

Symposium

Work in the 21st Century— Creating the Social Architecture

By MARIA L. ONTIVEROS*

ON MARCH 29, 2003, the University of San Francisco School of Law gathered labor attorneys, activists, organizers, students, and professors to discuss the contemporary labor movement and contemporary labor and employment law.¹ During the day-long symposium the participants considered how these vital issues are playing out in at least four different contexts: the global marketplace; the American labor movement; the relationship between individual employees and employers; and United States law schools. The authors in this issue of the *University of San Francisco Law Review* continue and build upon this discussion. In addition to concern about substantive protections for workers, several themes recur: the importance of the rule of law, the use of collective power, and the importance of participation. The picture that emerges is of a vibrant and vital area of the law, the study of which is key to the well-being of workers all around the world.

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1. The symposium panelists included David Bacon (labor journalist and activist), Donald Carroll (Adjunct Professor, University of San Francisco School of Law and Partner, Carroll & Scully, Inc.), Mike Casey (President, Hotel Employees and Restaurant Employees International Union, Local 2), Terry Collingsworth (Executive Director, International Labor Rights Fund), Charles Craver (Professor, The George Washington University Law School), Joshua Davis (Professor, University of San Francisco School of Law), Stephen Diamond (Professor, Santa Clara University School of Law), Marielena Hincapié (Staff Attorney, National Immigration Law Center), Paul Johnston (Executive Director, The Citizenship Project), Maria L. Ontiveros (Professor, University of San Francisco School of Law), Katie Quan (Director, John F. Henning Center for International Labor Relations and labor activist), Melinda Riechert (Partner, Morgan, Lewis, & Bockius), Mark Ross (Adjunct Professor, University of San Francisco School of Law and Of Counsel, Seyfarth Shaw), Elliot Schrage (Adjunct Senior Fellow in Business and Foreign Policy, Council on Foreign Relations), Robert Talbot (Professor, University of San Francisco School of Law), and Marley Weiss (Professor, University of Maryland School of Law).

I. The Global Marketplace

Where the global market place is concerned, the symposium panelists agreed that transnational companies, through the World Trade Organization and other mechanisms, have created an international financial architecture to facilitate business. The challenge, as the panelists framed it, lies in the creation of a social architecture that will compliment the financial architecture. This social architecture would hold companies accountable to ensure internationally recognized labor standards, so that globalization can be a “race to the top,” rather than a “race to the bottom.”

The need for such a framework was discussed at the symposium by labor journalist and activist David Bacon.² In addition, Kate Andrias describes the particularly pernicious impact globalization has had on women in her article *Gender, Work, and the NAFTA Labor Side Agreement*.³ Looking to the future, Professor Stephen Diamond recognized that the entry of the People’s Republic of China into the World Trade Organization, and the elevation of its government controlled labor organization to the Governing Body of the International Labor Organization, provide enormous and urgent challenges to creating a new social architecture.⁴ Katie Quan underscored the issue by noting that in 2005, the current structure of garment quotas will be altered and removed, so that production location will no longer affect this quota. This could lead to huge shifts in garment production from California and Mexico, to China, Indonesia, and Bangladesh.

Through the symposium and this issue, several proposals emerged for creating this social architecture. In his article, *The Alien Tort Claims Act—A Vital Tool For Preventing Corporations From Violating Fundamental Human Rights*,⁵ Terry Collingsworth discusses the use of the Alien Tort Claims Act (“ATCA”) as an avenue to find a forum, in this case United States courts, to hold corporations accountable for human rights abuses within workplaces. These abuses include torture,

2. The experience of some workers at the U.S.-Mexico border is described in David Bacon, *Unions Without Borders*, THE NATION, Jan. 22, 2001, at 20.

3. See Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U.S.F. L. REV. 521 (2003). For a discussion of how this particularly affects women of color, see Maria L. Ontiveros, *A Vision of Global Capitalism that Puts Women and People of Color at the Center*, 3 J. OF SMALL AND EMERGING BUS. L. 27, 33–37 (1999).

4. See Stephen F. Diamond, “Race to the Bottom” Returns: China’s Challenge to the International Labor Movement (Mar. 25, 2003) (unpublished paper, on file with the University of San Francisco Law Review).

