LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT

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To my parents,
Thomas and Pauline Forbath

Preface

Like all historical scholarship, this work is a conversation with persons long gone—a conversation, in this case, about the development of American labor law and the American labor movement. It is also the product of conversations with persons present, many of whom I thank in the acknowledgments, both about American labor history and about the broader themes of law, politics, and society. Here I briefly describe that broader conversation, which has involved scholars in diverse disciplines over the past several years, for it reveals the theoretical issues that concerned me during the research and writing of this book. The description is here separated out, because, like most histories, the one that follows leaves many of its theoretical arguments implicit, woven into narrative. For some readers that style of argument will seem appropriate, but others will want a more explicit theoretical discussion.

My first concern lies in the question of how far the legal order has had an autonomous role in social and political development. A great many legal scholars and legal historians insist upon the lesson of Legal Realism: that law almost always plays a derivative role in human affairs. Given the prominence of law in American culture and society, this denial of its relatively independent power to shape social life is surprising. Some critics depict the denial as a flight by lawyers from responsibility for the substantial power they wield. Perhaps the denial springs, instead, from disillusionment regarding law's efficacy as a vehicle of reform.

Whatever may inspire it, however, the view of law as epiphenomenon shaped the reactions of my own law teachers to this historical project when it first occurred to me, almost a decade ago. They told me it was folly, and no doubt that had much to do with my deciding to pursue the subject. It was folly, they said, because the research would be terribly time-consuming (on that they were right), and because it simply would show that the notorious Lochner Era judiciary and the infamous labor injunction made no big difference in American labor history. The era's courts and judge-made law reflected more fundamental conflicts and developments. What happened would have happened, whatever the courts had done.

I was vexed; all the more so because, as I show in the text, my mentors' view proved also to be the prevailing one among labor historians. That cannot be because the historians have a stake in what may be a collective denial on the part of legal academics. Rather, I think, the denial partakes of broader currents of modern social thought, which have tended to see the realm of the social and economic as determining, and the realm of law and politics as derivative. Among historians and social and political scientists as with law professors, scholarship about law and society has emphasized the ways that the interests of social groups shape the law; it has slighted the ways that law shapes the very interests that play upon it.

Of late, this view of law as epiphenomenon or "superstructure" has been subject to a growing battery of criticisms, most insightfully, I think, by critical legal scholars like Robert Gordon.[1] However, the argument for viewing law as "constitutive" rather than "reflective" of the social world has been made largely on the plane of theory. One aim of this book is to offer a more empirically grounded case for the constitutive power of law. Thus, in my research, I tried to probe the limitations of the prevailing model, and to explore how the specific structures and traditions of American law contributed toward shaping the labor movement's and its members' identities, material interests, and capacities for collective action.

1. See, especially, Gordon, "Critical Legal Histories," 36 *Stanf. L. Rev.* 57 (1984).

To inquire into the shaping influence of law requires a view of *how* law may have influenced social actors; that is the second main theoretical concern animating the book. Two general views have proved fruitful. The first is associated with social choice theory. This view focuses upon the material constraints and inducements which any institutional order creates for social actors. It posits that social actors make "rational choices" among alternative courses of action. But, in the version of the theory that interests me, it also underscores that such choices are always contextually constrained, and however rational in the short term, often yield a long-term irrationality. Thus, the constraints on action forged by the legal order may render rational the pursuit of a narrow trade union strategy: yet this strategy may yield a weakened labor movement in the long run. That is what Joel Rogers has found in applying this model of social action to the unions and labor law of the post-World-War II era.[2] The model also proved useful in analyzing the constraints and inducements which courts created for earlier trade unionists who were making strategic choices about politics and organizing in the Gilded Age. Therefore, although it does not use the vocabulary of social choice theory, my narrative is informed by some of its basic insights. I have tried to show how American trade unionists made many hard-nosed choices that importantly narrowed their political and industrial paths as a result of harsh constraints and significant incentives forged by the nation's courts.

At least in the law schools, proponents of this theoretical approach insist that it exhausts the explanatory significance of law for social action. In particular, they insist that attending to the ideological, discursive, and symbolic dimensions of law adds precious little to an understanding of the historical conduct of subordinate groups such as labor.

