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Abstract
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Keywords
Labor movement; Labor movement--History; Civil disobedience; Civil rights

WHAT'S LAW GOT TO DO WITH IT? HISTORICAL CONSIDERATIONS ON CLASS STRUGGLE, BOUNDARIES OF CONSTRAINT, AND CAPITALIST AUTHORITY©

BY BRYAN D. PALMER*

This article offers a preliminary theoretical statement on the law as a set of boundaries constraining class struggle in the interests of capitalist authority. But those boundaries are not forever fixed, and are constantly evolving through the pressures exerted on them by active working-class resistance, some of which takes the form of overt civil disobedience. To illustrate this process, the author explores the ways in which specific moments of labour upheaval in 1886, 1919, 1937, and 1946 conditioned the eventual making of industrial legality. When this legality unravelled in the post-World War II period, workers were left vulnerable and their trade union leaders increasingly trapped in an ossified understanding of the rules of labour-capital-state relations, rules that had long been abandoned by other players on the unequal field of class relations. The article closes by arguing for the necessity of the workers' movement recovering its civil disobedience heritage.

Cet article offre une représentation théorique préliminaire du droit en tant qu'ensemble de bornes freinant la lutte des classes dans l'intérêt de la férule capitaliste. Mais ces bornes ne sont pas figées à jamais : elles sont en constante évolution par le biais des pressions qu'exerce sur elles la résistance active de la classe ouvrière, dont une partie s'exprime par une désobéissance civile ostensible. Pour illustrer ce processus, l'auteur analyse comment des événements précis des soulèvements ouvriers de 1886, 1919, 1937, et 1946 ont conditionné l'édification finale de la légalité industrielle. Puis, après la deuxieme guerre mondiale, la légalité industrielle s'est dégradée, rendant les travailleurs vulnérables, et leurs chefs syndicaux de plus en plus piégés dans leur compréhension fossilisée des règles des relations ouvriers-capital-États, règles depuis longtemps abandonnées par les autres acteurs sur le champ inégal des relations entre les classes. L'article se conclut par une argumentation sur la nécessité, pour le mouvement ouvrier, de reprendre en mains sa tradition de désobéissance civile.

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I. LAW, SUBORDINATION, AND SOCIAL CHANGE

How do subordinate groups register their presence and their protest? Bounded by various constraints, struggling to have their voices heard as walls of silence are everywhere erected around them, battling often merely to be seen as they are made invisible by a political economy that measures their materiality as inconsequential, such peoples face a range of obstacles in their efforts to function with the rights of citizenship. How might they conceive of law, and how might we understand law's relationship to them, especially in terms of acts that are oppositional and dissident, that carry the designation of civil disobedience, and that are construed, in specific quarters, as *illegal*? These are some of the larger questions that frame my comments on class and other struggles as they relate to law over the course of the nineteenth and twentieth centuries. For law, while it is undoubtedly many things, is also a constraint, both imposed and internalized; it is a wall of silence and an articulation of political economy's material and hierarchical ordering of society around its concepts of property and propriety, an expression of cultures that have, from antiquity to the present day, valued rank whatever the evolving rhetorics of equality. And law has always erected boundaries within which protest, resistance, and collective organization have been meant to exist.

But law is also a malleable construct, a changing set of understandings that demands to be appreciated historically. For yesterday's law is today's crime, as the history of chattel slavery, patriarchal rights to physical punishment of wives and children, and master and servant legislation all confirm, just as the illegalities of decades past are today's conventional behaviours, as the history of the condom would suggest. Without the disobedient—those willing to challenge law in everyday acts of irreverence and defiance as well as in organized mobilizations of protest—we would be living in very different world.

II. THEORIZING LAW AND CIVIL DISOBEDIENCE

Contemporary theory of law has addressed this complexity in an array of useful discussions, none of which, however, has entirely resolved a sequence of contradictions.

