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The Return of Judicial Repression: What Has Happened to the Strike?

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Abstract

Discussions of the current state of American labor have overlooked the fact that the strike, a principal form of union and working class power, has virtually disappeared from American life. The rise of an anti-union institutional legal regime has undermined the right to strike and effectively reversed the structure of incentives for collective bargaining envisioned under the National Labor Relations Act. The dynamics of the current regime are illustrated by one of the largest and longest strikes of recent decades, the 1995 Detroit Newspapers strike. The consequences go beyond unionized labor and constitute a de-democratization of workplace governance in the United States.

KEYWORDS: strikes, collective bargaining, unions

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No discussion of unions or collective bargaining in the contemporary United States should proceed without considering workers' right to strike, a right explicitly protected by the 1935 National Labor Relations Act (NLRA) and effectively recognized as a basic human right by the United Nations' International Labor Organization (Gernigon, Odero, and Guido, 1998). The right to strike was a crucial part of the system for democratic workplace governance under the NLRA, as the U.S. Supreme Court affirmed in its 1960 *Insurance Agents* decision. There is only one problem now: The strike has virtually disappeared from American life.

The numbers are stark. During the 1970s, an average of 289 major work stoppages involving 1000 or more workers occurred annually in the U.S. By the 1990s, that number had fallen to about thirty-five per year, and in 2009 there were no more than five (Lambert 2005; U.S. Bureau of Labor Statistics 2011). Nor can the decline in the number of strikes be explained solely by declining union density in the economy. According to a study by sociologist Jake Rosenfeld (2006), unionization among private sector, full-time employees fell by 40 percent between 1984 and 2002, but the drop in total strike frequency was even greater, falling by more than two thirds.

Why has the strike disappeared, and what does that mean for us now? Since the 1980s, the forces of economic globalization, technological change, and corporate re-structuring have all put increasing pressure on the employment relationship. None of those forces by themselves, however, need automatically lead to the disappearance of either strikes or unions, as the comparative experience of other industrialized countries shows. Rather, the most important cause has been the profound change in the legal and institutional regime governing labor relations and workers' rights in the U.S. The strike has been transformed from an economic bargaining tactic and protected legal right to a more high-risk confrontation, in which the issues at stake are no longer the dollars-and-cents on the table but the continued existence of the collective bargaining relationship.

To understand these changes, we first need to acknowledge that our traditional notions of strikes are either poor caricatures or badly out of date. We can then illustrate the historic shift by recalling how the New Deal system of labor relations was supposed to work, and how it stabilized under the so-called post-World War II labor "accord." From the beginning, however, a rival, anti-union path of institutional development grew alongside and apart from the New Deal order. The balance of power shifted in the 1980s, with the ascendancy of the anti-union regime. Backed by Republican administrations and increasingly conservative federal courts, employers began not only to resist unions in unorganized sectors but to try to eliminate unions where they were already established.

The attempt to de-unionize in the private sector was largely successful, and set the stage for the current attacks on public-sector unions and collective bargaining rights. The effects of the anti-union regime are far-reaching: The de-

cline of unionization is a major factor in the rise of American economic inequality and the stagnation of earnings among middle and lower income groups. More than that, the political consequences are as important as the economic ones. The loss of workers' rights to bargain collectively and to strike represents a significant *de*-democratization of American society, in the institutional governance of the workplace and in the civic ecology of the community.

How We Misunderstand Strikes

The disappearance of the strike is an historic event, but one that is scarcely reported in the mainstream news. The typical news coverage of labor issues, media scholar Christopher Martin (2004) writes, commonly tells a story organized by certain value assumptions or frames. These include, first, that the "consumer is king," meaning that readers are addressed in terms of the values of individual private consumption. Second, the experience of consumption is divorced from the process of production. Except for the occasional scandal affecting consumer safety, *how* goods and services arrive in the market is generally invisible and is not a matter of public concern. Since production occurs mostly offstage, the principal actors in the economy appear instead to be the "heroic" Wall Street titans and corporate CEOs that dominate the daily business news. For everyone else, the labor market is presumed to be meritocratic, and mobility is the result of individual choice. If workers do not like their job, they can and should just get another, using whatever bootstraps they may have. By contrast, collective economic action by definition is bad, and upsets the "natural" equilibrium of the free market.