I disagree. First, material constraints and inducements, and calculations of group self-interest, do not present themselves in transparent, nonideological terms. They are always imbued with ideo-

2. See Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Law,' " 1990 *Wisc. L. Rev.* 1.

logical significance. Subordinate groups encounter an enormous array of coercions and constraints. Some they defy, even in the face of state violence; some they seek to alter in various ways; others they simply take for granted and may not even recognize as constraints. These individual and collective responses go a long way toward defining the political outlook of a social movement such as labor. In the case of no group or movement with which I am familiar can one derive these choices simply on the basis of an "objective" calculus of material costs and benefits. For culture and ideology also profoundly affect the responses, fostering particular forms of political creativity and bravery, and, at the same time, obscuring or condemning other possible avenues of change and resistance.

Of course, one could concede that culture and ideology shape the ways that people experience and respond to material constraints and constellations of social power; and still one could object that the language and imagery of *law* play a negligible part in this. How far the discourse of law enters ordinary people's social experience is, largely, an empirical question, and the answer may vary greatly across different groups and different time periods. In the case of the group and era studied here, I will show that the penetration was great. Late-nineteenth- and early-twentieth-century trade unionists encountered the language of judge-made law everywhere, setting many of the key terms of public discourse and debate. They wrestled with it, and it entered deeply into their own language of protest and reform.

A last question remains, one much discussed by social and cultural as well as legal thinkers. How ought we to characterize the influence of legal discourse or "rights talk" upon the consciousness and aspirations of subordinate social groups? Many scholars characterize "rights talk" as profoundly confining, as silencing the authentic aspirations of subordinate groups; others insist that the language of law supplies invaluable rhetorical resources for articulating those aspirations. In the Conclusion I return to this debate and offer some insights that emerge from this work. It is sufficient here to note that, as with the theme of law's "constitutive" power, much of the writing on this topic has a decidedly abstract air. I think we do well to

address it in a less abstract fashion, by attending in some detail to the specific and intricately intertwined experiences of such groups with law as language, as discourse, on one hand, and, on the other, law as institutional practices, constraints, and legitimated violence. That too is my aim.

Acknowledgments

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Jacqueline Braitman, Julia Jimmerson, Louis Karlin, Mark Palley, and, especially, Margaret Talbot provided expert research assistance.

Various portions of this book were first presented as papers at a number of venues: the M.I.T. Industrial Relations Symposium; the Harvard/M.I.T. Colloquium on Society and Politics; the Workshop in Critical Perspectives on the History of American Labor Law, Georgetown Law School, June 1987; "Historical Perspectives on American Labor: An Interdisciplinary Approach," New York State School of Industrial and Labor Relations, Cornell University, April 1988; Organization of American Historians, Annual Conference, 1988; Law and Society Association Annual Conference, 1988. My thanks to the commentators and participants at these events. I hope they will note that I have tried hard to respond to their many keen criticisms and suggestions.

As the various papers found their way into a single, unwieldy manuscript, many friends and colleagues generously contributed substantive ideas and criticisms as well as stern editorial advice. I would like especially to thank Richard Abel, Jean-Christophe Agnew, Alison Anderson, Peter Arenella, James Atleson, Craig Becker, David Brion Davis, Carole Goldberg-Ambrose, Dirk Hartog, Sanford Jacoby, Kenneth Karst, Daniel Lowenstein, Staughton Lynd, Martha Minow, Gary Nash, Karen Orren, Steven Ross, Steven Shiffrin, Theda Skocpol, Katherine Stone, Chris Tomlins, John Wiley, and Stephen Yeazell. In addition, two fellow historians, David Scobey and Allan Steinberg, offered solidarity and hours of conversation.

Improved by all their efforts, this work first appeared as a long article in *Harvard Law Review* where it benefited from the editing of Warrington Parker and Robert Townsend.

