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America's Disappearing Labor Law

Michał Seweryński is acknowledged in Europe and beyond as a significant figure in labor law. I am honored to have been asked to contribute to a volume celebrating his life and work. For the United States, the question, The Future of Labor Law, comes at a critical moment: labor law, in both its collective and individual protective aspects, is slowly disappearing, albeit for different reasons. How this is so is explained below.

1. Introduction

From the last third of the nineteenth century into the first third of the twentieth, the United States and Europe created legal frameworks to accommodate worker demands for collective representation. These countries had also confronted issues of workplace injury, excessive hours, and the intermittency of work. In the latter part of the century, civil rights were extended into the workplace, especially in protections against discrimination on a variety of invidious grounds. One would think that these settled bodies of law would have continuing vitality as new issues emerge and call for legal address. The United States, however, is witnessing the disappearance of at least some of what is. The prospect is of labor without law; more accurately, without the law's public appearance. The dynamic in the collective and individual sphere differs significantly; but, the consequence is much the same.

2. Collective Labor Law: Disappearance by Irrelevance

In the period of maturing industrialization no nation in the Western world save Russia experienced the degree of violence over "The Labor Question" as the United States. The persistent issue was whether employers

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would deal with their employees' unions. It was a matter of power, but also of competing visions of the social order. On one side stood the American belief in individualism and the sanctity of individual contract; on the other side stood an emerging industrial world in which the individual was helpless, where collective agency was sought to level the playing field. The U.S. Supreme Court stood solidly on the side of individual contract. In 1917, it upheld the lawfulness of contracts of adhesion, called "yellow dog contracts", by which the employee promised not to aid another or come of the aid of another in any employment dispute – by joining a union, suing in court, making a wage demand, or in any other regard.

After decades of agitation by organized labor and the reform-minded, in 1932 Congress enacted the Norris-LaGuardia Act which declared any such "promise" or "undertaking" to be "against the public policy of the United States" and unenforceable in the federal courts. Three years later Congress enacted the Labor (or Wagner) Act. It protected the right of employees to join unions, to engage in concert of action for mutual aid free of employer constraint, and to engage in collective bargaining. It established the principle of exclusive bargaining representation by majority rule and the duty of employers to bargain in good faith. It created an administrative agency, the National Labor Relations Board (NLRB), to enforce these rights at public expense.

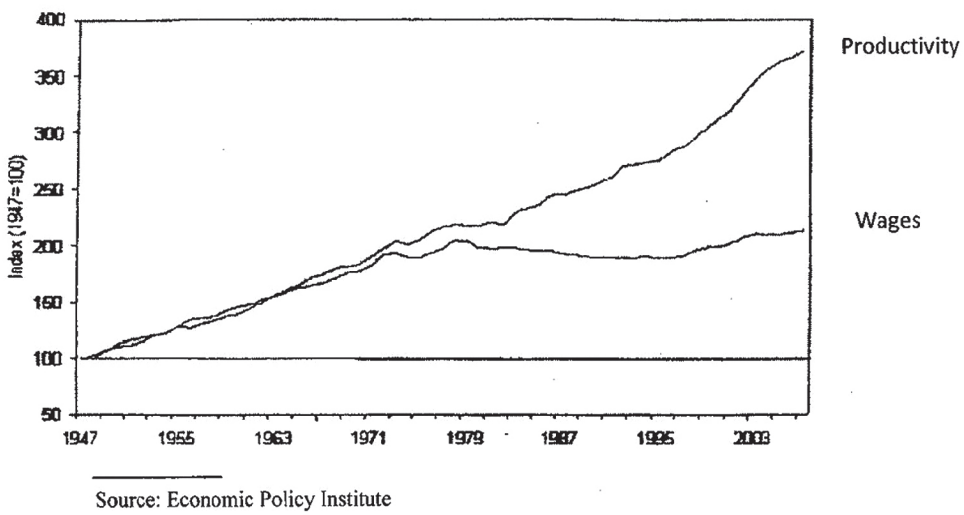
However, in 1947, in reaction to a wave of post-War strikes, the Taft-Hartley Act, passed over President Truman's veto, amended the Labor Act significantly to curtail both the reach and power of unions: it narrowed the scope of Labor Act coverage; it required an election as the sole method for the NLRB to decide contested questions of representation; it allowed employers a nearly unfettered right to oppose unionization, short of threats or retaliation; it imposed swift and severe sanctions on the use of economic power by unions to enlist (or dragoon) third parties to assist them in disputes with targeted employers ("secondary boycotts"). The Labor Act, as amended, has, in all essential respects, remained unchanged ever since; politically, it has proven impervious to change.

