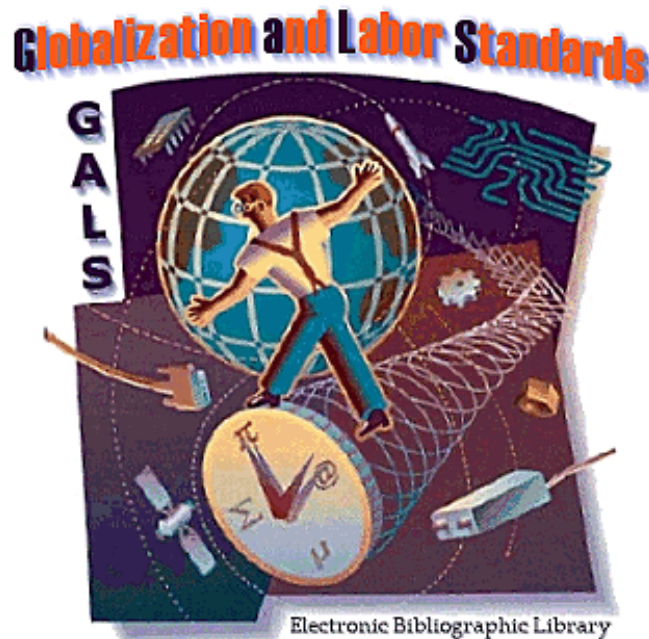


# Globalization and Labor Standards (GALS) Working Paper Series



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## COMPARED TO WHAT? THE UCLA COMPARATIVE LABOR LAW PROJECT AND THE FUTURE OF COMPARATIVE LABOR LAW

GALS Working Paper 1-06

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COMPARED TO WHAT?

THE UCLA COMPARATIVE LABOR LAW PROJECT AND THE  
FUTURE OF COMPARATIVE LABOR LAW

H.W. Arthurs\*

Abstract

*This article describes the work of the Comparative Labor Law Group from 1965 to 1978 as a particular “moment” in the life of post-war labor law. That “moment” had its origin in the post-war compromise, and was waning by the late 1970s. It was a time in which there was widespread agreement that the purpose of labor law was to provide justice in the workplace and that workers should enjoy economic and employment security. The author shows that a crisis in political economy, legal institutions and legal theory undermined the consensus and with it, the underpinnings of traditional labor law and comparative labor law scholarship. The national labor law systems that were the focus of the consensus moment withered under the combined onslaught of technological change, the rise of the service sector, neo-liberal ideology, the restructuring of key industries, the expansion of knowledge-intensive work, the entrance of women and excluded groups into the mainstream workplace, and changes in the nature of work itself. In the wake of the demise of the national labor law systems, new sources of normative authority derived from private rule-making institutions have increased their governance role in work relationships. Such systems include corporate codes of conduct, the UN Global Compact, the institutions of trade regimes, and other “soft law” initiatives. The author calls for a new type of comparative labor law that compares these diverse, semi-autonomous systems of non-state normativity in order to develop a “new syntax, grammar, and vocabulary of comparativism which will help make them mutually intelligible.”*

**Introduction**

Progressive politicians, scholars, civil servants and ordinary citizens in Europe and North America have been comparing each other’s experience with labor and social policy since at

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\* University Professor Emeritus and President Emeritus, York University. I have benefited from Claire Mummé’s helpful research assistance, and from the insightful comments of Peer Zumbansen and Katherine Stone.

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least the late 19<sup>th</sup> century.<sup>1</sup> This progressive and internationalist tradition in comparative labor studies, epitomized by the work of the pioneering American industrial relations scholar, John R. Commons,<sup>2</sup> clearly influenced the UCLA Comparative Labor Law project.<sup>3</sup> However, it was the fate of the UCLA project to be conducted during the dozen or so critical years (1965 – 1978) when the New Deal’s progressive legacy in industrial relations was entering its terminal phase, when the state’s role in labor market regulation was being radically redefined, when traditional understandings concerning the nexus between state and law were being brought into question, when the nature of law and legal research was being hotly debated and when the hitherto staid discipline of comparative law was beginning to experience significant intellectual destabilization – partly at the hands of the very labor lawyer who had inspired the UCLA project.<sup>4</sup>

This makes the UCLA project a worthy subject of study in its own right, and at the same time provides an opportunity to assess the impact of these traumatic developments on the broader discipline of comparative labor law.

### ***The UCLA Comparative Labor Law Project in Retrospect***

Comparative scholarship confronts a threshold problem: how can scholars overcome the implicit bias, and sometimes explicit condescension, which results from using the system they know best as a lens with which to examine “other” systems? The UCLA project – a series of studies on the legal regulation of industrial conflict, dispute resolution and workplace discrimination – sought to overcome this problem by mobilizing a team of senior scholars from six countries, each of whom assumed responsibility for a report on

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<sup>1</sup> Daniel Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Belknap Press, 1998).

<sup>2</sup> Rodgers recounts how the walls of Commons’ seminar room at the University of Wisconsin, Madison were festooned with summaries of foreign labour laws, many of which had been translated by his students (at p. -). Studies by Commons, his colleagues and students provided a foundation for some important New Deal labour legislation. *Supra* note 1 at 31.

<sup>3</sup> Their published books included: B. Aaron (ed.) *Dispute Settlement Procedures in Five Western European Countries* (Los Angeles: Institute of Industrial Relations, 1969); K.W. Wedderburn and P.L. Davies *Employment Grievances and Dispute Procedures in Britain* (Berkeley and Los Angeles: University of California Press, 1969); B. Aaron (ed.) *Labour Courts and Dispute Settlement in Western Europe* (Berkeley and Los Angeles: University of California Press, 1971); B. Aaron and K.W. Wedderburn (eds) *Industrial Conflict: A Comparative Survey* (London: Longman, 1972); F. Schmidt (ed) *Discrimination in Employment: A Study of Six Countries* (Stockholm: Almqvist and Wiksell International, 1978).

<sup>4</sup> Benjamin Aaron, who initiated the UCLA project, claims to have been inspired to undertake it by Otto Kahn Freund. Kahn Freund, an English academic and former German labour court judge, was also a distinguished comparativist. His influential, and controversial, Chorley Lectures, “On the Uses and Misuses of Comparative Law” (1974) 1 *Mod. L. Rev.* 1 were an important early contribution to the anti-formalist movement in comparative law. See also C. Summers, “American and European Labor Law: The Use and Usefulness of Foreign Experience” (1966) 16 *Buffalo L.R.* 210.

his own national system as well as contributing to a thematic or integrative study.<sup>5</sup> This strategy, conceived and sustained by the project's organizer, Benjamin Aaron, was only partly successful. As he suggests in his candid "personal appraisal" of the project,<sup>6</sup> international collaboration amongst legal scholars is difficult even if they work in the same field and share a general disposition towards their subject. In preparing the first series of studies, he notes, the six participants spent three months at UCLA "in a more or less continuous colloquium...."<sup>7</sup> Anyone who has engaged in earnest exchange with colleagues for three hours or three days knows that the longer one seeks common ground, the more steeply it falls away. After three months, it is a wonder that any common ground remained at all.