As Martin argues, these assumptions inform the ways the media cover labor disputes, especially strikes. Underlying conflicts of interest between business and labor are often left unexamined in favor of the clash of personalities among management and union leaders. Reports of negotiations highlight the employers' market-driven "offers," while union "demands" seem like unreasonable claims for special privilege. As a result, strikes often appear as unnecessary or ego-driven conflicts led by fist-pounding union "bosses" demanding "More!" The government, meanwhile, stands apart and is mainly responsible to minimize public (i.e. consumer) inconvenience and the threat of disorder, even if this means forcing strikers to return to work.

These kinds of narratives are familiar, but they also reduce the struggles of entire industries and communities to the personalities and egos of a few (usually) men. In addition, hidden within them are social science concepts that continue to shape our understanding of strikes. For example, economic theories of strikes generally begin with a market relationship in which employers and unions bargain the price of labor. Each party is assumed to enjoy organizational security, act rationally, and calculate the costs and benefits of the decision to strike. Ideally,

through negotiation both sides should be able to estimate each other's room for concessions and thereby reach agreement without enduring the actual costs of a strike.

In this model, the key questions are first, the sheer incidence of strikes (or why they should occur at all), and second, the strong correlation of strike frequency with short-term fluctuations in the business cycle (that is, strikes increase in a growing economy when labor markets are tight and wages lag behind inflation, and decrease in downturns when unemployment is high). For the first question, the conventional answer suggests some form of error or failure in bargaining, due to imperfect or uncertain information or the behavioral irrationality of one or both sides.

Some economists stress the role of long-term bargaining relationships or coordination in reducing uncertainty. Others distinguish union leaders from the rank-and-file and assign imperfect information to the latter: Impelled to strike by restive members, leaders must balance workers' wage demands with the economic needs of the firm. This makes the bargaining relationship one-sided—employers are presumed to act with market efficiency while only workers must change their concessions to come around to an acceptable compromise (Ashenfelter and Johnson 1969; Franzosi 1989).

Nevertheless, such imagery dominates both ordinary and legal interpretations of unions and strikes: Collective bargaining is a private contest with stable set of participants and rules, like a regular Friday night poker game among friends. Both sides play their hands as best as they know how, and strikes are just another tactic union leaders use to win gains at the bargaining table. Strikers "gamble" on the success of the strike, in the words of Supreme Court Justice Sandra Day O'Connor, and bear the full risks of a losing bet (Gould 1993). The state keeps the game from becoming a nuisance, and the public, with no stake in the outcome, seeks only to get on with its own affairs.

Whether or not these ideas were ever really true, they no longer correspond to current realities. As critics have argued, the assumptions of organizational security and rational cost-benefit calculation depend on the historically-contingent formation of strong institutions governing relations between business and labor. Thus, the business cycle variables were strongest in the U.S. in the post-World War Two period, *after* the implementation of the NLRA. The micro-analysis of actors' information or behavioral mechanisms, moreover, fails to explain long-term, systemic changes that have occurred in strike patterns. As economist Bruce Kaufman (1992) writes, "The level of strike activity in the 1980s plummeted to the lowest level of the post-World War II period and, furthermore, remained at this level even as the economic environment changed in ways that historically have led to increased strike rates." (p. 119).

The assumption of institutional stability overlooks the fact that legal regimes can vary sharply over time. In the U.S., the prevailing labor relations order has been transformed several times in the last century, from the pre-New Deal era, to the postwar accord, to the period since 1980. Even within regimes, tensions persist that can drive further rounds of change. In the current period, these tensions have led to a far-reaching, historic change in the structural and institutional context for strikes, and for the system of industrial relations as a whole.

Labor Relations in the U.S.: The New Deal and the Postwar Accord

Prior to the 1930s, American unions confronted a legal environment that historians have described as “judicial repression” (Hattam 1992; Dubofsky 1994). For decades, federal courts had repeatedly struck down workers’ rights to organize and act collectively, as violations of property rights and combinations in restraint of trade. With little administrative capacity to regulate industrial relations, government authorities typically entered into labor disputes as an external, blunt force. In the event of a major strike, conservative judges would issue swift injunctions that declared further protest to be an unlawful disruption of public order. All too often, then, strikes ended with the deployment of troops. In the landmark struggles of the time—of steelworkers in 1892 in Homestead, Pennsylvania; in the nationwide Pullman rail strike of 1894; and in the mining strikes in Coeur d’Alene, Idaho, in 1899 and Ludlow, Colorado, in 1912—the use of military power resulted in tragic losses of life.