Union density, which stood at about 10% of the civilian workforce before the Labor Act was passed in 1935, more than trebled in the ensuing twenty years. In that period, the economic premise of the law, the need to increase mass purchasing power, was vindicated. Major mass production industries were unionized and non-union firms, to remain non-union, echoed the wages and benefits secured by unions. Greater equality of income was achieved as those with low skills or less education benefitted more from collective representation than the skilled and educated. Despite Taft-Hartley, which did blunt union growth, by 1960, union density

was still over 25%, wages had grown in tandem with increases in productivity, and income inequality, the percentage of income taken by the top 1% of earners (exclusive of capital gains) had shrunk from nearly 20% in 1920 to about 8% of labor market participants.

Starting in the early 1970s the situation reversed. Union density began a steep decline and income inequality began a return to near the level of 1920. As Figure 1 shows, the tacit post-War compact between major industries and "big unions", with the attendant economic ripple effect nation-wide, whereby labor captured part of the economic return of increased productivity, broke down.

Figure 1. Relationship of Wage Growth to Productivity 1947–2005

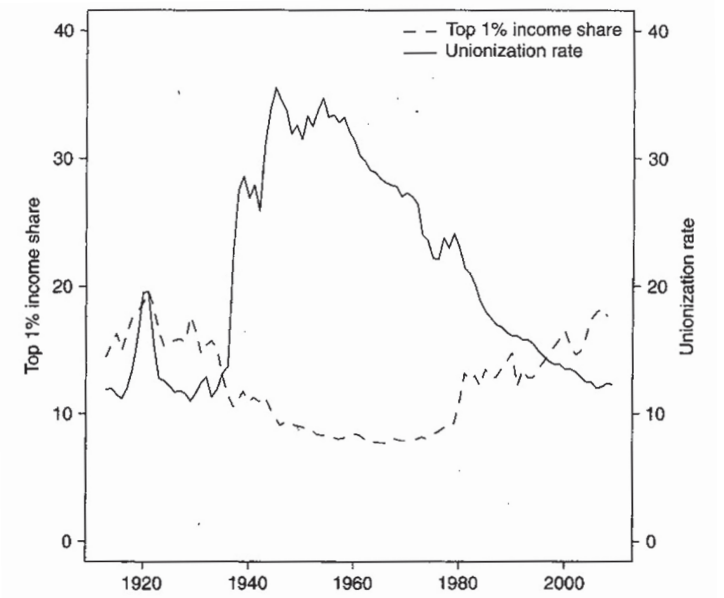


Source: Economic Policy Institute

Figure 2 aligns the decline in union density with the rise in income inequality. Because state and local government employees did not achieve bargaining rights until the late 60s and early 70s, and as they now make up a majority of unionized employees, Figure 2, which includes the public sector, does not accurately reflect the private sector. Union density in the private sector now stands at about 6.6%. The curve for unionization in private employment should be lowered accordingly[1].

[1] The disparity is even greater when one considers the distribution of total wealth. From 1983 to 2009, wealth of the top 5% has increased by 82%; that of the bottom three quintiles – the bottom 60% – has fallen by 7.5%. L. Mishel, *Huge Disparity in Share of Total Wealth Gain Since 1983* (September 15, 2011) as cited in J. Rosenfeld, *What Unions No Longer Do*, Harvard University Press, Cambridge, Massachusetts 2014.

