A NEW LABOR LAW FOR A NEW WORLD OF WORK: THE CASE FOR A COMPARATIVE-TRANSNATIONAL APPROACH

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There are many reasons to study comparative labor law. One is that comparative labor law can reveal the way in which different legal systems approach similar issues differently. That is, a study of comparative labor law can assemble and reveal unfamiliar doctrines and approaches, much as a museum collects and displays unfamiliar artifacts. Alternatively, comparative labor law can serve not only intellectual curiosity, but also instrumental goals. Understanding comparative law and alternative institutional arrangements be useful to fill in gaps in national legal systems of regulation—to provide a source of inspiration and information about alternative regimes when one's domestic regime is deemed to be incomplete or unsatisfactory. The gap-filling use to comparative labor law, like the museum use, emphasizes differences between the domestic regime and the comparative "other." A third, more anthropological approach to comparative labor law seeks to identify and to understand legal differences as one instance of other structural differences that both reflect and constitute the observed differences between nations in their histories and their practices.

Each of the three approaches described involve approaching comparative law as a study in differences. An alternative approach is to study comparative labor law in order to understand not differences but similarities. In this vein, some hope that by identifying similar patterns and homologous legal institutions, they might be able to identify a universal approach to labor regulation and develop a meta-theory of labor regulation.

There is also an intensely practical reason to study comparative labor law. In our increasingly globalized world, cross-border

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knowledge is increasingly necessary for labor lawyers, corporate lawyers, and others who deal with employment issues in more than one country. It is becoming important for international lawyers to have some knowledge of comparative labor law in order to practice across national borders.

In this article I suggest an approach to comparative labor law that incorporates each of these approaches but that goes one step further. I suggest that we use comparative labor law in order to develop a cross-national agenda for progressive social action. I argue that to effectively protect labor rights today, it is necessary to be comparative in method, transnational in perspective, and local in action.

I. COMPARATIVE LABOR LAW IN U.S. LABOR POLICY DEBATES

At several points in time, comparative labor law has played an important role in U.S. labor policy discussions. In the early twentieth century, U.S. trade unionists and activists engaged in passionate debates about the national arbitration systems developed in New Zealand and New South Wales and the conciliation system adopted by Canada. In the same period, the American labor movement paid close attention to the *Taff-Vale* decision in Great Britain that imposed tort liability on unions for actions of their members. These instances of labor regulation in other countries were used as a starting point for debates about how labor should be regulated in the United States. Some reformers and labor activists used these comparative examples to argue that the United States adopt some of these approaches, but Sam Gompers and the American Federation of Labor embarked on a distinctly American approach.

In the 1970s, there was another wave of interest in comparative labor law. This one, spearheaded by Ben Aaron of UCLA, involved a remarkable group of labor law scholars including Bill Wedderburn of Great Britain, Gino Guigni of Italy, Thilo Ramm of Germany, Xavier Blanc-Jouvan of France, and Folke Schmidt of Sweden. Through meetings and scholarly exchanges over an extended period, the Comparative Labor Law Group devised a new kind of comparative project. Their aim was not to formulate the official policy of the labor movement or devise new labor laws for the United States, but to try to understand national differences and to identify each one's unique approaches to common problems.

Today, we have a new need for comparative labor law, one that is at least as urgent as those that came before. Many countries in the developed world are facing major challenges to their labor law

regimes, challenges that emanate from the separate but interrelated dynamics of flexibilization, globalization, and privitization. *Flexibilization* refers to the changing work practices by which firms no longer seek long-term employees but rather seek flexible employment relations that permit them to increase or diminish their workforce, and reassign and redeploy employees with ease. *Globalization* is the increase in cross-border transactions in the production and marketing of goods and services that facilitates firm relocation to low labor cost countries. *Privatization* refers to the rise of neo-liberal ideology, the attack on big government and the dismantling of the social safety net. These three dynamics are coalescing to reshape labor relations in the twenty-first century.[1]