At the heart of these is law's instrumentality, its relation to structure and agency (a persistent and wide-ranging dilemma that relates to a range of structures conceptualized beyond the narrowly defined "economic"), and the problematics of humanist or structuralist readings of resistance. Maureen Cain and Alan Hunt, for instance, compiled a fairly exhaustive account of the ways in which Karl Marx and Frederick Engels wrote in relation to issues of law. Stimulated by Althusserian appreciations of determination's complexities, the articulation of levels of structural domination beyond the merely economic, and of a consequent opposition to humanist explanation that commences with reified "man," Cain and Hunt provide a starting point for the radical interrogation of law as it relates to economic relations, ideology, the state, and politics. Beyond the reductionist view of law as "an instrument in the hands of a ruling class," suggest Cain and Hunt, lies the need to theorize law in ways that accord a primacy to structures, situating law within ensembles of capitalist social relations, but that also restore "to people their dignity by acknowledging that they are capable of changing their world."[1]

Just how this self-acknowledged Althusserian approach springs us out of an ostensible humanist trap is not entirely clear, and this should have been evident to Cain and Hunt in so much as they cited as brilliant the discussion of law in E.P. Thompson's *Whigs and Hunters*, an account as resolutely humanist as it is perhaps possible to imagine.[2]

Hunt and Wickham's later elaboration of a sociology of law as governance, keying now not on Marx and Engels, but on Michel Foucault, continues in this tentative vein; Foucault is situated in relation to law in ways that accent interpretive possibility, which Hunt and Wickham designate as "ground clearing, surveying, and mapping."[3] Indeed, as a recent debate in Social and Legal Studies suggests, Foucault scholars can differ markedly on how they situate Foucault in terms of law and the

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[1] Maureen Cain & Alan Hunt, *Marx and Engels on Law* (New York: Academic Press, 1979) at xi and xiii.

[2] *Ibid.* at 68, n. 3.

[3] Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994) at 132.

analytics of governmentality.[4] And, as Hunt and Wickham stress, at the point that resistance to structures of domination, in terms of civil disobedience, is actually placed at the forefront of our analytic agenda, Foucault's relevance is immediately compromised: Foucault, whatever his suggestive insights vis-à-vis the power/resistance coupling, attended to resistance weakly at best.[5]

The governmentality theorists have, of late, chosen to valorize this Foucauldian shortcoming in a way that Foucault might well have been uncomfortable with. For if Foucault did not place resistance at the center of his own research agenda, his entire *oeuvre* can hardly be read as diminishing the significance of resistance; it simply was not what he, for the most part, studied. And it should never be assumed that because a scholar has chosen to accent one dimension of the past's many layers, that he or she derides the significance of other unstudied realms. Mariana Valverde, in an admittedly all-too-cavalier article, expresses skepticism concerning "resistance." A more intellectually rigorous discussion in Nikolas Rose's *Powers of Freedom* contains a curious backing away from the political meaning of resistance,[6] especially its collective organized variants that are central to the history of what we might designate civil disobedience.

More fruitful, I would suggest, for an appreciation of law's historical meaning, particularly as it relates to civil disobedience, is an understanding of law's materialized discourse as well as of acts of lawbreaking that either changed law or contributed to the development of new law. This relationship of articulation/contestation constructed and reconfigured boundaries within which social relations unfolded, those relations simultaneously influenced by law and pushing law's development in new directions. To be sure, actors in this contested theatre were not always entirely conscious of what law's actual codes entailed, understandably so in specific periods and contexts, such as early Canada, when knowledge of law was weak at best. Nor, alternatively, were such agents of change acutely aware of how tilting their human sails against law's winds reconfigured the legal climate. But outside of such consiousness, the law changed, and with it a part of the environment of social relations, and thus, again, the social relations themselves. "Men make their own history, but they do not make it just as they please." Law, one aspect of those many 'traditions' of "dead

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[4] Nikolas Rose & Mariana Valverde, "Governed by Law?" (1998) 7 Soc. & Legal Stud. 541; Frank Pearce & Steve Tombs, "Foucault, Governmentality, Marxism" (1998) 7 Soc. & Legal Stud. 567.

[5] *Supra* note 3 at 17.

[6] Mariana Valverde, "Some Remarks on the Rise and Fall of Discourse Analysis" (2000) 65 Histoire Sociale/Social History 59 at 77; Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999) at 279-80.

generations" that weigh "like a nightmare on the brain of the living," is thus not so much historically separable and above various conflicts, as it is forged and reformed within them.[7]

Such ways of conceptualizing law and civil disobedience resonate theoretically with Habermas's conceptually detailed, if often dense and difficult, grasp of law's location within what he calls the place of social mediation situated between facts and norms.[8] Eric Tucker's account of how nineteenth-century workers contested the social and legal zones of toleration within which their collective endeavours were situated also animates one of the more interesting discussions of the history of early Canadian labour law.[9] In many ways this kind of perspective on law allows us to reconsider some of E.P. Thompson's reflections on the Rule of Law that form something of an endnote to his account of the foresters' struggles of eighteenth-century England:

