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Still Unjaded: Jim Atleson's Twenty-First Century Turn to International Labor Law

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Still Unjaded: Jim Atleson's Twenty-first Century Turn to International Labor Law

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I. VALUES AND ASSUMPTIONS AND THE THINKING UNION ORGANIZER

I came late to the academy and am still more of a trade unionist than a scholar, so I am going to start my remarks from this perspective. When Jim wrote *Values and Assumptions* I was in my earlier life as a union staffer with the United Electrical, Radio and Machine Workers of America (UE), a great, democratic, independent left-wing union. Like everyone else on the union staff, I was a generalist and an itinerant. I received organizing and bargaining assignments in New England, the Carolinas, and Baltimore, corporate campaign assignments in South Dakota, Pennsylvania, and California, political and legislative assignments in Washington, and a dozen other projects. It was nonstop action from the time I started working for the UE after finishing law school in 1973.

I had taken labor law with Clyde Summers when he was still at Yale, but I didn't have any experience against which to measure what I studied. The cases said what they said, but I had no context for really understanding them. I remember reading a smorgasbord of labor-related literature—Stanley Aronowitz, Harry Braverman, Baran and Sweezy; *Labor's Untold Story*, manifestos from the Dodge Revolutionary Union Movement, and more,¹ but they were

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1. See STANLEY ARONOWITZ, FALSE PROMISES: THE SHAPING OF AMERICAN WORKING CLASS CONSCIOUSNESS (1973); PAUL A. BARAN & PAUL M. SWEEZY, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER (1966); RICHARD O. BOYER & HERBERT M. MORIAS, LABOR'S UNTOLD STORY (2d prtg. Marzani & Munsell, Inc. 1955); HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974); Martin Glaberman, *Detroit: The Dodge Revolutionary Union Movement*, INT'L SOCIALISM, Apr.-May 1969, at 8, available at <http://www.marxists.org/archive/glaberman/1969/04/drum.htm>.

all abstractions while I was still in school.

Once I started working, there was no time for reading and reflection. I was immersed in the day-to-day currents of trade union work. More to the point: I was always swimming upstream. I thought labor law was supposed to vindicate workers' rights, but I found it full of backwash and crosscurrents and obstacles.

By the time *Values and Assumptions* was published, I was eager to put my experience into an analytical framework. I devoured Jim's book because it spoke to everything I confronted. He made the connection between what I was doing in the day-to-day life of a union organizer and negotiator, and the underlying dynamics of the labor law system that made it so hard to advance.

I had thought that the Wagner Act was labor's Magna Carta and that the emergence of the Congress of Industrial Organizations (CIO) marked a fundamental change, but Jim showed how subordination of workers in the employment relationship endured in the labor law system despite historic breakthroughs in organizing and collective bargaining.

Jim's chapter subtitles are a road map to what I confronted:

A. *The Right to Strike?*

When a majority of workers at a Westinghouse apparatus service shop in Richmond, Virginia joined the union and we filed for an NLRB election, management's main counterattack was a promise to permanently replace them if they joined an imminent nationwide Westinghouse strike. The company pointed to Greyhound, Phelps-Dodge, International Paper, and other high-profile strikes broken by replacements. Out of twenty-six workers in the shop, seventeen had signed union cards. All seventeen came to what was supposed to be our victory party the night of the election, swearing they voted for the union. But we had lost the election seventeen to nine. Eight people were too embarrassed to say that management had frightened them into a "No" vote with the permanent replacement threat.

B. *Employer Control over Property and Workers?*

In my first organizing assignment in July 1973 I distributed leaflets in an employee parking lot during a shift

change at an insulated wire factory in Plymouth, Massachusetts. The plant manager chased me away with a Doberman Pinscher while workers watched. We never succeeded in organizing there.

Later, at another plant where I customarily went inside to talk with shop stewards in the break room, management got mad at me—something about “fomenting grievances”—and barred me from the premises. When we protested, the industrial relations director said, “What part of ‘It’s our property’ don’t you understand?” We went to arbitration on a past practice theory, and the arbitrator said the same thing—it’s their property. We got access back in bargaining the next time negotiations came up, but under much more restrictive conditions.

C. *Status Assumptions and the “Common Enterprise”?*

In a national corporate campaign against Litton Industries in the early 1980s, I had to constantly soften our members’ public criticism of the company for fear of running afoul of *Jefferson Standard* and the disloyalty doctrine.² We could not risk having workers fired for not showing sufficient fealty to the company that employed them, no matter how much the same company was screwing them.