The three dynamics are operative in the United States, but they are not confined to the United States. In many countries, flexibilization, globalization, and privatization are challenging regulatory regimes, redefining labor regulations, and reshaping labor-management relations. In many places, these dynamics have combined to undermine existing labor regulatory regimes that for much of the twentieth century protected worker rights. Nations around the world are debating how to adapt and yet preserve their distinctive labor relations regulatory regimes in the face of these threats. In this chapter I describe each of these dynamics and then ask how labor law scholars might help conceptualize new regulatory or organizational approaches to protect employment rights, re-invigorate unions, and re-secure a social safety net. I argue that a turn to comparative labor law is an essential next step. Just as labor movements in the western world faced pressures in the early and mid-twentieth century that generated a comparative focus, so too do they now. And while each country has its own national traditions and historically-determined starting points, I believe that the common pressures today are such that we can and must learn from each other's experiences and approaches. That is, the dynamics of flexibilization, globalization, and privitization force us to be comparative as well as transnational in our perspective.

1. *See* Katherine V.W. Stone, *Flexibilization, Globalization and Privatization: Three Challenges to Labor Rights in Our Time,* 44 OSGOODE HALL L. J. 77 (2006).

II. PRESSURES SHAPING THE EMPLOYMENT RELATIONSHIP TODAY

A. *Flexibilization*

Over the past two decades, major changes have occurred in the nature of the employment relationship in the developed world. Previously, most large corporations organized their workforces into what has been termed an "internal labor market."[2] The job structures of the internal labor market were designed by the industrial engineers of the scientific management movement and the industrial psychologists of the personnel management movement in the early twentieth century as a way to routinize task performance and diminish the role of skill in the production process.[3] In internal labor markets, jobs were arranged into hierarchical ladders and each job provided the training for the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level, then utilized internal promotion to fill all of the higher rungs. Employers wanted employees to stay a long time, so they gave them an implicit promise of long-term employment and of orderly and predictable patterns of promotion. Consistent with internal labor market job structures, employers structured pay and benefit systems so that wages and benefits rose as length of service increased.[4]

In recent years, employers in many countries have dismantled their internal labor market job structures and abandoned the implicit promises that went along with them. In their place, employers have created new types of employment relationships that give them flexibility to cross-utilize employees and to make quick adjustments in production methods as they confront increasingly competitive product markets. Firms are also changing their practices out of a new appreciation of the value of the intellectual and cognitive contributions of employees. Unlike the scientific management theories of the past, human resource theorists today believe that the intellectual capital of employees is a primary source of firm value. Accordingly firms want to motivate employees to create, gain, and

2. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004). *See also* INTERNAL LABOR MARKETS (Paul Osterman ed., 1984); PETER DOERINGER & MICHAEL PIORE, DUAL LABOR MARTKETS AND MANPOWER ANALYSIS (1971).

3. Katherine V.W. Stone, *The Origin of Job Structures in the Steel Industry*, *in* LABOR MARKET SEGMENTATION (D. Gordon et. al. eds., 1975); SANFORD JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20th Century (1985).

4. *See* Katherine V.W. Stone, *Policing Employment Contracts Within the Nexus-of-Contracts Firm*, 43 U. TORONTO L.J. 353, 363–69 (1993).

share their knowledge on the firm's behalf. They want employees to commit their imagination, energies, and intelligence on behalf of their firm.[5]

Much contemporary human resource policy is designed to resolve the following paradox: Firms want to motivate employees to contribute their knowledge to the firm, yet they are dismantling the job security and job ladders that have given employees a stake in the well-being of their firms for the past 100 years. Hence managers have been devising new organizational structures that embody flexibility while also promoting skill development and fostering employee engagement. Firms today believe that they need not merely predictable and excellent role performance, they need what has been described as "spontaneous and innovative activity that goes beyond role requirements." Organizational theorists characterize this something extra as "organizational citizenship behavior."[6]

Firms are creating a new employment relationship in which regular, full-time work has become contingent in the sense that the attachment between the firm and the worker has been weakened. The "recasualization of work" has reportedly become a fact of life all along the employment spectrum from blue collar workers to high-end professionals and managers.[7]