Figure 2. Unionization and Income Inequality in the United States, 1913–2008, Exclusive of Capital Gains



Source: J. Rosenfeld, *What Unions No Longer Do*, Harvard University Press, Cambridge, Massachusetts 2014, Figure 8.1 at p. 185

Much thought has gone into exploring the reasons for the collapse of unionization in the private sector[2]: the reduction in trade barriers has made outsourcing for manufactured goods, and of some services, economically feasible, depriving domestic unions of the ability to take wage competition out of price competition – the *sine qua non* for unionization; the shift from manufacturing – the traditional citadels of unionization – to service jobs, now 70% of the labor market, which are traditionally difficult to organize and employ large cohorts of part-time and contingent workers who have more than one job, are subject to precarious hours, and have no time or reason (given the velocity of job change) to invest in union organizing; the "fissurization" of work – the devolution of responsibility down lines of subcontracting that pit small employing units against one another to compete for contracts on the basis of lower wages and benefits[3]; the intense, even extreme hostility of management driven

[2] This is explored by J. Rosenfeld, *What Unions No Longer Do...* and B. Kaufman, *Book Review*, "Perspectives on Work" 2014, vol. 89, No 18 [*What Unions No Longer Do*]. See also S. Luce, *Labor Movements: Global Perspectives*, John Wiley & Sons, Hoboken, New Jersey 2014.

[3] *See generally* D. Weil, *The Fissured Workplace*: *Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, Cambridge, Massachusetts 2014.

by the need to satisfy shareholder demand for ever-higher stock prices, and the fact that senior managers' compensation has become increasingly composed of stock options; even the location (and relocation) of factories and offices to parts of the country, notably the South, where the local ethos is strongly hostile to unions. One study estimated the likelihood of a union organizing campaign being brought to the successful execution of a collective bargaining agreement, start to finish, at 20%; the likelihood becomes 9% if the employer commits unfair labor practices[4]. Yet other reasons have been given: that whatever value unions might add to productivity are offset by the transaction costs of negotiation, contract administration, and the inflexibilities of contract terms which makes management even more resistant; that today's workers want more cooperative forms of representation than tradition-bound unions, engaged in confrontations with management, are able or willing to supply; that the "public goods" secured by union contracts are increasingly supplied by law. That idea will be picked up in Section III.

Much thought has also been given to the role of law in this. The consensus among academics in the United States would appear to be this: on balance, the Labor Act is mostly irrelevant; at worst, it is a hindrance. Unions do not have ready access to those they'd like to organize[5] while employers have no difficulty in reaching the workforce, including captive audition for the company's anti-union messages. Traditional economic pressure, notably the strike, is useless; strikes have almost disappeared, due, perhaps, to the rule that allows economic strikers to be replaced permanently. Remedies for unlawful employer action are pitifully weak. Even the principle of majority rule works against representation: survey data reveal that a third of American workers want traditional union representation, but unless they make up a majority in any one "bargaining unit", that felt need has no legal consequence. Bargaining units, traditionally configured on the basis of the employees' community of interests, can obstruct union ability to aggregate power; that is, the NLRB cannot order multi-employer bargaining absent the consent of all the employers, which makes it almost impossible for the union to rationalize an industry, even in a local product market.

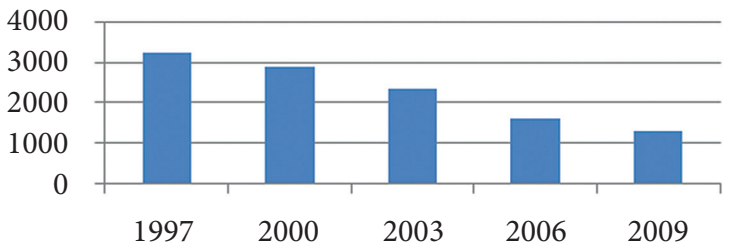
[4] J.-P. Ferguson, *The Eyes of the Needless: A Sequential Model of Union Organizing Drives*, 1995–2004, "Industrial and Labor Relations Review", October 2008, vol. 62, No 1.

[5] On December 11, 2014, the NLRB, by a party-line vote of three to two, held that employees who have access to their employers' email system may use the system to solicit co-workers for union support and for other Labor Act purposes unless "special considerations" allow an employer to curtail that use. Purple Communications, Inc., 361 N.L.R.B. No 126 (2014). One of the dissenters pointed to the ubiquity of social media by which employees already readily communicate with one another. Thus, the practical impact of the access the Board would accord remains to be seen, if, that is, the decision survives judicial review.

The decline in resort to the NLRB has paralleled the decline in union representation.

Figure 3 displays the number of petitions for union representation elections for the past decade[6].

