

Law and the Collective Struggle for Economic Justice

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Current Condition: “Two Americas”

- Polarized economically, socially, politically
- Middle class hollowed out
- Financial insecurity widespread--The Great Risk Shift [Jacob Hacker]→
Safety net shrinking, individuals and families bearing risks once borne by government & employers
- Declining economic mobility, opportunity
- Democracy in Chains [Nancy MacLean]
- Current condition is the result of deliberate policy choices; economic inequality reinforces political disenfranchisement

“The Great Exception” [Jefferson Cowie]

- Era of liberalism from Roosevelt to Kennedy & New Deal policies the exception; current condition the norm, historically
- Crisis of Depression and World War II forced dramatic realignments of American politics and class relations
- Cessation of hostilities was temporary
- Then—as now—condition was a result of deliberate policy choices, many codified in law

What to do about it?

- Stiglitz: mass mobilization, coalitions of workers and social movements, popular rebellion
- Stiglitz is right, historically: this is what generated New Deal (mass strikes, labor uprisings, a kind of civil war)
- But need legal frame to protect group action; law communicates, reinforces moral values
- One of the most significant policy choices in New Deal was Labor Law that embraced unionism and collective bargaining as a route to prosperity and redistribution of income

Correlation between Labor Union Decline and Rise of Two Americas

- Over time, labor law was systematically converted from a lever designed to equalize power and distribute productivity gains to a tool for corporate control
- Decline in unionization between 1973 and 2007 explains one-fifth to one-third of the growth in income inequality [Bruce Western & Jake Rosenfeld]
- Studies link decline in union density, power and influence with rise of share of rents that corporations receive vis-à-vis their workers

Should Labor Law be Reformed and Unionism Revived?

- Answer is complex; Need to understand first what we had in New Deal, gains we achieved, gaps that remained, policy choices that led to union decline.
- Challenge is not just decline of unionism, but hostility of law to collective action more generally, in any form
- Rise of individualism, free choice rhetoric, a fundamental part of the problem
- Has been translated into constitutional doctrine through the weaponization of the First Amendment

The Original Goals of Labor Law: the Wagner Act of 1935

- Protected right of workers to organize and use economic pressure—strike, picket, boycott—to leverage power at the bargaining
- Collective bargaining would institutionalize gains in labor contracts
- Enhancing workers' purchasing power was designed to stimulate consumer demand and lift the country out of the Great Depression
- Labor law had three goals:
 - (1) promote industrial peace by channeling labor strife into therapeutic bargaining,
 - (2) create countervailing force to balance power of capital-owners, and
 - (3) create system of workplace governance tailored to each workplace that would enhance democracy in the larger political arena by habituating workers to the practice of democracy in their daily lives and harnessing unions as collective voice for workers in the political realm

Law succeeded in accomplishing its goals

- By 1950s, union density in private sector extended to more than one-third of eligible population, with least educated workers major driver for union growth
- Strikes dramatically diminished; no-strike agreements standard terms in labor contracts
- Unions built the middle class
- Union wage premium: 20% more than nonunion workers in similar jobs
- Erected safety net and normalized valuable benefits: employer-provided health insurance, disability insurance, pensions/retirement plans, paid vacation, sick leave
- Established norms for “good jobs” that created economic opportunity—protections for job security (discharge only for just cause); progressive disciplinary systems; seniority systems; internal job ladders; apprenticeship training programs; informal, speedy resolution of workplace disputes through arbitration paid for jointly by employer and union under negotiated rules

Benefits extended to NonUnion workforce

- Union “threat effect” —NonUnion employers raised wages and instituted benefits to disincentivize unionization
- Spillover effects—By increasing wage and benefit floors, unions spread the gains to middle managers in a ripple effect; employers found it necessary to maintain the wage differentials between positions
- Unions lobbied for employment legislation protecting all workers, (higher minimum wage, overtime protections, health and safety laws, workers comp., plant closing legislation, antidiscrimination law, family and medical leave)
- Union lawyers litigated to ensure that protections were not rolled back by judiciary
- Unions served as watchdogs and enforcers for statutory rights, filling the gap where administrative agencies were underfunded