The changing employment patterns are evident in a series of new work practices that employers have instituted over the past decade. The new work practices include innovations such as broadbanding that are designed to give employers flexibility to cross utilize employees across job titles and departmental lines. They also include compensation practices such as pay-for-performance and bench-marking that attempt to match employees' pay to their individual contribution and to their value in the external labor market. Other features of the new employment relationship are a flattening of hierarchy and an increase in discretion to ever lower ranks of employees. The latter is an effort to capture employee knowledge, skills, and imagination for firm goals. To cultivate and capture employee knowledge, skills, and imagination, firms have designed

5. These changes are described in detail in STONE, *supra* note 2.

6. *See* DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME 4–5 (1988).

7. *See*, *e.g.*, *The Future of Work: Career Evolution*, ECONOMIST, Jan. 29–Feb. 4, 2000, at 89; *see also* PETER F. DRUCKER, MANAGING IN A TIME OF GREAT CHANGE (1995); ROSABETH KANTER, ON THE FRONTIERS OF MANAGEMENT 190 (1997); RICHARD SENNETT, THE CORROSION OF CHARACTER 23 (1998).

various types of workforce empowerment programs to give bounded discretion to relatively low level employees.[8]

The new employment relationship also involves a change in the implicit contract between the employee and the firm. Instead of giving employees an implicit promise of employment security, today's employers implicitly promise employability security—the ability to acquire skills that will enhance their opportunities in the labor market. Employers also no longer promise their employees orderly promotional opportunities but rather promise opportunities for employees to network and gain skills that will prepare them for other jobs outside the firm. In the new "boundaryless" employment relationship, employees are expected to manage their own careers, rather than to expect long-term employment from a single firm.[9]

The labor laws in the United States were designed for the old employment relationship between of large firms and stable, long-term employees. For example, under the National Labor Relations Act (NLRA), the unionized workplace is divided into discrete bargaining units, each unit a well defined, circumscribed, and economically stable group. While the individuals in the unit could and did change, the bargaining rights and bargaining agreements applied to the unit. Unions negotiated agreements that contained wages, work rules, and dispute resolution systems for those individuals working in the unit. The terms and benefits applied to the job—they did not follow the worker to other jobs when they left the unit. Job-centered benefits were not problematic in a workplace in which jobs themselves were stable and long-term, but as individuals make frequent movements between departments and firms, bargaining unit based unionism means that union contractual gains are ephemeral from the workers' point of view.

The mismatch between today's flexible work relations and conventional union practices has led companies to resist unions more fiercely than ever. Indeed, unions have had a difficult time gaining a foothold in companies such as TRW and Hewlett Packard that have been at the vanguard of the new human resource revolution. Some companies, such as General Electric, engaged in aggressive deunionization first in order to restructure their labor relations. The move to flexible employment practices has thus been one of the factors feeding management's assault on unions.

8. *See generally*, STONE, *supra* note 2, at 87–113.

9. *See generally*, THE BOUNDARYLESS CAREER: A NEW EMPLOYMENT PRINCIPLE FOR A NEW ORGANIZATIONAL ERA (Michael B. Arthur & Denise M. Rousseau ed., 1996).

2. *Globalization*

Globalization is the cross-border interpenetration of economic life. It is the result of many well-known factors, including new telecommunications and computer technologies that enable firms to produce, distribute, and market all over the world; new trading regimes that reduce trade barriers and foreign exchange restrictions; and the rise of multi-national corporations and production networks whose long supply chains span continents. As a result of globalization, national borders are becoming permeable to products and capital flows from all around the globe.

Trade unionists and progressive policymakers have long feared that globalization will mean the demise of hard-won labor standards and workplace rights in the Western world.[10] Many economists have found that companies are moving low-skilled jobs to low-wage, low union density countries, thereby leaving depressed wages and increased unemployment in their wake.[11]

Globalization not only undermines domestic labor standards directly, it also undermines the strength of domestic labor organizations.[12] As capital mobility increases, businesses have an incentive as well as an ability to relocate to countries with lower labor standards. The result is that unions have less power at the bargaining table in their home countries because they are always bargaining against the threat of relocation. In practice this means that companies are less likely to yield to union demands. Unions, in turn, scale back their demands out of fear of triggering business flight.