D. *Managerial Control and the Fear of Anarchy?*

At a Baltimore electric power porcelain insulator plant we had a contract clause that defined “one hundred percent output” as—to make it simple—producing fifty insulators per hour. This was based on management’s own time-motion studies. Again, to simplify, workers got \$10 per hour for this output (this was, in the early 1980s, a good wage). But the workers knew how to make sixty insulators an hour, which got them extra incentive pay (about \$11.50 per hour—it was not a straight-line incentive system). Management came to expect sixty insulators an hour. They budgeted for it, and got it most of the time.

But the important thing was that workers could reduce output to fifty insulators per hour, and the company could not discipline them because fifty per hour was “one hundred

2. See generally *NLRB v. Local 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464 (1953).

percent" production. So "going down to one hundred percent"—a work slowdown—was a powerful shop floor weapon for workers to pressure the company in bargaining or over grievances.

Management called this "anarchy," and demanded, in bargaining, to make sixty insulators per hour the new one hundred percent output. They were willing to pay for it, too, making what had been the incentivized rate (\$11.50) the new hourly rate—a fifteen percent raise. But it meant a loss of shop floor strength. We struck over this issue, but we could not hold it. When the company told us they were going to start hiring permanent replacements, we had to go back to save the union. There were just too many workers being laid off in other Baltimore area plants in the early 1980s who would be attracted to an \$11.50-an-hour-job.

E. *The Scope of Mandatory Bargaining?*

When General Electric closed its Ontario, California electric iron plant in 1982 to move operations to Singapore, we asked the company to bargain over the decision. We had numerous ideas for ways to save the plant. They told us this was part of their "core of managerial prerogative," citing the Supreme Court's new *First National Maintenance* decision.³ We did a great job in effects bargaining, getting enhanced severance pay and continued medical insurance, but 1000 workers lost good jobs.

F. *Mobility of Capital and Underlying Premises?*

When a new company bought a UE-represented power transmission equipment plant in 1976, again in Baltimore, it had to recognize the UE since the new owners kept the incumbent workforce. But they had no obligation to honor the existing agreement, thanks to the then-recent *Burns Security* decision.⁴ They demanded bargaining from scratch, and it took a six-week strike to get a contract approximating the prior agreement.

Each of these situations shows how Jim's analysis applies to them. My point is not to go through every topic in *Values and Assumptions* and link it to my experience. The

3. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981).

4. *See NLRB v. Burns Sec. Servs., Inc.*, 406 U.S. 272 (1972).

point is to give personal witness to the impact of Jim's book among thinking union organizers—if that is not an oxymoron. It created a “Now I see what's really going on” moment for us, getting underneath the surface eddies and froth of the labor law system to its deep, constant current, showing how values and assumptions about prerogatives of capital permeate the system even after passage of the NLRA and Section 7's purported affirmation of workers' rights.

II. STILL UNJADED AFTER ALL THESE YEARS

That is my intervention on *Values and Assumptions*. Now I want to fast-forward to Jim's current work—though they are clearly connected. I do not see this as a typical *hommage* to an emeritus colleague based on his pathbreaking past accomplishments. As you know, Jim is still making vital contributions to labor scholarship and to the labor movement with his turn in recent years to international labor law. Since this is my main area of research and writing, it means I have had the good fortune of collaborating closely with Jim as we try to move forward in this field.

Over the past four years, Jim and I worked with Kerry Rittich, Calvin Sharpe, and Marley Weiss to produce an international labor law textbook for use by labor law teachers and other professors who want to develop a new course offering in this area.⁵ The project really began when Jim started exchanging materials with me and Harry Arthurs more than ten years ago—maybe closer to fifteen. Thanks to Buffalo-Toronto geography, Jim and Harry also had the opportunity to bring their students together for some of their international labor law classes. I should add that Harry and Clyde Summers gave us wise counsel in our early planning discussions for the textbook project.

Truth be told, Jim was one-fifth of the authors but he produced two-fifths of the book. The hundreds of e-mails that we exchanged in the course of this project create a terrific record of Jim's initiative and care and meticulousness in getting the book out. Hardly a day went by without proof that Jim was thinking about the book and ways to improve it. What about this? How about that? Did you see this? Should we fit this in? Does this mean we have to change

5. JAMES ATLESON ET AL., *INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY* (2008).

that? In fact, he's still doing it, as we try to get new information onto a website and contemplate a second edition. Jim has cut back his teaching load while he repairs to the seashore in Maine, but what I see is Jim thinking as hard as ever about these issues.

