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Exploring Contemporary Labor Struggles: Responses to Labor Law from Old School to New School and the Frontier to the Border

Introduction

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The summer immediately preceding the fall 2023 symposium that convened the contributors to this issue has been dubbed another “hot labor summer.”¹ The term “hot labor summer,” is attributed to Chris Smalls, the Amazon Labor Union president, who perhaps best represents labor movement resurgence, especially during the pandemic. Smalls was already deploying the term “hot labor summer” in 2022 to

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¹ See, e.g., Helen Li, *Hot Labor Summer, By The Numbers*, LA TIMES (Sep. 1, 2023, 6:30 AM PDT), <https://www.latimes.com/california/newsletter/2023-09-01/hot-labor-summer-by-the-numbers-essential-california> [<https://perma.cc/V3S8-BK77>] (discussing the number of labor-related activities in the United States in the summer of 2023).

describe his tour around the country sharing his organizing experiences.²

Continuing what has been described both in mainstream media accounts and in the scholarly literature as a resurgence of the labor movement precipitated by the pandemic,³ all across the country in the summer of 2023, workers in a variety of industries, from hotel workers to autoworkers to actors to nurses and more, took a range of actions against their employers.⁴

Indeed, the symposium took place alongside the launching of a new Labor and Community Center at the UC Davis Law School, itself a major labor victory as labor-allied legislators alongside other labor advocates fought for and won a major allocation from the California state budget for the creation of labor centers across the University of California (“UC”) system, an unprecedented expansion of such centers.⁵ The UC system itself has been the site of major labor activity, with graduate students leading what was one of the largest higher education strikes in U.S. history.⁶

A primary objective of the symposium, and hence this issue, is to examine contemporary labor issues and how labor stakeholders have

² Wes Enzinna, *What Will Chris Smalls Do Next?*, N.Y. MAG.: INTELLIGENCER (July 18, 2022), <https://nymag.com/intelligencer/article/chris-smalls-amazon-profile.html>; <https://www.clevescene.com/news/amazon-union-prez-chris-smalls-electrifies-cleveland-crowd-on-hot-labor-summer-tour-39102371> [<https://perma.cc/5SAB-LHVN>].

³ JAMIE K. MCCALLUM, ESSENTIAL: HOW THE PANDEMIC TRANSFORMED THE LONG FIGHT FOR WORKER JUSTICE (2022); Abigail Abrams, *The Challenges Posed by COVID-19 Pushed Many Workers to Strike. Will the Labor Movement See Sustained Interest?*, TIME (Jan. 25, 2021, 12:46 PM EST), <https://time.com/5928528/frontline-workers-strikes-labor/> [<https://perma.cc/DV9T-DTKF>].

⁴ See *Labor Action Tracker*, CORNELL UNIV. SCH. OF INDUS. & LAB. RELS., <https://striketracker.ilr.cornell.edu/> (last visited Apr. 22, 2024) [<https://perma.cc/6T9C-7V86>] for updated labor actions.

⁵ UCLA Labor Ctr., *Historic Labor Center Expansion Begins Across UC Campuses*, UCLA INST. FOR RSCH. ON LAB. & EMP. (Mar. 21, 2023), <https://irle.ucla.edu/2023/03/21/historic-labor-center-expansion-begins-across-uc-campuses/> [<https://perma.cc/X65Y-8XQY>].

⁶ Mikhail Zinshteyn, *Six Takeaways for Californians after the UC Graduate Student Worker Strike*, CALMATTERS (Jan. 6, 2023), <https://calmatters.org/education/higher-education/2023/01/six-takeaways-for-californians-after-the-uc-graduate-student-worker-strike/> [<https://perma.cc/LNP3-Y59U>].

responded to these issues in both traditional and innovative ways. Specifically, this issue examines the role of law in shaping the composition of the workforce, conditions of work, and the degree to which workers can (and do) contest unfair labor practices through legal means.

When it comes to the composition of the American workforce, numerous factors have always been at play. As a racial capitalist system, the U.S. economy has always been shaped by deeply racialized divisions between capital and workers and among workers themselves; divisions actively fomented by capital and reinforced by the state.⁷ The United States is a white settler colonial state and U.S. capital is, in the main, white. Workers, meanwhile, have been both white and non-white, yet racialized and ethnic divisions between workers undermine labor solidarity, and this solidarity is further undermined by divisions between workers on the basis of immigrant and “native” status, legal and undocumented status, and other kinds of social divisions. As Leticia Saucedo and Andrea Senteno demonstrate, moreover, even the categories of adult and child are exploited by capital.⁸ Despite the ways child labor has been ostensibly illegalized, it has and continues to be a feature of American workplaces. At issue, however, is when child labor becomes an issue. In the main, why child labor becomes a moral issue around which advocates mobilize has been deeply racialized over the course of American history. Child labor, when performed by enslaved Africans, did not elicit moral outrage; child labor performed by white children, however, became a means by which white racial solidarity was solidified post-reconstruction. More recent campaigns and public discourse around child labor have either demonized wayward parents or nefarious third parties, shifting critiques of child labor away from employers who are ultimately responsible for exploiting child labor. The obscuring of employer responsibility is a consistent feature of anti-child labor campaigns.

When it comes to conditions of work, various processes at the global, national, state, and local levels need to be considered. The dominance of neoliberalism globally — in addition to the particularities of the

⁷ See Jodi Melamed, *Racial Capitalism*, 1 CRITICAL ETHNIC STUD. 76 (2015).