By contrast, the 1935 National Labor Relations Act (NLRA, or Wagner Act) marked a radical departure. Congress recognized that corporate law had already empowered employers by transforming them from individuals into collective entities, with all of their assets and organizational resources concentrated in the firm. Employees, on the other hand, remained individuals, left to fend for themselves in the labor market. To rectify the imbalance, the Wagner Act declared it the policy of the United States to encourage the practice of collective bargaining, and protected workers’ rights to organize for the purpose of negotiating terms and conditions of employment or other mutual aid or protection.

Under the NLRA, the federal government created a system for legally recognizing union representation and managing industrial conflict. Over time, this relationship was articulated as a model of industrial pluralism, with unions as the democratically chosen representatives of workers, labor and management acting jointly as “legislators” in bargaining, the contract as the rule of law in the workplace, and legally sanctioned procedures for grievance and arbitration as a judicial system of due process and enforcement. The law recognized the employment of labor as a relationship between collective actors, and codified a form of dialogue between them. The result was an historic democratization of the American work-

place and economy, embodied in the institutional arrangements of the postwar labor accord.

The accord represented an historic shift of government policy; from repression to what sociologist Holly McCammon (1993) called a legal regime of “integrative prevention.” Under the accord the government regulated and protected workers’ rights, and strikes became limited mainly to bread-and-butter issues of wages and compensation arising at moments of contract renewal. Unlike many other industrialized nations, however, in the U.S. the government did not intervene in negotiations to ensure a settlement (except in rare cases of national emergency). The law only set the ground rules for bargaining, and contracts remained voluntary agreements between unions and management. The integrity of the process required that both parties be free to walk away from the table; indeed, otherwise the employment relationship would approach the character of involuntary labor. Thus, the language of the NLRA explicitly protected the right to strike.

In this framework, strikes played a legitimate role as an incentive for management and labor to resolve their differences. The underlying threat of economic sanctions served to push the two sides to compromise, and move their way incrementally toward agreement through the bargaining process. The U.S. Supreme Court affirmed this relationship in its 1960 decision in the *Labor Board v. Insurance Agents International Union* case:

The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . The two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one’s terms—exist side by side.

The system had built-in incentives to come to terms, and the strike remained a last resort. Work stoppages imposed pain on both sides, as employers lost production and profits and workers lost wages and their means of subsistence. Nonetheless, while the law was intended to reduce industrial strife it relied on the right to strike as an essential guarantee of the free exchange of labor.

Under the NLRA, American unions did gain considerable power to regulate their labor markets in the postwar era. In organized sectors, “pattern” bargaining with the leading employers standardized conditions and took wages out of competition among firms. Inside the firm, contractual provisions for seniority, promotion, recall, and due process for discipline and discharge helped stabilize employment and gave a hard-won job security to workers previously exposed to arbitrary dismissal and often wild fluctuations in the availability of work. Union

contracts also raised standards at non-union employers, who often improved conditions in order to avoid organizing efforts among their own employees.

The Limits of the Accord and the Rise of the Anti-Union Regime

Nevertheless, the New Deal system possessed institutional limits that not only hastened its decline but also shaped the terms of post-accord conflict. Employers and the government set strict limits on the kinds of issues that could be subject to collective bargaining. Decisions by the NLRB and the courts distinguished “mandatory” subjects covering bread-and-butter issues of compensation and work rules from “permissive” issues to which the parties could agree, but were not required, to negotiate. From the start, managers adamantly resisted union efforts to bargain over permissive issues related to the direction and control of the firm.

The question was effectively settled by the 1950 contract between the United Auto Workers and General Motors, in what sociologist Daniel Bell, writing in *Fortune* magazine, called the “Treaty of Detroit.” The union won higher wages and benefits in exchange for improvements in productivity, while ceding to management the control of strategic decisions beyond the shop floor. Thereafter, the typical collective bargaining contract included a “management rights” clause, reserving to the employer exclusive rights to determine investments in production and technology; the design, quality, and pricing of products and services; where to locate, expand, or close down plants and facilities; and all other matters not explicitly covered by the contract.

In addition, bargaining was generally confined to those work sites and units with either voluntary employer recognition or NLRB certification, and was typically conducted at the level of the plant or firm, not at the level of the industry. As a result, employers could and did erode bargaining units by reclassifying jobs and transferring work away from union jurisdiction. The 1947 Taft-Hartley Act excluded supervisors from protection and allowed states to ban the “union shop,” and more than a dozen states, mainly in the South, quickly did so. Within the industrial core, companies began to re-locate their factories away from unionized urban centers to suburban and rural areas, to the less-unionized southern states, and to other countries around the world. In a remarkably short interval, the process of de-industrialization turned the once powerful manufacturing cities of the Northeast and Midwest into the abandoned, distressed regions of the “rust-belt.”

