Legal Theory and Workers’ Rights: A Historian’s Critique

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As a historian, not a legal scholar, jurist or analyst, I found both papers intriguing and enlightening. They establish the salience of New Deal and post-New Deal labor law, especially as interpreted and implemented by judges, for trade unions and also for individual workers. Both papers also reflect recent work by Ralph Miliband, Nikos Poulantzas and others on the theory of the capitalist state, the institution most essential in the contemporary era to the reproduction of the existing system of social and economic relations.1 As Miliband notes, “More than ever before men now live in the shadow of the state. . . . It is for the state’s attention, or for its control, that men compete; and it is against the state that beat the waves of social conflict.”2

In the Miliband-Poulantzas model, the state serves neither as a neutral agent nor as a simple instrument of a dominant ruling class, i.e., the capitalist class. Rather the state is a battleground on which contending classes or conflicting forces struggle for ascendency. State policy emerges as the result of the balance of power between or among contending classes. That is not to say state action fails to affect the balance of power. Indeed, the primary theme of the papers by Klare and Lynd is precisely how federal labor law, an obvious aspect of state policy, affected the balance of power between capital and labor from the New Deal to the present.

As Klare and Lynd establish, labor law strengthened the position of employers (capital) and also trade unions (formal institutions) at the expense of rank and file workers. This was accomplished in four ways. First, federal law from Section 7(a) of the National Industrial Recovery Act3 through the Wagner Act4 and subsequent NLRB rulings and dis-

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2. MILIBAND, supra note 1, at 1.
strict and Supreme Court decisions institutionalized trade unionism and collective bargaining. Statutory law and its judicial interpretation rendered the trade union and the labor-management contract as the only sanctioned defenses for workers. Second, a series of NLRB rulings and court decisions diluted the right to strike. The Supreme Court reinterpreted the Norris-LaGuardia Act to allow injunctions against strikes in violation of contract or even against wildcat strikes, absent binding no-strike agreements. Third, formal union-management grievance procedures and, ultimately, binding arbitration were the only ways administrative and judicial rulings sanctioned to deal with workers' job-related, shop-floor complaints. This too served to outlaw traditional forms of "direct action" such as the slow-down, the institutionalization of informal work rules and the quickie strike as well as the conventional strike. Fourth, and finally, federal labor law stressed the worker's rights as collective and institutional, not individual and natural. Hence labor law according to Klare and Lynd, immobilized trade unionism as a militant force and deradicalized the labor movement. In some instances, it also exposed workers to exploitation by avaricious employers and autocratic union leaders.

To be sure, I am sympathetic with this analysis of labor law's impact in the United States, especially since the 1930s. Yet I remain somewhat suspicious of Klare and Lynd's analysis as well as some of their conclusions. It seems to me, as a historian of American workers and their labor movement, that much of substance and vital importance has been omitted.

One should not look to members of the federal judiciary or such legal scholars as Archibald Cox and David Feller to enunciate explicitly or manifestly anticapitalist legal and administrative doctrines. The fundamental aim of those legal thinkers was always to humanize or discipline capitalism, to transform the anarchy of the marketplace, which exploited workers, into the harmony of a "modern" cooperative capitalism, which protected workers.

Furthermore, it is important to bear in mind the historical background for what Irving Bernstein called the New Deal "revolution" in labor law. Once upon a time, back in the "New Era" of flappers, bath-

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7. Id.
tub gin and Model Ts, industrial harmony was to have been accomplished through a benevolent capitalism. The “new order” of the 1920s offered workers employee representation plans, company-initiated grievance procedures, pensions, fringe benefits, and most important, relatively steady employment. Unions were perceived as unnecessary and also harmful. And the new order seemed to work, at least until the coming of the Great Depression. Then it was realized that unions might be necessary to the stabilization of modern cooperative capitalism, and so during the New Deal the “ruling class” came to terms with organized labor as a vital partner in the American system.

There is much truth in such a version of what occurred during the 1930s. But again also much is missing. If New Deal law and its subsequent implementation did what Klare and Lynd assert it did, one must ask why unions and workers did not rebel against the new system of industrial relations. But as Klare and Lynd tell us, labor had no reason to rebel, for New Deal statutes and rulings strengthened and stabilized unions. The law, so it is argued, secured unions from employer counterattacks as well as from rank and file insurgencies. It is with this line of analysis or interpretation that I am most uncomfortable.

