help resolve the argument by bringing the whole Swedish labor, management, government and academic establishment to Los Angeles, where they would be pacified by then-Secretary of Labor William Usery. That was humorous in itself—a bit like flying the NBA players and owners off to Stockholm to discuss a salary cap. But the real joke was yet to come. Secretary Usery had to cancel his appearance, and on about fifteen minutes' notice Ben asked me to fly down from Toronto to speak in his place. Naturally, I was an obvious choice: I knew very little about Swedish labor law, I had not read or even heard of the legislation, and I had a full-time day job as dean of a large law school. Nonetheless, I must have done something right. The Swedes laughed uproariously, they published my speech in Swedish, and they abandoned the legislation. Twenty-four years later I was asked to fill in as a last-minute substitute speaker for Robert Reich, who had just resigned as President Clinton's Secretary of Labor. If Ben or anyone else can tell me who is going to be Secretary of Labor in 2023, I can get an early start on my next speech.

So much for Ben's sense of humor. Happily, this personal reminiscence also allows me to make a serious point about Ben's contribution as a pioneer of comparative and international labor law. The Swedes came to U.C.L.A. because of Ben's reputation, not Usery's, and certainly not mine. Ben didn't just dabble in the field: he worked at it over many years, in close collaboration with a group of international scholars, and at a level of detail and intensity that has remained a model for those who built upon his early work. In fact, I can truly say that I am here tonight, speaking about globalization and its implications for labor law, very much because of Ben's foundational work on the subject.

Oddly, despite Ben's interest in the subject, none of the Benjamin Aaron lectures to date has dealt with comparative and international labor

law, or what we might call transnational or global labor law.¹ From one perspective, perhaps, this is not too surprising. After all, most labor and employment professionals practice or write or teach exclusively about domestic labor law and industrial relations and rarely, if ever, encounter foreign systems. But from another perspective, it is rather odd, because globalization is one of the defining influences in our political, economic and social life—not least in labor law and industrial relations.

Hence my title tonight, “Re-inventing Labor Law for the Global Economy,” and the four questions I am going to ask in this lecture. First, what is globalization? Second, why don’t labor law and industrial relations scholars and practitioners talk about globalization very often? Third, how does globalization in fact influence our existing industrial relations (IR) and labor law systems? Finally and most importantly, what kind of new labor law system is developing in the context of the global economy?

II.

WHAT IS GLOBALIZATION?

On the first question I think I can speak with some authority. After all, I am the man who discovered it, with a little help from my research assistant. In the summer of 1999, I decided to brush up my on-line search skills by seeing if I could find everything I myself had written on globalization—at least I would be able to figure out what was missing. To my shock, a subject search of “globalization” turned up absolutely nothing: nothing of mine, nothing by anyone else. To make a long story short, it turns out that the Library of Congress, whose classification system is used by most English-language libraries and journals, had no subject heading called “globalization.” I wrote to protest, but it was not until December 1999, after several months of our nagging, that the Library of Congress belatedly introduced “globalization” into its classification system.²

So much for my credentials; now to make my point. Globalization, as we know it today, is an integrated system of business arrangements that seeks to move large volumes of goods, services, information and capital across international borders with low friction and at high velocity. But it is much more. Globalization is also a technological system that uses transportation and communications and manufacturing techniques to make such movements possible.

Moreover, globalization—at least in its current incarnation—is a

1. The lone exception is Alvin L. Goldman, *Potential Refinements of Employment Relations Law in the 21st Century*, 3 EMPLOYEE RIGHTS & EMP. POL’Y J. 269 (1999).

2. E-mail from Paul Weiss, Cataloguing Policy and Support Office, Library of Congress, to Matina Karvellas, research assistant to Harry Arthurs (Feb. 4, 2000) (on file with author) (“The heading ‘Globalization’ was created in late 1999.”).

political system sometimes known as neo-liberalism, a tribute to Adam Smith and the 19th century liberal economists who built on his work. Neo-liberals, like their forbears, believe that market forces are superior to all other forms of social ordering, such as state intervention or community cooperation.³ Consequently, neo-liberals want to eliminate both domestic market regulation and all barriers to transnational trade. Of course, neo-liberals do not favor markets to the point of utter foolishness. States are still welcome to provide infrastructure, protect commerce from fraud and violence, and discipline obstreperous workers. But at least at the level of rhetoric, globalization as we know it is built on the neo-liberal premise that states should govern to the least extent possible. This neo-liberal political project has succeeded to the point where it has become paradigmatic. It is now generally accepted that the logic of markets sweeps everything before it and that all other logics must give way. Not surprisingly, people who resist market logic—that is, people who persist in thinking and acting as if politics or families or culture or ethics mattered—often become the sworn enemies of neo-liberalism and globalization. Workers who claim rights and dignity despite their lack of market power, farmers who resist destruction of their indigenous stocks by genetically-modified imports, and cultural communities that shelter their books and movies from the great global entertainment conglomerates are all, in their way, fighting the culture of globalization and neo-liberalism.

Finally, I want to stress that globalization is a legal system. It depends upon the willingness of states to repeal old laws that constrain trade, to bring existing laws into alignment with the regulatory and property regimes of international trading partners, to abstain from passing new laws that discriminate against foreign firms or discourage foreign investors, and to accommodate the complex body of contractual and customary legal arrangements that have grown up to facilitate global business transactions.

III.

WHY DO LAWYERS INSIST THAT LABOR LAW IS LOCAL, NOT GLOBAL?

One might expect that this economic, technological, political, cultural and legal system we call globalization would have produced something we could call global labor law. However, according to forty or so management-side labor lawyers I recently interviewed in seven countries, no such thing exists.⁴ They were unanimous: international labor standards

3. Amongst the classic texts of neo-liberalism are F.A. HAYEK, *THE ROAD TO SERFDOM* (1944) and M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

4. See Harry Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law*, in *THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS* (W. Felstiner et al. eds., forthcoming 2001) (containing interviews of lawyers in England, France,

do not affect their advice-giving or advocacy functions. Labor law is local law, plain and simple.

How can we explain this discrepancy between the clearly important role of law in the process of globalization, and the conclusion of these experienced professionals that globalization has nothing to do with labor law? Perhaps they have simply not grasped the big picture and perhaps, as a practical matter, they need not do so; after all, there is no Global Labor Relations Act or Global OSHA, no GLRB or Global Department of Labor. But there is the North American Free Trade Agreement (NAFTA)⁵ and its labor side agreement, the North American Agreement on Labor Cooperation (NAALC).⁶ There are the UN Covenants on Human Rights,⁷ the International Labor Organization (ILO) and its Charter and conventions,⁸ and the Organization for Economic Co-operation and Development (OECD)⁹ and its many reports and guidelines. In fact, the corpus of global labor law is as large as the corpus of global banking or shipping or insolvency or intellectual property law, although the United States has not ratified or adopted most of it. So we are back to the same basic question: why does the whole notion seem so strange to labor lawyers, and especially to American labor lawyers? I am going to suggest four reasons.