Globalization also diminishes the level of domestic labor-protective regulations. Companies prefer to produce in legal

10. Katherine V.W. Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L LAW 987 (1995).

11. For example, William Cooke analyzed data on foreign direct investment by U.S. multinational firms within the nineteen OECD countries between 1982–1993 and found that one of the most important factors in such locational decisions within the developed world was that investment was negatively correlated with levels of unionization and protective labor legislation. William N. Cooke, *The Influence of Industrial Relations Factors on U.S. Foreign Direct Investment Abroad*, 51 INDUS. & LABOR REL. REV. 3 (1997). In a similar vein, Richard Freeman and Ana Reganga found that increased trade between the United States and less developed countries between 1970 and 1992 led to significant reduction both in employment levels and wages for low-skilled workers in the United States. Richard Freeman & Ana Reganga, *How Much Has LDC Trade Affected Western Job Markets?*, Conference for on International Trade and Employment (1995). *See also* Robert Scott, *Alternatives to the Neo-Liberal Model that Address Differences Between North and South*, Economic Policy Institute, at 3-4 (1998) (summarizing studies).

12. I develop each of these issues in detail in Katherine V.W. Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93 (1999); Katherine V.W. Stone, *Labor and the Global Economy*, 16 MICH. J. INT'L L. 987, 990–97 (1995).

environments that offer the least protections for labor and, when feasible, they shift production to capture the resultant lower labor costs. As a result, nations compete for business using lower labor standards to attract businesses, a dynamic known as "regulatory competition." Regulatory competition leads non-labor groups to oppose labor regulation on the ground that business flight hurts them. Thus regulatory competition can trigger a downward spiral in which nations compete with each other for lower labor standards while labor, having lost its historic allies at the domestic level, is thus rendered powerless to resist.

Globalization could be an impetus toward international labor solidarity and cooperation, but without meaningful international labor standards, it can pit labor organizations in one country against those in another. For example, unions in developed countries have advocated supra-national legislation that would equalize labor standards and hence decrease the likelihood of capital flight, but unions in less developed countries have resisted these measures and attacked them as protectionist.[13] Some unions have attempted to organize workers across national and regional borders and bargain for parity. However, while such a strategy has a lot of potential, it is also problematic. Countries have markedly different labor laws and collective bargaining systems, so that it is difficult for unions in one country to collaborate with unions in other countries in a way that jointly harnesses their economic weapons and furthers their common bargaining goals.

Finally, globalization can lead to the deterioration of labor's political power. National labor movements operate in the context of a particular regulatory environment. Labor's political power is undermined when the locus of labor regulation moves from a national to an international arena.

3. Privatization

A third trend that is reshaping labor relations is privatization. The term "privatization" usually refers to policies that shift responsibilities and resources from the public to the private sector. However, in current parlance, the term also refers to the neo-liberal

13. *See* Louise D. Williams, *Trade, Labor, Law and Development. Opportunities and Challenges for Mexican Labor Arising From the North American Free Trade Agreement*, 22 BROOK. J. INT'L LAW 361, 377 (1996) (arguing that developed and developing countries' unions have opposing interests, because LDC unions benefit from the influx of jobs). *See also* Karen Vassler Champion, *Who Pays For Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L. L. & COM. 181, 215–16 (1996).

ideology that underlies the shift from the public to the private realm. In the United States, the neo-liberal assault on New Deal social policies has had two goals. First, it attempts to shift responsibility for social welfare out of the public domain and into the arena of private contract. And second, it attempts to move the locus of social legislation away from the federal government and back to the states. Both of these intellectual and political attacks on the New Deal have been garnering strength over the past twenty years, and have contributed to the weakening of labor protection.