5. Terry Collingsworth, *The Alien Tort Claims Act—A Vital Tool For Preventing Corporations From Violating Fundamental Human Rights*, 37 U.S.F. L. REV. 563 (2003).

slavery, and extrajudicial killing. Mr. Collingsworth argues that corporations have practiced these acts with impunity. The rule of law requires accountability, and accountability requires a legal forum. Thus, creating a social architecture to balance the international financial structure requires that corporations answer to the rule of law.

At the symposium and in her article, *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*, Professor Marley Weiss examined the use of trade linkages as a way to protect labor rights, and reaches a similar conclusion. After discussing the experience of the North American Agreement on Labor Cooperation (“NAALC”) and surveying other free trade agreements, she concludes that linking trade to labor rights will not improve conditions unless an independent tribunal exists to adjudicate matters. Otherwise, the decision whether to proceed with a case, and its proper resolution, remains in the political process and at the discretion of governments, through whom the rights of workers are not guaranteed. She argues that

[o]nly in the context of more stable institutional arrangements can one envisage labor provisions which fulfill the goals . . . to preserve existing labor laws, [to] protect against a downward spiral, to encourage expanded trade and foreign direct investment from companies headquartered in the other Parties, and to foster effective enforcement of each Party’s domestic labor laws, and ultimately to result in a leveling upwards of labor rights and living standards.⁶

During the symposium, Professor Elliot Schrage argued that other pressures on corporations—including market-based pressures from customers and investors, regulatory pressures, legal pressures, and social pressures—more effectively lead to the construction of a social architecture that manages to provide jobs and improved living conditions for people around the world. His suggestions included the implementation of voluntary codes of conduct, by which companies require their supply chain partners to comply with internationally recognized labor standards. Katie Quan elaborated as to how the public, consumers, and non-governmental organizations can use these codes to effectively organize. She argued, however, that the most important form of resistance needs to come from the workers themselves, who can organize to create a countervailing power to that of transnational corporations.

6. Marley S. 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*, 37 U.S.F. L. REV 689 (2003).

David Bacon also emphasized the importance of creating cross-border solidarity movements as a way to improve conditions. In his view, workers need to claim collective power in order to counter the power of multinational corporations, and this power must now be exercised on a global—not just national—scale. In elaborating this argument, he quoted AFL-CIO secretary treasurer Rich Trumka, “The cold war has gone. . . . [i]t’s over. We want to be able to confront multinationals as multinationals ourselves now. If a corporation does business in fifteen countries, we’d like to be able to confront them as labor in fifteen countries.”⁷ Although he views the substantive provisions of the NAALC as a failure, he argued that cross-border solidarity is emerging from within labor’s rank-and-file.⁸

Thus, an important byproduct of creating a new social architecture that ensures substantive labor rights is the collective action upon which it depends. Labor movements—at home and abroad—have traditionally served the democratizing function of allowing and encouraging participation. This participation at the workplace and within the union hall provides the momentum for participation in global and national affairs. Its distinctly collective nature forces people to view themselves in relation to each other, not just as autonomous individuals.⁹ In her article, Kate Andrias discusses how the legislative debate on the NAALC has particularly failed women in this regard.¹⁰ By not involving women in the legislative process, she argues, the agreement has not and cannot adequately address their concerns—concerns which she sees as central in the global marketplace.

The symposium discussion and the articles in this issue suggest that we must create a social architecture to balance the international financial structure created by multinational corporations. Such an architecture would help ensure the substantive protection of workers around the world. This social architecture would surely be facilitated by the rule of law, which would ensure a forum to hold corporations accountable. The power to create this architecture, if it is to exist at all, ultimately must come from the collective action of workers and their allies. The same collective action can then be used to strengthen such an architecture in the long run.

7. Bacon, *supra* note 2, at 24.

8. *See id.*

9. *See* Cornel West, *Audacious Democrats*, in *AUDACIOUS DEMOCRACY* 262, 267–68 (Steven Fraser & Joshua B. Freeman eds., 1997).

10. *See* Andrias, *supra* note 3.