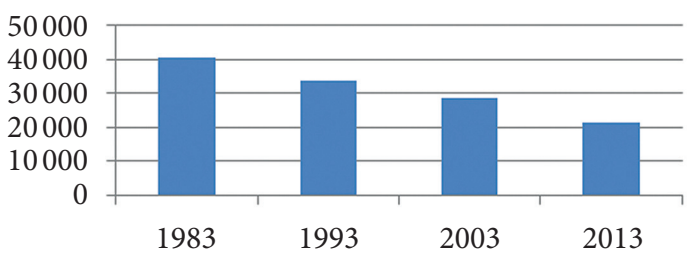
Figure 3. Number of Representation Elections



Source: NLRB

Figure 4 is a snapshot of charges of unfair labor practice filed with the Board over a twenty year period.

Figure 4. Unfair Labor Practice Charges Filed



Source: NLRB

Where labor-management relations are harmonious and constructive there need be no resort to law; in such cases, the law's absence is a sign of health. But, American labor relations are too often less than harmonious and resort to law is common. In consequence, American labor relations

[6] On December 15, 2014, the NLRB issued rules that would expedite representation elections. Whether these will result in more electoral activity remains to be seen.

are highly juridified[7]. The absence of resort to law these figures display is indicative of an absence of aggressive labor activity; and without unions, collective labor law becomes a dusty exhibit in the museum of lost causes.

3. Labor Protective Law: Disappearance by Design

One of the explanations given for union decline is that the "public goods" secured by unions – protections of health and safety, protection against wrongful discharge – are being increasingly supplied by law. Three years after the Labor Act, Congress enacted the Fair Labor Standards Act which set a minimum wage and required payment at the rate of time-and-a-half for overtime. Starting in the 1960s, and roughly paralleling the decline in union representation, federal law has stepped in to provide a greater range of protections; the states as well began to expand employee protections by legislation and, starting in the 1980s, by common law, particularly in tort (delict). Municipalities have also been expanding worker protections. The sorts of labor protective legal claims an employee can make today has been catalogued in a document issued by the bank, JPMorgan Chase.

> The employee can claim employment discrimination if protected by applicable federal, state or local law, and retaliation for retaliation for raising discrimination or harassment claims, failure to pay wages, bonuses or other compensation, tortious acts, wrongful, retaliatory and/or constructive discharge, breach of an express or implied contract, promissory estoppel, unjust enrichment, and violations of any other common law, federal, state or local statute, ordinance, regulation or public policy, including, but not limited to Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, Section 1981 of the Civil Rights Act, and the Worker Adjustment and Retraining Notification Act.

What is of interest here is the document, not the compilation. It is a "Binding Arbitration Agreement" that the bank's employees must sign as a condition of employment. It requires employees to agree not to go to court, but to bring any of these legal claims exclusively into an arbitration system established by the employer. The United States Supreme Court has held that these agreements must be enforced under a 1925 federal arbitration law "according to their terms". These policies may not be

[7] See e.g. R. Gorman, M. Finkin, *Labor Law: Analysis and Advocacy*, Juris Publishing, Inc., New York 2013.

adopted unilaterally in unionized workplaces; but, given the near evaporation of unions, it has been estimated that a quarter or more of the civilian workforce is covered by agreements of this kind.

Employers have adopted arbitration policies for two kinds of benefits it holds for them: efficiency benefits, in that arbitration is swifter and less expensive than litigation; and legal benefits, in the preservation of confidentiality and the avoidance of precedent. These advantages for employers are joined to the claim that employees benefit as well in having greater access to justice because of the difficulty of finding lawyers for the "high stakes" game of court litigation.

Research has shown that there are efficiency benefits. Research has also shown that employees do less well in arbitration, but have no less need for legal counsel in the arbitral forum. However, employees have a more difficult time finding lawyers to represent them in the "lower stakes" game of arbitration than in court litigation[8].

Access to justice is even more problematic when the employer's arbitration policy precludes the employee from bringing or participating in any group claim, as does JPMorgan Chase. Low wage workers are too often cheated of their legally mandated wage, as a recent U.S. Department of Labor study concluded[9]; but, the wages lost by each employee may be relatively small. Without the capacity to aggregate these claims the individual worker is often remediless[10]. The NLRB has held such preclusions of group resort to be an unfair labor practice; but, thus far, the judicial reception has been hostile[11]. Even so, one would think the Norris-LaGuardia Act, discussed above, denying enforcement to any "promise or undertaking" whereby the employee agrees not to engage in "concerted activity for mutual aid or protection", would apply to such provisions. Thus far, however, no court has found Norris-LaGuardia to be applicable. In fact, they have declined seriously to engage with the text, history, or policy of that law[12]. The Norris-LaGuardia Act has been made to disappear.