For example, beginning around 1980, as the Labor Board retreated from protecting union organizing, the protection for labor rights devolved more and more to the states. At the same time, changes in the labor law preemption rules had the effect of undermining unions' contractual protections while strengthening protection for individual workers.[14] In the 1990s, the trend continued with the rise of the "new federalism" in constitutional law and the continued dismantlement of the social welfare state of the New Deal. For example, in 2002, in *United States v. Morrison,* the Court struck down the Violence Against Women Act on the grounds that it was not a valid regulation of interstate commerce.[15]

The devolution of the site of regulation from the federal to the state level has been accompanied by other neo-liberal policies that undermine the social welfare state. Local anti-tax movements have succeeded in enacting tax cuts and defeating local bond initiatives, thus depriving local governments of the ability to fund many social programs. As a result, social welfare programs have moved from the federal level to the states and localities where there are less resources to pay for them. The shift from federal to state regulation is one manifestation of the neo-liberal agenda of shrinking the public sector and reversing the redistributive policies of the New Deal and post World War II years.

The shift in the site of regulation has been accompanied by a shift of responsibilities and resources from the public sphere to the private sector. One area where this shift has occurred is in the adjudication of labor rights violations. Increasingly, employers are requiring

14. *See* Katherine V.W, Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and The New Deal Collective Bargaining System*, 59 UNIV. CHICAGO L. REV. 575 (1992).

15. 529 U.S. 598 (2000). There have also been a number recent cases cutting back on federal power to impose anti-discrimination measures on the states. *See*, *e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). On the nature of the "new federalism" in the area of social regulation, see Robert B. Post & Riva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

employees to waive their rights to a public forum and agree instead to bring any claims of labor rights violations to a private forum that is crafted and often controlled by the employer. The Supreme Court has upheld the use of mandatory private arbitration tribunals for adjudicating claims under the discrimination laws, and lower courts have upheld them for many other types of employment claims.[16] Employment law is thus becoming a body of law that is interpreted by private arbitrators outside of the public eye. As employers move more and more disputes about labor rights out of public fora, the resolution of employment disputes become invisible and the decision makers become unaccountable. There also fails to develop a body of publicly-known jurisprudence that can provide a normative basis for the assertion of labor rights by others.[17]

In the United States, the ascendancy of neo-liberal public policies has had many ramifications for labor, including diminishing worker health and safety protections, diluting the right to organize unions, weakening the strike weapon, reducing funding for public education and health programs. One result is that regulatory competition has again become a serious concern. States aggressively compete for businesses by touting their low labor costs and union-free environment, and this pressures other states to lower their labor protections as well.

III. RE-FOCUSING RESEARCH AND STRATEGY

Each of the three dynamics described above contributes to union decline and a diminishment of labor rights. Flexibilization increases employers' incentive to avoid unions because they perceive unions as promoting rigidity, uniformity, job protections, and narrow job definitions. Globalization increases employers' desire to avoid unions and labor regulations in their quest for lower labor costs. In addition, global production chains, enhanced transportation and communication, and lower trade barriers give employers considerable leverage to avoid unions altogether, or limit their effectiveness where

16. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

17. For critiques of the use of private dispute resolution in employment relations, see Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. & EMP. L.J. 1 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Katherine V.W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER UNIV. L. REV. 1017 (1996).

they exist. Privatization fosters policies that have diminished legal protection for labor rights and collective bargaining and have contributed to rapidly growing income inequality.

The dynamics of flexibilization, globalization, and privitization are not merely present in the United States. Every day, newspapers, law reports, and scholarly journals in every developed country report that companies are changing the contract of employment by utilizing temporary workers, reneging on long-term commitments, employing independent contractors, shifting production offshore, utilizing overseas suppliers, out-sourcing, in-sourcing, and subcontracting. Many nations are also grappling with the challenges these new practices pose to their existing systems of labor regulation. The most pressing question for labor relations scholars throughout the Western world today is how to respond to these three dynamics. How can labor standards and worker rights be safeguarded in a globalized, flexibilized, and privitized world?