My discomfort derives largely from the absence of real material forces or power balances in the analysis. The evolution of the law must be seen in light of shifts in the political balance of power and ebbs and flows in the labor movement, aspects of history which these papers neglect owing to their necessarily narrow focus on the law itself. I realize quite well that the law cannot simply be reduced to a function of the balance of material forces in the economic and political arenas, nor viewed solely as a personification of ruling-class beliefs. The law indeed has an existence of its own. Nevertheless, the evolution of the law must be seen in relation to fundamental changes in other arenas of life and struggle. Seen in isolation, as sometimes appears the case in these two papers, labor law makes little sense.

We hear much about post-New Deal labor law as the institutionalizer of collective bargaining and the solvent of class conflict. Yet in the 1920s, when law was most hostile to labor, class conflict, at least as revealed in the statistics of strikes and violence, seemed absent. Only after the passage of New Deal pro-labor legislation did strikes and incidents of violence increase and intensify, a reality which Lynd acknowledges. This was true not only in 1933-34 and 1936-37, before the Supreme Court legitimated the Wagner Act, but especially in 1940-41, 1943 and 1945-46, when unions and their members struck despite the institutionalization of collective bargaining and a world war.10 Strike

levels in the United States have never returned to the low level of 1923-
1932, before the enactment of New Deal labor legislation.\textsuperscript{11}

True, few, if any, of the individual strikes or strike waves which
have occurred repeatedly since 1933 have had revolutionary implica-
tions. Yet one of the purposes of New Deal labor legislation, as stated
in the preamble to the Wagner Act, and subsequent laws, judicial rul-
ings and NLRB decisions, as shown by Lynd and Klare, was to elimi-
nate the compulsion for workers to strike. In reality, quite the reverse
happened. The number of strikes rose steadily after 1936 and re-
mained at historically quite high levels in the 1960s and 1970s. More-
over, there is no solid evidence to prove that the more numerous post-
New Deal strikes were less militant or radical than the less frequent
ones which preceded them.

I am further troubled by Klare and Lynd's suggestion that trade
unions and labor law are repressive instruments for workers. Accord-
ing to Klare, collective bargaining law leads employees to participate in
their own subjugation, transmuting the union contract from a gain,
wrested collectively by workers from capital, to a sophisticated mana-
gerial response to shop-floor discontent.\textsuperscript{12} And in Lynd's original for-
mulation we see the establishment of a form of industrial government
in which workers have few if any rights.\textsuperscript{13}

But one, of course, must ask, what rights did workers have before
New Deal law, stable unionism and labor contracts? The answer is,
precious few! New Deal reforms and their subsequent interpretation
and implementation did not produce utopia for American workers, but
they surely did not strip those workers of rights or freedoms once held.
Perhaps after World War II, labor laws as well as judicial and NLRB
rulings stripped New Deal labor law of its radical potential. Neverthe-
less, most workers today probably have more job rights than they had
in the past when the state was a less intrusive presence in industrial
relations.

I am struck by the formalism and individualism implicit in the two
papers. One gets the impression that unions, not employers, pose the
gravest threat to workers. This position flows logically from Klare's
view of contemporary unions as disciplinary agents for management
and especially from Lynd's initial emphasis on workers' individual and
natural rights. In particular, to stress individual and natural rights is to
lose sight of how workers best defend themselves in a capitalist setting.
I am delighted that Lynd, in his afterword, recognizes that even today
the union remains the worker's best defense against arbitrary manag-

\textsuperscript{11} Id.
\textsuperscript{12} Klare, supra note 8, at 458-61.
\textsuperscript{13} Lynd, supra note 6, at 490.
ers, and collective action a far more effective shield than individual or
natural rights.

Moreover, unions have to be understood as peculiarly contradic-
tory institutions. They are, as J.B.S. Hardman and A.J. Muste both
pointed out in the 1920s, simultaneously town meetings and military
formations. In one guise, unions are marked by rank and file participa-
tion where policy decisions are reached only after open democratic de-
bate. In the other guise, they are fighting machines struggling for
survival or victory through discipline, absolute loyalty to command
and unbroken solidarity. To stress workers' individual rights and to
romanticize the heroic rank and file compared to autocratic union lead-
ers is to threaten the survival of trade unionism. As David Montgom-
ery observed elsewhere, shop-floor militancy could not assume an open
form without unions and the availability of legal defenses. "To see the
role of unions in this setting as nothing more than disciplinary agents
for management . . . is a facile and dangerous form of myopia." 15

Both papers also exhibit confusion over what unions may bargain
about. Lynd contends that the Coxes, Fellers and Dunlops deny un-
ions the right to bargain over management's unilateral investment deci-
sions. That should occasion no surprise, for these authorities are all
pro-capitalist and not about to dilute the system's essence. But trade
unionists make no such theoretical concession. What they have and
will bargain about is determined by the prevailing power balance be-
tween labor and capital, not by rights or prerogatives that union bosses
totally concede to management. Management prerogatives remain a
constant arena of struggle, from the issue of plant closings to that of
capital investment, judicial rulings to the contrary notwithstanding.

