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WHERE HAVE YOU GONE, JOHN R. COMMONS, NOW THAT WE NEED YOU SO?

Harry W. Arthurs†

Daniel Rodgers' story is one that many will not have heard before. It is the story of a journey of beginnings and endings and how to tell one from another, of old worlds and new and how they sustain and challenge each other, of action and ideas and their causal and temporal relationship, and especially of social justice and the faltering steps America has taken towards that elusive goal.

Between 1870 and 1940, three or four generations of American and European progressives—academics, journalists, social activists, enlightened businessmen, architects, politicians, labor leaders and public servants—visited and corresponded back and forth across the Atlantic. For over 70 years, this great, ramshackle pilgrimage of progressive thinkers and doers shuffled towards a notional new Jerusalem, seeking a better world through “social politics,” a political, intellectual and moral crusade which recruited some of the best and brightest from the United States, the leading nations of Western Europe and peripheral polities around the Atlantic and in the Antipodes.¹ They signed up for graduate degrees, lecture circuits, international congresses, government fact-finding missions and “sociological grand tours;” they inspected social housing and rural cooperatives, insurance bureau and sewage works, tram systems and labor exchanges; they wrote reports and articles, drafted manifestos and statutes; they corresponded and cooperated, debated and denounced; they served warring states and rival political parties of the left, right and center. In some countries they succeeded, or seemed to, only to see their achievements disappear into the cataclysm of war or

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1. As a Canadian, one of my few disappointments with Rodgers' book is the minimal attention it pays to my own country, whose progressive (and anti-progressive) institutions, policies and intellectual movements were clearly shaped by its location at the confluence of influences emanating from the United States, the United Kingdom and France. The election in 1944, of a Cooperative Commonwealth Federation (Social Democratic) government—a hybrid of British Fabianism and American agrarian radicalism—would have provided a stirring climax to Rodgers' story.

depression. In others, they failed, or seemed to only see their ideas rise phoenix-like from dusty file cabinets when war or depression provided the needed impetus for fresh policies and strategies.

The story is intriguing enough on its own merits and Rodgers writes it with verve, irony and attention to both the big picture and the compelling anecdote; he festoons it with footnotes; and he treats the reader to sketches, photos, posters, building plans and original documents.² But most importantly, Rodgers makes us reconsider the received wisdom of American exceptionalism and think differently about the future. My task then, in this short essay, is to suggest how Rodgers' insights might help us to re-examine our own field of comparative labor law and policy.

* * *

Rodgers analysis proceeds along three dimensions, which I will describe as space, time and context.

Space first. What is startling in Rodgers' account is the extent to which progressives on both sides of the Atlantic had a sense that they were inhabiting a common political, intellectual and economic space, in which policies or institutions proposed or implemented by any one state, political party, non-governmental association, technical expert or moral entrepreneur had potential salience for all. Of course, in some people's eyes, the foreign provenance of ideas was enough to discredit them as "un-German" or "un-American," a serious accusation, especially at moments of international tension or national trauma. And, of course, it was recognized that ideas originating in one country might have to be modified to suit the circumstances of another. Nonetheless, the success of a social experiment in one country provided progressives in another with powerful evidence and arguments for its adoption; failed experiments likewise provided their own salutary lessons.

We should not underestimate the practical difficulty of achieving this sense of a trans-Atlantic political space during the early progressive era, before telecommunications or photojournalism, let alone mass tourism, television or the Internet. Nor did the difficulties diminish even when travel and communications began to become easier, faster and cheaper in the years following World War I. Growing nationalism in Europe and isolationism in America, and

2. My favorite is a 1931 advertisement for a "Sociological Trip to Europe," led by Dr. R.B. Stevens, Professor of Sociology, Elmira College in Elmira, NY: "Would you like to take tea with the London Commissioner of Prisons?... How about a visit to a Welsh coal mine...?" (following p. 208). See DANIEL RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 208 (1998).

growing political polarization on both sides of the Atlantic, created a hostile climate for the progressive project in most countries, through most of the 1920s. Nor should we fail to take account of the enormous differences throughout the entire period in political systems and cultures, in economic development and class structures, that subsisted even between countries with affinities of language and history—Germany and Austria, France and Belgium, the United States and the United Kingdom—let alone amongst those countries. Nonetheless, as Rodgers shows so convincingly, a trans-Atlantic progressive policy community did emerge, and did persist right through to the 1940s. Several factors seem to have been crucial: the influence of German academic thought on American economists and other scholars at the beginning of the period;³ the extensive and growing trade and investment links between Europe and North America both before and after World War I; the sheer volume of information and impressions gathered and energetically disseminated by social investigators on both sides of the Atlantic; and the fact that the United States did not clearly emerge as the Atlantic hegemon until World War II.