[8] A.J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, "Berkeley Journal of Employment & Labor Law" 2014, vol. 35, Issue 1/2, No 71; M. Gough, *The High Cost of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, "Berkeley Journal of Employment and Labor Law" 2014, vol. 35, No 91.

[9] Final Report of the Eastern Research Group, Inc., for the U.S. Dept. of Labor, *The Social and Economic Effects of Wage Violations*: Estimates for California and New York (December 2014).

[10] N. Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low Wages*, "Michigan State Law Review" 2012, vol. 1103.

[11] D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013). *The Board reiterated its position Murphy Oil USA*, Inc., 361 NLRB, No 12 (2014).

[12] M. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, "Nebraska Law Review" 2014, vol. 93, No 6.

Nor is this quite all. In one case the arbitration policy allowed an op out, which the employee did not exercise. A panel of a federal appellate court acknowledged the obstacle the Norris-LaGuardia Act and Labor Act posed, as sister courts have not, but thought it easy to avoid them by holding the employee to have agreed to waive them[13]. It did not strike the court as obvious, even intuitively, that it makes no sense for a law forbidding the enforcement of "*any*" undertaking, whereby the employee is rendered unable to join in a common cause, to be relinquished nevertheless by individual agreement; nor, as the law has long held, could the parallel protections of the Labor Act[14]. When this was pointed out to the entire court, not a single judge thought the panel's decision should be reconsidered[15]. As a result, a foundational principle of American labor law has been made to disappear.

There is no doubt that arbitration yields the legal benefits management sees in it: confidentiality insulates the employer from reputational harm and so the pressure of adverse public opinion. The lack of precedential effect allows the employer to argue each case afresh; it need not deal with the inconvenience of a prior adverse award even on the same facts. But, arbitral awards are private: they are neither published nor subject to public oversight. Instructive are the results of a study of the coverage of individual employment disputes in five major American news outlets for the five year period 2008–2013, whether the matter would or had been referred to the courts or to arbitration, as well as coverage of the consequence of that resort.

These are set out in Figure 5.

Figure 5. Employee Dispute Press Coverage in Five U.S. News Outlets (2008–2013)

	Litigation	Arbitration
Employment Discrimination	410	18
Discharge for Misconduct	43	5
Whistleblowing	358	15
Wage Theft	27	1
Total	838	39

Source: ZVglRWiss 113 (2014) Table 1 at 184.

[13] Johnmohammadi v. Bloomingdale's, Inc., 775 F.3d 1072 (9th Cir. 2014).

[14] The Act's rights "may not be stipulated away or renounced". Killefer Mfg. Corp., 22 NLRB 484, 490-91 (1940).

[15] *Johnmohammadi, supra* n. 13, case No 12-55578, motion for reh'g en banc denied (December 31, 2014).

In other words, as the use of arbitration expands, as public law is increasingly placed for disposition in private hands, the law in application disappears from public view; to diminish, perhaps even to disappear as a matter of public concern.

Accordingly, the argument that legal protection will fill the vacuum left by the collapse of unionization remains to be seen. Union-represented workers achieve more compliance with the law than the unrepresented. For the individual, legal representation is essential for legal vindication, but low wage workers find it difficult to secure legal representation: those relegated to the arbitral forum find it even harder; and the preclusion of group resort for the presentation of common claims may make access to justice for relatively small sums impossible. For workers most in need of protection, labor law has increasingly become a chimera. For them, there is no law.

4. The Future

Those who have thought about the future fall into three groups: some despair; some see glimmers of hope; a few are chiliastic.

Despair: A generation ago one of the most perceptive of labor law academics captured his sense of the direction the nation was taking in the title of an essay, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*[16]. Though proposals for federal legislation have proliferated in the ensuing twenty years, efforts to change an anachronistic law of collective representation have had no success, nor is any politically achievable. Emblematic of this situation is the serious suggestion that it might be best if the Labor Act were repealed in favor of a policy of total legal neutrality[17], of the law of the jungle[18].