II. The American Labor Movement

The same themes resonate when one looks at the American labor movement in the twenty-first century. Labor attorney Donald Carroll, management attorney Mark Ross, and Hotel Employees and Restaurant Employees International Union ("HERE") Local 2 President Mike Casey all agree on one thing: the labor movement is on the rise. All have witnessed a recent increase in union organizing and grassroots activism. This activism has helped HERE experience success in organizing new workers and in finally reaching a contract with the Marriott Hotel in San Francisco, an agreement that brings working conditions there in line with those of other hotels in the area. The participants all noted that the increased activity has been especially strong in minority communities. Mr. Carroll noted that workers in such communities are easier to organize because they have the most to gain from unionizing¹¹ and because they are more likely to understand the need for collective action, as opposed to individual action, than their white counterparts. He also emphasized that any new social architecture must be based on the dignity of individual workers and the recognition that the work of a human being is not a commodity. In this way, he harkens back to the core values of the labor movement.¹²

Looking to the future, two different approaches have been outlined, both of which emphasize these core values, as well as the participative function of unions. The first, outlined by Paul Johnston at the symposium, utilizes a social movement framework for unions.¹³ It focuses on creating a new type of union-affiliated organization: one that is powerful enough to become a governing coalition. Its social movement base comes from an explicit recognition of the values and beliefs for which the organization has been developed. It embraces community unionism or citizenship unionism by taking workplace/union demands and reframing them as issues of interest to the community. It also focuses on the organization as a means to assemble and exercise power. By assembling new governing coalitions, it displays or-

11. See Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1101-03 (1999) (discussing the wage differential between organized and unorganized workers as broken out by race).

12. For a discussion of the core values of the labor movement and how they have been challenged by global capitalism, see Ontiveros, *supra* note 3, at 32.

13. For a further discussion of this model, see Maria L. Ontiveros, *Forging our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 U.C. DAVIS L. REV. 1057, 1059-62 (2000).

ganic solidarity, not just mechanical solidarity. It can thus outflank existing power structures because it changes the rules and terms of the debate. Johnston has seen the success of this model in the creation of the Citizenship Project, a community-based workers' and immigrants' rights center in Salinas, California, and in the recent success of the strike by Teamsters Local 890 against Basic Vegetable Products and Con Agra Corporation.¹⁴

A different approach is offered by Professor Charles Craver in his article *The American Worker: Junior Partner in Success and Senior Partner in Failure*.¹⁵ He argues that “[t]he time has come to provide rank-and-file employees and lower level managers with basic employment dignity and true industrial democracy—to allow them to influence decisions affecting firm success and failure.”¹⁶ His call for this approach rests on the disparities in substantive benefits in the American workplace—chief executive officers are getting rich and keeping their jobs, while workers are being laid off and watching their real wages fall. Craver argues that federal legislation mandating employee involvement is the only avenue toward ensuring worker dignity and workplace democracy. Drawing on the experiences of other countries, while recognizing the unique economic circumstances of the United States, he argues that this approach can meet the needs of businesses, individual employees, and unions.

Both Johnston and Craver focus on the need to improve wages and working conditions for American workers. In addition, they both recognize that American workers need more: the right to participate in their workplace. Workers can then use their workplace organization and participation as a springboard to acquire the power and skills needed to meaningfully participate in this country's governance. The current challenge seems to be in creating a forum for this participation—both the realization of a reimagined labor movement and mandatory worker participation are intriguing approaches, which merit serious consideration in the twenty-first century.

14. Information on The Citizenship Project can be found at www.newcitizen.org (last visited Apr. 15, 2003); Paul Johnston's article, *Outflanking Power, Reframing Unionism: the Basic Strike of 1999–2001* is forthcoming in *LAB. STUD. J.* (2003).

15. Charles B. Craver, *The American Worker: Junior Partner in Success and Senior Partner in Failure*, 37 *U.S.F. L. Rev.* 587 (2003).

16. *Id.* at 607.

III. Individual Employees and the Law

At the beginning of this century, the great majority of United States workers are not affiliated with a union.¹⁷ Instead, the rules of their workplace are defined by individual negotiations with their employers, as circumscribed by work-related statutes. As discussed by the symposium participants and the articles in this issue, a major challenge facing these employees is the ability to seek redress for violations of the law. Although we generally assume that workers have a right to go to court to enforce their rights, the reality is quite different.