A. *The Neptune Jade Story*

I think that Jim's *Voyage of the Neptune Jade* work is the most comprehensive and acute analysis you can find on the implications of globalization for working people and trade unions, and on workers' responses to globalization.⁶ Of course, Harry Arthurs, Bill Gould, Kerry Rittich, and others have produced landmark works on globalization and labor, like Harry's *Reinventing Labor Law Benjamin Aaron Lecture*,⁷ Bill's *Uneasy Case* piece in his international labor volume,⁸ and Kerry's *Two Paths Entwined Peace Palace Paper*.⁹

Of course, there are other people today who also made monumental contributions—Ben Aaron himself, and Clyde Summers, for example. I apologize to others who should also be mentioned here, but if I start down that road it will take up the rest of my time.

Like a good lawyer as well as a good scholar, Jim started with the facts of the remarkable story of the *Neptune Jade*, a cargo ship loaded by a union-busting shipping firm. The *Neptune Jade* plied the oceans looking for a place to unload. It was a *Flying Dutchman* of the global workplace, turned back by trade unionists from Oakland, Seattle, Vancouver, and Yokohama before it finally found relief from a government-controlled union in Taiwan.

6. See generally James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004).

7. Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271 (2001).

8. William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 81 (Robert J. Flanagan & William B. Gould IV eds., 2003).

9. Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?*, in LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT 157 (Int'l Bureau of the Permanent Court of Arbitration ed., 2003) (Peace Palace Papers).

Jim took this story and put together a powerful brief for looking at the labor law-globalization nexus in a fundamentally new way. Everything an international labor law scholar and student and international labor activist needs to understand is contained in Jim's *Neptune Jade* work. He called it "a look at law from the ground up,"¹⁰ and it is a model of engaged scholarship.

Actually, we could have saved ourselves three years' work on the textbook and just made all our students read and discuss Jim's *Neptune Jade* work all semester. It is all right there.

Fundamental human rights instruments? Jim discusses the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights, the UN Covenant on Economic, Social and Cultural Rights, the European Social Charter, the Canadian Charter of Rights and Freedoms, International Labor Organization (ILO) core labor standards, and our own First Amendment.

International institutions? He covers the International Labor Organization, World Trade Organization, the International Monetary Fund, the World Bank, the Organization for Economic Cooperation and Development, and even harkens back to the failed International Trade Organization and its Havana Charter of workers' rights.

Trade agreements and trade laws on workers' rights? We find the North American Free Trade Agreement (NAFTA) and its labor side agreement, trade and labor agreements between the United States and Chile, Jordan, and Singapore; labor rights provisions in the Generalized System of Preferences, and more.

International trade union groups? Jim gives us the International Confederation of Free Trade Unions (now the International Trade Union Confederation), Union Network International, the International Metalworkers Federation, the International Transport Federation, the International Union of Food Workers, and many more, along with their International Framework Agreements with multinational firms. And from the past, the Knights of Labor and Marx's Second International.

Multinational firms? Here are General Motors, Ford,

10. Atleson, *supra* note 6, at 97.

Daimler-Chrysler, Olivetti, Renault, Levi's, UPS, Sprint, Continental Tire, BHP Billington, Nordana Shipping, and more. And of historical note, the East India Company and the Hudson Bay Corporation.

Interdisciplinary sources and discussions? Outside the law, Jim draws from history (David Montgomery, Howard Zinn, Daniel Rodgers), economics (David Ricardo, John Keynes, Jagdish Bhagwati), political science (Ellen Meiksins Wood, Douglas Imig, Sid Tarrow), sociology (Anthony Giddens, Kathryn Ward), geography (Nick Blomley, Andrew Herod), immigration studies (Peter Stalker, Douglas Massey), industrial relations (Roy Adams, James Gross, John Windmuller), and other fields.¹¹

Legal scholarship? Jim packs in too much even to give a sample, except to say they include all the giants and many more labor law scholars from four generations in a dozen countries on three continents. He doesn't stop there, either. Outside labor, he looks to legal scholarship in tax, criminal, libel, property, contract, torts, legal history, and other fields. Many of you are in this room; forgive me for not naming names—you know who you are, and who they are.

Outside the academy, Jim draws from dozens more journalists (David Moberg, JoAnn Wypijewski, Robert Taylor), trade union advocates (Charles Levinson, Ken Zinn, Steve Early) labor-critical activist/writers (Kim Moody, Peter Waterman), ILO specialists (Lee Swepston, Ruth Ben-Israel), and more.