The effect of these boundaries was to support a rival, non-union path of development and to give employers a crucial exit option. Taft-Hartley and judicial decisions denied labor rights to workers in expanding white-collar sectors of the economy, leaving unions concentrated in an eventually declining blue-collar sector. For emerging technical and professional occupations, employers could seek to

have employees classified as managers or supervisors under the law, making them “exempt” from union protections. Ultimately, the parallel layer of non-union labor would approach the norm even in traditionally unionized industries, increasing the pressure on those firms still committed to collective bargaining.

Finally, Congress and the courts early on began to erode the statutory protection for the right to strike. Just one year after it had upheld the NLRA itself, in 1938 the Supreme Court ruled in its *Mackay Radio* decision that while workers could not be fired for striking, they could be “permanently replaced” (Lambert 2005: 154; Gould 1993: 185). Under *Mackay*, if employees struck to achieve economic contract terms like wages and working conditions, the employer could hire permanent replacements and it would not have to give the strikers their old jobs back when the strike was over. For most workers, it made little difference whether one was fired or permanently replaced, and in time the decision would profoundly alter the balance of power between the two sides. For, if employers could operate freely using permanent replacements during a strike, they would have far fewer incentives to reach agreement at the bargaining table.

The *Mackay* doctrine allowed firms not only to avoid unionization in new facilities but to displace unions in existing ones. For much of the postwar period, employers generally accepted the status quo ante in sectors where unions were already well-established. Restrictions on unions’ sympathetic action under Taft-Hartley further bounded and compartmentalized disputes, turning public attention and responsibility away from what became framed as private market transactions. Labor-management conflicts became “civilized,” as journalist William Serrin (1973) wrote. Federal courts prohibited most “wildcat” strikes during the life of the contract and refused to protect strikes for permissive demands challenging managerial control.

By the 1980s, however, even the limited protections for the strike were collapsing. In 1981, President Ronald Reagan summarily fired the striking federal air traffic controllers and busted their union, the Professional Air Traffic Controllers Organization (PATCO). As federal employees, the controllers were not covered by the NLRA, and Reagan’s action had no direct effect on the law governing private employers. The outcome of the PATCO strike, however, announced a critical juncture in the American government’s attitude toward workers’ rights. With this opening, employers in traditionally unionized industries quickly adopted more aggressive tactics, seeking to end the practice of pattern bargaining and drive down the cost of labor. The anti-union strategy developed into its own industry, with an array of nationally-known business consultants, law firms, industrial psychologists, and private security “strike management” services.

At the bargaining table, the newfound ease of permanent replacement dovetailed with legal rules that allowed employers unilaterally to implement their last offer upon declaration of impasse. By the early 1940s, the NLRB and the

courts had affirmed the doctrine that allowed employers to impose contract terms upon reaching impasse in negotiations. In the 1980s, the NLRB under President Reagan issued a series of decisions making it easier for employers to reach impasse and thus implement their final offers. As labor law scholar Ellen Dannin (2006) argues, the combined rules of permanent replacement of strikers and implementation on impasse cast a long shadow back into labor-management negotiations. An employer could now demand deep concessions that were predictably unacceptable to the union and then simply decline to move from its position. If the union chose to strike, the strikers could be permanently replaced. If it did not, a declaration of impasse would allow the employer to impose its desired terms unilaterally.

Hence, the previous mechanisms that once encouraged settlement were now reversed. Employers gained incentives to reach impasse quickly and terminate bargaining, while unions often scrambled to find ways to prolong negotiations in order to stave off impasse. Even profitable employers soon began to demand steep concessions, in effect daring workers to strike, knowing that the outcome might easily lead to displacing the union.

The Labor Movement: Strategic Responses

Confronted by these new conditions, American unions developed at least two counter-strategies, from both inside and outside the framework of the NLRA. First, although the law permits replacement of “economic” strikers seeking better wages and working conditions, it forbids permanent replacement of workers who strike against employers’ unfair labor practices. Such strikers are entitled to reinstatement when they end their strike, and employers who refuse to take them back may be liable for back pay.