First, unlike capital, goods, or information, workers generally do not move across national borders in our global economy. True, there are exceptions. Some highly privileged workers, such as athletes, entertainers, executives, technicians, and airline pilots, do work abroad in the global economy. Indeed, they are sometimes the targets of aggressive public and private recruitment initiatives.¹⁰ Although most of these workers have

Belgium, Holland, Mexico, Canada and the United States).

5. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057, 32 I.L.M. 289 (entered into force Jan. 1, 1994).

6. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 107 Stat. 2057, 32 I.L.M. 1502 (entered into force Jan. 1, 1994).

7. Universal Declaration of Human Rights, G.A. Res. 217A (III) U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 12, 1951); International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23 1976).

8. See Constitution of the International Labor Organization, June 28, 1919, 2 Bevans 241 (entered into force Jan. 10, 1920), *available as amended at* <http://www.ilo.org/public/english/about/iloconst.htm>.

9. See Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T., 888 U.N.T.S. 179 (entered into force Sept. 30, 1961).

10. For recent examples of public initiatives, see the American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, div. C, tit. VI, 112 Stat. 2681-641 to -657 and the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251. See also Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR.

individual or collective agreements stipulating that the law of their home jurisdiction will govern their employment relations, others, such as seamen, are protected by special rules of international labor law.¹¹ Some highly underprivileged workers, like the immigrants, refugees, guest workers and illegal border-crossers who make up a large part of the work force of Los Angeles or Toronto, achieve mobility while governed by a special regime of labor law, the first principle of which is that they should be neither seen nor heard from.¹² But putting aside the over-privileged and the underprivileged, it remains true that most workers are not mobile, and that although labor is clearly implicated in the international system of production,¹³ it is not a "globalized" factor of production in the same sense as capital, technology, or trademarks.

Second, despite a century or more of experimentation, unions have not managed to develop viable international structures comparable to those of transnational corporations. Labor organizations seem unable to achieve any kind of ideological or programmatic consensus, workers in different countries see themselves as competing for the same job opportunities, and governments are vigilant in excluding foreign labor agitators. Once again, for the record, I will cite a few contrary examples. Most AFL-CIO unions are international unions, which is to say they have (or used to have) large Canadian memberships.¹⁴ Moreover, the AFL-CIO was closely aligned with non-Communist unions in Western Europe and Latin America during the Cold War.¹⁵ And in the past decade or so, AFL-CIO unions have joined with other national labor movements to develop bilateral and multilateral strategies on a regional and global basis.¹⁶ Nonetheless, the fact remains

L.J. 789 (1997); Jung S. Hahn, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673 (2000).

11. See, e.g., International Convention on the Arrest of Sea-Going Ships, May 10, 1952, 439 U.N.T.S. (protecting sailors' wages); International Convention on Maritime Liens and Mortgages, May 6, 1993, 33 I.L.M. 353 (same); International Labor Organization Conventions 7 and 58 (minimum age), 9, 22, 145, and 179 (hirings and conditions of employment), 23 and 166 (repatriation of seamen), 53 (officers' competency certificates), 55, 56, 73, 130 (sickness and injury) 68 (food and catering), 92 (accommodation of crews), 134 (prevention of accidents), 147 (merchant shipping minimum standards), 178 (labour inspection), text of all conventions available at <http://iiolex.ilo.ch:1567/public/english/docs/convdsp.htm>.

12. For an introduction to this issue, see M. Patricia Fernandez Kelly, *Underclass and Immigrant Women as Economic Actors: Rethinking Citizenship in a Changing Global Economy*, 9 AM. U. J. INT'L. L. & POL'Y 151 (1993); Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulation*, 103 YALE L.J. 2289 (1994).

13. A useful review of the early literature on the "international division of labor" can be found in ALEJANDRO PORTES, LABOR, CLASS AND THE INTERNATIONAL SYSTEM 189-91 (1981).

14. In 1962, 70 % of Canadian unionists belonged to U.S. based internationals, by 1995 only 30%. DIANE MAINVILLE & CAREY OLINECK, UNIONIZATION IN CANADA: A RETROSPECTIVE 9 (1999).

15. See Andrew J. Herod, *Labor as an Agent of Globalization and as a Global Agent*, in SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL 174-81 (K. Cox ed., 1997).

16. See John Windmuller, *The International Trade Union Movement*, in COMPARATIVE LABOUR

that labor organizations are not significant players in the global economy. Consequently, few practitioners have any compelling reason to think about something as improbable as global labor law.

Third, labor lawyers' clients do not want them to think about global labor law. Both first world and third world governments and employers have their own reasons for wanting labor law to remain local. This is not to say that lawyers think only what their clients want them to think. In fact, lawyers in every country I surveyed (other than the United States) acknowledged that globalization had significantly influenced the content and administration of their national labor law. I will return to this point.

Fourth, then, I have to say something about the special case of the United States, since it happens to be the most important one. My tentative hypothesis is that—like the Library of Congress—American labor lawyers seem to have taken little notice of globalization because their experience of it differs from that of lawyers in most other countries.

Some countries, especially the United States, are globalizers; others, like Guatemala or Thailand, are globalizees; and some, like France or Korea, are a mixture of the two. Thus, globalization for Canada largely involves integration into a North American economic space dominated by the United States; globalization for the United States is a marginal adjustment of its relationship with other countries in order to advance the interests of American investors and, if they are lucky, American workers. Globalization for Canada is the export of some 40% of its GDP; globalization for the United States is the export of 5% to 10%. Globalization for Canada is the gradual transformation of Canadian business corporations into subsidiaries of foreign-based transnationals; globalization for the U.S. is the increasing domination of other people's markets and production centers by U.S. companies.¹⁷ In short, American lawyers may seem indifferent and insensitive to globalization—even as compared with Canadian, Mexican and European lawyers—because they are generally the authors of globalization, not its subjects.

If that is true, however, the American lawyers ought to rethink their position. Globalization is no respecter of persons, countries or lawyers. Canada obviously is a junior partner in the North American economic system. But this year Ontario, my home province, will produce more cars than Michigan. Toronto, my home town, will provide locations for more

LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALISED MARKET ECONOMIES 83, 86 (R. Blanpain ed., 4th ed. 1990); Robert O'Brien, *Workers and the World Order: The Tentative Transformation of the International Union Movement*, 26 REV. INT'L STUDIES 533, 538-39 (2000); Ian Robinson, *NAFTA, Social Unionism, and Labour Movement Power in Canada and the United States*, 49 INDUS. REL./RELATIONS INDUSTRIELLES 657, 672-84 (1994).

17. See Harry Arthurs, *The Hollowing out of Corporate Canada*, in GLOBALIZING INSTITUTIONS: CASE STUDIES IN SOCIAL REGULATION AND INNOVATION 29 n. 35 (J. Jenson & B. Santos eds., 2000).

movie shoots than any North American city except New York and Los Angeles. Seagrams began in Canada, converted itself into an American company, and is about to disappear into a French firm. Chrysler, once as American as apple pie, now looks suspiciously like *apfel strudel*. My point is simply that even globalizers must pay a price for globalization, that even globalizees may benefit from being on the receiving end, and that the absence of personal encounters with globalization—good or bad—may explain, but does not excuse, a failure to consider its full effects.