Jim's footnotes alone are a comprehensive bibliography of international labor law scholarship and advocacy. So, who needs a 1,000-page textbook when it is all right here in a 100-page article? Fortunately, Jim did not argue that point, and instead threw himself into the textbook project with us. We did include ample *Neptune Jade* selections in Jim's chapter on cross-border labor organizing and international collective bargaining, which I think is the most exciting one in the book.

B. *Perils and Promises*

Like all of us, Jim found different outlets for his *Nep-*

11. The names in parentheses here and following are only samples, not complete lists.

tune Jade work—Karl Klare and Mike Fischl's and Jim Gross's edited volumes, for example.¹² Each new version refined his approach and brought new insight into the work. But I think his 2004 Buffalo Law Review article, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, is really the mainstay of the project.¹³ It is a *tour d'horizon*, a *tour du terrain*, and a *tour de force*—a magisterial review of the effects of globalization on workers and unions, and the problems that result from a lack of transnational regulation of labor standards and protection of workers' rights, especially the right to act in solidarity with one another on a scale matching that of transnational firms. At the same time, it is an affirmation of workers' willingness to fight back, to find new and creative ways to assert their rights in the face of a hostile legal system, and sometimes even to win.

Jim starts with a strong assertion of workers rights as human rights. He makes the case that workers are caught up in an intricate web of relationships—personal, economic, cultural, juridical, institutional, and more—where the exercise of their individual rights takes place. He suggests that individual rights can only be fulfilled in this social framework.

The right to organize does not exist in a vacuum. Workers exercise their right to organize for a purpose: to enable them to fight for collective advance in a way they cannot do individually. Here is how Jim put it:

[T]he recognition and protection of *collective action* is critical to the advancement of many kinds of rights, especially work-related rights. These rights are generally stated in individual terms, but all have a collective dimension. Many rights are meaningful only when exercised in a collective manner or, at least, can only be effectively achieved, recognized, and enforced in a collective manner.¹⁴

12. See James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 379 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002); see also James Atleson, "An Injury to One . . .": *Transnational Labor Solidarity and the Role of Domestic Law*, in *WORKERS' RIGHTS AS HUMAN RIGHTS* 160 (James A. Gross ed., 2003).

13. Atleson, *supra* note 6.

14. *Id.* at 86.

Cross-border solidarity action is the focus of the work. Jim gives an essential description of how the global economy functions and how mobile capital takes advantage of it. He covers the NAFTA and its labor side agreement, the WTO and the ILO, and their usefulness and failings. Then he mounts a powerful argument that, while such international institutions should not be dismissed or discounted, capital mobility should be countervailed by the workers' right to take solidarity action.

Jim notes an important theme at the outset: such solidarity action is restricted and even unlawful in many national settings, but it involves the expression of a basic human right. It may not have a remedy for its violation now, but that is how workers defend themselves and make advances in a capitalist society—by taking action in the face of hostile laws and ultimately convincing society to change the laws. As Jim put it, "Labor history is filled with thrust, counterthrust and the often unexpected effects of those strategic moves."¹⁵

While he argues that international labor law fails sufficiently to protect workers' solidarity, Jim takes us through the voyage of the *Neptune Jade* to show how trade unions take action anyway, despite legal obstacles and potential liabilities. But he doesn't stop there. He analyzes a number of cross-border labor initiatives like worldwide support for the 1997 UPS strike, trans-European labor action supporting Renault workers at the Vilvoorde plant in Belgium, the Paper and Energy workers' international campaign defending American workers employed by the French multinational firm Imerys, the United Steelworkers' successful international campaign to resurrect the union at Ravenswood Aluminum, the United Mineworkers campaign against Peabody Coal, international defense of the "Charleston 5" dockworkers in South Carolina, and others.

This is the beauty of Jim's *Jade* work: he makes powerful theoretical legal, political, and economic arguments, but backs them up with concrete examples from scores of real-life cases and actions.