In reconstructing this period of our shared political histories, Rodgers reminds us of a fact that today's enthusiasts for globalization sometimes forget: It is not just goods, services and capital which move internationally, but ideas; and it is not just ideas about manufacturing and money and markets which move, but progressive and even oppositional ideas. However, ideas are not like cotton, coal, cars or computers. Ideas tend to evolve in transit. Political ideas especially take on different shape, different institutional form, even different symbolic significance, as they move across borders and encounter new material circumstances, new intellectual traditions and new alignments of social forces. For example, "Fordism" attracted intense academic and artistic, as well as technical, attention in Europe during the 1920s. According to Rodgers, it "invaded Europe as a progressive idea: future-oriented, flexible and melioristic."⁴ This European reaction would have seemed odd to future Ford workers in the 1930s, as they waged pitched battles over union recognition with their notoriously non-flexible employer and his egregiously non-melioristic, heavily-armed security force. Or, to take another example, the social

3. Rodgers provides a fascinating account of the debates in the American Economic Association, the American Political Science Association and at leading universities in the 1880s and 1890s, between orthodox laissez faire economists and a new generation of German-trained economists, committed to the "state as an agency whose positive assistance is one of the indispensable conditions of human progress." See RODGERS, *supra* note 2, at ch. 3.

4. See RODGERS, *supra* note 2, at 375.

inventiveness of an expansionary and optimistic Europe at the turn of the century left the United States with a clear “balance of payments” deficit in progressive ideas and *avant garde* culture up to, say, 1914. But, in the post-war years, as a demoralized, exhausted and turbulent Europe struggled to regain some semblance of prosperity and social peace, America became a net exporter of what passed for cultural energy and innovation. American films virtually monopolized movie screens across Europe in the 1920s, and American pop music, fast foods, designs, retailing and advertising seemed ubiquitous to European observers.

Which brings me to the time dimension. Rodgers has chosen to end his study—except for a postscript on the British Beveridge report of 1942—with a lengthy and incisive chapter on the New Deal. This is a brilliant stroke of periodization. There is a tendency today to think of the New Deal as a beginning—for collective bargaining; for social security; for state provision of public goods, such as housing, electricity and civic amenities; for state regulation of public “bads,” such as stock market fraud, sweat-shop labor and predatory trade practices. Rodgers corrects that tendency. He makes the plausible claim that the New Deal was in many respects not so much a beginning as a recapitulation, a grand summation, of previous progressive analysis and agitation. As he astutely notes, although the Great Depression was undoubtedly a “searing and indelible experience,” arguably worse in the United States than elsewhere, this alone could not explain the advent of the New Deal: Otherwise, the other Atlantic nations would have adopted roughly similar strategies instead of opting for fiscal orthodoxy (the United Kingdom), social democracy (Sweden), national socialism (Germany) or an eclectic *étatisme* (France).

The New Deal, Rodgers argues, was shaped by the “intellectual economy of catastrophe,” which gave rise to a configuration of circumstances uniquely favorable to the implementation of the progressive agenda:

Crises . . . sustained long enough . . . can bring the established structure of responses into deep discredit By eroding the conventional wisdom, extended crises may create room into which innovations may flow.⁵

But what kind of innovations?

The paradox of crisis politics is that at the moment when the conventional wisdom unravels, just when new programmatic ideas

5. *Id.* at 413.

are most urgently needed, novel ones are hardest to find. The need for well-formulated solutions goes hand in hand with conditions least suited for reflective policy formulation: haste, confusion, the opportunism of expediency, the impossibility of perspective on the onrushing events. One of the most important consequences of crises, in consequence, is that they ratchet up the value of policy ideas that are waiting in the wings, already formed though not yet politically enactable.⁶

Thus, precisely because progressive policy ideas were “waiting in the wings” of American politics—the souvenirs of many Atlantic Crossings over two or three generations—it was their value which was “ratcheted up” when, as Rodgers says, the crisis “altered the conditions of the politically possible” by “devaluing and delegitimizing certain agendas, and shifting . . . [t]he grid of powers, patrons, interests, and institutions that control political outcomes.”⁷