What, then, are those effects? How does labor law change under the pressure of globalization, even in the United States? That is the third question on my agenda.

IV.

THE INFLUENCE OF GLOBALIZATION ON LABOR LAW AND INDUSTRIAL RELATIONS

A. *International Influences on American Industrial Relations: A Brief History*

American industrial relations have always been subject to international influences. Sometimes those influences have been manifest in the realm of the economy, sometimes in the realm of ideas; sometimes the balance of influence has been in America's favor, sometimes against; and sometimes the international and global connection has strengthened respect for labor's rights and interests, sometimes it has undermined these interests.

To begin at the beginning, John R. Commons, a Progressive and one of the architects of industrial relations as a modern academic discipline and social system, was greatly influenced by ongoing exchanges between American and European labor practitioners, administrators, and scholars. In fact, in his Madison, Wisconsin seminar room Commons maintained an up-to-date chart of all the world's labor legislation. Commons and his disciples helped shape the beginnings of modern American labor law in the 1930s, including the New Deal labor standards legislation, the Wagner Act, and the first elements of a social security system. In doing so, they drew heavily on the comparative labor legislation and labor scholarship imported by Americans from Europe, Canada, and Australia since the 1890s.¹⁸

By the 1930s, however, ideas were about all that was being imported; international trade had fallen drastically in the face of world-wide protectionism. No wonder the Congressional findings in the preamble to the Wagner Act identify as one of its key ambitions the recovery of both

18. The initial part of this "history" draws heavily on DANIEL ROGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998).

wages and purchasing power.¹⁹ This recovery very much depended on the recovery of export, as well as domestic, markets, and in fact occurred only after 1940 when the economy was given a significant boost first by the demand for war *materiel*, then for aid to reconstruct Britain and liberated Europe, and ultimately by more conventional exports. This export-enhanced prosperity created jobs for Americans, improved living standards, and built a foundation of confidence for unions. Not by coincidence, it also made internationalists of Ben Aaron and other thoughtful labor lawyers such as Willard Wirtz, Clyde Summers, and Robert Mathews. When they formed the Labor Law Group in Ann Arbor in 1947, and invented labor law as an academic discipline, they made an explicit commitment to teach the subject within an international and comparative perspective.²⁰

This decision was hardly surprising. In that far-off, innocent time fair labor standards, collective bargaining and social security were thought to be fundamental rights in any free and democratic society. In 1944, the year of the ILO's historic Philadelphia Declaration,²¹ American labor law was adopted *holus-bolus* in Canada;²² soon afterwards, the Japanese were introduced to collective bargaining through the unlikely agency of General Douglas MacArthur.²³ By the late 1940s, American labor experts and practitioners had helped to persuade the ILO to adopt important conventions on subjects such as Freedom of Association and Collective Bargaining;²⁴ and American negotiators had initially agreed (though Congress ultimately did not) that fair labor standards were to be guaranteed by the International Trade Organization, the failed precursor of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).²⁵

19. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

20. The history of the Labor Law Group has been traced by John E. Dunsford, *In Praise of Casebooks (A Personal Reminiscence)*, 44 ST. LOUIS U. L.J. 821 (2000), and by Ben Aaron, *The Labor Law Group: 1947-1982* (1992) (unpublished manuscript, on file with the author). The Group, whose collaborative publications have now appeared over half a century, constitutes the "Burgess Shale" of American labor law. Its rich intellectual deposits await the attention of an imaginative socio-legal paleontologist.

21. Declaration Concerning the Aims and Purposes of the International Labor Organization, May 10, 1944, 9 Hudson 124, annex to ILO Constitution, *supra* note 8.

22. See JUDY FUDGE & ERIC TUCKER, *LABOUR BEFORE THE LAW: WORKERS' COLLECTIVE ACTION AND THE STATE IN CANADA* (forthcoming 2001).

23. See WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964*, 582-597 *passim* (1979).

24. See Robert Cox, *Labor and Hegemony*, 3 INT'L ORGS. 385 (YEAR); Herod, *supra* note 15.

25. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (entered into force Jan. 1, 1948) as amended by the Marrakesh Agreement Establishing the World Trade Organization, Dec. 15, 1993, 108 Stat. 480 (1994), 33 I.L.M. 13 (entered into force Jan. 1, 1995). The early history is reviewed in Steve Charnovitz, *The Influence of International Labor Standards on the World Trading Regime: A Historical Overview*, 126 INT'L LAB. REV. 565, 566-57 (1987). See

The 1950s and 1960s were the “golden years” of American industrial and employment relations. The domain of collective bargaining expanded with the development of health and safety and anti-discrimination legislation. This expansion of labor rights, including rights for minorities and women, was made possible by an expanding American economy fueled, in part, by the recovery of the world economy. Here again we see how the fortunes of American labor were tied to global economic developments. Of course, the world economy did not always bring prosperity to America and positive outcomes for its workers. Beginning with the oil shocks of the early 1970s, the deregulation of international financial markets around the same time, and the rise of powerful foreign competitors in key sectors such as steel, electronics, cars, and banking, the American economy entered a new and more challenging period that featured slowing growth and rising inflation. At the same time, America saw the erosion of real hourly wages, the decline of unionism, the stalling of progress for minorities, the abandonment of the idea of full employment, and the end of prospects for reform—or even effective enforcement—of the NLRA; not to mention the dissolution of the historic New Deal coalition that had supported all of the above. Surely, then, American labor relations have something to do with globalization.

Now, at the beginning of the new century, we find America ensconced as the dominant global economic power, and once again we find that the fortunes of American labor seem to be improving, albeit modestly. Unemployment is very low; real wages for workers have begun to climb again; unions have pretty much stopped shrinking; and most importantly, the American labor movement seems to have found a mobilizing issue: globalization. At the beginning of the 1990s, labor desperately tried and failed to block NAFTA; by the end of the 1990s, labor had helped to deny President Clinton fast-track authority to negotiate free trade agreements, played a lead role in the “battle of Seattle,” and continued to flirt with third party candidates running on an anti-globalization platform.²⁶ Who knows what the outcome will be? Perhaps labor’s new agenda will generate new energies and attract new recruits, perhaps it will lead to a new labor-led coalition of social forces, or perhaps in the end labor will conclude that globalization is the engine of prosperity and that further resistance is counterproductive. Whatever the case, globalization cannot be ignored: one way or another it is affecting the vital interests of American workers, shaping the fate of the American labor movement, and rewriting American industrial relations.

also generally Daniel Drache, *The Short but Amazingly Significant Life of the International Trade Organization (ITO): Free Trade and Full Employment: Friends or Foes Forever?* Roberts Centre for Canadian Studies, at http://www.robarts.yorku.ca/public_domains/ (last visited May 29, 2001).