The Voyage of the Neptune Jade moves on to a penetrating exercise in comparative labor law, examining secondary boycott statutes and doctrines in the UK, Canada, Japan,

15. *Id.* at 164.

and the United States. Much like *Values and Assumptions*, it is a brilliant combination of legal history and legal analysis. Even his footnote commentaries are important insights, for example, from note 179:

The whimsicality of U.S. secondary boycott law borders on the excessive perhaps, but one additional wrinkle is relevant here. The Court has sometimes, but not always, referred to secondary picketing as “speech plus,” something more than “pure” speech. The “plus” can be regulated by law without offending the First Amendment. If you restrict the “plus” portion, of course, you bar the “speech” part as well. In fact, it is hard to see what the “plus” is unless it is the inherent threat of violence. But, if this is the case, then why is primary picketing permitted? Indeed, why is some secondary labor picketing allowed?¹⁶

But again, he does not stop even with the four countries just mentioned. He goes on to review the right to strike and secondary boycott law in Germany, Sweden, Denmark, France, Italy, and Spain, weaving it all into an analysis of ILO jurisprudence on these issues.

Then Jim goes deeper with provocative discussion of whether one can really distinguish between “primary” and “secondary” strikes and between “economic” and “political” strikes, and whether the right to strike is a fundamental human right. His arguments speak for themselves so I will not repeat them here, other than to say I am convinced.

I am easy, I know. As a trade unionist, I am on board. Convincing the judiciary is something else again. As Jim points out reprising his central insight in *Values and Assumptions*, the trumping value of management prerogatives over workers’ rights and the assumption that empowered workers are a menace make for widespread restrictions on workers’ solidarity based on “judicial fear of class-based action.”¹⁷

CONCLUSION

I conclude by noting that Jim’s *Neptune Jade* work is infused with both idealism and cold-eyed realism. The idealism is expressed in the three propositions he sets as the foundation of the work: fairness at work is critical for de-

16. *Id.* at 143 n.179.

17. *Id.* at 174.

mocracy, labor rights are human rights, and workers' collective action is critical to the advancement of human rights. We find it again in his provocative argument that there is no such thing as "secondary" labor action. They are all primary if workers decide to take action against their own employer for aiding and abetting another employer out to destroy their brothers and sisters.

The realism is reflected in Jim's recognition that his propositions have not carried the day. He knows that they make for contested terrain, and that capital has clawed back a lot of territory from workers since passage of the NLRA and adoption of international human rights standards. Jim also wisely cautions that "we should resist assuming that global forces are the source of all of labor's plight" and that "[i]nternational labor solidarity activists should also be prepared for the possibility that . . . social clauses in future trade agreements . . . may not help all the workers that should be aided,"¹⁸ acknowledging that hundreds of millions of workers around the world subsist in informal sectors and agricultural sectors untouched by labor law.

Jim is also realistic about the obstacles to international labor solidarity. Despite globalization, workers and unions still tend to focus inward on their national labor frameworks. They often see counterparts as potential competitors for jobs. Jim gives a sobering account of the Canadian Auto Workers' breakaway from the United Auto Workers and the tensions and conflicts that arise even in what should be a natural framework for cross-border solidarity in a major industrial sector with the same multinational employers in two neighboring countries. If Canadian and American autoworkers cannot hold together to deal jointly with GM, Ford, and Chrysler, imagine the challenges facing workers and unions in other companies flung farther across the globe. At the same time, Jim gives us plenty of examples of workers and unions overcoming obstacles to mount effective international solidarity movements.¹⁹

18. *Id.* at 181.

19. Amid the idealism and realism and obstacles and advances, Jim maintains a sense of humor, too. Criticizing the Supreme Court's application of NLRA secondary boycott strictures to an action with no "primary" dispute (the dockers' 1979 work stoppage protesting the Soviet invasion of Afghanistan), Jim

What I see in Jim's recent international work is the same impression I took away from *Values and Assumptions*: the humanity at the core of his work, the controlled rage against injustice and abuse of power, and the closely-reasoned analysis and recommendations for righting the balance of power to vindicate workers' humanity and the rights that go with it.

"Bring me my chariot of fire," said William Blake, voicing his rage against the wrongs of "these dark satanic mills." In *Values and Assumptions* and *Neptune Jade* and in all his work before, since, and still to come. Jim has brought us his chariot of fire for the struggle for social justice in the workplace.

"I will not cease from mental fight" until justice is won, Blake added. I think I've said half a dozen times here that Jim "doesn't stop" here or there; he keeps on moving in both an intellectual and a practical fight for justice. His idealism and realism come together in an optimistic conclusion that "labor law has often changed when workers have asserted rights they believed they possessed, and pressure often alters prevailing understandings."²⁰

ends dryly, "Students in labor law classes begin to despair at this point, assuming it has not occurred earlier." *Id.* at 146.

20. *Id.* at 97.