Union Success Sowed the Seeds of Union Demise

- Conservative forces rallied to enact amendments to Wagner Act in 1947 and 1959
- Amendments shrunk coverage, excluding supervisors; dramatically constrained labor's economic weapons (picketing, secondary boycotts), attacked union funding (authorized state right to work laws)
- Network of statutory protections for individual rights equipped employers with powerful anti-union marketing tool
- Rise of rhetoric of individualism, free choice, privileged exit over voice

Union Decline

- Dramatic decline between 1950s and 1980s: membership rate dropped from 35% to 20% in 1983; 11% today
- Decline in private sector was worse; growth in public sector unionism as states enacted public sector bargaining laws camouflaged it. Private sector now at 6.5%.
- Erosion of worker bargaining power caused reduction in wages and benefits and sustained pattern of risk-shifting at bargaining table, which spilled over to nonunion sector.
- Unions' declining power translated into losses in political realm at local, state and national levels; appointment of conservative judiciary and administrative bodies (NLRB) hostile to labor's agenda further diminished legal protections

Hostility to Unionism Intensified

- Conservative politicians attacked public sector bargaining laws, beginning in the birthplace of public sector rights, Wisconsin
- Attack takes hold in heartland, once a union stronghold (Ohio, Indiana, Illinois)
- Right to Work legislation gains traction in deindustrialized union strongholds (Michigan, Indiana, West Virginia)
- Legislative gridlock at federal level and federal preemption doctrine rendered labor laws obsolete, unable to adapt to changes in labor market—labor law “ossified”
- Employers harnessed First Amendment to protect and advance right to conduct powerful anti-union campaigns

A New Low: Janus v. AFSCME Council 31

- June 2018: Court rules that “fair share” or “agency fee” arrangements designed to fund public sector unions’ collective bargaining and contract administration costs incurred on behalf of non-union-members covered by the contract are unconstitutional, violating First Amendment speech and associational rights of non-members
- Effect: in combination with majority rule/exclusivity doctrine (once elected, unions bargain for and represent entire bargaining unit, not just those who choose union membership), requires public sector unions to continue to represent free-riders
- Expected to decimate public sector union membership rolls as workers make rational choice not to pay dues
- Impact on union coffers severe; cases already pending requiring unions to refund fees collected under non-unconstitutional doctrine
- Conservative forces benefit from reduced support to Democratic Party—public sector unions were major contributor

Unions Contributed to Their Demise with Mixed Record on Race, Gender, Immigration

- Well-known history of racism, sexism and nativism— unions viewed people of color, women and immigrants as competitive threat
- Employers used these groups to divide workers against one another
- Unions were slow to penetrate service sector, where women, people of color and immigrants predominated
- Empirical study of union organizers in late 1980s—rhetoric about need to organize women, but gender considered irrelevant in organizing campaigns (sexual harassment, family leave, pay equity dubbed “luxury topics”)
- Rise of identity politics in 1980s and 1990s created clashes with traditional class politics of unions

Rise of Individual Rights, Free Choice Rhetoric

- Law embraced a powerful rhetoric of individual freedom and choice
- Freedom of contract from Lochner era revived
- Legitimated employment at will; enforced covenants not to compete
- Eviscerated statutory employment law protections by enforcing predispute waivers of right to bring individual statutory claims in court in exchange for arbitration regime created, funded and controlled by employer (Gilmer v. Interstate/Johnson Lane Corp. , 1991)
- Doctrine ignores the power disparities between employers and individual workers; leaves intact illusion of rights but undermines enforcement

Judicial Resistance to Collective Action in Any Form

- Conservative judiciary generates legal doctrine that favors employers and cabins other forms of group action, beyond organized labor context
- E.g. *Walmart v. Dukes* (2011)—imposed high legal bar to class actions under antidiscrimination law, requiring proof of single companywide policy resulting in systematic failure to promote women into management; actions by individual managers made possible by corporate policy that allowed local supervisors wide discretion over employment decisions not sufficient
- *Epic Systems v. Lewis* (2018)- upholds employer ability to require workers as a condition of employment to waive right to bring employment-related class claims in court or arbitration

What to Do about it?