Given the new alignment of political forces, and given the new parameters of the politically possible, what emerged was energizing though lacking in coherence. The lack of coherence, Rodgers argues, derived from the ambition of the New Deal to achieve not only recovery, but reform. It featured proto-Keynesian measures—a recent product of the trans-Atlantic dialogue—but also a miscellany of progressive measures, many of which had been sidelined for decades as the American version of the welfare state lagged farther and farther behind that of most West European countries. However, even though recovery and reform strategies were sometimes self-cancelling, they bonded together the strange Democratic coalition of intellectuals, southerners, urban immigrants, rural populists and trade unionists in what turned out to be the high-water mark of American progressivism. Thus, there is much to be said for Rodgers’ conclusion that:

The New Deal was a great, explosive release of the pent-up agenda of the progressive past; its clearest logic was the vertical logic of history.⁸

But Rodgers does not only explain the character of the New Deal. He helps us to understand why, forty years after American progressivism reached its high water mark, it seemed to trickle out on an ebb tide of neo-liberalism.

On the one hand, it is clear that the advocates, stakeholders and beneficiaries of the New Deal were not committing themselves

6. *Id.* at 414.

7. *Id.*

8. *Id.* at 416.

unreservedly to a disciplined political movement, much less to a coherent political ideology. In the 1940s, military mobilization turned out to be the most successful Keynesian recovery strategy of them all; in the 1950s, the Cold War made "progressivism" suspect, not least because of its foreign provenance; in the 1960s and 1970s, various New Deal reforms were acknowledged to be—or were made to appear—ineffective or even regressive; and many of the heterogeneous constituencies which had coalesced in the New Deal Democratic Party began to defect to more congenial causes and coalitions.

On the other hand, the "intellectual economy of catastrophe," which Rodgers hypothesizes, may explain the ultimate triumph of the Thatcher/Reagan revolution. By the mid-1970s, the Fordist industries which had sustained post-war prosperity were reeling under the impact of new technologies, new forms of industrial organization, new globalized patterns of production and distribution; faith in Keynesian economics was receding in the face of persistent "stagflation," the oil shocks and the perceived burden of taxation; and the putative achievements of the welfare state were being challenged by critics on both the left and the right. In short, the post-war welfare state was experiencing a crisis of both legitimacy and performance. Objectively, this crisis was nothing like the catastrophe of the Great Depression; but it was real enough, in Rodgers' phrase, to trigger a process of "devaluing and delegitimizing certain agendas, and shifting . . . [t]he grid of powers, patrons, interests, and institutions that control political outcomes." "Waiting in the wings" were economic policies generated by neo-liberal think tanks over thirty or forty years; a large neo-conservative constituency which, for two or three generations, had been muttering "O tempore, O mores;" and the astonishing resources of a bottom-line-fixated corporate community, which had by now forgotten how state intervention had once rescued it from its own excesses.

Thus, like the New Deal fifty years earlier, Thatcherism and Reaganism did not so much spring full-blown from the brow of eponymous political actors, as emerge slowly and painfully from the efforts of a miscellany of less well-known figures over several decades of theorizing, consulting, planning, experimentation and, especially, alliance-building and political strategizing and fundraising.

Nor should we neglect the "Atlantic Crossings" which contributed to the demise of North American progressivism—the intellectual influence of Hayek on American neo-liberals, for example, or the demonstration effect of de-regulating Wall Street on Thatcher's "Big Bang" initiative in British financial markets, or the

emulation by conservatives in Alberta and Ontario of the brilliant *blitzkrieg* mounted by New Zealand's Labor government in the mid-1980s when it demolished the world's most durable welfare state. In fact, a case can be made that the anti-progressive version of Atlantic Crossings—now called the Washington Consensus—will be with us for some time yet. Even though the World Bank, the World Economic Forum in Davos, and other influential institutions and individuals have recently mused about putting a human face on globalization, a broad neo-liberal consensus continues to dominate academic analysis, political strategies and public policy formation in most advanced economies. Indeed, it seems to have subverted or converted the remaining adherents of European social democracy and social market policies. We have succumbed to “globalization of the mind.”⁹

Perhaps the neo-liberal consensus will dissipate over time, as did the New Deal coalition. What will replace it? If Rodgers is right, we will only know when we next experience “the intellectual economy of catastrophe.” This is not an experience anyone looks forward to. It is likely to bring misery to vulnerable people all over the world, in a more general version of the misery engendered by the “Asian flu” financial crisis of 1998. And it is unlikely to give rise to a latter-day New Deal. We no longer have on hand anything like the repertoire of ideas, policies and experiences, which energized the Roosevelt administration during its progressive apotheosis.