Such provisions offered the chance for a procedural check in bargaining, as employers might be deterred from unfair or unlawful declaration of impasse. While the process of adjudication might take years, the prospect of massive liabilities for back wages could be used to restore a balance of power in negotiations. By the late 1980s unions had learned to ensure that strikes were linked to employers’ unfair labor practices, in order to gain some protection against permanent replacement. For the most part, however, the ULP strike remained a defensive tactic, but it highlighted the fact that the central conflict in many strikes had shifted from the specific economic issues on the table to the future of the bargaining relationship.

A second, more highly-public, counter-strategy goes beyond the simple work stoppage and is aimed at mobilizing support from the surrounding community. This has taken various forms, from consumer boycotts to demands for state intervention to demonstrations and civil disobedience, all designed to open up the

political space for action and to frame individual disputes in terms of larger cultural meanings and collective identities. In urban labor markets, these forms of mobilization may be described as a kind of community-based or “metro” unionism, taking advantage of geographic union density and gaining resources from the fabric of local civil society.

Among the more well-known examples of these efforts have been the Service Employees International Union’s Justice for Janitors campaigns. The strategy has developed especially in service sectors with spatially-anchored or locally-organized employers, like large hospitals or hotels, city-wide janitorial contractor associations, or state-subsidized nursing homes and home health care agencies, all drawing on low-wage urban, minority, and often immigrant workforces. Under such conditions, local unions might well have the resources and density to organize and bargain effectively within urban and regional contexts.

With the decline of the postwar accord, the institutional channeling of labor conflict has likewise broken down. The boundaries of disputes have become blurred, and workplace struggles have expanded into or re-entered other arenas of the state and civil society. The shift in federal government policy de-regulated industrial relations and forced unions to adopt new strategies, reconstructing strike leverage by using the law and reaching out to community groups previously left out of collective bargaining disputes. Confrontations between unions and employers have been de-routinized, and strikes that occur now have turned into high-stakes, wide-ranging contests over the very terms and future of the bargaining relationship. This new context can be seen in one of the largest and longest strikes of the past two decades, the 1995 Detroit newspaper strike.

An Exemplary Case: The Detroit Newspapers Strike, 1995-2000

On July 13, 1995, the unions representing some 2,500 workers went on strike against the morning *Detroit Free Press*, owned by Knight Ridder, Inc., the evening *Detroit News*, part of the Gannett media chain, and their Joint Operating Agency (JOA), Detroit Newspapers, Inc. Members of six local unions, including journalists, printers, press operators, circulation workers, janitors, and truck drivers, walked off their jobs after contract negotiations broke down, amid union charges of bad faith bargaining and unlawful declaration of impasse by the employers. Taking a hard line, the newspapers hired permanent replacements for the strikers and effectively militarized their operations. Altogether, the companies spent an estimated forty million dollars on private security forces and paid more than one million dollars to suburban municipalities to cover police overtime at their production and distribution sites (Rhomberg 2012).

The conflict quickly turned violent and bitter, with hundreds of altercations, injuries, and arrests, particularly at the newspapers’ giant printing plant in

suburban Sterling Heights. The strikers rallied support from the Detroit area community, organizing a circulation and advertising boycott, mounting civil disobedience and protest actions, and publishing their own alternative weekly strike paper, the *Detroit Sunday Journal*. In addition, the strike drew upon the organized culture of labor solidarity in southeastern Michigan, and hundreds of rank and file members from other unions joined mass picket lines, in mobile teams deployed out of local and regional offices of the United Auto Workers (UAW) and other unions. Prominent area civic, political, and religious figures also stepped forward to condemn the use of permanent replacements and urge a settlement. By their own estimate, the two papers combined lost nearly \$100 million in the first six months, while circulation dropped by as much as a third. Yet the unions were unable to stop either production or distribution of the newspapers, and the strike stretched into its second year.

Meanwhile, the dispute generated an enormous body of litigation. The six unions, united as the Metropolitan Council of Newspaper Unions (MCNU), formally struck over three principal unfair labor practice complaints issued by the Detroit regional office of the NLRB. The first complaint charged the DNA with unfairly transferring work out of the printers' bargaining unit, in violation of a previous agreement to negotiate such changes with the union. The second accused the *Detroit News* management of unlawfully declaring a bargaining impasse, in order to impose a merit pay plan on the Newspaper Guild. Third, the NLRB charged that the companies had reneged on a prior commitment to bargain jointly on economic issues with the MCNU.

