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Book Review: Rights v. Conspiracy: A Sociological Essay on the History of Labour Law in the United States

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Rights v. Conspiracy: A Sociological Essay on the History of Labour Law in the United States by Anthony Woodiwiss
New York, Oxford and Munich: Berg Publishers Limited: 1990.

Recent years have seen interest in the history of American labor law grow rapidly and dramatically. Historians have had a role to play both in stimulating and in sustaining this upsurge of interest, but from the first the new field of labor law history has been inhabited by scholars from an exceptionally wide disciplinary catchment area — political science, law, anthropology and sociology. Somewhat surprisingly, too, in view of its relative esotericism, the subject has proven strongly attractive to scholars outside North America.

Anthony Woodiwiss's book reflects and exemplifies the variety which marks the field. A lecturer in Sociology at the University of Essex, England, Woodiwiss here offers both an appraisal of some of the last decade's seminal attempts to historicise the study of American labor law, and his own particular theorisation of that history. The latter is developed and applied in the course of an account, based on reasonably wide secondary reading, of American labor's legal history since the Revolution. Laced with the terminology of post-Marxist social theory, Woodiwiss's effort will no doubt test the patience of some. It is nevertheless greatly to be welcomed and makes an important contribution to the development of explicit theorisation of the subject.

Woodiwiss sees debates about the historical significance of labor law polarised between a radical instrumentalist critique which condemns labor law as systematically and intentionally disadvantageous to labor, and a consensual liberal/conservative orthodoxy which defends the law as a source of labor rights. Choosing to navigate between these poles, Woodiwiss adopts the 'relative autonomy' formulation, which theorises law as independent of extralegal determination, or even 'fair', in its particular applications, but not in its social-structural role. The coherence of the relative autonomy position has come in for considerable criticism over the last few years. For Woodiwiss, its savior is Foucauldian discourse analysis: what is 'law' at any given moment is determined by the rules of formation of legal discourse, not by protagonists' responses to an exterior influence. Law's autonomy hence inheres in the particularities of legal discourse. If it is to enjoy social authority, however, legal discourse must remain consistent with 'the principles structuring the dominant or hegemonic discourses within the wider society' (11). Concern for consistency demonstrates law's continuing context-sensitivity, but as a discursive practice consistency is also the foundation upon which is built law's potent 'ideology-effect' of legitimation. The pursuit of consistency thus both demonstrates relativity and simultaneously reinforces law's claim to autonomy.

Woodiwiss describes American labor law as a succession of three identifiable discursive systems: conspiracy, government by injunction, and labour rights. In each case he describes the socio-economic context appropriate to each discursive system, the system itself in relation to the wider development of legal discourse, and the particular legal phenomena associated with it. In terms of law's consistency with wider hegemonic

discourses, these three systems illustrate (1) the appearance and growing influence of classical liberalism, (2) its apogee, and (3) its decline and replacement by the ideology of corporate liberalism.

Considered as an exercise in the writing of history there is not a lot here that is new. Woodiwiss's account of the chronology of the succession of his discursive systems is quite conventional and seems to me a bit casual — as usual *Commonwealth v Hunt* marks a point of transition from conspiracy to 'reluctant tolerance' prior to the emergence of government by injunction in the 1870s; Norris-LaGuardia marks the end of government by injunction and heralds a much shorter transition to the labour rights discourse of the NLRA period. His descriptions of the socio-economic contexts of each system are not only rather brief but also reveal some important gaps in secondary research: none of Forbath's important work on the Gilded Age, for example, features in his discussion of 'government by injunction'. The author offers little in the way of new substantive historical research.

Yet writing history, in the sense of engaging in discovery, is hardly Woodiwiss's goal here. Rather, his purpose is to uncover the theoretical relation of context, discursive system and particular legal acts in order to show how individual legal acts may exhibit a perfectly plausible autonomy while the systems of which they are constituent elements can only be understood through their close articulation with both legal discourse as a whole and with the dominant discourses and structures of the society at large. Indeed, 'the dependence of changes in the labour law of the United States on general discursive changes within the law *as well as* on general social-structural changes' (156, emphasis added) is one of the book's main themes.

Although concerned with the whole period since the Revolution, better than half the book is devoted to the origins and consequences of post-New Deal 'labour rights' discourse. One of Woodiwiss's concerns in this book is to criticise the revisionist theorisation of labor law associated with the Critical Legal Studies movement, and that goal comes through with particular clarity here. Departing from the expansive reading of labor rights discourse's potential urged by Karl Klare a decade ago, Woodiwiss dismisses Klare's vision of a Wagner Act pregnant with incipient radicalism as 'wonderful but barmy' (167). He finds the ambit of labor rights to be discursively restricted, a situation which became ever more obvious with the ongoing assimilation of labor law to the new ideology of corporate liberalism and its discourse of 'responsible unionism' in the postwar years.

Woodiwiss's cautionary reappraisal of Klare's influential article strikes me as important and insightful. Yet at the same time it illustrates what remains for me a major problem in his own theoretical approach. Klare's point, after all, was to deny that the Wagner Act was susceptible to only one particular reading, and thus, extrapolating, that 'legal discourse' has a single identifiable character or indeed that we can speak meaningfully of 'the law' as if it were inhabited by one specifiable meaning. Woodiwiss disavows this indeterminist approach. The cost of so doing, however, is to restrict the realm of legal phenomena that he is investigating to that which is officially or professionally defined as 'legal'. That is, the identity of the