So much for space; so much for time; what of context? We are used to thinking of labor legislation and welfare policy, architecture and rural economics, education and sanitary engineering, gender and peace, social emancipation and technology as discrete fields of scholarship and public policy. Rodgers reminds us how closely these were all intertwined in the “social politics” of the Atlantic community during the progressive age. Indeed, how could it have been otherwise? People did not experience their difficulties in convenient categories, which corresponded to the demarcation lines amongst university disciplines or government departments. They lacked power on the labor market no less than in politics; they were made insecure by the threat of illness, accident and old age no less than by the threat of the business cycle; they were victimized by discrimination in employment—often on multiple grounds of class, race, gender, ethnicity and national origin—but also in education and public services; their homes and communities, like their workplaces, were

9. H.W. ARTHURS, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CAN. J. OF LAW & SOC'Y 219 (1997).

often unsafe, insalubrious and lacking in amenity; and their lives were as liable to be blighted by the consequences of natural disaster, changing technology or economic crisis as by political upheaval, war or revolution.

But though issues of peace, power, dignity, amenity, health and exclusion were intertwined in the life experience of workers and other citizens, in the context of politics, legislation, administration and academic analysis, they were often wrenched apart. To state the obvious, Bismark's pension scheme was not intended to usher in German parliamentary democracy, but to forestall it; the Wagner Act greatly benefited workers in mass production industries, but was not well-suited to bring economic justice to most other Americans; the National Health ensured a more equitable distribution of medical services, but could not alter the close affinity between health and class that characterized British society; social housing might shelter Viennese workers in healthy, attractive and sociable surroundings, but could not insulate them from the multiple shocks of war, the dissolution of empire, the depression and ultimately, Nazism. In other words, because of its intensely practical concerns, progressivism seems to have been less a coherent political philosophy than a *congeries* of unrelated ameliorative and emancipatory projects.

No wonder then that even—especially—progressive movements and governments were unable to develop or sustain an integrated view of the challenges facing them. Some progressive movements favored state regulation and enterprise; others looked to collectivist action or cooperative ownership. Some were prepared to enter coalitions to gain electoral power; others feared compromises that might align them with the supporters of, say, Prussian militarism or British capitalism. Some had significant pacifist, internationalist or universalist elements; others purged these elements during the 1914-1918 period when they joined or headed wartime administrations. Some developed into broad-based parties during the interwar period; others lost their mass following to nationalist or communist parties which borrowed their programs and married them to less pragmatic and benign ideologies. Surprisingly, even poverty represented a divisive issue for many progressive movements. Most progressive movements, says Rodgers, focussed on the needs of “deserving” workers and their families—and by extension, on those of would-be workers and former workers; few were built upon concern for the terminally impoverished underclass which was apparently doomed to subsist on the thin gruel of patronage or on private, denominational or municipal charity.

* * *

Rodgers has written a kaleidoscopic, provocative and useful book—but not a perfect book. Inevitably there are issues he does not address. Perhaps because he focuses on “crossings” or connections—rather than the things connected—Rodgers fails to clearly specify just what he means by “progressive.” I have already suggested that progressivism lacked a defining ideology or unified program that might have given it internal discipline and coherence. Alas, the same deficiency also made it difficult to say where progressivism left off and other political tendencies began. In both Europe and America, progressivism shaded off in one direction towards Marxism, anarcho-syndicalism and other radical and revolutionary ideologies; in the other, towards nationalism, capitalist paternalism, technocracy and ultimately fascism. Though relations between progressivism and its mutant forms are explored occasionally—especially in discussions of the American labor movement—we do not have a clear account of the confusions and contradictions which led to alliances and tensions within and amongst these forces during this long and turbulent period. Oddly, too, Rodgers does not make very much of the most obvious of all Atlantic crossings—the great waves of European immigrants, who until the 1930s, moved eastwards towards England and France and especially on towards America, and who having arrived, then dispatched money, hope, ideas—and occasionally themselves—back to the countries they left behind. While their plight clearly moved American progressives, as Rodgers shows in word and picture, they themselves sometimes became important actors in progressive politics. They populated many progressive and radical movements and parties, but they also engendered a nativist, anti-immigrant backlash that disrupted and discredited elements of the progressive movement. And finally, Rodgers’ book shows us how progressive ideas shaped the social politics and policies of the period, but he does not fully come to grips with the fact that these ideas were, on the whole, successfully countered, not by ideas of comparable weight or sophistication, but by the sheer inertia of conventional wisdom, entrenched political power and great wealth.