Once the strike began the employers systematically fired strikers for alleged picket line misconduct, some of them several times, which led the NLRB to issue more complaints for illegal discharge. The unions and several individual strikers filed federal civil rights cases against the employers, their security firms, and various local police and governmental authorities for conspiracy and police misconduct. In turn, the employers brought charges against the unions under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, and later named the UAW as a co-defendant in the suit. Finally, union protests and hand-billing of customers at merchants advertising in the papers led to legal maneuvers with the NLRB and local police over the strikers' freedom of speech.

On February 14, 1997, after 19 months on strike, the unions made unconditional offers to return to work. But the employers announced they would take back only a fraction of the striking workers, as new vacancies allowed. On June 19, 1997, an NLRB administrative law judge found the newspapers guilty of unfair labor practices that had "caused" and "prolonged" the strike. The judge ordered the companies to reinstate the striking workers, displacing, if necessary, the replacement workers, and making any strikers not reinstated eligible for back pay. Two days later, an estimated 60,000 union members and supporters from across

the country arrived in Detroit for a giant march and rally, in a national show of solidarity led by the AFL-CIO.

The newspapers immediately appealed the ALJ's decision, while the NLRB petitioned for an interim injunction requiring that all strikers be returned immediately to their jobs. Despite an NLRB record of favorable rulings or settlement in around 90 percent of such cases, in August 1997 a U.S. District Court judge refused to grant the injunction. In the spring of 1998, religious, civic, and union leaders across the Detroit metropolitan area convened a community summit to try to bring the parties together, again without success. In August 1998, the NLRB in Washington, D.C., unanimously agreed that the strike was caused by management's unfair labor practices. But the companies pursued the case to the federal court of appeals, and the litigation continued. By the end of 1999, more than 200 strikers had been fired and several hundred more remained locked out.

The strikers' fate was now tied to the unfair labor practice case. Already upheld by the regional and national NLRB, the charges in the Detroit case might have required the employers to pay out more than one hundred million dollars in back wages. On July 7, 2000, a federal appeals court overturned the NLRB decision, destroying the unions' hopes for a reinstatement order. Deprived of their legal leverage, the unions were forced to accept contracts on management's terms. The last of the six unions settled in December 2000, and, more than five years after it began, the Detroit newspaper strike was over.

Ratification of the contracts, however, did not bring an end to the litigation. The agreements offered no amnesty provisions for fired strikers, and the legal appeals in the discharge cases went on for several more years. Finally, most of the individual civil rights suits were dismissed or settled out of court, but at least one case went all the way to trial and a verdict. On December 21, 2000, a federal jury found the newspapers, the City of Sterling Heights, and its police officials guilty of conspiracy to deprive striker Ben Solomon of his civil rights. A key piece of evidence at the trial was a series of memos from the city to the newspaper agency, from July 1995 to October 1996, itemizing weekly police overtime costs related to the strike. The memos were followed by checks from the company to the city made out for the exact amount, down to the penny, ultimately totaling nearly one million dollars.

While costly, the employers' victory nevertheless set a new standard in national labor relations, and pre-figured subsequent mass lockouts in the 2003 Southern California grocery and 2004 San Francisco hotel disputes. In 2002, President George W. Bush politically affirmed the companies' stance by appointing Robert Battista, the lead counsel for the companies in the unfair labor practices trial, as chair of the NLRB. Meanwhile, in Detroit the strike permanently altered the newspapers' relationship to the local community. Circulation fell at eight times the rate for the industry as a whole between 1995 and 1999, and dozens of

veteran journalists left the papers and the city, taking with them years of local knowledge and public memory. Finally, in late 2004 top executives at the DNA quit to take over the struggling *San Francisco Chronicle*, and in 2005, after sixty-five years in Detroit, Knight-Ridder sold the *Free Press* to Gannett, which in turn sold the *News* to MediaNews Group, Inc., a national suburban newspaper chain.

The events in the newspaper strike reflected the broader historic collision of two opposing institutional logics. The companies pursued a neo-liberal agenda of corporate restructuring and management autonomy, while the unions organized to defend New Deal principles of collective bargaining. In effect, the two sides were simply operating under different sets of rules. The strike was fundamentally not about the traditional bread-and-butter issues, but about the control of the workplace and the future of the bargaining relationship. With an aggressive agenda for restructuring, the newspapers began preparing to break any potential strike months before the negotiations even began.