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[16] M. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, [in:] *The Legal Future of Employee Representation*, Ch. 2, M. Finkin (ed.), Ithaca, New York 1994. This is echoed more recently, and more plaintively, by Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, [in:] *The Idea of Labour Law*, Ch. 6, G. Davidov, B. Langille (eds), Oxford University Press, Oxford 2011.

[17] M. Crain, *An Imminent Hanging*, "ABA Journal of Labor & Employment Law" 2011, vol. 151, No 155 ("[W]e should give serious thought to whether repeal of the labor laws could reenergize labor unionism"). Labor historian David Brody has ruminated that, "One could argue that the labor movement might have been better off had history stopped with Norris-LaGuardia" D. Brody, *Labor Embattled*. History, Power, Rights, University of Illinois Press, Champaign, IL, 2005, p. 142–143.

[18] In *Vegelahn* v. *Guntner*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J. dissenting), Justice Oliver Wendell Holmes, Jr., then on the Massachusetts Supreme Court, opined that the policy of the law in the face of labor's organizational efforts should be "free struggle for life".

Glimmerings: Some observers have drawn attention to the proliferation of grassroots movements – of immigrant worker centers, associations of freelance professionals, independent contractor taxi and truck drivers – that have sprouted in several cities[19], and to the protests nationwide of fast-food workers and others demanding a living wage[20]. These are seen as potential seedbeds for the revitalization of the labor movement, albeit in ways that may differ from traditional unions[21]. That potential, as well as the very sustainability of these efforts over time, remain to be seen[22]. But, it pays to note that these developments are about self-help, not law. Law is availed of when useful, circumvented when obstructive. Legal accommodation to these efforts will depend on their sustainability and political power.

Chiliasm: Reflective of a singular focus on social momentum without reference to law is the argument that what the American working class awaits is the return of the animating spirit of the 1930s. One commentator has opined that what is needed is a vanguard, a "formation" of "radical democratic leftists", of "anarchists, socialists, and communists"[23]. Perhaps. But, as anarchists and socialists are in noticeably scant supply in the United States today, and as communism has been discredited, the author would seem to hinge the future on a saving remnant from the past[24].

[19] E.g., *New Labor in New York: Precarious Workers And The Future of The Labor Movement*, R. Milkman, E. Ott (eds), Cornell University, Ithaca, New York 2014. An overview and bibliography is supplied by Peggy Kahn & Kimi Lee, *Worker Centers as an Inflection Point?*, [in:] *The Disunited States of America: Employment Relations Systems in Conflict*, Ch. 4, D. Jacobs, P. Kahn (eds) Cornell University, Ithaca, New York 2014.

[20] B. Penn, *Fast Food Strikes Spread to 190 Cities, Tied to Retail, Airports, Home Care Efforts*, "Daily Labor Report (Bloomberg BNA – Bureau of National Affairs)" 2014 (December 4), vol. 233 at A-15.

[21] *See* several of the papers in *Symposium: Reimagining Labor Law*, 4 "U.C. Irvine Law Review" 2014, pp. 523-938.

[22] J. Rosenfeld, *What Unions No Longer Do*, Ch. 8...

[23] S. Aronowitz, *The Death and Life of American Labor: Toward a New Workers' Movement*, New York 2014, vol. 172; They would discuss "with one another the basic questions of a future society". *Ibidem.*

[24] This resonates against Daniel Bell's autopsy on American radicalism a half century ago, taking his introductory cue from T.S. Eliot's *Four Quartets:*

We cannot revive old factions
We cannot restore old politics
Or follow an antique drum.

D. Bell, *Marxian Socialism in The United States*, Princeton 1967, p. xii.

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Znikające amerykańskie prawo pracy

Streszczenie

Od dwóch generacji związki zawodowe sektora prywatnego przeżywają ostry kryzys, któremu towarzyszy utrata znaczenia zbiorowego prawa pracy. Prawo to zanika. Jednocześnie, zwiększono zakres środków indywidualnej ochrony prawnej pracowników. Te są jednak stopniowo „wymiatane" do prywatnych systemów rozjemczych ustanawianych jednostronnie przez pracodawców. W rezultacie, prawna ochrona indywidualnych pracowników znika z widoku publicznego. W odbiorze publicznym wyłania się praca bez prawa.

Tłumaczenie z języka angielskiego – Zbigniew Hajn