Moreover, even good faith, collaborative efforts to avoid ethnocentrism, to approach all comparator systems on an equal basis, may founder if the participants do not inhabit the same academic cultures or share the same intellectual premises. Take, by way of example, the exchange between Aaron as editor, and Wedderburn (and his collaborator, Davies) as authors. Wedderburn and Davies were supposed to contribute a chapter to a collective study on dispute resolution; instead they produced an entire book, to Aaron's understandable dismay as project coordinator and editor.<sup>8</sup> "We write as lawyers", said Wedderburn and Davies in their introduction;<sup>9</sup> "they have given us a sociological as well as legal analysis" rejoined Aaron in his preface.<sup>10</sup> "Doubtless, many American and British readers will disagree with some or all of the views expressed by Wedderburn and Davies" ventures Aaron;<sup>11</sup> Wedderburn and Davies do not seem self-conscious about expressing their "views" but did acknowledge that "it may well seem odd" to English readers that they should have embarked on the study at all, while Americans "will probably be startled by the picture revealed."<sup>12</sup>

The substantive issues canvassed in this exchange between Aaron, the American project organizer, and the two British authors were, as it happens, familiar to all students of comparative labor law scholarship.

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<sup>5</sup> The participants were Benjamin Aaron (USA), Xavier Blanc-Jouvan (France), Gino Guini (Italy), Thilo Ramm (Germany), Folke Schmidt (Sweden) and K.W. Wedderburn (U.K.).

<sup>6</sup> Aaron, "The Comparative Labor Law Group: A Personal Appraisal" (1977) 2 *Compar. Lab. L.J.* 228

<sup>7</sup> B, Aaron, "Foreword" in Wedderburn and Davies, *supra* note 3 at vi.

<sup>8</sup> Aaron, *supra* note 6 at 230

<sup>9</sup> Wedderburn and Davies, *supra* note 3 at xii

<sup>10</sup> Aaron in Wedderburn and Davies, *supra* note 3 at vi

<sup>11</sup> Aaron in Wedderburn and Davies *supra* note 3 at viii

<sup>12</sup> Wedderburn and Davies *supra* note 3 at xii

On the one hand, even though the United States and the United Kingdom have much in common, differences in their industrial relations systems and legal cultures caused Wedderburn and Davies to anticipate different reactions to their book in the two countries ranging from bemusement to astonishment. This reminds us that comparativists have a responsibility not merely to convey information about legal rules but to contextualize it; and not merely to contextualize it but to do so in ways which are comprehensible to readers who are encountering that context at a distance and for the first time.

On the other hand, Aaron focuses on a different concern, the contested boundary between law and sociology. In this he was prescient; as we will see, the opening of law to the social sciences has come to play a crucial role in the re-invention of comparative law. However, his reference to the influences of the social sciences was somewhat opaque. Like most academic lawyers of the period, Aaron disavowed, perhaps mistrusted, theory. “I initiated ... our projects with few theories ...”, he said.<sup>13</sup> His present-day successors in the field of comparative labor law would not likely be so diffident. According to one distinguished scholar, the proliferation, elaboration and entrenchment of theoretical perspectives has grown to the point where it arguably impedes discourse amongst legal scholars, let alone collaboration.<sup>14</sup>

Indeed, perhaps Aaron himself was less diffident than his disclaimer would suggest. He began his project, he says, with a strong “working hypothesis” which was “conclusively confirmed”

... namely that institutional arrangements for the conduct of labor-management relations are products of the unique geographic, demographic, historical, political, economic and social factors within each country; they cannot be transplanted to alien soil. A study of the systems that evolved in other countries, however, like the exploration of outer space, teaches us much about our own country (or world) because it gives us a different perspective from which to view it. As a consequence, we ask different questions about our own system, questions it would otherwise have never occurred to us to ask.<sup>15</sup>

On close examination, Aaron’s “working hypothesis” actually incorporates a number of sophisticated - if inexplicit - theoretical positions: that “institutional arrangements” – presumably including both labor law and other forms of law - are ultimately shaped by “unique ... social factors within each country”; that law therefore logically lacks the capacity to transform itself or society; that understandings of the nature and function of law are grounded in variable and particular, rather than immutable and universal, “perspectives”; that departures from conventional internal analyses of law are consequently legitimate

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<sup>13</sup> Aaron, *supra* note 6 at 234

<sup>14</sup> M. Finkin, “Reflections on Labor Law Scholarship and its Discontents: The Reveries of Monsieur Verog” (1992) 46 U. Miami L.R. 1101.

<sup>15</sup> Aaron, *supra* note 6 at 234

and necessary; and that asking “different questions” is what sets comparative legal scholarship apart from more parochial approaches.

This “working hypothesis” also has important methodological implications for comparative law. If “unique ... social factors” produce a country’s labor law, then knowledge of these factors is surely indispensable for comparative analysis. This new and necessary dimension of comparative law surely explains Aaron’s insistence that “law professors need to do more interdisciplinary research, especially with the social sciences”.<sup>16</sup> However, Aaron confesses that not only did he initiate the project with “few theories”, but that he possessed “even less factual information about the foreign countries included in the study”. As a result, the studies produced by the group “tended to be more descriptive than analytical ....”<sup>17</sup> But not “descriptive” simply of formal legal rules. Rather, says Aaron, the studies “... reflected our perceptions of how the law actually works, as well as of customs and practices that coexist with and affect the operation of common and statutory law”.<sup>18</sup> The facticity of the UCLA studies – “how the law actually works” - does distinguish them from many comparative law studies of the period (and from some recent studies as well). However, they still do not purport to investigate many of the “unique ... social factors” which, according to Aaron’s hypothesis, determine “institutional arrangements” and their practical outcomes.