I suggest that we need to change the focus, or at least the locus, of our research. We need to become at the same time, comparative, transnational, and intensely local. The threat of flexibilization requires us to be comparative—to understand how flexible work practices are undermining established collective labor relations and to explore efforts in different places to adapt organizational forms to the new work practices. The threat of globalization requires us to be transnational—to imagine the possibilities of cross border unionism and of transnational labor regulation. And the threat of privitization requires us to be intensely local—to understand how the public and private spheres are joined in our specific national context, and to formulate strategies in the localized context for the reinvention of the social safety net. Let me be more specific.

A. Flexibilization

The dismantlement of internal labor markets is a worldwide phenomenon. In developed countries, the change in the nature of work is undermining employee representation, threatening the viability of programs for health insurance and old age assistance, creating new types of employment discrimination, generating disputes about the ownership of employee knowledge, and widening the income distribution. While each country starts at a different point, they all face similar pressures to revise their regulatory regimes and labor relations practices. In many countries, employers are seeking to use more atypical employees and to change the labor laws so they can

utilize new types of short term employment contracts. In others, the new mobility of labor has led to heightened disputes over restrictive covenants and other post-employment restraints. In yet others, the changes are threatening customary and statutory employee protections. To understand the possibilities of response, it is necessary to engage in a comparative study of parallel changes in the nature of work as they are manifest in countries that have very different structures of employment regulation.

For example, while Japan has had a well entrenched but informal system of lifetime employment, that system is beginning to unravel under pressure from new demands for flexible work practices. Australia, in contrast, had a highly regulated and centralized system of industrial relations based on industry-wide awards. The recent pressures of flexible production have led to both an increase in the role of collective bargaining and an increase in the role of individual employment—both representing a departure from the use of industry-wide awards to set conditions of employment. Europe, which has had highly developed worker protections and extensive roles for unions, is debating how to preserve these protections while responding to the market pressures for change. Within the EU, there are a number of models of employment regulation that permit more flexibility in labor contracts while preserving some core worker protections.

As labor law scholars, we need to understand the many ways in which the changing employment relationship is affecting the workplace in different national contexts. The comparative approach can give us insights into changes that are occurring in our own labor relations systems. Whether or not these similar pressures will lead to a convergence of labor relations systems is an open question, but one that has great importance for labor organizations dealing with globalization.

A comparative approach can also expand our imagination and enable us to envision new programs and policies to address the pressures of flexibilization. For example, in parts of Europe in the past fifteen years, there has been lively experimentation with the use of local and regional institutions to protect labor rights and at the same time strengthen local economic opportunities. In some areas of Italy, Spain, and the United Kingdom, local and regional social pacts have been negotiated amongst tripartite institutions at the local level to set labor market policy. The pacts are typically negotiated not only by the traditional social partners—employers associations and trade unions—but also civic groups and other organized local constituencies. They receive funding from the European Union

structural funds as well as their national governments to invest in infrastructure and regional economic development.[18] As Bruno Caruso writes, territorial employment pacts in Italy have

> fostered territorial bargaining in the so-called economy of 'districts.' . . . [Territorial bargaining has involved a] bilateral partnership but at a territorial rather than industry or plant level, to support the competitiveness of micro firms by injecting a heavy dose of flexibility (as regards working hours, wages, and geographic location) into both the internal and external labor market. These measure are almost always accompanied by others supporting income levels if not permanent employment security.[19]

There is considerable debate about the effectiveness of these local forms of bargaining, but many observers acknowledge that they are a promising means to improve local economic performance while at the same time providing employment protection to local populations.[20] As more is learned about the operation of social pacts, it might be possible to transplant some of the ideas about regional/territorial bargaining to the United States and other countries.

As work becomes an episodic and transitory experience, a paramount issue for social protection involves transitions: People need income support, skill development opportunities, health and pension protection, and other forms of continuity as they move in and out of the workplace. There are various approaches one could take to the problem of transition assistance. One would be to expand the welfare system, but, at least in the United States, this approach is politically unlikely. However, there is an alternative proposal to deal with transitions in Europe that might have some salience in the United States. In 1996, a group of European labor relations experts, chaired by Alain Supiot, was commissioned by the European Commission to study changing work practices that were causing a loss of job and income security for European workers. In 2000 the group issued a report, known as the Supiot Report, that called for the creation of a program of "active security" to help workers weather transitions as the workplace shifted away from internal labor markets

18. For a detailed description of local social pacts in Europe, see Ida Regalia, *Decentralizing Employment Protection in Europe: Territorial Pacts and Beyond*, *in* GOVERNING WORK AND WELFARE IN THE NEW ECONOMY 158, 163–70 (Jonathan Zeitlin & David M. Trubek ed., 2003).