Division and incoherence, demoralizing prejudice and the relative ease with which power trumped ideas: these contradictions haunted progressive movements in pre- and post-war Europe; they haunted American radicals and progressives during the 1930s. And *plus ça change*: they haunt those who claim lineal descent from the trans-Atlantic progressives—Blair and Schroeder, Clinton and Jospin—right down to today.

* * *

Rodgers tells us that the seminar room of John R. Commons—the complete progressive and America's pioneering labor economist—“was . . . circled by a massive chart of all the world's labor legislation—a visual reminder of the trans-Atlantic reform network.”¹⁰ Who are the intellectual heirs of John R. Commons today? And what hangs on the walls of their seminar rooms?

These are painful questions. True, we have brilliant economists aplenty, a small fraction of whom do not genuflect towards Chicago when they invoke their gods. However, macroeconomics dominates the field. Few contemporary economists are interested in institutional economics, fewer still are labor economists like Commons, and hardly any profess progressive politics. In fact, labor economics has virtually ceased to be a significant sub-discipline. Likewise, “industrial relations”—nomenclature whose conflictual assumptions were enshrined in statutes, tribunals and commissions, professional journals, university centers and corporate vice-presidencies—has largely given way to “human resource management.” This is more than mere cosmeticization of the class struggle; it is a declaration that the struggle has gone game, set and match to capital. And likewise, “labor law”—which was generally understood as a synonym for the law of collective bargaining—graces fewer and fewer law school calendars and is more rarely found on the business cards of lawyers. In its place, we find “employment law,” the anodyne post-modern equivalent of the evocative Victorian term, “master and servant law.”

And worse news yet: in the haunts of late-surviving *homo sapiens Commonsensis*—specimens are rare at major universities and almost extinct in the corridors of power—“massive charts of all the world's labor legislation” no longer hang on the walls. In part, this is for practical reasons: grand tours are now conducted on the Internet, not by Cunard liner and *wagons lits*. In part, charts have gone out of fashion as a result of developments in the sociology of law: it is now better understood than it used to be that “law on the books” is less important than “law in action,” and that legislation cannot simply be uprooted from one country's statute books and transplanted into another's.¹¹ But in significant measure, the reasons are ideological:

10. RODGERS, *supra* note 2, at 31. Commons himself recounts how he arranged for “fifty undergraduates speaking half a dozen languages” to translate “the labor laws of all countries.” JOHN R. COMMONS, *MYSELF* 129 (1963).

11. See RODGERS, *supra* note 2, at 400. Rodgers makes the telling point that the sociological tour “. . . emphasized a kind of visual politics. Drawing its participants to its finished products, it diminished the economic and social processes that had been essential to their creation. It made the wholes more visible than the parts.” Of course, this point was understood

Mrs. Thatcher's startling revelation that "there is no such thing as society," makes sociological tourism and social politics a logical impossibility and the comparative study of labor legislation an irrelevancy—unless aimed at hastening its repeal.

What remains of the old progressive agenda? The situation differs from country to country. The nations of Western Europe have persevered with a fairly generous—albeit somewhat reduced—version of the welfare state, which they pioneered during the pre- and inter-war years and expanded during the post-war "miracle." Australia and New Zealand were early laboratories for the welfare state and the protection of the rights of working people; the United Kingdom—and to a lesser extent Canada—adopted a fairly ambitious version of the progressive agenda during the post-war period; the United States made a promising beginning during the New Deal, but by Atlantic standards, expanded slowly and modestly beyond this initial venture. But now all the English-speaking countries have begun to abandon their progressive traditions, in some cases—New Zealand especially—with dramatic speed. Indeed, in these countries, significant aspects of the original progressive agenda have been virtually eliminated. For example, in the United Kingdom, the United States and New Zealand, changes in labor law or its administration have helped to reduce union membership by two-thirds or more, and to disempower the vestigial remnants of the labor movement. In the United Kingdom, cooperatives and friendly societies have been privatized, council housing has been sold off, and draconian measures have been taken to purge the welfare rolls. In some Canadian provinces, "workfare" is replacing "welfare," expenditures on public education have been badly eroded, social housing programs have been cancelled, labor legislation has been weakened and workplace inspectorates pared to the bone. Above all, the Canadian federal government has radically reduced its post-war leadership role as custodian of the welfare state, which had been built on its now unpopular powers of taxation and spending. Australia—like the United Kingdom, Canada and New Zealand—has privatized state enterprises, reduced public expenditures and significantly de-regulated the labor market.