- Impulse toward collective action is strong; humans are social animals
- Potential for change through mass mobilization is real
- Illustrations: Civil Rights Movement; #MeToo; #BlackLivesMatter
- “Alt-Labor” groups like Fight for \$15, Workers’ Centers, National Domestic Workers’ Alliance, Freelancers’ Union, NY Taxi Workers Alliance have capitalized on their outsider status to win protections at local and state levels
- Change won’t happen through labor law, has become a tool for corporate control (Lane Kirkland, Rich Trumka denounced it in the 1980s)
- Response of conservative forces to new movements has been to derail them by trying to pull them under NLRA umbrella, define them as “labor organizations”

Legal Protection is Neither Necessary, nor Sufficient

- Public sector teachers' strikes in spring 2018 demonstrate power of mass mobilization even where law does not support it-- #RedforEd movement
- Began in WV—teachers mobilized workers in all 55 counties of very diverse state despite absence of public sector bargaining statute and state law prohibiting public employee strikes
- Garnered widespread public support and shut down schools state-wide; achieved 5% raise and shored up state's public health insurance system.
- Why did it succeed? Teachers framed their struggle as moral crusade, aligned themselves with public interest in educating children as citizens; Strike was overtly political, presented as demand for democracy in form of investment in public education (connected strikers' demands with democracy and public interest)

Grassroots mobilization

- Bottom-up, not centrally controlled war machine
- Used picketing, rallies, streamed them; social media
- WV Education Association represented them, but strike turned wildcat when teachers did not trust tentative deal between Governor and WVEA
- Activists said demand for increased wages and solvent health insurance system was “almost a distraction” from the fundamental political demand for investment in public education of state’s citizens
- #RedforEd– strikes and other group actions spread to Oklahoma, Arizona, Kentucky, Colorado and even North Carolina

The Role of Law

- Law can't confer power, but it can embody cultural values and provide a crucible around which social justice movements can and have mobilized
- E.g., Equal Rights Clause--feminists (voting rights, sexual harassment law, abortion rights); civil rights activists (Jim Crow laws, civil rights statutes); gay and lesbian rights movement (right to marry; civil rights protections)
- So far, movements for income redistribution have not found that frame—e.g., Occupy, Fight for \$15
- Need legal frame that will support institutional structures that can tell stories that move hearts and minds and inspire public support; and frame must be unapologetically collective, not individualistic

First Amendment Free Speech Rights are Not the Answer

- Organized labor has looked largely to the First Amendment right of free speech, or its implied cousin, freedom of association
- Free speech right has become a sword for the powerful, “weaponized” by conservatives (Janus, Justice Kagan)—building on arguments by liberals, conservatives have used First Amendment to justify unlimited campaign spending, discrimination against gay couples, and attacks on regulation of tobacco, pharmaceuticals and guns
- Free speech right is fundamentally individual (see Janus) and right of free association is derived from it, supports it

A Better Frame: First Amendment Right of Assembly

- Explicitly protected by First Amendment (unlike free association)
- Inherently group-focused
- Was historically used to strike down legislation limiting labor protest, including pickets
- Has been used to counter enforcement of criminal “mass assembly” convictions in Black Lives Matter context
- Could be used to deconstruct labor law restrictions on pickets, boycotts, strikes; could take down majority rule/exclusivity and ground a new regime
- Could be used to counter rulings like Epic Systems—group litigation and group arbitration are forms of virtual assemblies
- Explicitly aligns workers’ interest with public interest in protecting group action to shore up American democracy

Assembly Rights not a Panacea

- Legal rights are always susceptible to efforts to derail, limit
- Still need groups to mobilize, with stable funding source
- Labor unions should be one of those groups, but not the only one
- Need to partner with other social movements, and Assembly Rights provide a stronger frame for that, protection

Conclusion

- Dramatic rise of income inequality and polarization pose a threat to our democracy and demand a strong response
- If the people do not have the power to compel ruling elites to bargain with them over matters directly affecting their lives, what does democracy mean?
- Many legal advances once thought impossible occurred in the wake of unforeseen events that catalyzed change.
- We need to look beyond labor law for new strategies, new tools
- “The master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those . . . who still define the master’s house as their only source of support.” [Audre Lorde]