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***Review Essay: Marginal Workers: How Legal
Fault Lines Divide Workers and Leave Them
without Protection, by Ruben J. Garcia***

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The paper can be downloaded free of charge from SSRN at:

To try to capture Dayan's rich analysis in a crisp summary is, however, to do her project an injustice. Over the course of seven chapters, she ranges broadly across centuries and texts (juxtaposing Maitland, Blackstone, and Locke with stories of vodou and zombies, autobiographical narrative, Melville novels, NGO reports, and dog law) in a distinctive narrative voice, one that infuses remarkable and incisive rhetorical analyses of legal opinions with historical and anthropological coloration, no doubt emerging from her prior work on Caribbean literature, religion, and history. In form, the book is non-linear, allusive, less interested in causality than resonance. It might productively have defined some of its key terms more clearly, particularly the idea of ritual; and those interested in legal history may wish for more particularity and care with the use of historical sources. While some readers accustomed to sharp writerly outlines may find her approach elusive, it is Dayan's stated desire to walk the reader through the landscape of a world "without demarcations such as those between past and present, primitive and civilized" (p. xiii) in order to inhabit her central claim: that reason and unreason conjoin in modern law. The interleaving of her sources gives the book real analytic purchase both because of the originality of their juxtapositions and the trenchant analyses Dayan offers to persuade us of their conceptual interconnections. Again and again she asks: when or who or what does law render less than fully human? In what contexts and with what effects? In revealing law's unvarying answers to those questions, and in making legal reasoning "blooded and vital" (p. xvii), Dayan reveals legal judgment to be a matter of sorcery, not logic. Conjuring for its readers that endlessly persistent and maleficent power, *The Law is a White Dog* makes a moral case that demands reckoning.

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Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them without Protection. By Ruben J. Garcia. New York: New York University Press, 2012. 195 pp. \$45.00 cloth.

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Marginal Workers by Ruben J. Garcia conveys a strong sense of empathic engagement with those workers most vulnerable to

employer exploitation in the United States: racial minorities, women, noncitizens, and others in the expanding low-wage sector. One also feels Garcia's deep-seated frustration with both the legal rules that have methodically weakened organized labor for the last half-century and the initiatives championed by unions to reverse that dynamic. Garcia makes a sustained plea for the incorporation of new sources of law—constitutional and international—in advocacy efforts for vulnerable workers in the United States. More ambitiously, he argues for a “paradigm shift” (p. 20) toward “a new global understanding of worker protection” (p. 115).

Garcia persuasively argues that the National Labor Relations Act and the employment law regime—including discrimination and wage and hour laws—have failed vulnerable workers. This critique of American labor and employment law is familiar. Garcia extends the critical analysis by carefully examining the implications of key Supreme Court precedents, including *NLRB v. Hoffman Plastics* (2002), *Emporium Capwell v. W.A.C.O.* (1975), and *Espinoza v. Farah Manufacturing* (1973). In each of these cases, workers were made invisible to courts because they had fallen into the space between incongruously overlaid legal regimes. Garcia's focus on the workers in these cases—especially their race and immigration status—is an important addition to the critical canon. It is not surprising but it is worth acknowledging that labor and employment law continues to fail a growing class of low-wage workers marked by subordination along multiple dimensions.

Garcia pivots from the individual stories to the larger problem caused by these cases within the labor movement over time: workers are divided along lines of race and immigration status and continue to lose bargaining power vis-à-vis their employers. *Marginal Workers* aims to set forth a coherent legal framework to serve as a floor for working conditions in the United States. Garcia argues that principles derived from the U.S. Constitution (specifically, the First Amendment freedoms of speech and association and the Thirteenth Amendment proscription against involuntary servitude) and international human rights law (especially the conventions of the International Labor Organization) can provide a “default canon” (p. 11) in favor of workers' rights, especially when statutes are in conflict. Garcia's ideas on the use of constitutional principles to advance workers' rights are interesting and build on bodies of scholarship focused on the First and Thirteenth Amendments. He helpfully jumpstarts those conversations on behalf of workers, as the relative bleakness facing organized labor threatens to snuff out longer term efforts to reshape constitutional interpretation. If the American right can successfully narrow the Commerce Clause and broaden application of the Second Amendment,

then it behooves those studying the crisis of labor to think expansively as well.