Nor can methodology be completely disaggregated from theory or ideology. Aaron hypothesizes that he and his fellow labor law professors were able “...to work within a common framework of research and discussion” more easily than other scholars “because we tend to take a pragmatic view of the phenomena we are studying”.<sup>19</sup> In the same spirit, he asserts that the group consciously “avoided making value judgments” and that “discussions of the political situation within any one country [have] always been conducted cautiously, even delicately” because of the group’s “remarkably diverse” political makeup”. Nonetheless, he concedes, “occasional flare-ups” did occur.<sup>20</sup>

Perhaps, as Aaron seems to imply, deference to political sensibilities curtailed investigation of the very factors which his hypothesis identified. Or perhaps, to the contrary, the “pragmatic view” he ascribes to the group members stemmed from the fact that they shared sufficient assumptions and values that in-depth investigation of “social factors” seemed to be less than urgent. After all, the group members came to prominence as scholars during the post-war era and apparently subscribed to the then

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<sup>16</sup> *Idem* at 237.

<sup>17</sup> *Idem* at 236

<sup>18</sup> *Id.*

<sup>19</sup> *Ibid* at 237

<sup>20</sup> One member of the group was described as a “conservative Gaullist”, another as “an ardent supporter ... of the left wing of the British Labour Party” and the remainder as “somewhere between the two”. Aaron, *supra* note 6 at 236.

widely-held view that workers should enjoy a degree of security in a mixed economy (how much security and how mixed an economy would have been debated); all apparently accepted that the historic mission of labor law was to advance justice in the workplace (how much justice and by what means would have been an issue); and all apparently believed - why else collaborate? - that labor law's mission would be enhanced by adding an outward-facing comparative and international dimension to a corpus of scholarship which had been up to then largely self-regarding and country-specific. Finally, all were prepared to work not only across national boundaries – a political statement in itself – but across legal traditions and, to an extent, across disciplinary boundaries.<sup>21</sup>

Perhaps this is to say no more than that legal comparativism is possible only when sufficient commonality exists so that the comparator systems are mutually intelligible. If so, then perhaps the intensifying crises of political economy, legal institutions and legal theory mentioned earlier may help to explain why the group suspended its activities while it had yet another project under consideration.<sup>22</sup>

In succeeding sections of this paper, I investigate this possibility, in each case reflecting on the potential implications of traumatic change for traditional comparative labor scholarship. I conclude by speculating on what the new agenda of comparative labor law might look like.

### ***The paradigm shift in industrial relations and labor law***

Each of the national systems encompassed in the UCLA studies had been shaped by the long post-war recovery and embedded in some version of the so-called post-war compromise. In each, workers implicitly or explicitly accepted the primacy of the market economy in exchange for higher living standards, increased access to public goods and enhanced participation in decisions affecting the workplace. However, as we know with hindsight, the UCLA project spanned the period during which the post-war compromise began to deteriorate. From the mid 1960s onwards, the countries encompassed in the UCLA studies began to experience accelerated technological change, the restructuring of key industrial sectors, the growing importance of the service sector, the expansion of knowledge-intensive work, and a new workplace demographic in which women and other previously excluded groups featured more prominently.

As a result, the paradigm of employment which underpinned much postwar labor legislation in advanced economies became increasingly anachronistic.<sup>23</sup> No longer could

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<sup>21</sup> However, they did not cross the final frontier: language. Aaron makes clear that facility in English was required for all participants. Aaron, *supra* note 6 at 229.

<sup>22</sup> Aaron assigns quite different reasons, *supra* note 6 at 232.

<sup>23</sup> K. Rittich, *Vulnerability at Work: Legal and Policy issues in the New Economy*. (Ottawa: Law Commission of Canada, 2004); A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*. (Oxford: Oxford University Press 2001)

it be assumed that industrial relations systems were populated primarily by semi-skilled white male industrial workers employed by domestic companies, earning relatively high salaries, enjoying lengthy job tenure and receiving social benefits built on that tenure and on the class and workplace solidarity which tenure facilitated. No longer, therefore, could public policy platforms, legal entitlements or union strategies be usefully constructed on the old paradigm.

True, the nature of the new paradigm is even now not yet clear. Which workers, doing what kind of work in which sector with what attachment to the employment relationship should be identified as the archetypal subjects of labor policy? Which employers in what country at what remove from the direct control of the primary enterprise and operating in what kind of labor markets should labor law regulate? Which vision of social justice, whose aspirations, whose interests should labor scholarship be concerned to protect? We know only that the old paradigm is likely gone forever, not what will take its place.

During this same period, advanced industrial nations began to suffer from rising and sometimes persistent unemployment, slower growth, inflation, the breakdown of the Bretton Woods international financial system, petro-shocks, the globalization of production and financial markets, the faltering of social democracy and the resurgence of neo-liberalism. Most labor law scholars and practitioners accept that as a result of these exogenous developments - perhaps hastened by endogenous failures of social theory, institutional design, political will and legal logic - the "golden era" of postwar industrial relations and labor law systems had come to an end by, say, the mid 1970s. The timing and causes of systemic failure no doubt varied somewhat from one country to another, and according to one observer or another. However, putting aside exact dates and precise diagnoses, by the time the last of the UCLA studies had appeared, in the late 1970s, the emergence of a new regime of accumulation and a new political dispensation had begun to wreak profound changes in industrial relations and labor law, the effects of which are only becoming fully evident decades later.

New variants of capitalism and state governance, new modes and sites of production and new alignments of political and social forces have revised longstanding assumptions about the role which states could and should play in industrial relations. The trans-nationalization of markets, enterprises and work relations and new corporate strategies of production, distribution and management have given employers an "exit option" and thereby shifted power from states and workers to employers. New information, communications and transportation technologies have facilitated these changes, to the considerable benefit of employers. However, they have not, so far, facilitated worker resistance or adjustment to them. Indeed, in some respects the potential for worker resistance has declined. Growing detachment from class membership and consciousness, greater gender, generational, racial, ethnic, locational, aspirational and educational diversity in the workforce, and more attenuated and ephemeral relations amongst geographically dispersed workers with short-term job tenure have all made worker solidarity more difficult to achieve and further weakened the political and industrial power of workers.



The result, all the evidence suggests, has been a growing disparity of wealth and power not only between employers and workers but also amongst workers in different countries, economic sectors, occupations and demographic categories. Indeed, so great are these disparities that “labor” is at risk of becoming anachronistic as a credible category of social and political analysis, of cultural and psychological significance or of legislative and scholarly concern.<sup>24</sup>

Can a new, more equitable regime of labor law - comparable in outcomes if not in architecture to the post-war compromise - be established under such unfavorable conditions? The answer is not obvious. To regulate labor relations in the global economy requires effective rule-making and adjudicative bodies with transnational jurisdiction; but no such bodies exist. To restore balance to domestic labor policy requires a plausible philosophical or ideological premise for the proposition that workers are entitled to social protection; but no such premise so far commands widespread support. To revive collective bargaining requires a labor movement which is willing and able to use its political or industrial power to insist on its rights; but labor movements are everywhere enfeebled and divided. And to generate momentum for these developments requires the kind of fundamental transformation in perceptions and values which is usually triggered by a serious political or economic crisis; but no one would argue in favor of, say, a war or depression even if they might give rise to a new and inspiring vision of labor law.