26. See Lars-Erik Nelson, *Watch Out, Democrats!*, 47 N.Y. REV. BOOKS, July 20, 2000, at 13-16.

B. Globalization and Labor Law

Next, I am going to turn to the more specific and contemporary effects of globalization on labor law.²⁷ Inevitably, I am going to have to say something as well about technological change and neo-liberalism, which are very much tied up with globalization, but I will try to keep globalization as my main focus.

First, and most powerfully, globalization has changed the way we think about labor law and labor policy. As a result of what I have called “globalization of the mind,”²⁸ governments of all stripes have accepted that in the world-wide competition for jobs, investment and prosperity, rewards will flow to countries whose labor policies can be described as “business friendly.” Though the mix varies from country to country, these policies come in two basic models. Model one features structural changes in the economy designed to keep workers in line and reduce the threat that wage-driven inflation will dilute returns on investment.²⁹ Model two is characterized by the passive failure to renovate labor law so that it works effectively to protect workers’ rights in the new, global economy.³⁰ These trends are both evident in the United States where the Federal Reserve Bank disciplines greedy workers, where at sixty-five the Wagner Act is too old to work but too young to die,³¹ and where the administrative apparatus that used to give labor law its bite has been seriously degraded by judicial interpretations and politicized appointments.³² These same trends are equally evident in other English-speaking countries that have been even more aggressively rewriting labor law in order to diminish the power of unions and the rights of workers.³³ Much of Western Europe has moved in

27. For a comprehensive analysis see UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) WORLD INVESTMENT REPORT 1994 - TRANSNATIONAL CORPORATIONS, EMPLOYMENT AND THE WORKPLACE (New York / Geneva: United Nations, 1994).

28. Harry Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CANADIAN J.L. & SOC. 219 (1998).

29. See John Godard, *Managerial Strategies, Labour and Employment Relations and the State: The Canadian Case and Beyond*, 35 BRIT. J. INDUS. REL. 399, 414-16 (1997).

30. Recent vain attempts to provoke legislative reforms that might respond to the new paradigm of labor relations include PAUL C. WEILER, *GOVERNING THE WORKPLACE* (1990) and U.S. DEPARTMENTS OF LABOR & COMMERCE, *COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (THE DUNLOP COMMISSION), FACT-FINDING REPORT* (May 1994); THE DUNLOP COMMISSION, *REPORT AND RECOMMENDATIONS* (Dec. 1994).

31. Interestingly, no legal or industrial relations publication appears to have commemorated the 65th anniversary of the Wagner Act—as much a comment on the decline of collective bargaining in American labor markets as on the decline of these subjects in American academe.

32. For the lament of a one-time sometime NLRB Chair see William Gould, *American Regulatory Policy: Have We Found the ‘Third Way’?*, 48 U. KAN. L. REV. 751 (2000).

33. See Francis G. Castles, *The Dynamics of Policy Change: What Happened to the English-Speaking Countries in the 1980s?*, 18 EUR. J. POL. RES. 491, 492-98 (1990); Richard B. Freeman, *The Future of Unions in Decentralized Collective Bargaining Systems: US and UK Unionism in an Era of Crisis*, 33 BRIT. J. INDUS. REL. 519, 528-33 (1995); Robert Boyer, *The Future of Unions: Is the Anglo-*

the same direction, though social market policies do persist in modified form, and new thinking is much more in evidence.³⁴

Second, globalization has changed the effect of the law by placing groups of workers in different jurisdictions in competition with each other. Employers now have a choice—and are perceived to have a choice—between producing in their own countries using local workers and local suppliers, shifting production off-shore to foreign workers and subsidiaries, or out-sourcing production altogether to foreign suppliers and subcontractors. Indeed, thanks to technology, service functions such as data entry and call centers are even more easily moved offshore than production functions. Thus workers across the globe are effectively forced to compete for jobs: they must underbid their rivals in other countries by promising not only to be more productive, but to work harder and more cheaply and to be less assertive about their rights.

In a sense, the pressures—or temptations—for employers to shift work to jurisdictions with low labor standards resemble those which prevailed in the United States before the federal commerce power was used to establish a single system of labor law.³⁵ However, today these competing groups of workers are located in jurisdictions that are sovereign nations, not states in a federal union, and there appears to be no way to bring them all under one overarching legal regime.

Third, globalization has helped to attenuate the connections between employers and employees and to dilute the whole notion of community of interest amongst workers. Whereas employees used to work for an identifiable common employer, today they occupy an often-uncertain location on a global production and distribution chain that links transnational corporations, their divisions, subsidiaries and allies to a host

Saxon Model a Fatality or Will Contrasting National Trajectories Persist?, 33 BRIT. J. INDUS. REL. 545, 552-53 (1995); Bob Hepple, *The Future of Labour Law*, 24 INDUS. L.J. 303, 307-12 (1995); Andrew Hacker, *Who's Sticking to the Union?*, N.Y. REV. BOOKS, Feb. 18, 1999 at 47-49 (reviewing S. ARONOWITZ, *FROM THE ASHES OF THE OLD: AMERICA'S LABOR AND AMERICA'S FUTURE*).

34. See THE TRANSFORMATION OF LABOUR AND THE FUTURE OF LABOUR LAW IN EUROPE (Oxford U.P. 2000). This is a report by an Expert Group appointed by the European Union. I am indebted to Professor David Trubek at University of Wisconsin, Madison, who allowed me to see an advance copy of this important document, and to Professor Alain Supiot, General Rapporteur of the Expert Group, for providing publishing information.

The report identifies five major social changes that are transforming labor relations: changes in the structure of private power, the status and meaning of employment, the time dimension of work, structures and processes of collective organization, and the place of the state in the labor market. These changes in turn implicate a series of changes in labour, employment, and social security law including: a redefinition of "employment," training programs and employment subsidies, job security, discrimination and social exclusion, the place of women in the labor market, changes in collective representation systems, protection of "social rights," transnational labor relations, and measures designed to better integrate working life and "free time."

35. See Mark Barenberg, *Law and Labor in the Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 445, 453-54 (1995).

of ephemeral local contractors, brokers, and distributors.³⁶ Whereas employees of a given employer used to share many common interests and characteristics—language, culture, politics, history, legal rights, managerial supervision, and integrated work processes—workers in the global economy may share none of the above. And whereas “employees” used to be pretty much identifiable as such for statutory and social purposes, today more and more workers around the world are self-employed, are reluctant parties to the “new psychological contract” of discontinuous, serial and sometimes contingent jobs,³⁷ or work under other coercive arrangements that leave their legal status unclear, their economic future uncertain, and their sense of solidarity greatly attenuated. For all of these reasons, it is increasingly difficult for workers in the global economy even to identify their common adversary, let alone to define common expectations, claim common entitlements, or implement common strategies.