By the same token, I find it hard to take seriously the charge that
state regulation is responsible for making the labor movement "overly
bureaucratized, politically unimaginative, and generally on the defen-
sive." 16 Again we need only to turn back to read what the dean of
American labor economists, George Barnett, said about AFL lead-
ership in 1932: "I see no reason to believe that American trade unionism
will so revolutionize itself within a short period as to be become in the
next decade a more potent social influence than it has been in the past
decade." 17 State regulation tamed labor only to the extent that it ren-
dered capitalism as a system more workable and productive. And the

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14. Hardman, The Stakes of Leadership and Muste, Factional Fights in Trade Unions, in
15. D. Montgomery, Workers' Control in America 156 (1979) (emphasis in the
original).
16. Klare, supra note 8, at 482.
17. Cited in Brody, The Expansion of the American Labor Movement: Institutional Sources of
same might be said about the deflection and demoralization of popular participation. Historically, at least, American workers proved no more militant and radical in the past in the absence of positive state legislation. Indeed, the enormous success of capitalism globally in the 1950s and 1960s tamed labor everywhere in the advanced industrial world, not just in the United States, and institutionalized unionism within the capitalist system.

What, then, may we say in conclusion about these two papers? First, they might have paid more attention to the contradictory nature of the law and its interpretation. Even if New Deal legislation may have been intended to confine and coopt the struggles of some militant workers (and that remains a debatable contention), it significantly aided and encouraged the self-organization of other less militant but more numerous groups of workers.

E.P. Thompson's discussion of the law in *Whigs and Hunters* is especially relevant to these papers. Perhaps we may agree with Thompson that "the law . . . may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation." But we might also agree with him that the "law mediated . . . class relations through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers." And the law, moreover, also served as "a genuine forum within which certain kinds of class conflict were fought out." These papers also remind me of the following cautionary note written by Thompson:

I am told that just beyond the horizon, new forms of working-class power are about to arise which, being founded upon egalitarian productive relations, will require no inhibition and can dispense with the negative restrictions of bourgeois legalism. A historian is unqualified to pronounce on such utopian projections. All that he knows is that he can bring in support of them no historical evidence whatsoever. His advice might be: watch this new power for a century or two before you cut your hedges down.22

With Thompson, I believe that the paradox or contradiction inherent in the law was "held in equipoise upon an ulterior equilibrium of class forces." That is, the interpretation and evolution of the law must be understood not in isolation but in closer relation to shifts in the balance of power between labor and capital and to the political forces contending for power within the state.

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19. Id. at 262.
20. Id. at 264.
21. Id. at 265.
22. Id. at 266.
23. Id. at 269.
Finally, one must ask what Lynd and especially Klare propose to set in place of the existing structure of federal labor law? Given the current distribution of political and economic power in the United States, would unleashing management as well as unions from legal restraints work to the advantage of labor or capital? In a society in which employers, at best, merely tolerate unions, in which many union members have only the shakiest allegiance to their organizations and in which an increasing proportion of the labor force is unorganized, does one serve the interest of workers by railing against trade-union bureaucracy and autocracy and demanding more rights for the individual worker against his union leaders? If that is really so, why, do most anti-labor employers and politicians speak the language of workers' individual rights and seek labor law reforms which would extend workers' individual "democratic" rights within the union? I do not have the answers to these questions. But today, more than ever, American workers and their labor movement need solidarity, a common front which will enable them to endure the onslaught of the Reagan administration and its corporate allies. How the labor movement can maintain solidarity, discipline and fighting strength without sacrificing rank and file initiative or internal union democracy remains problematic. History offers few clear answers but now, as always, we are partly free to make our own history.

24. D. Brody, Workers In Industrial America 171-214 (1980). In particular Brody demonstrates how the surrender of union rights was linked to the "diminution of managerial discretion." Id. at 203-05.