> What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights: ... for officialdom, "preserved grounds" for the deer; for the foresters, the right to take turfs. For as long as it remained possible, the ruled—if they could find a purse and a lawyer—would actually fight for their rights by means of law; occasionally the copyholders, resting upon the precedents of sixteenth-century law, could actually win a case. When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.[10]

If Thompson goes too far in his argument that class relations were actually expressed "through the forms of law," and I think he does indeed reach past where analysis needs to go in an effort to carry on a specific war of intellectual position that he had been waging with the editors of the New Left Review since the early 1960s, it is nevertheless the case that his close attention to the field of force that law, in part, ordered, reminds us of the play at work historically between resistance and incorporation, in which law as written and as lived figured prominently.[11]

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[7] Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte" in *Karl Marx and Frederick Engels: Selected Works* (Moscow: Progress, 1968) at 97.

[8] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge: MIT Press, 1996).

[9] Eric Tucker, " 'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-1877" (1991) 27 Labour/Le Travail 15–54 [Tucker, "Indefinite Area of Toleration"].

[10] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975) cited in *supra* note 2 at 261.

[11] *Ibid.* at 262. For background on Thompson's intellectual-political differences with the New Left Review of Perry Anderson, Tom Nairn, and Robin Blackburn, in which understandings of law and its relation to capitalist repression certainly figure forcefully, see, among many other sources, Michael

This is not unrelated to the original 1842 discussion of Marx on "Debates of the Law on Thefts of Wood,"[12] but it takes us in entirely different directions than the conventional, if somewhat counterposed, Marxist discussions of legal norms, modes of production, and evolving abstractions of bourgeois individuality expressed in the pre-Althusser writings of Karl Renner and E.B. Pashukanis.[13] Moreover, as Leon Trotsky suggested in one of his more contentious pieces of polemical writing, *Their Morals and Ours*, it is imperative never to lose sight of the elasticity of law as it relates to ethics and moral governance, especially in terms of the ways in which, in extraordinary situations, fundamental reversals can take place. This alerts us to how zones of tolerance can find themselves inverted, not only for societies, but for collectivities, *if* extreme contexts condition acute shifts in subjective rationales of particular acts and behaviours:

> Under "normal" conditions a "normal" person observes the commandment: "Thou shalt not kill!" But if one kills under exceptional conditions for self-defense, the jury acquits that person. If one falls victim to a murderer, the court will kill the murderer. The necessity of courts, as well as that of self-defense, flows from antagonistic interests. In so far as the state is concerned, in peaceful times it limits itself to legalized killings of individuals so that in time of war it may transform the "obligatory" commandment, "Thou shalt not kill!" into its opposite. The most "humane" governments, which in peaceful times "detest" war, proclaim during war that the highest duty of their armies is the extermination of the greatest possible number of people.[14]

As Trotsky then went on to suggest, situations develop, albeit rarely, in which the usual categorical imperatives of law for society's members are weakened substantially, and, "[t]he solidarity of workers, especially of strikers or barricade fighters, is incomparably more 'categoric' than human solidarity in general."[15] In such moments it is not the case that law is dispensed with so much as that law is redefined. Such redefinition can be transitory and open to reversal or, in rare circumstances of either

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Kenny, *The First New Left: British Intellectuals After Stalin* (London: Lawrence & Wishart, 1995).

[12] Karl Marx, "Debates on the Law on Thefts of Woods" in Karl Marx & Frederick Engels, *Collected Works* vol. 1 (Moscow: Progress, 1975) 224-63. See also, Erica Sherover-Marcuse, *Emancipation and Consciousness: Dogmatic and Dialectical Perspectives in the Early Marx* (Oxford: Blackwell, 1986) at 17-44.

[13] Karl Renner, *The Institutions of Private Law and their Social Functions* (London: Routledge and Kegan Paul, 1976); Evgeny. B. Pashukanis, *Law and Marxism: A General Theory*, ed. by Chris Arthur, trans. by Barabara Einhorn (London: Ink Links, 1978); and the discussion in Tom Bottomore *et al.*, eds., *A Dictionary of Marxist Thought* (Cambridge: Harvard University Press, 1983) s.v. "law."

[14] Leon Trotsky, John Dewey & George Novack, *Their Morals and Ours: Marxist versus Liberal Views on Morality* (New York: Pathfinder, 1973) at 22.