In other words, as the strong national labor law systems explored by Aaron and his colleagues gradually withered away, a new and more difficult question began to confront comparativists: How is it possible to meaningfully “compare” labor laws and industrial relations systems when the foundations of the old systems are eroding and their basic values brought into question, when they are in rapid transformation but at different stages, when familiar actors and institutions are being replaced or revalorized, when familiar laws and processes are being drained of meaning and new ones coming dramatically or surreptitiously into force,?

The answer to this question is that comparative labor law will have to find new subjects for study. The likeliest place to find such subjects is outside the familiar but degraded framework of state legislation, administration and adjudication.

### ***The State without Labor Law / Labor Law without the State***

Of course, certain crucial elements of labor law have always existed outside the state legal system, on its periphery or in tension with it.<sup>25</sup> However, the balance between state and non-state elements has shifted significantly in favor of the latter because of the

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<sup>24</sup> H.W. Arthurs, “What Immortal Hand or Eye? – Who Will Redraw the Boundaries of Labour Law?” in G. Davidov and B. Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart, forthcoming 2006).

<sup>25</sup> H.W. Arthurs, “Labour Law without the State?” (1996) 46 U. Toronto Law Journal 1

effects upon state labor law of globalization, neo-liberalism, enhanced technologies and changing workplace demographics.

This shift would appear to be long-term, perhaps permanent. States have committed themselves to global and regional trade treaties, under which all forms of regulation are suspect as barriers to cross-border trade, or - in the case of labor regulation - as adding unacceptably to the cost of doing business. Moreover, treaties aside, the doctrine of extraterritoriality prevents states from reaching down transnational production and distribution chains to protect workers offshore. Even though states clearly retain regulatory jurisdiction over domestic labor markets, they may be unable to exercise it effectively. Their regulatory capacity has been seriously impaired by the long-term neo-liberal project of “shrinking the state” – of retrenching its ambition, of reducing its financial cost, of shearing away its powers, of diminishing the expectations of its clientele. This project has sometimes been accomplished overtly by the repeal or amendment of labor legislation, but more often by stealth, by appointing unsympathetic tribunal members to administer labor legislation, or by reducing the numbers, pay, zeal and presence of field staff charged with detecting or remedying violations. However accomplished, the result is that it is no longer safe to assume that states will enforce their existing labor laws domestically, much less successfully adapt them for use in the new global context.

State labor law, finally, is increasingly made not by labor departments, but in other ministries and agencies of state. Fiscal, monetary, social welfare, education, immigration and trade policies – not labor statutes - determine structural and cyclical changes in the labor market and their consequences for workers. In many countries, even matters clearly denominated as “labor policy” no longer fall within the mandate of a Ministry of Labor. They are now typically assigned to larger, more generic ministries concerned either with economic affairs or social affairs. As a result, it is increasingly unusual for an influential Minister of Labor to sit at the cabinet table as an advocate for labor’s interests or even as the person charged with curbing its power.<sup>26</sup>

As states divest themselves of the right to make labor law, the means to enforce it and the institutional capacity even to think about it, the significance of non-state labor law is likely to grow proportionately. Of course, labor lawyers will still have to concern themselves with the vestigial remnants of the “common and statutory law” of labor (Aaron’s phrase) and, increasingly, with aspects of state law and policy which originate in other policy domains but affect labor. But more and more they are likely to be preoccupied with the significant corpus of labor law which originates from sources other than the state, and which is enforced elsewhere than in state tribunals.

If this is true, the implications for comparative labor law are considerable. Comparisons amongst state labor law systems will retain a certain antiquarian allure, but will shed little light on the affinities and differences amongst the non-state regimes which increasingly produce workplace norms and resolve workplace disputes in the contemporary world. This

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<sup>26</sup> Arthurs, *supra* note 24.

suggests that the new focus of comparative labor studies will be on “law without the state”, on non-state and supra-state systems.

This is by no means a radical prediction. The privatization of policy- and rule-making, enforcement and adjudication has been widely noted in the domains of global business transactions,<sup>27</sup> administrative law,<sup>28</sup> domestic disputes,<sup>29</sup> the delivery of public goods and services,<sup>30</sup> technical standard setting<sup>31</sup> and penal facilities,<sup>32</sup> to name but a few. It could be said, then, that the expansion of the non-state dimension of labor law is “normal” in the sense that it reflects a more general trend in contemporary public, private and - I predict – comparative law.<sup>33</sup> Indeed, a question of particular interest to future comparativists will surely be how these different regulation regimes have survived their transformation from the public to the private domain.

What might the new, privatized labor law look like and what will comparativists have to compare? Corporate codes of conduct governing employment practices are frequently cited as examples of these new, non-state regimes. Many of these codes have been developed with the encouragement of governments or international bodies; some have been drafted with a degree of participation by social movements and occasionally union bodies; a minority mandate workplace audits and other measures designed to encourage compliance; and a few may even have been successfully invoked to improve the conditions of real workers in real workplaces.

Will future comparative labor scholars collect, contextualize and classify the codes of different corporations as if they once did with statutes and doctrines of state law? From one perspective, this might seem an odd thing to do. After all, for all their faults, state labor laws at least claimed to empower workers. By contrast, corporate codes are clearly not the product of worker agency nor do they encourage employee voice on the shop

<sup>27</sup> See e.g. R. Appelbaum, W. Felstiner, V. Gessner (eds.) *Rules and Networks: The Legal Culture of Global Business Transactions* (Oxford: Hart Publishing, 2001) 273.

<sup>28</sup> See e.g. D. Mullan and A Ceddia “The Impact on Public Law of Privatization, Deregulation, Outsourcing and Downsizing: A Canadian Perspective” (2003) 10 *Ind. J. Glob. L. Stud.* 1999, J. Freedman, “Extending Public Law Norms Through Privatization” (2003) 116 *Harv. L.R.* 1285; H. Arthurs, “The Administrative State Goes to Market (and Cries “Wee, Wee, Wee” All the Way Home” (2005) 55 *U.T.L.J.* 797.

<sup>29</sup> J.B. Singer, “The Privatization of Family Law” [1992] *Wisc. L. Rev.* 1443.