For progressives, the United States has always been a special case. In this century, "Social Democracy" has hardly dared speak its name in America; its native near-equivalent—"Progressivism"—was eliminated from the political lexicon sometime around 1948;

earlier by some than by others. One of the first and finest international labor law comparativists made this point consistently; see OTTO KAHN-FREUND, *SELECTED WRITINGS* 312 (1976).

Liberalism—the “L-word”—was last uttered with approbation sometime before the last ballots were cast in the presidential election of 1988; and when the born-again “New Democrats” assumed office four years later, the last ties to the New Deal, and to the social politics of Rodgers’ “trans-Atlantic reform network,” were more or less consciously repudiated. In this light, the New Deal has always stood out as the one counter-example available to refute or qualify the notion of American exceptionalism. Here Rodgers’ periodicity becomes very relevant again, however. If the New Deal indeed showed that the United States was firmly—if belatedly—linked to the social politics of the Atlantic community, the subsequent flat trajectory of the American welfare state explains how it diverged from the rest of the Atlantic community.

This would all be regarded as a mere oddity of American political history were it not for the inconvenient fact that the United States has been for much of the twentieth century, the dominant power in the Atlantic and global economies. Its social politics are therefore necessarily of interest to its Atlantic neighbors and to much of the rest of the world. What has happened to American social politics in recent years? As the result of “reforms” proposed by President Clinton and enacted by a more-than-willing Republican Congress, welfare for the poorest families has been radically reduced and reconfigured. Social housing programs have been denounced and abandoned. Workplace regulation, though it continues on the books, has been significantly weakened through new administrative arrangements, including reliance on self-regulation and arbitration rather than inspection and prosecution. Social Security is the focus of intense scrutiny, and will apparently end up being “saved” in ways not yet possible to foresee. And most alarmingly, there is the matter of universal publicly funded health care—or rather of its absence. As Rodgers shows,¹² this progressive cause was lost in battles with the insurance industry and the medical profession in the early decades of this century. Despite efforts to reopen the issue—notably by President Clinton early in his first term—nothing much has changed. A fortunate majority is covered by high-cost private health insurance, but now confronts an increasingly spartan system of “managed care;” the elderly and welfare recipients are statutorily provided for, but only to minimal levels of care; and over forty million Americans are left to fend for themselves without protection of any kind.

12. RODGERS, *supra* note 2, at 260.

However, this is not to say that social politics has been completely abandoned in the United States. Progressive programs deemed essential to national defense or national economic interests have survived and sometimes flourished, albeit in odd configurations: interstate highways, urban infrastructure and renewal, higher education and techno-scientific research, and certain public health programs come to mind. And more importantly, a new and distinctive version of American progressivism has emerged based on the logic of individual rights. Access without discrimination on grounds of race, gender, age or disability, to public goods, services and facilities, to the political process, and to employment, accommodation and the other incidents of membership in civil society has been guaranteed by law. Due process—including access to relevant information—has likewise been legally assured in the making of many public and private decisions. And protection has been extended to important personal interests such as privacy, dignity and autonomy, and to certain community interests such as the environment.

These new progressive rights have sometimes been grounded in constitutional interpretations—many of them by the Warren Court—sometimes in innovative legislation or executive orders and occasionally in imaginative tort judgments. This, one might think, is a guarantee that their effects will be both long lasting and pervasive. Were that true, this would indeed be a signal contribution by the United States to the progressive tradition. But it is not true, by and large. Obviously, arbitrary decision-making persists within both public and private bureaucracies; individuals and communities seem to feel as powerless and insecure as they ever did, and arguably more so; discrimination on constitutionally-proscribed grounds has by no means disappeared from schools or housing or the labor market; and a most pervasive and debilitating form of discrimination—discrimination based on poverty—seems to have been indelibly inscribed in the unwritten constitution of American economic life.

Nonetheless, despite the gap between aspiration and achievement, this new rights-based progressivism is a development of great significance. While causes and effects are by no means clear, the outcome is that social politics in the United States has been largely replaced by the politics of rights. This has led to a realignment of loyalties within the progressive movement, in favor of single-issue or identity-based constituencies and away from broad coalitions built on the principle of social solidarity. It has led to a shift of tactics within progressive circles from politics and social action to litigation despite—some would argue—a paucity of evidence concerning the

efficacy of the latter.¹³ And oddly, it has caused some American progressives and conservatives to converge on a shared view of citizens as autonomous bearers of rights rather than as active members of a collectivity, and on a shared antipathy towards intrusive government (though naturally, both seek intrusion when it suits their purposes).