A smaller group of scholars, litigators, and activists have considered the use of human rights law to benefit American workers. Garcia is most emphatic in arguing for court decisions incorporating human rights principles and “changed attitudes” (p. 10) toward international standards among agency personnel. His ardor is rooted in an analysis of the battle in the United States between market fundamentalism and the right of workers to join unions. Garcia believes that workers have access to an international legal framework that favors their position over that of their bosses. The effort to “bring human rights home” to the United States, advanced by organizations such as the National Economic & Social Rights Initiative (NESRI), is laudable. NESRI works closely with the Coalition of Immokalee Workers on its “Fair Food” campaign to pressure retailers and restaurants to improve conditions of work for frontline workers in the industry, along the lines suggested by Garcia. Human Rights Watch (HRW) has trained its powerful spotlight on various American institutions in the last decade with some improvement in compliance with minimal standards of conduct.

Putting aside postcolonial critiques of human rights ideology that is advanced by U.S. institutions abroad, it seems clear that American scholars, litigators, and activists are obliged to innovate and unearth new tactics and strategies in the effort to counterbalance the power of transnational capital. However, Garcia’s call for the elevation of human rights rhetoric in worker struggles invites caution. Although there are points in *Marginal Workers* at which Garcia embraces “tactical pluralism” and puts international legal frameworks on equal footing with other sources of law, there are other points in the narrative when he implies more of a zero-sum relationship. For example, Garcia believes that “the language of human rights can . . . provide a transcendent basis for labor rights” (p. 53). He repeatedly argues for organized labor to “chang[e] the conversation” from domestic legislative campaigns to global labor rights (p. 58). Garcia’s background as a labor law litigator and the range of his scholarship indicate that he is a thoughtful and pragmatic practitioner and researcher. It may well be that the emphatic statements in *Marginal Workers* in support of a human rights approach to U.S. workers’ rights are meant to disrupt the inertia of movement advocacy strategy. However, for any reader who might take these statements at face value, a zero-sum approach creates two dangers: First, it may lead one to overestimate the efficacy of human rights ideology in domestic struggles. Exploitative employers may or may not care that there is an international legal framework that favors workers. Large employers such as Wal-Mart are

likely to attempt to alter those legal norms rather than improving conditions of work or allowing workers to organize as a union. Second, the presumption that there may be a “silver bullet” solution to the crisis of labor may lead scholars and activists to focus excessively on the content of legal rules and rhetorical approaches rather than the mechanics of resistance and disobedience.

Legal norms have the potential to (1) order relations between employers and workers *ex ante* through deterrence effects and *ex post* through enforcement; (2) facilitate worker mobilization, either directly by shielding participants in workplace organizing or indirectly by framing a workplace dispute as one involving legal violations; and (3) structure radical democratic organizations and alternative forms of economic production and exchange, such as cooperatives, worker buyouts, and bartering systems. Large employers in the United States have successfully ignored deterrence effects and avoided enforcement by a systematically weakened state. As a result, labor and employment scholars must grapple with the following kinds of questions:

What is the extent of mobilization potential for any given rule or norm?

What are the distinctive features of legal norms that facilitate mobilization?

Is there a legal framework available to harbor nascent and emerging organizing efforts?

Is there a legal framework available to structure institutions created through worker organizing?

Garcia is correct to suggest that international legal frameworks may offer answers for these questions. However, any success for vulnerable workers in the United States will be a consequence of resistance and disobedience strategies that spread vertically within supply chains and horizontally across geographies, including national borders. These successful movements will adaptively and nimbly draw on domestic and international sources of law, as well as appeals to morality and ethics. *Marginal Workers* is an essential call for the American labor movement to embrace varied solidarity strategies and to broaden the narrative in favor of workers' rights. This work of engaged scholarship should be disseminated widely and read carefully by workers, activists, lawyers, and scholars in all corners of the country.

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