<sup>30</sup> M. Minow, *Partners, Not Rivals: privatization and the public good* (Boston: Beacon Press, 2002)

<sup>31</sup> L. Salter, “The Housework of Capitalism: Setting Standards for the New Communication and Information Technologies”, (1993-94) 23(4) *International Journal of Political Economy*, 105

<sup>32</sup> R. Harding, *Private Prisons and Public Accountability* (New Brunswick, NJ: Transaction Publishing, 1997); and see B. Forst and P.K. Manning, *The Privatization of Policing: Two Views* (Washington, D.C.: Georgetown University Press, 1999).

<sup>33</sup> H. Arthurs and R. Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy* (1996) 34 *Osgoode Hall L. J.* 1

floor; they are the product of employer self-interest and invite acquiescence in employer self-regulation. They do not represent an enforceable legal guarantee of employee rights; they testify to the state's impotence or indifference. In short, corporate codes do not curb employer power; they assume, legitimate, and reinforce it and – at best - teach it good manners.<sup>34</sup>

Why then should comparativists concern themselves with such codes? What might be the justification for comparing rules, processes and institutions which are not “legal” in the conventional sense, but which fill the void left by the depletion of state labor law? Under the old comparative law, there would be none. But under the new dispensation, where comparativism is committed to examining what is actually happening in the real world, the argument in favor of comparing corporate codes is a strong one.

Other practical projects and scholarly scenarios of non-state labor law offer additional prospects for comparative scholarship. The Global Compact launched in 2000 by the Secretary General of the United Nations seeks to publicly commit the world's most prominent corporations to respect core labor rights.<sup>35</sup> The Ratcheting Labor Standards (RLS) project proposes to enforce employer “best practices” through the mobilization of public opinion and the imposition of market sanctions.<sup>36</sup> Other schemes seek to facilitate this mobilization, and to enhance the effectiveness of non-state sanctions, by requiring more complete information about where goods are produced and under what conditions,<sup>37</sup> by labeling goods which originate in workplaces with high labor standards,<sup>38</sup> by banning substandard goods from the WTO global trading regime<sup>39</sup> by denying producers of such

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<sup>34</sup> See H.W. Arthurs, “Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation” in J. Conaghan, K.Klare, M. Fischl (eds.) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2001); A. Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct” (2001) 8 *Indiana Journal of Global Legal Studies* 401

<sup>35</sup> The text may be found at [www.unglobalcompact.org](http://www.unglobalcompact.org).

<sup>36</sup> A. Fung, D. O’Rourke & C. Sabel, “Realizing Labor Standards” (2001) <http://bostonreview.mit.edu/BR26.1/fung.html>; see also C. Sabel *et al* “Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace” (2000) <http://www.law.columbia.edu/sabel/papers/ratchPO.html>.

<sup>37</sup> See e.g. D. Doorey, “Who Made That? Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation” (2005) 45 *Osgoode Hall LJ* (forthcoming).

<sup>38</sup> See e.g. J. Diller, “A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives” (1999) 138:2 *International Labour Review* 99 at 103; S. Zadek, S. Lingayah, M. Forstater, “Social Labels: civil action through the market. Paper by the New Economic Foundation for the European Commission (London: New Economics Foundation, 1998).

<sup>39</sup> See e.g. R. Howse, “Trade Policy and Labor Standards” (2005) 14 *Minn. J. Glob. Trade* 261.

goods access to government contracts, loan guarantees or other benefits<sup>40</sup> or by inciting shareholder to pressure corporate management to improve labor practices.<sup>41</sup>

It is possible – if unlikely - that these schemes will materially improve the rights, economic well-being or dignity of workers. However, they will certainly help to prepare labor law for its new role as an exemplar of the powerful tendency towards non-state or hybridized regimes of governance.<sup>42</sup> Given that “law without the state” has always been an important feature of labor law, in the new dispensation it seems likely to become the dominant feature. How can comparative labor law research fail to engage with non-state regimes?

At the very least, comparativists will have to learn how to investigate the structural and functional differences between the old and the new regimes, between state and non-state systems of labor law. Almost certainly, they will want to compare these new non-state labor law systems to each other, hopefully not just in formal terms but operationally as a way of assessing their efficacy, symbolic powers and relationship to adjacent systems of old- and new-style regulation. And most intriguingly, comparisons amongst these diverse, semi-autonomous and often obscure systems may perhaps lead to the emergence of the new syntax, grammar and vocabulary of comparativism, which will help to make them mutually intelligible. If so, this will be a distinct contribution to both comparative and labor law.

### ***Legal theory without the state: labor law and comparative law***

However, the new focus of comparative labor law is not driven solely by exogenous events. It owes much to recent movements in legal and socio-legal theory and methodology as well.

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<sup>40</sup> For one recent unsuccessful attempt, see the Corporate Code of Conduct Act, HR 4596. 106<sup>th</sup> Cong (2000) introduced by Rep. Cynthia McKinney on June 2, 2000. Under Rep. McKinney’s proposal complying corporations would receive preferential treatment in the awarding of federal contracts, participation in trade and development programs, and access to loan guarantees and import-export credits.

<sup>41</sup> See e.g. M. O’Connor, “Labor’s Role in the American Corporate Governance Structure” (2000) *Comp Lab L. & Policy J.* 97; P. Plitch, “Unions wield investor clout – More memberships use shareholder rights rather than job actions to advance agenda” (May 5, 2002) <http://www.detnews.com/2002/business/0205/b01-481560.htm> See also testimony of Daman A Silvers, Associate General Counsel AFL-CIO to the Senate Committee on Commerce, Science and Transportation (May 20, 2003) [http://commerce.senate.gov/hearings/testimony.cfm?id=767&wit\\_id=2102](http://commerce.senate.gov/hearings/testimony.cfm?id=767&wit_id=2102).

<sup>42</sup> For an imaginative attempt to situate this development in a positive light, see O. Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2003) 89 *Minn. L. Rev.* 262.

The past several decades have witnessed a considerable expansion of efforts to describe and theorize, and less successfully, to prescribe and implement, regimes of non-state norm production and regulation. These efforts follow the century-long trajectory of legal scholarship away from the traditional focus on the authoritative texts and institutional architecture of state courts, legislatures and bureaucracies and beyond their traditional techniques of taxonomy and exegesis. Recently, scholars have begun to map non-state normativity more systematically, to show how all social fields tend to generate their own distinctive legal norms and processes, how these non-state legal regimes interact with each other as well as with state law, how they exist often “in the shadow” of state law – even within state institutions, and how they reinforce, deflect and even transform state law.<sup>43</sup>

This new interest in non-state normativity has particular significance for theorizing about labor law. While mainstream legal scholarship was focused almost exclusively on state legal institutions, labor law had always been something of an exception in its acknowledgement of other normative systems. Indeed, state labor law has long incorporated significant elements of non-state law. Going back to the beginning of the industrial revolution, trade custom and usage served as the benchmark for “fair” wages and working conditions.<sup>44</sup> With the advent of a “free” labor market, the principles of state contract law ostensibly dominated employment relations; but these principles in reality served as a thin carapace under which employers (always) and workers (rarely) fashioned the substantive norms governing their relationship.