19. Bruno Caruso, *Decentralised Social Pacts, Trade Unions and Collective Bargaining—How Labor Law in Changing*, TOWARDS A EUROPEAN MODEL OF INDUSTRIAL RELATIONS?: BUILDING ON THE FIRST REPORT OF THE EUROPEAN COMMISSION 193, 210 (Mario Biagi ed., 2001).

20. Regalia, *supra* note 18.

toward more flexible industrial relations practices. A key feature of the active security program was a proposal for what they called "social drawing rights." Under this proposal, workers would accumulate credits as they work, credits they could utilize to take leaves for purposes of retooling, caregiving, or other interruptions to their work lives. Individuals would accumulate social drawing rights on the basis of time spent at work. The drawing rights could be used for paid leave for purposes of obtaining training, working in the family sphere, or performing charitable or public service work. It would be a right that the individual could invoke on an optional basis to navigate career transitions, thereby giving flexibility and security in an era of uncertainty. As Supiot writes, "They are *drawing* rights as they can be brought into effect on two conditions: establishment of sufficient reserve and the decision of the holder to make use of that reserve. They are *social* drawing rights as they are social both in the way they are established . . . and in their aims (social usefulness)."[21] The proposed social drawing rights would smooth transitions and give individuals resources to retool and to weather the unpredictable cycles of today's workplace.

In the United States, we have precedents for the concept of paid time off with reemployment rights to facilitate career transitions or life emergencies. There are well established precedents for paid leaves for military service, jury duty, union business, and other socially valuable activities. Some occupations also offer periodic sabbatical leaves. These programs all reflect and acknowledge the importance of subsidized time away from the workplace to facilitate a greater contribution to the workplace. They could serve as the basis for developing a more generalized concept of career transition leave.

My purpose here is not to present a blueprint for social reform for the U.S. employment system, but rather to demonstrate how comparative work can help expand the ideas and dialogue about social welfare at the national level. No doubt more comparative discussions will provide a rich source of approaches to the new and changing workplace, some of which might be candidates for cross-national transplantation, and some not.

21. *See* ALAIN SUPIOT ET AL., BEYOND EMPLOYMENT 56 (2001); Alain Supiot et al., *A European Perspective on the Transformation of Work and the Future of Labor Law*, 20 COMP. LAB. L. & POL. J. 621, 28 (1999). *See also Labor Law and Social Insurance in the New Economy: A Debate on the Supiot Report*, (David Marsden & Hugh Stephenson eds., London School of Economics' Centre for Economic Performance, Paper No. CEPDP500, 2001), *available at* http://cep.lse.ac.uk/pubs/download/DP0500.pdf.

B. Globalization.

The challenge of globalization forces us to think transnationally—to look to the possibility of developing transnational institutions that can protect labor rights across borders. The International Labor Organization (ILO) is one such possibility, but historically its effectiveness has been limited by its lack of enforcement power. Yet as production has become more global, the role of the ILO as a generator of fair employment norms and a practitioner of soft approaches toward enforcement has become more prominent. Scholarly studies on ILO standards and Convention adoption rates have proliferated, and the ILO projects such as the Decent Work Initiative and the Free of Association Committee are explicit attempts a deepen the cross-border commitment to shared norms.