Fourth, even when workers occasionally transcend these perceptual and conceptual difficulties and organize across national boundaries, they confront systemic difficulties in the form of local labor laws with inconsistent legal rules. Even as between democratic countries where workers have comparable legal protections, and even within industries where operations are integrated across national boundaries, these systemic difficulties are formidable. Just imagine the problem of trying to create a bargaining unit or negotiate a collective agreement that covers all Daimler Chrysler workers in America, Canada and Germany.³⁸ Just imagine the complexity of orchestrating a strike of professional athletes that is legal on both sides of the Canada-U.S. border in, say, Major League Baseball.³⁹

The principle of national sovereignty, that every nation has the right to enact and enforce its own laws, is a prime source of these systemic difficulties.⁴⁰ There is nothing wrong with sovereignty. In fact, those of us

36. See Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 350-52 (1999) [hereinafter Hepple, *Race to the Top*].

37. The phrase is explicated in an important recent article by Katherine Van Wezel Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

38. But such an agreement once existed! See D. Blake, *Multi-National Corporation, International Union and International Collective Bargaining: A Case Study of the Political, Social and Economic Implications of the 1967 U.A.W.-Chrysler Agreement*, in TRANSNATIONAL INDUSTRIAL RELATIONS 137 (H. Gunter ed., 1972).

39. For example, the Ontario Labour Relations Board declared unlawful the use of replacement umpires by the major leagues under Ontario labor legislation (since repealed), although this employer strategy was clearly lawful under the National Labor Relations Act. See *Association of Major League Umpires v. American League & Nat'l League of Professional Baseball Clubs & Toronto Blue Jays Baseball Club*, OLRD no. 0298-95-U (1995); *National Basketball Referees Association v National Basketball Association*, OLRD no. 2919-95-U (1995).

40. See generally R. Tali Epstein, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application?*, 13 U. PENN. J. INT'L BUS. L. 653 (1992-93); F. Balazano, *Extraterritorial Application of*

fortunate enough to live in a democracy tend to think it is not only constitutional bedrock but also a pretty good idea. Sovereignty ensures that the will of the people, as expressed in the constitution and through the political process, ultimately determines national law and policy. But sovereignty stands in the way of creating an effective trans-border labor law regime. It complicates the harmonization of national labor laws;⁴¹ it gives repressive states a rationale for insisting that they be allowed access to global markets on their own terms, unconstrained by “universal” labor standards; and it enables democratic states to insist—albeit hypocritically—that everyone else should sign on for international standards even though they themselves refuse to do so.⁴²

To sum up, globalization has shifted much labor activity beyond the reach of national law, has weakened the political legitimacy and practical effect of national labor law, and has inhibited, rather than promoted, the development of new labor law systems that might respond to the realities of transnational economic activity. But law, in the formal sense of international or national law, is not the only law that operates in the workplace. Equally important is the so-called “law of the shop,” the web of rules found in all workplaces, whether unionized or not.⁴³ By transforming corporate management, globalization has transformed the law of the shop, no less than it has national or international law.

The head offices of global companies now exercise much greater control over both subsidiaries and suppliers than ever before. Divisions and subsidiaries are told that they must meet corporation-wide expectations as profit centers or suffer disinvestments and closure, suppliers must agree to constantly reduced prices, and workforces must be flexible and responsive to changing production requirements. In short, everyone is under pressure. However, this does not mean that head offices directly intervene in local IR or HR policies or practices. Head offices are primarily concerned with the bottom line, not with how a division, subsidiary or supplier reaches it. Only rarely will global corporations attempt to establish worldwide human resources or industrial relations policies, and when they do, such policies

the National Labor Relations Act, 62 U. CIN. L. REV. 573 (1993-94); Philip Berkowitz, *Extraterritorial Effect of U.S. Anti-Discrimination Laws and Special Concerns of Foreign Employers in the U.S.*, 23 INT'L BUS. L. 134 (1995); Michael Starr, *Who's the Boss? The Globalization of U.S. Employment Law*, 51 BUS. LAW. 635 (1996).

41. See Morley Gunderson, *Harmonization of Labour Policies Under Trade Liberalization*, 53 INDUS. REL./RELATIONS INDUSTRIELLES 24 at 35-36 (1998).

42. The United States and Canada, for example, have not acceded to a number of ILO conventions that establish core labor standards, but nonetheless favor provisions in the WTO, in bilateral trade treaties and in their own trade legislation, which bars goods from market if they originate in states that do not observe those standards. See generally Lance Compa, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, Human Rights Watch, at <http://www.hrw.org/reports/2000/uslabor> (August, 2000).

43. JOHN T. DUNLOP, *THE INDUSTRIAL RELATIONS SYSTEM* 7-18 (1958).

are likely to be administered rather differently in different places.⁴⁴ And even more rarely will global corporations voluntarily adhere to home-country policies that are more labor-friendly than those which apply in host countries.⁴⁵ Generally, head offices concern themselves with local employment practices only if a strike threatens to interrupt the global production chain, if a local agreement might create a precedent for negotiations elsewhere, or if a public relations disaster looms.

In effect, then, globalization has the effect of severing corporate head office power from managerial on-site responsibility. This places local managers and workers on a short leash. They can adhere to local industrial relations culture and customs only so long as they produce the results mandated by the head office. Such arrangements are a prescription for conflict—or at least, they would be if unions were not at the same time paralyzed by the fear that jobs may be outsourced or exported. By changing the dynamic of employment relations, globalization has transformed the law of the shop.

All in all, then, this has been a pretty melancholy account of where labor law stands today, and where it seems to be going in an age of globalization. On the basis of what I have said so far, one might conclude that labor's prospects at the beginning of the 21st century are no better than they were 100 years earlier, that John R. Commons launched us on a project doomed to failure, and that the workers of the world ought to be uniting to thank management for their chains, not trying to shed them. Perhaps, indeed, some of you actually have reached those conclusions. But I have not. I do not believe we have arrived at the end of history; I do not believe that we will see the gradual withering away of state intervention or the ultimate demise of labor law and industrial relations as we have known them; and I do not believe that workers or citizens will continue indefinitely to accept whatever cards they are dealt by the invisible hand of the market. To the contrary, I believe that there will be a new dawn for labor law and industrial relations, and that workers, states, enlightened employers and sympathetic citizens are already beginning to build a just and effective law of labor for the new, global economy.

44. See Laura Beth Nielson, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 L. & SOC. POL'Y 247, 260 (1999); Stephen Frenkel, *Patterns of Workplace Relations in the Global Corporation: Toward Convergence?*, in *WORKPLACE INDUSTRIAL RELATIONS AND THE GLOBAL CHALLENGE* 247, 267-69, 273 (Jacques Belanger et al. eds., 1994).

45. See, e.g., David Drache, *Lean Production in Japanese Auto Plants in Canada*, 2(3) CANADIAN BUS. ECON. 45, 45-48 (1994); RUTH MILKMAN, *JAPAN'S CALIFORNIA FACTORIES: LABOR RELATIONS AND ECONOMIC GLOBALIZATION* 39-49 (Los Angeles: Institute of Industrial Relations, 1991); Anthony Ferner, *Country of Origin Effects and HRM in Multinational Companies*, 7 HUM. RES. MGMT. J. 19, 19-20 (1997).

V.

WHAT KIND OF NEW LABOR LAW SYSTEM IS DEVELOPING IN THE
CONTEXT OF THE GLOBAL ECONOMY?