Interestingly, rights-based progressivism on the American model has begun to appear in Europe and in various English-speaking countries, which suggests that perhaps "Atlantic crossings" did not taper off with the Beveridge Report in 1942, as Rodgers contends. Although the United States itself has been loathe to acknowledge its international progeny, during the early post-war period, American progressivism clearly influenced the normative and institutional architecture of important international regimes such as the UN Declarations of Human, Social and Political Rights and the ILO Conventions on Freedom of Association and on Collective Bargaining. American-style Charters of Rights have been adopted in many countries in the Atlantic community (Germany, Canada, the European Union and, soon, the United Kingdom), in its former colonies (India and post-apartheid South Africa) and, if the World Bank has its way, pretty much everywhere.¹⁴ Moreover, distinctive American progressive inventions—for example, laws banning workplace harassment and mandating equal pay and equal opportunity—have been adopted by many other countries. In general, individualistic, rights-based progressivism has, to an extent, crossed over from the United States to the rest of the Atlantic community where, to be sure, it has been restated in the local legal and political vernacular and in some cases, modified to complement rather than displace traditional solidaristic strategies.

Nor is this particular rights-based variant of American progressivism the only one that has been exported in recent years. The "third way" approach pioneered by Clinton's New Democrats—"progressive lite," one might say—has helped to restore the fortunes of center and center-left parties in many Atlantic countries. These parties describe themselves as reform-minded (although ironically, the "Reform" label itself has been appropriated by the populist right in North America) and they overtly or covertly borrow each other's policies—along with political rhetoric, strategies and personnel.

13. GERALD ROSENBERG, *THE HOLLOW HOPE* (1991).

14. B. SANTOS, *The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts*, in *GLOBALIZING INSTITUTIONS* (Jane Jenson & B. Santos eds., 2000).

However, unlike the earlier progressive period, the vast discrepancies in scale, wealth and power between the United States and most other Atlantic countries and the increasingly peculiar configuration of American politics have complicated the borrowing process. Non-American politicians are understandably wary of being too closely associated with the great power which is perceived as a threat to the distinctiveness and autonomy of their own country, and American politicians understandably see no gain in identifying themselves with the policies and personalities of “lesser” nations.

Below the political level, at the level of public affairs and policy analysis, a progressive trans-Atlantic community still exists, though it is neither particularly influential nor confined to the Atlantic nations. The *Guardian Weekly*, *Le Monde Diplomatique* and the *New York Review of Books* still circulate on both sides of the ocean. European and North American scholars still share the pages of the *Comparative Labor Law & Policy Journal*, the *Encyclopaedia of Labor Law and Industrial Relations* and other academic and professional journals. The International Association for Labor Law and Social Security still meets dutifully as did its predecessors at the height of the progressive age. The ILO still debates and disseminates, investigates and chides. Regional and world congresses of this or that international professional, non-governmental or para-governmental body still do a brisk trade in policy ideas, some of them progressive. And because of developments in information technology, this policy community can conduct exchanges at a speed and with a comprehensiveness that would have been unthinkable to Rodgers’ progressives.

Information technology is also the foundation of what is potentially the most powerful of all trans-Atlantic networks. The Internet enables academic sects, social movements and moral entrepreneurs to convene in continuous session as a virtual congress of progressive movements. After a somewhat ambiguous success in forestalling adoption of the Multilateral Agreement on Investment (MAI), they mounted an impressive effort at the “battle of Seattle” and prevented the World Trade Organization from launching a new round of trade liberalization talks. Whether this success can be replicated is the question. Seattle may have been no more than a rearguard action to defend workers and children, frogs and fish, cultures and communities against the forces of hegemonic capitalism. Or it may have been the beginning of a shift in political momentum towards the progressive end of the spectrum.

The great work initiated by John R Commons and the early progressives may have produced partial and disappointing results;

“progressivism” may not mean what it used to; the old progressive “networks”—though more technically sophisticated—may be more attenuated and less influential than they once were. But the moral and intellectual imperatives that powered the Atlantic crossings of the earlier progressive age continue to animate progressives today.