⁸ See Leticia M. Saucedo & Andrea Senteno, *Children, Labor, and Child Labor*, 57 UC DAVIS L. REV. 2967 (2024).

United States as a racial capitalist state — shape work conditions in this country. The COVID-19 crisis exposed the anti-labor, pro-capital logics that have always been at the core of neoliberalism.⁹ Indeed, these are the very logics which more and more workers, like the likes of Chris Smalls, began to organize against at the pandemic’s height. Nevertheless, employers continue to find ways to discipline labor. Non-compete clauses are one means by which workers are disciplined. As Eushrah Hossain, Valencia Scott, and Joshua Rosenthal write, “Workers who are bound by noncompete agreements are less likely to report employer violations of local, state, and federal law because of the fear that they may lose their jobs and be restricted from finding a new one.”¹⁰ When it comes to domestic workers — including care workers like childcare providers and elder care workers who were indispensable during the pandemic — the divisions between “public” and “private” have long been the means by which their exploitation is effected. Domestic workers, whose worksites are the homes of their employers, have been exempt from different labor protections like the Fair Labor Standards Act (“FLSA”) — a feature of racial capitalism. As César F. Rosado Marzán states,

It excluded domestic workers from those laws to preserve the New Deal coalition, including its Southern Dixiecrat bloc, which wanted Jim Crow conserved. Black domestic and agricultural workers formed part of the backbone of the Jim Crow economy, and the Dixiecrats would not support the New Deal if it threatened that system.¹¹

Finally, one workplace struggle that many workers are subject to, but which may not be directly connected to their employers, is workplace violence. The extent to which existing authorities and policies, namely

⁹ David Harvey, *Anti-Capitalist Politics in the Time of COVID-19*, JACOBIN (Mar. 20, 2020), <https://jacobin.com/2020/03/david-harvey-coronavirus-political-economy-disruptions> [<https://perma.cc/YH5F-62YC>].

¹⁰ Eushrah Hossain, Valencia Scott & Joshua Rosenthal, *Unconventional Tools for States and Cities to Build Worker Power: A Case Study on Noncompete Agreements*, 57 UC DAVIS L. REV. 3063, 3070 (2024).

¹¹ César F. Rosado Marzán, *Personal and Political: How the Illinois Domestic Workers’ Bill of Rights Connected Lives*, 57 UC DAVIS L. REV. 3033, 3046 (2024).

the Occupational Safety and Health Administration (“OSHA”) and the workers’ compensation system, provide workers exposed to violence sufficient remedies is the focus of Victoria Morales-O’Connor and Shayak Sarkar’s contribution.¹²

It should be noted that among the ways that employers assert their power over workers is in the ways they attempt to obscure the definitions of who is an employer, who is a worker, and what is a workplace. It is because the home as a private space has been exempt from the application of labor laws that domestic workers have been denied rights; it is also because public discourse focuses on parents or third parties that employers avoid being penalized for their role in exploited child laborers.

Despite the myriad of challenges workers face, there are various legal mechanisms by which government authorities can protect workers or by which workers can assert their rights. Hossain, Scott, and Rosenthal, for example, offer the strategies by which state or local authorities can play a role in protecting workers including 1) enforcing the Federal Trade Commission’s (“FTC”) proposed rule that would ban non-compete agreements,¹³ 2) going after employers for imposing “unfair and[/or] deceptive acts and practices” (“UDAPs”) for their inclusion of non-compete clauses in employment contracts or 3) going after employers should a non-compete clause appear to be a form of worker retaliation.¹⁴ Morales-O’Connor and Sarkar, meanwhile, suggest that beyond OSHA and the workers’ compensation system, there are possibly other legal remedies that workers can pursue when they are threatened with and are victims of workplace violence including common law tort and collective bargaining agreements. Marzán describes how domestic workers successfully organized for the passage of state legislation that offered protections that did not already exist. Though the legislation was limited in many ways, it nevertheless represented an important

¹² See Victoria Morales-O’Connor & Shayak Sarkar, *Addressing Workplace Violence: From Collective Bargaining to Constitutional Forfeitures*, 57 UC DAVIS L. REV. 2941 (2024).

¹³ Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition> [<https://perma.cc/J2KZ-S7K4>].

¹⁴ Hossain et al., *supra* note 10, at 3063.

victory for domestic workers in the case study of the Illinois Domestic Workers' Bill of Rights Marzán conducted. Marzán as well as Saucedo and Senteno highlight the power of narratives and storytelling when it comes to law-making.

Finally, this issue offers a powerful historical essay from Catherine Fisk that examines how an especially repressive anti-labor law, the Smith Law, served to “weaken multiracial labor organizing by inflicting hardships on both union leaders and union lawyers,” in the 1940s and 1950s.¹⁵ Fisk’s piece is an important cautionary tale that the likely readership of this journal — future and current lawyers — must seriously contemplate in the current moment, especially as the prospect of another Trump presidency may be a very real possibility. Lessons from the period of the Smith Act — particularly the active role of the U.S. Department of Justice in prosecuting radical labor leaders — are vital for the future of unionism.

¹⁵ Catherine L. Fisk, *The Fire Last Time*, 57 UC DAVIS L. REV. 2997, 3001 (2024).