This brings me to my final point: how, despite the inability of many lawyers to detect it, a new labor law is actually emerging in the global economy. This new labor law has not yet begun to affect U.S. domestic labor law, but it is gradually beginning to shape relations between transnational employers and their workers, and to influence the industrial relations and labor law systems of many of America's trading partners and competitors. In the long run, therefore, it may leach back into the United States, just as it did under the New Deal and during the postwar period. This emerging global labor law has at least five components.

The first is international treaties and conventions. Obviously, these have a direct juridical effect only on the countries that sign them—which, in most cases, the United States has not. However, the United States has been arguing for some time that those countries that do not adhere to “core labor standards” should be denied membership in the WTO, in which the United States is very much a dominant player. Ironically, since “core labor standards” are, in fact, taken directly from the ILO's large catalogue of Conventions⁴⁶—many of which the United States has not ratified— if the United States succeeds in making compliance a condition of WTO membership, it will have extended the reach of the ILO not only to cover other countries, but possibly itself as well. Indeed, at least one scholarly study has argued that these standards have already become part of customary international law, adherence to which is already required by the WTO statute.⁴⁷

Moreover, the United States obviously is a member of NAFTA and has

46. Core labor standards are usually understood to include ILO Conventions 87 and 98 (freedom of association and of collective bargaining), Conventions 29 and 105 (prohibition of forced labor), Convention 138 (minimum age of employment) and Conventions 100 and 111 (equal remuneration and non-discrimination). See INTERNATIONAL LABOR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1991 (2d ed. 1992), 435 (Convention 87); 524 (Convention 98); 115 (Convention 29); 618 (Convention 105); 1038 (Convention 138); 529 (Convention 100); 702 (Convention 111). For a discussion of the ILO conventions, see, e.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 28-37 (1996); International Labour Organization, *Declaration on Fundamental Principles and Rights at Work* (1998), at <http://www.ilo.org/public/english/standards/decl/declaration/background/index.htm> (last visited June 4, 2001).

47. See Robert Howse, “The World Trade Organization and the Protection of Workers' Rights,” 3 J. SMALL & EMERGING BUS. L. 131, 142 (1999); Robert Howse & Makau Mutua, *Protecting Human Rights in the Global Economy: Challenges for the World Trade Organization*, Rights and Democracy, International Centre for Human Rights and Democratic Development (2000), at <http://www.ichrdd.ca/111/english/contentsEnglish.html> (last visited June 4, 2001).

signed the so-called "labor side accord," the NAALC.⁴⁸ This agreement commits each NAFTA partner to adhere to its own labor laws, establishes a dispute resolution process to ensure compliance, and allows this process to be accessed not only by the other governments, but by their aggrieved citizens. As a result, over the past five or six years, American workers, unions, and social movements have filed twenty or thirty complaints with the NAALC National Administrative Office in Washington against the failure of the Mexican government to extend protection to its own workers, especially in cases involving foreign subsidiaries doing business in the *maquiladoras*. A number of these complaints have given rise to hearings, and the resulting findings and publicity have embarrassed the employers involved, the official Mexican trade unions, and the Mexican government. As a result, some improvements have taken place in the administration of Mexican labor law.⁴⁹ More to the point, the complaints process has helped to launch a new independent trade union movement in Mexico, has been the catalyst for much greater cooperation amongst Mexican, Canadian and American unions, and has also legitimated and reinforced the activities of churches, women's groups and other social activists on behalf of Mexican workers.⁵⁰ Complaints against the United States in Mexico and Canada have been relatively infrequent, but on at least one occasion they have resulted in a change in administrative practice by the U.S. Department of Labor.⁵¹ Here, then, we see a beginning—albeit a very modest one—of a new treaty-based regime of labor law that reaches across national boundaries. This new regime has the capacity to alter the way in which national labor law is administered and may significantly change the industrial relations dynamic of the countries bound by it.

Another example is the Treaty of Rome, which established the European Union (EU), by far the world's most elaborate and effective transnational regime.⁵² So far, the EU has not developed a significant body

48. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 107 Stat. 2057, 32 I.L.M. 1502 (entered into force Jan. 1, 1994).

49. See John McKennirey, *Labor in the International Economy*, 22 CAN.-U.S. L.J. 183, 189-90 (1996); Lance Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEXICO L.J. 159, 175-76 (1995); Lance Compa, *NAFTA's Labour Side Agreement Five Years On: Progress and Prospects for the NAALC*, 7 CANADIAN LAB. & EMP. L.J. 1, 24-29 (1999).

50. See Compa, *supra* note 49; Deborah Greitzer, *Cross-Border Responses to Labor Repression in North America*, 1995 DCL/MSU L. Rev. 917, 918-19 (1995).

51. YALE LAW SCHOOL WORKERS' RIGHTS PROJECT ET AL., PETITION ON LABOR LAW MATTERS ARISING IN THE UNITED STATES (1998) (*Workplaces Employing Foreign Nationals* case). The Department agreed to end its practice of searching for illegal immigrants while checking for health and safety and other workplace violations, on the ground that such searches deterred complaints. See D. Billings, *Complaint-Driven Workplace Inspections Will No Longer Include Immigration Checks*, Daily Lab. Rep. (BNA), No. 227-AA1 (Nov. 25, 1998).

52. The Treaty of Rome has been amended on several occasions to address labor market issues, notably by the so-called Maastricht Agreement that established the European Social Charter. For a

of collective labor law, in part because of objections from the United Kingdom. However, it does have legislation governing workplace discrimination, plant closings and layoffs, employer insolvency, and Works Councils.⁵³ Whether a more comprehensive regime of EU labor law will grow up alongside EU competition, transport, consumer, and agricultural law remains to be seen. Some observers favor it, some claim to see it in the offing and some doubt that it will ever emerge.⁵⁴ I mention the EU specifically, however, to point out that it is possible for national labor law to be explicitly reconfigured as a result of globalization and regional economic integration. I doubt very much that the United States would accede to anything like the Treaty of Rome; if it did, I can imagine that attempts to use treaty obligations to trump domestic labor law would be frustrated by both legal and political strategies. But this does not diminish the fact that treaties are in fact legally binding, and that they are a potential source of transnational or global labor law.

The dissemination of "best practices" is the second major component of developing global labor law. This is essentially the optimistic obverse of a process I mentioned earlier, in which the law of the shop is degraded by globalization. The optimistic version begins with the proposition that best practices are indispensable for success in technology-based economies, where human capital is a strategic asset.⁵⁵ The United States has become such an economy and, over many decades, has contributed to a virtuous circle in which ideas about law, management and work originated in the United States, were exported and re-engineered abroad, and ultimately returned to challenge—even change—thinking in their country of origin. Seniority, quality circles and flexible production are all cases in point. It is

review of debates surrounding these provisions, see generally Silvana Sciarra, *Social Values and the Multiple Sources of European Social Law*, 1 EUR. L.J. 60 (1995); Brian Bercusson, *Social Policy at the Crossroads: European Labour Law After Maastricht*, in EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION? (Renaud Dehousse ed., 1994).