[15] *Ibid.*

revolution or readjustment, law can be remade. But this never happens entirely outside of civil disobedience.

My purpose here is to provide a broad overview containing some guidelines for an understanding of how law and civil disobedience are related in Canadian history, especially in terms of the class contests that have unfolded over time, and that have often pushed the parameters of zones of toleration, reconfiguring legislation and the boundaries of law's constraints. I am not suggesting so much law's irrelevance—"what's law got to do with it?"—as insisting on law's malleability; I claim not so much law's refusal of civil disobedience as, in its actual evolution, its reciprocities with resistance; and I accent less law's codes and concepts and continuities, important as these are, as its ruptures and reformations. Finally, what I try to negotiate is a middle ground in which the tendency to present modern law as merely bourgeois confinement and class constraint is refused, for no social movement of resistance and civil disobedience will flourish and succeed if it lacks a moral grounding in precepts of behaviour. Equally objectionable is the all-too-common tendency on the part of entrenched bureaucracies to reify law as given as somehow irreversible and unchallengeable, an accepted articulation of the fundamental order necessary to society's governance and the continuity of rarified rights.

III. EARLY CANADA: UNCERTAIN LEGAL CLASS RELATIONS AND PHYSICAL FORCE LAW

Let me begin in early nineteenth-century Canada when the law of labour and the response to civil disobedience, as H. Clare Pentland once pointed out, were rather arbitrary, there being little in the way of authoritative, widely understood, established law, generalized in its prescriptions. Instead, in this period, much was up for interpretive legal grabs. Both the law of labour, largely centered in master and servant relations and appreciations of the law of combinations and conspiracies in restraint of trade, and the legal response to civil disobedience, often understood as riots and suppressed through the calling into being of troops, police, and local militias, were framed by the decidedly limited knowledge and personalities of individual employers and magistrates. It did not so much matter what the law actually was, and where it came from, or whether it was applicable in the colonial context—the questions legal historians have most often asked—although these are not uninteresting and inconsequential issues. Rather, law was a lived application that was uneven and uncertain in its translation into social relations. More important than "abstract right," as Pentland suggests, was which side could mobilize force more successfully:

> Attempts to resume operations during a strike nearly always provoked violence, and the various questions of right dropped into the background as questions of physical attack came to the fore. The final arbiter of most of the disputes was not abstract right but physical force: the power of the massed labourers to do violence against the similar power of the troops that employers were able to call to their assistance.[16]

The boundaries of constraint, in these formative years, were thus not so much legal, as they were physical: who might twist whose arm the hardest. And the outcome was by no means certain, except over the long haul.

In that extended period, from the 1820s into the 1850s, the Canadian state was taking its first steps toward formation, and a not inconsiderable component of its birth pangs involved the police forces that came into being on early public works projects as a consequence of the need to suppress civil disobedience on the largest work sites of pre-Confederation Canada, the railways and canals that intersected the old and the new mercantile-industrial order.[17] In this sense, the nascent state was indeed, in Marx's words, "the intermediary between man and man's freedom," or, as Engels was later to put it more bluntly, "force in its organized form."[18]

To grasp law's meaning in this period of Canadian history it is critically necessary to see, not some hegemonic force, but a sticky filament that was necessary to brush against in specific circumstances in order to secure wages due, employments owed, or conventions to be observed. In the absence of deep structures of class and state formations, yet to be anchored in early Canadian socio-economic relations, the law was a presence, but one always to be negotiated, by both the propertied and the propertyless. This was evident in one contemporary's description of Peter Aylen, an ethnic leader of the rough Irish timberworker Shiners of the Ottawa Valley, and something of a *lumpenbourgeoisie*: "The laws are like cobwebs to him."[19] Pentland too appreciates this character of early law,

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[16] H. Claire Pentland, *Labour and Capital in Canada, 1650-1860,* ed. by Paul Phillips (Toronto: James Lormier, 1981) at 190.

[17] *Ibid.* at 189-97. See also a number of essays in Allan Greer & Ian Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992), see especially Allan Greer, "The Birth of the Police in Canada" at 17-49.

[18] Karl Marx, "On the Jewish Question" in Karl Marx & Frederick Engels, *Collected Works* vol. 3 (Moscow: Progress, 1975) at 152; Frederick Engels, "Materialien Anti-Duhring" in Gérard Bekerman ed., *Marx and Engels: A Conceptual Concordance*, trans. by Terrell Carver (Oxford: Blackwell, 1983) at 163.