In addition to the ILO, there have been several other transnational bodies that attempt to promulgate and adjudicate labor rights across national borders. Most notably, the EU has numerous directives on labor matters that have become part of the fabric of domestic law in the member countries. The NAFTA Side Agreement (the North American Agreement on Labor Cooperation, or the "NAALC")contains a much weaker but nonetheless path-breaking mechanism for protecting labor rights. NAALC's Annex 1 contains a detailed list of "guiding principles" that include a statement of labor rights—freedom of association, the right to bargain collectively and to strike, prohibition of forced labor, protection for child labor, minimum wages and other employment standards, elimination of discrimination in employment, equal pay for men and women, protection for occupational safety and health, compensation for occupational injuries, and protection of migrant workers.[22] Although the Guiding Principles are merely hortatory, the NAALC also contains a mechanism to ensure that each country enforce its own existing labor protections in certain areas.

In the 1990s, several international organizations achieved a consensus about what are the fundamental labor rights. The International Confederation of Free Trade Unions (ICFTU), the ILO, the OECD, and some other international organizations have each articulated its set of core labor rights, which they deem to be fundamental to any just international regime. While each group

22. North American Free Trade Agreement's Annex 1, NAALC, U.S.-Can.-Mex., 32 L.L.M. at 1595 (1993).

articulates its standards somewhat differently, there is a remarkable degree of consensus on what the core standards should be. They are (1) freedom of association, collective bargaining, and the right to strike; (2) prohibition of forced labor; (3) prohibition of discrimination in employment; and, (4) prohibition of child labor.[23] The articulation of these core labor rights has helped construct a normative vision of labor rights that is beginning to permeate institutions of both soft and hard law.

Beyond the labor protections offered by the EU, NAFTA, and other emerging trade blocs lies the question of whether labor rights will ultimately be established and enforced by some truly transnational adjudicatory institution. At present it is difficult to imagine a transnational labor tribunal or an international labor court that could promulgate and enforce international labor standards. It is easier to imagine transnational unions bringing pressures to bear on multi-national firms across national boundaries. The current multi-nation campaign to unionize Wal-Mart may prove to be a path-breaking venture into this new type of transnational trade unionism.

At present, any attempt at transnational labor unionism is hampered by the myriad of national labor laws that make transnational labor organization difficult. Unions have different powers, restrictions, and rights in different national legal systems. Also unions have developed in legal and historical contexts that create vested interests and unique practices, so that it is difficult to imagine how one union could adequately represent workers in several countries. However, if the changing nature of work brings about a convergence in labor regulatory systems and a homology in union responses, then international labor unionism could become a reality. That is, it might be possible that the dynamic of flexibilization can foster labor transnationalism.

C. Privatization

The third dynamic in the labor relations triumvirate is privatization, and it is a dynamic thar requires us to turn our attention inward. In the United States, privatization implicates issues of

23. *See*, *e.g.*, ILO Declaration on Fundamental Labor Rights, June, 1998; Organisation for Economic Co-Operation and Development (OECD); the core labor rights can also be found in some of the primary human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, ¶ 49, U.N. GAOR, 21st Sess., (Dec. 16, 1966) and the Universal Declaration of Human Rights, G.A. Res. 217, ¶ 71, U.N. GAOR, 3rd Sess., (Dec. 10, 1948). *See generally* Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of their Current Relationship*, 36 COLUM. J. OF TRANS. L. 659, 660–64 (1998).

federalism, substantive due process, and the other constitutional challenges to labor regulation that are looming large on the judicial horizon. In all developed countries, labor scholars need to defend the public sphere and a political vision in which it is legitimate for the state to protect the weakest and most vulnerable citizens. Every developed country has its own version of neo-liberalism and its own particular threat to its social welfare state. The inquiry must be country specific, yet there is room for comparative work, not to help promote convergence or to design transnational institutions, but for the more modest purpose of learning to see each distinctive legal system afresh by seeing others that are different.

V. CONCLUSION

Twenty-five years ago, Ben Aaron opined that one of the primary values of comparative work in labor law is to enable us to understand our own national systems differently. While I wholeheartedly agree, I also believe that today, the challenges and opportunities are different. Today we need to do more than use comparative work to reflect back on our national differences. We need to use comparative analysis to identify possibilities for action and forge alliances that can bring about a renewed progressive social agenda. Hence we need to act locally, think comparatively, and build solidarity across national boundaries.