Even when state labor law *was* specifically invoked, workplace disputes have long been decided outside of the regular courts. During the first half of the 19<sup>th</sup> century, workers and employers in several European countries began to resolve their disputes in arbitration, conciliation and other informal non-state forums.<sup>45</sup> In North America, from the early 20<sup>th</sup>

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<sup>43</sup> An eclectic list of recent important contributions includes S. F. Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7 *Law and Soc. Rev.* 719; P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Octagon Books, 1979); M. Galanter, “Justice in Many Rooms: Courts, Private Ordering and Indigenous Law” (1981) 19 *J. Legal Pluralism* 1; J. Griffiths, “What is Legal Pluralism” (1986) 24 *J. Legal Pluralism* 1; P. Bourdieu “The Force of Law: Toward a Sociology of the Legal Field” (1987) 38 *Hastings L.J.* 805; S.E. Merry, “Legal Pluralism” (1988) 22 *Law and Soc. R.* 869; G. Teubner (ed.) *Autopoietic Law: A New Approach to Law and Society* (Berlin/New York: Walter de Gruyter, 1988); P. Miller and N. Rose “Governing Economic Life” (1990) 19 *Economy and Society* 1; B. de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995); R. Macdonald *Lessons of Everyday Law* (Montreal/Kingston: McGill-Queens University Press, 2002).

<sup>44</sup> See e.g., E.P. Thompson “The Moral Economy of the English Crowd in the Eighteenth Century” (1971) 50 *Past and Present* 76.

<sup>45</sup> Bi-partite *Conseils de prudhommes* were established in France in 1806 and continue to function today; arbitration in England had been practiced from the 1840s onwards and was well established by the end of the 19<sup>th</sup> century; and successful systems of arbitration had taken root in the United States by about 1920. See Catholic Encyclopaedia Online, <http://www.newadvent>.

century, private arbitration was widely used by unionized workers to enforce collective agreements,<sup>46</sup> a practice which took on ironic significance recently as American employers began to require unorganized workers to seek recourse for violation of their statutory labor rights through arbitration, rather than in state forums.<sup>47</sup> Even when jurisdiction to administer state labor law was clearly assigned to state forums, specialized state labor courts or tribunals were typically selected for the task, rather than regular courts whose personnel and processes were demonstrably ill-suited to perform it.

Moreover, many contemporary studies have shown that the law of the workplace is still largely generated from within, in the form of collective agreements, arbitral jurisprudence, operating manuals, customs governing workplace demeanor, low visibility sanctions which determine the pace and intensity of work, racialized, gendered and inter-generational understandings concerning who does what jobs, and a myriad of invisible norms which are (in E.P. Thompson's phrase) imbricated in the routines of production.<sup>48</sup>

Even labor law practitioners must by now have come to accept that state legal regimes established to improve the status of workers often yield disappointing outcomes. Despite the Wagner Act, American workers are still (again!) unable to join unions and bargain collectively. Despite anti-discrimination statutes, women and racial minorities are far from having achieved equality in the workplace. Despite labor standards legislation, serious exploitation and abuse persist in parts of the service sector and in clandestine sweatshops. Despite international conventions to protect core labor rights, acceded to by national governments, the reality of working life in developing countries falls far short of what might be expected. And despite the claim that all citizens are equal before the law, many regimes of ordinary state law - tort, contract, intellectual property, taxation, insurance and human rights law - have produced outcomes which favor the interests of employers rather than workers.

For these historical and practical reasons, labor law scholars and practitioners had to acknowledge the existence and legitimacy of non-state or hybrid systems of law and dispute resolution much earlier than their professional colleagues in other fields. And for much the same reasons, social scientists exploring non-state normativity in industrialized

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org/cathen/o4190d.htm; the 1911 Encyclopaedia [http:// 11.1911encyclopaedia.org/A/ AR/ ARBITRATION AND CONCILIATION.htm](http://11.1911encyclopaedia.org/A/AR/ARBITRATION_AND_CONCILIATION.htm); J. Jaffe "Industrial Arbitration, Equity and Authority in England 1800-1850" (2000) 18 *Law and History Rev* 525.

<sup>46</sup> E. E. Witte, *Historical Survey of Labor Arbitration* (1952) (Philadelphia: University of Pennsylvania Press, 1952)

<sup>47</sup> See e.g. K. Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s" (1996) 73 *Denver U. L.R.* 1017

<sup>48</sup> See H.W. Arthurs, "Understanding Labour Law: The Debate Over 'Industrial Pluralism'" (1985) 38 *Curr. Leg. Prob.* 83 and "'Landscape and Memory': Labour Law, Legal Pluralism and Globalization" in T. Wilthagen (ed.) *Advancing Theory in Labour Law in a Global Context* (Amsterdam: North Holland Press, 1997).

societies drew on the experience of labor law in some of their early work.<sup>49</sup> Comparativists – to come belatedly to the point - can hardly fail to follow their lead.

***Compared to what? The future of comparative labor law.***

Comparative labor law is obviously affected by these developments in political economy, regulatory technology and socio-legal theory. Comparativists often argue that the principal “use” of their subject is that “...it gives us a different perspective from which to view [our country]. As a consequence, we ask different questions about our own system....”<sup>50</sup> This prevents “an attitude that tends to take [one’s] own system for granted, even for superior....In this respect, comparative law is an exercise in developing modesty”.<sup>51</sup>

Note: comparative law is not unique in this respect; it has much in common with an interdisciplinary approach to law. Comparing “law on the books” with “law in practice”, for example, also demands that we acquire “a different perspective”, that we develop “modesty” in our claims about law.

However, the achievement of “perspective” or of “modesty” in labor law is not an end in itself: it is a project with a purpose. What is that purpose? Not just to map labor law more accurately to facilitate domestic navigation or foreign tourism, but to bring into clearer focus the forces which shape labor law “in practice” as well as labor law “on the books”. What are those forces? Not “legal tradition” in itself as some comparativists suggest, nor the history and sociology of enterprises or trade unions as other propose, nor even the conceptual vocabulary which defines the way we think and talk about such things. Rather, the dynamic forces which must be brought into focus are those which delegitimize tradition, re-write history, destabilize society and transform law: political economy, ideology, technology and culture. And how does comparativism bring those forces into focus? Not by the simple scientific cataloguing of difference or dissonance, but by exposing us to the psychological shock of encountering “the other”, in much the same way as voyages of discovery in the 17<sup>th</sup> and 18<sup>th</sup> centuries helped to create the new, critical sensibility of enlightenment and revolution.