* * *

We must ask, finally, what *are* the prospects for these moral imperatives, for the critical analysis that informs them, and for progressive social politics in this age of globalization? And—a question of special interest to the readers of this *Journal*—is the pursuit of these prospects likely to resuscitate labor economics, industrial relations and labor law? The source of the problem is well known. Economics and politics are out of sync. Economics is transnational; politics is national. Economics is tending towards a concentration of power; politics is tending towards its diffusion. Economics has its own justificatory rhetoric; politics must justify itself in economic terms. In the labor context, all of these problems are compounded by further difficulties: the practical and legal constraints on applying labor law extraterritorially; the absence of strong transnational union structures commensurate with transnational corporate structures; the persisting relevance of national traditions, employment cultures, social practices and legal systems in developing strategies of labor representation and resistance; the reluctance of governments in both developed and developing countries to adopt labor policies which may alienate investors; the changing structures of transnational corporations which combine highly centralized control with an extended network of “independent” suppliers and contractors, both domestic and foreign; and, of course, the enormous and expanding economic power of transnational corporations.

Nonetheless, knowledgeable observers are somewhat optimistic about prospects for new, transnational strategies of countervailing power and social regulation. Some claim to perceive the emergence of new regulatory regimes forged by transnational advocacy networks linking new social movements and long-established, if newly energized, national and international labor centers.¹⁵ Some emphasize the need to provide a juridical foundation for labor and social rights,

15. See, e.g., DAVID M. TRUBEK, ET AL., *TRANSNATIONALISM IN THE REGULATION OF LABOR RELATIONS: INTERNATIONAL REGIMES AND TRANSNATIONAL ADVOCACY NETWORKS* (1999); R. O'Brien, *The Tentative Transformation of the International Union Movement*, *REVIEW OF INTERNATIONAL STUDIES* (forthcoming 2000); Andrew Herod, *Labor as an Agent of Globalization and as a Global Agent*, in *SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL* (Kevin Cox ed., 1997).

which would make them enforceable in international, as well as domestic fora,¹⁶ and to test the unexplored potential of domestic labor law to extend its reach extraterritorially.¹⁷ Some favor labor-sensitive “fair trade” regimes based either on a “social clause” in the WTO conditioning membership upon compliance with core labor standards,¹⁸ or on the publicity- and persuasion-generating procedures established under the North American Agreement on Labor Cooperation (NAALC).¹⁹ And finally, some believe that codes of conduct—adopted by transnationals themselves, by sectoral organizations or by transnational agencies such as the ILO, the EU or the OECD—will be an effective means of preventing abusive or exploitative employment practices.²⁰

These are novel, possibly useful, attempts to overcome the fundamental problem posed by globalization: there is no global legislature, no global labor court or inspectorate or administrative tribunal, no global regulatory regime which can fully replicate at the transnational level the national systems of protective and empowering labor legislation first developed in the Atlantic community during the progressive era period described by Rodgers. But in a sense, these attempts are beside the point. What we need is not so much new legal technologies as a new progressive vision—a vision as optimistic, as practical, as pervasive, as multifaceted, as cosmopolitan as the vision that inspired the Atlantic progressives a century ago. Rodgers deserves the last word:

16. See, e.g., Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS & INT'L TRADE (Lance Compa & Stephen Diamond eds., 1996).

17. See, e.g., Katherine Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L. LAW 987 (1995), and *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. OF SMALL & EMERGING BUS. L. 93 (1999).

18. See, e.g., Brian Langille, *Eight Ways to Think About International Labor Standards*, 31 J. WORLD TRADE LAW 27 (1997); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. OF SMALL & EMERGING BUS. LAW 131 (1999).

19. See, e.g., John McKennirey, *Labor in the International Economy*, 22 CAN.-U.S. L.J. 183 (1996); Lance Compa, *NAFTA's Labor Side Agreement Five Years On: Progress and Prospects for the NAALC*, 7 CAN. LAB. & EMP. L.J. 1 (1999), and for a more skeptical view, see Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. OF SMALL & EMERGING BUS. LAW 173 (1999).

20. See, e.g., Lance Compa & Tashia Hinchcliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUMBIA J. TRANSNATIONAL LAW 663 (1995), and for more skeptical views, see Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. LAW & POL'Y J. 347 (1999) and H.W. Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in TRANSFORMATIVE LABOUR LAW IN AN ERA OF GLOBALIZATION (J. Conaghan, K. Klare & M. Fischl eds., forthcoming, 2000).

To limit the socially self-destructive effects of morally unhindered capitalism, to extract from those markets the tasks they had demonstrably bungled, to counterbalance the markets' atomizing social effects with a countercalculus of the public weal: these were the tasks of social politics.²¹

An apt summary, I would argue, of the ultimate aim of labor law and policy today.

21. RODGERS, *supra* note 2, at 210.