53. See, e.g., Council Directive 76/207, 1976 O.J. (L 039) 40 (equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions); Council Directive 77/187, 1977 O.J. (L 61) 27 (safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses); Council Directive 80/987, 1980 O.J. (L 066) 23 (protection of employees in the event of the insolvency of their employer); Council Directive 94/45, 1994 O.J. (L 254) 64 (establishment of a European Works Council or a procedure in Community-scale undertakings for the purposes of informing and consulting employees). For a general commentary on EU labor law, see EUROPEAN LABOUR LAW: PRINCIPLES AND PERSPECTIVES (P. Davies et al. eds., 1996).

54. See, e.g., Silvana Sciarra, *How Global is Labour Law? The Perspective of Labour Rights in the European Union*, in ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT 99, 113-15 (T. Wilthagen ed., 1997); Brian Bercusson, *Globalizing Labour Law: Transnational Private Regulation and Countervailing Actors in European Labour Law*, in GLOBAL LAW WITHOUT A STATE 133, 173 (G. Teubner ed., 1997); Lord Wedderburn, *Consultation and Collective Bargaining in Europe: Success or Ideology?*, 26 INDUS. L.J. 1, 26-30 (1997).

55. See Hepple, *Race to the Top*, *supra* note 36, at 350.

pretty likely, the optimists argue, that such a virtuous circle will increasingly shape labor practices in the global economy in the future, as America and its trading partners compete with each other, learn from each other, imitate each other's successes, and avoid each other's mistakes.⁵⁶ If this is true, the dissemination of "best practices" will proceed both by way of borrowings amongst national legal systems and by way of non-legislated changes in company philosophy and shop-floor practice. Specifically, as someone once suggested to me, lawyers are likely to function as "bees and wasps." They gather best practices from one set of clients, incorporate them into legal forms, and then cross-pollinate them into the practices and forms of a second set of clients.

Third, management is constructing a kind of global labor law in the form of corporate voluntary codes of conduct.⁵⁷ These codes, which have been appearing at a great rate over the past decade, have been adopted by individual corporations and sectoral organizations voluntarily, under pressure from labor unions, consumer organizations and human rights groups and in response to the urgings of national governments the OECD, the ILO, and other international organizations.⁵⁸ These codes are "voluntary" in the sense that they are not imposed by law and do not appear to give rise to enforceable third party claims. However, in another sense they are not voluntary. Many were adopted under pressure by reluctant corporations in order to ward off adverse publicity, strikes, boycotts, embargoes, or political and legal sanctions. This pressure may become more intense. Scholars have proposed that codes of conduct should be made transparent and their enforcement "ratcheted" ever-upward through structured, systematic exposure to market sanctions.⁵⁹ And some form of

56. See *id.*

57. A content analysis of 182 codes adopted by transnational organizations, corporations, sectoral and stakeholder groups is found in OECD, *CODES OF CORPORATE CONDUCT* (OECD Working Party of the Trade Committee, Trade Directorate TD/TC/WP(98)74, 1988). For a discussion of the use of such codes to protect workers' rights see Lance Compa and T. Hinchliffe-Darricarrère, *Enforcing Labor Rights Through Corporate Codes of Conduct*, 53 COLUMBIA J. TRANSNAT'L L. 663 (1955); Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in TRANSFORMATIVE LABOUR LAW IN AN ERA OF GLOBALIZATION (J. Conaghan et al. eds., forthcoming 2001).

58. See, e.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES*, (1986) 15-16, available at <http://www.oecd.org/daf/investment/guidelines/mnetext.htm#4>; Hans Gunter, International Labor Office, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (1981), available at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm>; International Chamber of Commerce, *Guidelines for International Investment* (Paris: ICC, 1972) [bad cite—can't find this on the web site or in Melvyl]; International Chamber of Commerce, *Responsible Business Conduct: an ICC Approach* (May 6, 2000), at http://www.iccwbo.org/home/statements_rules/menu_statements.asp.

59. See Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, Feb. 23, 2000, available at <http://www.law.columbia.edu/sabel/papers/>

legal enforceability may not be far off. For example, a U.S. court recently mandated adoption, independent monitoring, and third-party enforcement of an employment code as part of the settlement of a massive claim under anti-peonage, indentured servitude, anti-racketeering, false advertising, and Fair Labor Standards laws;⁶⁰ and legislators in both Australia and the U.S. have recently been asked to consider legislation that would in effect force corporations seeking various government benefits to adopt and implement codes of conduct.⁶¹

Of course, apart from the issue of legal consequences, the provenance and the procedural, structural, substantive, and remedial features of codes vary considerably.⁶² Most are purely internal and can be activated, if at all, only by the corporation's own compliance officer. Only a few carry the imprimatur of third parties, provide for independent monitoring or are enforceable through neutral complaint bodies. They also differ in their content and coverage. Some offer specific guarantees of "core labor rights," and even of a so-called "living wage;" others amount to no more than a vague promise of good intentions. Some extend to all domestic and foreign suppliers and subsidiaries of the corporation; others only to its core operations. Many are no more than words on paper; others have produced at least modest changes in employment conditions. In other words, one can hardly point to voluntary, unenforceable, and unenforced corporate codes as a substitute for effective labor legislation.⁶³ But then, the same can be said of some Acts of Congress.

Fourth, corporations are not the only actors shaping global labor law.

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60. The case involved over 50,000 Asian workers in the U.S. dependency of Saipan. For a history of the litigation, see Sweatshop Watch, Summary of the Saipan Sweatshop Litigation (October 10, 2000), at http://igc.org/swatch/marianas/summary10_00.html.

61. In the United States, see the Corporate Code of Conduct Act, HR 4596, 106th Cong. (2000), introduced by Rep. Cynthia McKinney on June 2, 2000. Complying corporations would receive preferential treatment in the awarding of federal contracts, participation in trade and development programs and access to export-import credits and loan guarantees. In Australia, Senator Vicki Bourne introduced a similar bill as a private member's bill. See Corporate Code of Conduct Bill 2000, available at <http://search.aph.gov.au/search/parlinfo.ASP?action=browse&Path=legislation/> (last visited May 20, 2001). Neither the American nor the Australian bill is likely to be enacted in the foreseeable future.

62. For example, a recent KPMG survey of the ethical practices of 1000 large Canadian companies focused on 48 companies operating outside Canada and the U.S. Codes adopted by these companies generally guarantee freedom of association for "home country" workers, but extended only by exception to workers in foreign operations (31.3%) and only infrequently to those employed by suppliers or contractors (16.7%); active monitoring of these codes was rare (16.7% for their own operations, 6.3% for their suppliers'); and compliance was almost never reported to the company's board (2.1% for both their own and suppliers' operations). See *KPMG Ethics Survey 2000: Managing for Ethical Practice* 14-15, at <http://www.kpmg.ca/english/services/fas/publications/ethicssurvey2000.html> (last visited June 4, 2001).

63. For a rare empirical study of efficacy, see Andrew King and Michael Lenox, *Industry Self-Regulation Without Sanctions—The Chemical Industry's Responsible Care Program*, 4 *ACAD. MGMT. J.* 698 (2000).