Now a methodological warning. To consider the operation of political economy, ideology, technology and culture only within the optic of their effects on state labor law – “on the books” or “in practice” - is to truncate or distort our understanding of these same forces. To assume that state labor law can be disaggregated from them, is to

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<sup>49</sup> See e.g. P. Bourdieu, *supra* note 43; S.F. Moore, *supra* note 43; P. Selznick, P. Nonet and H. Vollmer, *Law, Society and Industrial Justice* (New York: Russell Sage Foundation, 1969); G. Teubner, “Industrial Democracy Through Law” in T. Daintith and G. Teubner “Contract and Organization: Legal Analysis in the Light of Economic and Social Theory” (Berlin/NY: DeGruyter, 1986) and *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin/NY: DeGruyter, 1987);

<sup>50</sup> Aaron *supra* note 6 at 234

<sup>51</sup> Manfred Weiss, “The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool” (2005) 25 *Compar. Lab. L. & Pol’y J.* 169 at 178.



underestimate their power and to overestimate the autonomy of law. And to assume that law's unique epistemology, deontology and logic provide a useful vantage point from which to comprehend and evaluate these other forms of social ordering is to persist in a conceit that we should long since have abandoned.

To recapitulate, comparative law - including comparative labor law - faces a two-fold challenge. It must begin to consider both state and non-state normative regimes; and it must acknowledge that normativity is shaped by social forces rather than the reverse. In fact, comparativists have already begun a root-and-branch reconsideration of the fundamental epistemological, methodological, ethical and political assumptions of their profession.<sup>52</sup> As a result, the classical project of comparative law - to compare legal rules and systems - seems even more problematic than it once did.

Suppose, for example, that we wished to compare the way in which different labor law systems regulate "strikes", enforce "agreements" or define which "employees" are covered by particular kinds of legislation – standard items on the agenda of comparative labor law. Do we begin by listing the institutional characteristics, procedures or substantive rules of the labor law systems of comparator countries? Or do we begin with prior, some might say "political", considerations? Should we not acknowledge that buried in words such as "strike", "agreement" or "employee" are hotly contested and culturally contingent assumptions – that "strikes" are to be treated differently from other refusals to deal, that "agreements" are to be obeyed, that "employment" is a category which entails special rights and duties? Or at an even more fundamental level, should we not acknowledge that to inquire how "the law" deals with these issues in (say) Germany, America and Brazil is deeply "lego-centric"?<sup>53</sup> Lego-centricity assumes what is often most contestable: that law is an unqualified social good, that law has an autonomous existence, that law produces the optimal resolution of conflicts, that law's legitimacy and power exceed that of other processes and institutions, such as markets, social mobilization or long-term cultural change; and that the evocative power of "law" is constant across these countries.

Of course, comparative labor law will likely remain lego-centric for some time to come. We will continue to explore differences amongst the institutions, processes and rules of national labor law systems. These have a nostalgic appeal; they remind us of when we and our subject were both much younger. They are intrinsically important because, like the Rosetta Stone or the Burgess Shale, they allow us to revisit a vanished world of which only vestigial traces remain. And, in fairness, comparative labor law generates practical (or perhaps placebo-like) effects. So long as people continue to believe in the power of law to do good, comparative examples from "relevant other" states will liberate them from

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<sup>52</sup> See especially G. Frankenberg, "Critical Comparisons: Re-Thinking Comparative Law" (1985) 26 *Harv. Int'l. L. J.* 411; Symposium on New Approaches to Comparative Law, (1997) *Utah LR*, A Riles "Whigmore's Treasure Box: Comparative Law in the Era of Information" (1999) 40 *Harv Int'l. L.J.* 221

<sup>53</sup> G. Frankenberg, "Critical Comparisons: Re-Thinking Comparative Law" (1985) 26 *Harv. Int'l. L. J.* 411 at 433

the tyranny of the *status quo*, and remind them that existing legal values are contestable, that legal rules are malleable and that legal architecture is wrought by human hands, not by fate or nature.

Still, the centre of gravity in comparative labor law scholarship is shifting away from national industrial relations and labor law systems. Given the declining ability and growing disinclination of states to intervene in labor markets, diminishing returns are available from the cataloguing of formal or structural differences amongst these systems,<sup>54</sup> debating the methodological difficulties of making functional comparisons amongst them,<sup>55</sup> or hypothesizing the circumstances under which labor laws might be “transplantable” from one country to another.<sup>56</sup> Nor is it particularly useful to ask similar questions at the international level. True, normative principles governing relations between employers and workers may be written into international covenants and conventions on human or labor rights, inscribed in declaratory protocols on proper standards of corporate conduct or embedded in other “soft law” initiatives. But it is even less productive to attempt to compare like with like in the international domain than in domestic law.<sup>57</sup> Even at the level of textual analysis, international labor law texts – where they exist - tend to be fragmentary, vague, admonitory, unenforceable and unenforced.

Instead, comparative labor law will have to be conceived and executed as part of a more general investigation of the effects of different systems of global and regional political economy and governance.<sup>58</sup> Trade regimes – the WTO, NAFTA, the EU - may not deal directly with labor law to any significant extent, but they do have profound consequences for labor markets and hence for relations between employees and employers. The task of comparative labor lawyers will be increasingly to trace out the chain of causation, to show

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<sup>54</sup> See e.g. Roy Adams *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995).

<sup>55</sup> See e.g. W. Twining, “Social Science and the Diffusion of Law” (2005) 32 J. Law and Soc. 203.

<sup>56</sup> See e.g. O. Kahn-Freund, “On Uses and Misuses of Comparative Law” (1974) 37 Mod. L.R. 1; C. Whelan, “On Uses and Misuses of Comparative Labour Law” (1982) 45 Mod. L.R. 285; T. Kohler, “The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation” (1998) 73 Notre Dame L. Rev. 1311; .B. Hepple, “Can Collective Labour Law Transplants Work? The South African Example” (1999) 20 Industrial L. J. 1.

<sup>57</sup> See e.g. M. Weiss, “Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA through Jordan, via Chile, to Latin America, and Beyond” (200) 37 U San Francisco L. R. 689. Indeed, the exercise may provoke spectacular disagreements, see P. Alston ‘Core Labor Standards and the Transformation of the International Labor Rights Regime’ (2004) 15 European J I L 4571; B. Langille, “Core Labor Standards – The True Story (Reply to Alston)” (2005) 16 European JIL 409; P. Alston, “Facing up to the Complexities of the ILO’S Core Labor Standards Agenda” (2005) 16 European JIL 467.