Once the strike began, the newspapers hired permanent replacements and were able to downsize their workforce and unilaterally set wages for the replacements at levels far lower than any they had hoped to achieve in bargaining with the unions. Although the unions filed unfair labor practice charges against the employers, the impact was to substitute a process of litigation for the voluntary negotiation between the two sides. The litigation on the unfair labor practice charges continued, *after* the unions' unconditional offer to return to work, for more than twice as long as the actual strike itself lasted. Overall, the outcome was a far cry from the "practices fundamental to the friendly adjustment of industrial disputes" envisioned under the NLRA.

The Return of Judicial Repression

The New Deal system established a relationship between collective actors, centralizing wage determination for multiple groups of workers through negotiations between unions and management. With the rise of the anti-union regime, however, such terms are no longer institutionally secure. In the absence of effective deterrence, companies in the U.S. may instead choose to decentralize wage-setting, restoring the imbalance identified in the NLRA between corporately-organized employers and individual employees. Without incentives grounded on union density, credible threats of disruption, or adequate state enforcement of workers' rights, employers will seek not just concessions but the *elimination* of the collective bargaining relationship.

This is not a failure of information. Rather, it reflects a structural tendency of one party to try to exit the relationship.¹ In the current system, in other words, one side comes to the table looking to make a deal. The other side comes looking to get rid of the table. A similar logic can be seen in current campaigns to restrict public sector workers' collective bargaining rights. As journalist Bob Herbert (2011) notes, such campaigns aim "not just to extract concessions from public employee unions to help balance state budgets, but to actually crush those unions, to deprive them once and for all of the crucial and fundamental right to bargain collectively."

Deliberately negotiating to impasse, unilaterally imposing conditions, and breaking strikes—all of these destroy the function of collective bargaining, whether or not the union is actually decertified. Workers, therefore, may at times be impelled to strike not for specific economic gains but to defend the ongoing relationship between the employer and their union. Section 8(b)(7) of the NLRA limits the right to picket to force an employer to recognize and bargain with a union that is not the legally certified representative of the employees. When the law fails to protect the status of even certified unions, however, every strike is *de facto* a recognition strike, in which the practical continuity of the relationship hangs in the balance.

The New Deal order both channeled labor conflict and established a framework of democratic rights in the workplace. The integrative prevention of conflict, however, proved historically temporary, and without protection for the right to strike a key mechanism sustaining the New Deal system has been lost. In the post-agreement period, the state has largely reverted to a policy of judicial repression, in the form of the administrative weakness of the NLRB and the ideological antagonism of the federal courts. The government may no longer send in troops, but ruinous legal and financial penalties threaten unions that violate the law. The current legal regime might therefore be described as aimed at the preventive *destruction*, rather than integration, of workers' collective action in the employment system.

With the consolidation of the anti-union regime, the judicial bias favoring employers has become ever more pronounced, influenced by the conservative "law and economics" school of jurisprudence. The current order signals a return to the pre-NLRA era, and a re-assertion of the "at-will" principle in employment

¹ The asymmetry between labor and management was noted by the D.C. Circuit Court of Appeals in its 1997 ruling in a dispute involving the McClatchy newspaper chain. In a comment on the *Insurance Agents* case, the court wrote that "a union's tactics, no matter how troubling or even independently unlawful, are always designed to reach a collective bargaining agreement. An employer, on the other hand, may well wish to break the union." *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C.Cir.1997).

relations. Classically stated by the Tennessee Supreme Court in 1884 in *Payne v. Western and Atlantic Railroad*, the at-will doctrine allows employers “to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.”

In the at-will relationship, legal scholar Clyde Summers (2000) writes, “The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his employees” (p. 78). The at-will principle derives from a conception of employment as a master-servant relationship rather than one of mutual rights and responsibilities. The assumption is that the employee is only a “hired hand,” who has no legal interest or stake in the enterprise beyond the right to be paid for the labor performed.

As Prof. Summers remarks, “So long as these arguments have currency in the courts and the legislatures, the bridge will not be to the twenty-first century but to the nineteenth century” (p. 86). The *Mackay* doctrine denies that employees are legitimate stakeholders in the firm with strong incentives of their own to reach agreement. It punishes workers for exercising their rights under the law and ignores the employers’ incentives to reach impasse quickly and “gamble” on daring the union to strike. These actions destroy the NLRA’s express purpose to promote collective bargaining, reinforcing the presumption of unilateral employer control. The system for negotiating the interests at work, the “table” where the parties might come together to determine their future, has broken down. In its place is a system of management autocracy largely unaccountable to any actors other than the company’s shareholders.