Unions are making a modest contribution too, whether through national unions and labor congresses, international labor bodies such as the so-called “trade secretariats,” or *ad hoc* union alliances built around specific disputes and for limited purposes. Needless to say, union efforts to build solidarity across national boundaries have not been hugely successful, for reasons mentioned earlier.⁶⁴ But in a few celebrated cases, unions have been able to win at least battles, if not actual wars.⁶⁵ Employers have been forced to abandon plant closings or compensate dismissed workers, improve wages and working conditions, recognize unions, and respect local health and safety standards. In other words, unions have been able to do on a small scale globally what they aspire to do on a large scale nationally.

Fifth, the new actors in the formation of global economy are social movements—women, consumers, university students, religious communities, environmentalists, aboriginal peoples, anti-poverty and anti-child labor activists, and human rights groups. These social movements, often working with unions in both the advanced and developing economies, have been able to arouse public indignation against abusive labor practices which, in turn, has forced retailers, investors, and ultimately governments to bring pressure to bear on offending employers.

It is difficult to imagine that governments, unions, corporations, and social movements might create and administer a system of global labor law by pasting together a collage of treaties and conventions, best practices, corporate codes, *ad hoc* settlements, and vestigial remnants of national legislation. But this, after all, is pretty much how we originally constructed our “old” system of labor law. Lest we forget, there was collective bargaining before the Wagner Act, employer- and union-sponsored welfare funds before Social Security, and grievance arbitration before the War Labor Board. Thus, I want to conclude by arguing that it is just possible that in these scattered, episodic episodes of rule-making and dispute resolution, we may shape the shape of the future.

VI. CONCLUSION

Of course, history will not repeat itself in every particular. It is not going to be easy to replicate on a global scale the Wagner Act strategy of

64. See *supra* text accompanying notes 14-16.

65. Examples are provided by David Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 L. & SOC. INQUIRY 1187, 1203-08 (2000); Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117, 128-48 (1993); JAMES B. ATLESON, *THE VOYAGE OF THE NEPTUNE JADE: TRANSNATIONAL LABOR SOLIDARITY AND THE OBSTACLES OF DOMESTIC LAW* (forthcoming 2001).

diverting labor conflict into legal channels.⁶⁶ On the contrary, as we can see from the experiences of Poland, South Africa, Indonesia and Korea, the so-called “CNN-effect” virtually assures that labor conflict will be perceived as part of a struggle for national renewal and social justice and against oppressive governments and their global allies and clients. This means that we are unlikely to soon experience in the global sphere the same process of legalization and juridification that, some argue, has been the curse of domestic labor law.⁶⁷

As a result, many things will remain ambiguous: the line between law, moral obligation and custom; between rules and practices; between labor law and other bodies of law such as human rights, environmental, immigration, and trade law; between employees and workers whose legal status is more uncertain; between unions and other groups claiming to represent workers’ interests; between lawful and unlawful subjects of bargaining; between lawful and unlawful forms of economic pressure; and between rights disputes and interest disputes. All of which is to reiterate that we are not going to translate easily into the global sphere a hundred years’ experience of embedding labor rights in complex legal language and then enforcing them through elaborate administrative and judicial proceedings.

Clearly, then, global labor law is going to be unclear, unfinished, and some would say, un-legal. I will not try to persuade an audience of lawyers that this is a step forward; however, perhaps we can all take solace in the fact that this lack of clarity is going to give everyone—lawyers, IR/HR specialists, unionists, academics, social activists—a great creative opportunity. Vague standards in treaties or corporate codes will have to be translated into specific rights and duties, which can then be claimed or challenged by workers and employers. Techniques will have to be found to give legal form and effect to understandings and practices that are not formally part of state law. Home remedies will have to be invented to protect offshore workers against blatant abuse. Strategies will have to be worked out to ensure that employers with a decent respect for labor standards can go about their business free from harassment by strikes, boycotts or trade sanctions. And finally, much of this work will have to be performed in forums where labor lawyers now seldom appear, such as trade tribunals under the WTO or NAFTA or complaints procedures unilaterally

66. For better or worse. See Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINN. L. REV. 265, 266-70 (1978).

67. See, e.g., Jon Clark, *The Juridification of Industrial Relations*, 14 INDUS. L.J. 69, 82-90 (1985); Spiros Simitis, *The Juridification of Labor Relations*, 7 COMP. LAB. L.J. 93, 109-130 (1985); Paul Weiler, *The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law*, 40 U. TORONTO L.J. 117, 186-90 (1990); Harry Arthurs, *The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration*, 7 CANADIAN LAB. & EMP. L.J. 45, 50-63 (1999).

established by employers or convened by well-meaning intermediaries.

Still, a good part of global labor law is going to be created where domestic labor law is created today—in national legislatures, courts and tribunals.⁶⁸ This is inevitable, because the line between domestic and transnational labor relations is by no means clear. What legal rules should govern the contractual relations of an American company that posts a Dutch employee to its operations in Nigeria? Or its conflictual relations with a German union representing baggage handlers who refuse to unload a plane it has chartered from a British company flying out of Hong Kong? Or its responsibility for harassment by local managers of women working in its Caribbean data processing operations? Goods move, work moves, sometimes even people move—but law does not move. So there will be a temptation to deal with these issues under the local law of the place where the conflict occurs and an equal and opposite temptation to litigate them in the courts of the company's home jurisdiction.

Alongside global labor law, then, we are likely to see the emergence of a new set of international conflicts of labor law rules designed to ensure that labor law enacted by one country is applied to employers and employees in another. As with other branches of the international conflicts of laws, this particular development is likely to generate pressure for standard rules of recognition and comity.⁶⁹ Depending on how the conflicts of laws rules sort themselves out, some countries—those whose companies are active in the global economy—are likely to become net exporters of labor law. Others—those who have enterprise zones, for example, or who are trying to gain access to valuable export markets—are likely to become net importers. In the mid-term, this imbalance between importers and exporters of labor law may lead to some informal convergence amongst national labor law systems. In the long term, it may lead to proposals to formally harmonize labor law through treaties or conventions, such as those that now govern intellectual property or the carriage of goods by sea—but only in the very long term.

In one of his famous *New Yorker* essays, Woody Allen recounts the story of a man who contacts his dead brother through a spiritualist. "Walter," he asks, "What is it like to be dead?" Walter replies, "It's a lot like Cleveland." No one could claim that global labor law is anything like Cleveland. Rather, it is like Los Angeles: diffuse, disjointed, dynamic; the hype always a little ahead of the reality; the reality always a little less real

68. For one of the most ambitious attempts to map out how and where this law will be made, see Katherine Van Wezel Stone, *Labor in the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1995).

69. See generally FELICE MORGENSTERN, *INTERNATIONAL CONFLICTS OF LABOUR LAW* (1984); Franz Gamillscheg, *Conflict of Laws in Employment Contracts and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS* (R. Blanpain ed., 1985).

than it ought to be; and the present more in debt to the past than we want to admit.