<sup>58</sup> D. Kennedy “New Approaches to Comparative Law: Comparativism and International Governance” [1997] Utah L. Rev 545.

how different regimes of transnational economic integration alter public policies, empower or dis-empower state and non-state actors, transform analytical discourse, revise expectations and above all, trigger substantive changes in economies in general, in broad labor markets and in workplace relations within individual enterprises.<sup>59</sup>

There are more quotidian comparisons to make as well. If most workers no longer have effective union representation, are they inventing new strategies for the defense of their interests? For example, statistics suggest that in the United States, more private sector workers may be enrolled in non-union employee associations than in conventional unions. How do the normative systems generated by these associations compare with those generated through collective bargaining? Studies have documented the emergence of technology-assisted employee “caucuses” or networks which enable professionals and knowledge workers with common interests to share information and act in parallel, if not in concert. How do their objectives and outcomes compare to with those of employee associations in other contexts? Conventional industrial action is often unavailable to workers in the global south. However, their allies and sympathizers in the global north have devised unconventional strategies to enhance their bargaining power - consumer boycotts and shareholder complaints, for example. How do these conventional and unconventional strategies compare in terms of short-term efficacy, long-term sustainability, counter-measures by employers and impacts on worker solidarity? Employees fired by employers determined to achieve a flexible, non-union work force may seek redress by reinventing themselves as victims of unsafe working conditions, racial discrimination or sexual harassment. What is there about these alternative forms of recourse which might enhance their attractiveness in given situations?

Comparisons within and amongst firms are also important. To what extent, by what means and under what circumstances do different firms or parts of firm engage in what, in a very different context, has been called “the reproduction of legality”.<sup>60</sup> That is to say, to what extent do they create their own distinctive norm-promulgating and dispute-resolving regimes outside the state legal system, but nonetheless in some respects consciously or unconsciously imitating it? Who are the effective actors in constituting these non-state regimes? Who plays the significant dispute compliance-instigating and dispute-resolving roles once assigned by statute to state tribunals or labor inspectors? At what level within transnational corporations, do indigenous regimes originate, and to what extent do they reflect local or head office culture? Are they spontaneous or the result of a calculated, long-term HR strategy? How do they interact with state law? Do they whet the appetite for more conventional forms of regulation or do they satisfy that appetite? Do corporate officials who administer indigenous labor law regimes do so cynically or do they find themselves gradually co-opted into trying to make them work? And most importantly, what are their practical outcomes in terms of improving labor standards? These are questions

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<sup>59</sup> For a pioneering effort, see K. Rittich, “The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social” (2004) 26 *Mich. J. Int’l. L.* 199.

<sup>60</sup> B. de Sousa Santos “The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda” (1977) 12 *Law and Soc Rev.* 5.

which can only be answered by comparative inquiry but inquiry with a strong empirical component.

Or to take one more set of examples: How do new discourses of industrial relations, new paradigms of employment, new configurations of production, new approaches to governance actually reshape state labor law systems in different countries, companies and contexts? To what extent are states actually changing the “policy platform” on which labor laws have traditionally been constructed? Does the new, cooperative “human capital” model produce different attitudes amongst workers and employers from those produced by the conflictual model which has prevailed for most of the modern history of labor law? If so, have those attitudes found institutional and behavioral expression in state and non-state contexts or do they remain merely rhetorical? If they have produced new legal technologies - social drawing rights, flexicurity, the open method of coordination – are the rights promulgated, promoted or protected by these technologies in addition to or in lieu of more conventional perquisites of employment, such as higher wages and job tenure? If they have led to the establishment of new workplace institutions, are these in addition to or in lieu of changes at the highest levels of corporate governance? And have new labor law institutions inspired by the positive promise of human capital theories generated as their unpleasant corollary multi-level labor law systems which favor knowledge workers and disfavor unskilled and semi skilled workers?

In short, the project of comparative labor law will become part of an intellectually ambitious and highly complex study of the changing political, economic, social, cultural and psychological terrain of work relations.

“It is magnificent”, a French general said, upon witnessing the charge of the Light Brigade, “but is it war?” You might fairly ask the same of me. I have described a magnificent project: but is it comparative labor law?<sup>61</sup> I think I can make a good argument that it is. It is “law” in the sense that it deals with issues of normativity. It concerns “labor” in the sense that it addresses relations between people who work and those who for whom work is performed. And it is “comparative” in the sense that it asks questions about alternative values, perceptions, actions and arrangements – those sponsored by the state and those which have some other provenance, those which we experience close up and those which operate at a distance in time or space, those which fit neatly within established concepts and categories and those which do not.

If this is an accurate description of the new comparative labor law, in practical terms, it will be impossible to be a labor lawyer without being a comparativist.

We will all become labor lawyers *sans frontières*. This is a metaphor worth pursuing. As everyone knows, *médicins sans frontières* is a humanitarian agency with a reputation for improvising solutions in conditions of extreme turmoil and bitter conflict. The allusion is especially attractive to labor lawyers who like to believe that they are engaged in a similar

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<sup>61</sup> Cf. M. Rodriguez- Piñero Royo, “What Do We Talk About When We Talk About Labour Law?” (2002) 23 Comp Lab L & Pol’y J. 701.

enterprise. But labor lawyers, like all lawyers, have traditionally operated *avec frontières* – within professional, jurisdictional and conceptual boundaries which are defined by their legal training, competence, culture and mandate. When they step outside those boundaries - as they do when they become comparativists - they tend to do so diffidently. And with good reason. After all, they are being admonished to be sure to consider law in its context. But if there are no *frontières* then everything is context; and if everything is context, nothing is law.

A confession, then: I seem to have hoisted myself on my own paradox. Or, more accurately, I have painfully rediscovered a truth which Aaron and his colleagues discovered forty years ago. Their pioneering studies on strikes, employment discrimination and dismissal from employment did not deny the crucial relevance of context. But they felt obliged to write primarily about the rules and institutions of state labor law rather than, as their central preoccupation, about context. Context, for them, was too vague, too complex, too bound up with history and culture and politics. The large question which will determine the fate of comparative labor law scholarship is therefore this: can we develop a new intellectual framework, can we muster the intellectual resources, can we recruit the array of intellectual talents needed to do comparative labor law as we know – as Aaron and his colleagues knew - it ought to be done, in all its breadth and depth and complexity?