Then, as I was turning to other tasks Aida Donald of Harvard University Press generously invited me to publish the long article as a short book. Neither of us, it turned out, wanted to see the article simply reprinted, and so began a process of modest revision and expansion. These modest improvements might have continued indefinitely, but for the editor's wise nudging. Rita Saavedra shared what turned out to be some onerous technical chores involved in turning article into book.

Throughout, Joel Handler was there with unflagging support and shrewd criticisms. Robert Goldstein supplied wonderfully lucid readings and rereadings and always buoyed my spirits. Zoey and Aaron Forbath, for their parts, provided enormous joy. Judy Coffin's love, humor, patience, and impatience saw me through.

Law and the Shaping of the American Labor Movement

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Introduction

America's labor laws provide far fewer protections against exploitation, injury, illness, and unemployment than the laws of the dozen other leading Western industrial nations. Our laws also exclude more workers from their crabbed coverage.[1] A key reason for the paltriness of American labor law and social provision lies in the fact that American workers never forged a class-based political movement to press for more generous and inclusive protections. Elsewhere, in the decades around the turn of the century, labor's national organizations embraced broad, class-based programs of reform and redistribution, but the American Federation of Labor spurned them, with the lasting effects that countless scholars have chronicled.[2] How does one explain this; how account for organized labor's historical devotion to voluntarism?[3] And what part did the legal order itself play in the story?

1. See Bok, "Reflections on the Distinctive Character of American Labor Law," 84 *Harv. L. Rev.* 1394, 1417–20, 1459–60 (1971); Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Law,' " 1990 *Wisconsin Law Review 1*; Shalev, "Class Politics and the Western Welfare State," in *Social Policy Evaluation: Social and Political Perspectives* (S. Spiro & E. Yuchtman-Yaar, eds., 1983). In the recent past attacks on the welfare state appear to have swept through several of these other nations. Yet even today the relative paltriness of American labor law and social provision is remarkable. See Rogers, supra.

2. See Bok, supra note 1; Rogers, supra note 1.

3. "Voluntarism" is the political philosophy that predominated in the American labor movement from the 1890s through the 1920s and continues to color organized labor's outlook today. It stands for a staunch commitment to the "private" ordering of industrial

The problem of explaining American labor's distinctive politics has a traditional answer, one that suggests that the legal order's role in shaping labor's politics was a minor and derivative one. American workers and the American labor movement have always been conservative and hostile to broad visions of reform and redistribution. The unique social context of the United States produced a working class that lacked "class consciousness." Instead, American workers have been wedded to individualistic strategies for bettering their lot, and the American labor movement has generally scorned class-based reform efforts. American trade unionists have been "pragmatists," not "class conscious" but "job conscious."[4] This particular union vision, the tale continues, sprang from various structural features of American society. Social mobility, ethnic and racial divisions among workers, and a pervasive individualism undermined the cohesiveness and class-based politics that apparently characterized Europe's working classes.

Traditional accounts do not fail to note how courts loomed large in late-nineteenth-century labor conflicts, enjoining strikes and voiding reforms. Indeed, the first great labor historians in the early twentieth century, those whom I will call the classics, paid much greater attention to the role of law and government in labor history than do current accounts. Even in the classic accounts, however, the law's role emerges as derivative—a reflection of "deeper" social forces including the same individualism that shaped the labor movement itself. These deeper structural forces shaped labor's politics. Experiences and struggles in the actual arenas of law and government

relations between unions and employers. Voluntarism teaches that workers should pursue improvements in their living and working conditions through collective bargaining and concerted action in the private sphere rather than through public political action and legislation. Thus voluntarism is labor's version of laissez-faire, an anti-statist philosophy that says that the "best thing the State can do for Labor is to leave Labor alone." Gompers, "Judicial Vindication of Labor's Claims," 7 *Am. Federationist* 283, 284 (1901). In truth, even in the Gompers era, voluntarism never meant abstention from politics. Rather, as we shall see, voluntarism meant spurning broad "positive" state regulation of industrial life, such as maximum-hours laws for all workers or state-based social insurance.

4. The phrases are from Selig Perlman's classic, *A Theory of the Labor Movement* (1923). On Perlman see infra Chap. 1, notes 1 and 2 and accompanying text.