The consequences of this regime go well beyond the fate of unionized workers, and are damaging for American society. In the last several decades economic inequality has risen sharply in the United States, as both academics and journalists have noted. During the middle of the 20th Century the distance between rich and poor in America steadily declined, but in the last quarter of the century the pattern was reversed. In the private sector labor market, wage inequality increased by 40 percent between 1973 and 2007, with declining unionization accounting for a fifth to a third of the increase (Western and Rosenfeld 2011). For more than a generation, the benefits of economic growth have gone disproportionately to corporate profits and to the top fifth of households, while incomes for the middle and bottom fifths have remained stagnant and fallen behind.

For many political theorists, modern mass democracy requires multiple institutional spaces for dialogue and decision-making among plural collective actors, including the actors in the workplace. Decades of economic re-structuring have now radically altered the spaces for such dialogue, on the job, in the com-

munity, and in the public sphere. The result highlights the historic *de-democratization* of the institutional regulation of labor in the United States, from the scope of collective bargaining in the workplace, to the civic spaces for group mediation, to the protection for workers' and citizens' rights to protest under the law.

What's Next? Recovering the Right to Collective Action

The right to strike is essential to any discussion of the future of the labor movement in the United States. The renewal of American labor does not require the restoration of all the elements of the New Deal order, even if that were possible. It does, however, imply a challenge to the logic and legal mechanisms that reproduce the anti-union regime, including the practices of impasse and implementation, permanent replacement of strikers, and other limits on collective action. The current regime radically reduces the scope for public engagement and dialogue between the parties in the employment relationship. We need to restore the integrity of the collective bargaining process which rests, ultimately, on a genuine right to strike.

This need not take the form of the institutional channeling established during the postwar accord. Rather, widening the scope of collective action could enlarge the spaces for public engagement and civic mediation among employers, unions, and community actors. That could encourage more flexibility, communication and innovation in negotiations between management and unions. It could also allow for the development of broader partnerships in support of the firm, its workers, and the local area. There is no a priori reason to credit company managers with exclusive wisdom to control the enterprise on behalf of all stakeholders. In the Detroit strike, the newspapers pursued a scorched-earth policy toward the strikers in a community that placed a high value on unionism. The newspapers lost a third of their circulation and at least \$130 million and forced the dispute to go through years of litigation. It is not obvious that these actions benefitted the workplace, the community, or even the shareholders in the long run.

Admittedly, reforming the law will be no easy task. Political forces in the United States make even modest labor law reform extremely difficult, and the record of union efforts to pass legislation in Congress is not encouraging. The labor movement may have to find its own ways to take back the right to collective action. As labor scholars have shown, union growth or revitalization in American history has frequently occurred in episodic bursts or "upsurges" (Freeman 1998; Clawson 2003). Strike mobilization is a key driver of these upsurges, especially in a liberal market economy with decentralized labor market institutions (like the U.S.).

Such periods often coincide with the growth of new forms of organization or outreach to previously unorganized groups of workers. In the 1890s, native-born and Northern European immigrant skilled workers built the craft unions that came together in the American Federation of Labor. During the 1930s, Southern and Eastern European ethnic factory workers joined the new wave of industrial unionism in the Congress of Industrial Organizations. Similarly, African American workers organized into public sector unions in conjunction with the civil rights movement the 1960s, and immigrant Hispanic and Asian workers form the base for union growth in low-wage service sectors today.

The return of judicial repression underlines the extent of labor's de-institutionalization under the current regime. In response, unions have increasingly turned to innovative organizing tactics and mobilizing grassroots allies in the community. Yet, community coalitions are not a magic solution, and civil society is a competitive field no less than the economy and the state. In Detroit, the newspapers deployed tremendous resources to override the power of the NLRB and pressure from an alliance of unions, local civic leaders, and members of the reading public. The outcomes for future struggles will depend on the conjuncture of forces in the economy and the state as well as in civil society.

In areas where labor and other structural inequalities coincide, where new immigrant or minority working-class communities combine with local cultures of union militancy, or where organizational and framing strategies re-define previously divided group identities, there may be greater possibilities for collective action. Moreover, the boundaries of mobilization are no longer strictly local. As corporations become larger and more globally integrated, unions have learned to use new leverage, from the strategic location of jobs in worldwide commodity chains, from regulations under national and international law, and from access to global media and civil society. Such changes may prefigure a new path of opposition to the now dominant anti-union regime.

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