During the symposium, management attorney Melinda Riechert described the effect of several United States Supreme Court¹⁸ and California Supreme Court¹⁹ cases that have opened the door for employers to enforce mandatory arbitration agreements. These are arguably adhesion contracts that require employees to have their statutory claims adjudicated by an arbitrator instead of a judge or jury. Any worker who has signed an arbitration agreement, then, can no longer seek a judicial forum. With so many individual employees having difficulty finding redress in the courts, many workers must now turn to alternative dispute resolution procedures, such as mediation. The University of San Francisco and the Equal Employment Opportunity Commission ("EEOC") have entered into a partnership to create a law school mediation clinic, which Professor Robert Talbot describes in *A Practical Guide to Representing Parties in EEOC Mediations*.²⁰ This partnership has been, for the most part, "a great success [because c]lients who might not otherwise have a voice are represented, and students are given an opportunity to learn and do justice."²¹ His article is a

17. See generally U.S. Census Bureau, Statistical Abstract of the United States: 2001, at 411 (2001) (stating that today, only 13.5% of American workers are members of a labor union).

18. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (emphasizing the strong federal policy favoring arbitration and holding that mandatory employment arbitration agreements are enforceable under the Federal Arbitration Act).

19. See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000) (establishing that arbitration may be compelled by a mandatory employment arbitration agreement if the arbitration permits an employee to vindicate his or her statutory rights, and further establishing that in order for such vindication to occur, the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration).

20. Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F. L. REV. 627 (2003).

21. *Id.* at 681.

practical "how-to guide," which he is uniquely qualified to write because of his extensive experience handling mediations before the EEOC. As his article demonstrates, the clinic serves the dual pedagogical purposes of developing the advocacy skills of students and serving the social justice mission of the school.

During the symposium, participants also discussed the particular problems immigrant workers have in finding a way to enforce their workplace rights. Both Mark Ross, a management attorney, and Marielena Hincapié, an immigrant's rights attorney, agreed that the recent Supreme Court decision in *Hoffman Plastics*²² wrongly prohibits undocumented workers from receiving the important remedy of back pay when their right to organize has been violated. Ms. Hincapié discussed the impact of this case on individual employees, who now fear imprisonment or deportation for asserting their right to organize. Mr. Ross sees this case as giving employers who violate the law an unfair competitive advantage over those employers who follow the law.²³

For individual, nonunionized workers, then, the same themes reappear: these workers are similarly struggling to find an appropriate forum through which to vindicate their rights. Unlike their union counterparts, however, they are left to find this forum on their own. Given the relative imbalance of power, it is not surprising that they lack avenues of redress. It is heartening, however, that law schools and their students are reaching out to help.

IV. The Law School Curriculum

The backdrop for the symposium and this issue is an American law school. Recently, the Labor Law Group's Task Force for Greater Commitment of Resources to the Teaching of Labor and Employment Law began a study focusing on the presence of labor and employment law in American law schools in three areas: the curriculum, the faculty, and law review scholarship. Although the results of their survey are still incomplete, several patterns have emerged. First, most schools are witnessing an increase in enrollment in employment law courses that focus on individual employee rights, and a decrease in enrollment in labor law courses that focus on unions and in employment discrimination courses focusing on workplace equality. Second,

22. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002).

23. For an extensive discussion of these issues when undocumented workers assert their rights against nondiscrimination under federal law, see Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 REV. L. & SOC. CHANGE 607 (1993-94).

within faculty ranks, fewer professors are entering the Academy with a labor and employment focus. Finally, labor and employment law has not been widely represented in top law journals.²⁴

These findings raise several disturbing issues. First, as noted by the attorneys and organizers who participated in the symposium, these trends run counter to the current job market and the workload of practitioners, in which traditional labor law and a concern for global labor standards is on the rise. Second, this downplays the value of a fun, rewarding area of practice. Mr. Ross spoke eloquently of the importance of having a career that affects real people in their daily lives. Professor Craver recounted an unexpected and unforgettable result of an arbitration case he handled. Approximately one year after ruling that a company could not eliminate health care coverage for infertility treatment, he received a birth announcement from an employee of the company and a note that read "Thank you." Finally, this trend indicates the disappearance of the only place in the curriculum addressing group or collective power as a way to change the world. As the symposium and this issue illustrate, this collective power is key to the ability of workers to become architects of twenty-first century society.

24. See William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189 (June 2000) (stating that in 1961 and 1966, labor and employment law articles were the sixth most popular topic being published in the top seventeen law journals. It is no longer among the handful of subject areas on which these journals focus.).