[19] Cited in Michael S. Cross, "Stony Monday, 1849: The Rebellion Loses Riots in Bytown" (1971) 63(3) *Ontario History* 177 at 182.

noting that unlike in Ireland, it was not, even for the most rowdy of canallers, "altogether regarded as an alien oppression."[20]

Thus, among the most disobedient demographic and occupational sectors of early Candian society, the unskilled Irish immigrant labourers, Pentland saw this group's emergence as a class force related to its coming to grips with the boundaries of class constraint. One part of these limitations related directly to law and civil disobedience. For the Irish Labourer developed an appreciation of the necessity of constraining the use of violence in defiance of law, but of keeping it in judicious reserve, marshaling physical force and civil disobedience so that they would be most effective. Although the situation was markedly different among the smaller collectivities of skilled tradesmen who faced early conspiracy charges for their proto-unionization efforts in the 1830s and 1840s, such craft workers also brushed their way uncertainly against law's constraints, at times securing legal vindication for their rights of association, at other times confronting defeat in the courts.[21]

IV. PRELIMINARY CODIFICATION: CLASS CONTESTS AND THE 1872 *TRADES UNION ACT*

Mobilizations of Canadian workers that reached beyond specific public works sites, large factories and mills, or small craft shops were rare between 1840–1870. When they did strike, such acts were almost always called acts of civil disobedience, as an 1853–1854 strike wave was dubbed "an insurrection of labour"[22] by the Canada West newspapers. Such defiance of conventional relations of labour and capital challenged understandings of uncertain laws of conspiracy. The boundaries of legal restraint containing workers' collective actions in this period were legislatively real, but for all practical intents and purposes it was other limitations established in the material relations of production and the small spaces of worker-employer contestation that were more critical determinants of whether tradesmen and labourers organized or whether they could be successful in their petitioning of employers over wage and job

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[20] *Supra* note 16 at 196.

[21] For the most useful discussion of this matter see Tucker, "Indefinite Area of Toleration," *supra* note 9 at 18-41.

[22] Paul Campbell Appleton, *The Sunshine and the Shade: Labour Activism in Central Canada, 1850-1860* (M.A. Thesis, University of Calgary, 1974) [unpublished].

condition issues.[23] The law was cobweb-like, to be sure, in its sticky traversing of the boundaries of class relations, but it was indefinite enough to never quite be a final deciding arbiter. Yet it necessarily constructed almost all working-class self-activity in terms of class mobilization for political or economic reasons as civil disobedience.

On the surface it would appear that 1872, and the passage of the *Trades Union Act*, changed all of this, ending years of legal uncertainty about unions' legal status. Yet as scholars have shown, the 1872 legislation, which was after all a direct outgrowth of civil disobedience in the form of demands for the nine-hour day that encompassed mobilizations of skilled workers in most major Ontario cities, a planned general strike called for May 15, 1872, and the Toronto printers' conspiracy trial of April of that year, was indeed quite ambiguous in the legal sense. It granted unions legal status only if they followed certain legal guidelines, which none did, and it was quickly followed by other pieces of legislation that hemmed in what workers could do in strike situations. In reality, the 1872 *Trades Union Act* and subsequent follow-up legislation refused to easily concede the legal right of freedom of association and collective bargaining, with the consequence that almost the entire history of class relations and working-class self-activity in the 1870–1945 period was placed in legal limbo. This was a long, drawn-out interregnum, but it was one in which, interestingly, the zones of toleration and the boundaries of legal constraint that had limited trade union possibilities in the past were expanded greatly, at the same time that they were also hedged in more effectively vis-à-vis legal statutes. Whatever the legalistic obfuscation that flowed from the aftermath of 1872, Canadian workers took it as their legal right to organize and negotiate with employers, however difficult those projects were going to be. But law also now had a more precise, if discretionary, power to prosecute. In this sense, the law of 1872 was a product of class organization, civil disobedience, and a legal regime that refused to concede the obvious, nevertheless acknowledging what it had to so that the everyday practices of the Canadian working class would no longer routinely be cast as criminal, but that could, if necessary, be subject to legal proceedings.[24]

It is in this context that the labour upheavals of 1886, 1919, 1937, and 1946 must be understood. To be sure, each of these major moments of working-class mobilization differed markedly: their times, places, and

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[23] See, for instance, Bryan D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1991* (Toronto: McClelland and Stewart, 1992) at 81-91 [Palmer, *Working-Class*]; Bryan D. Palmer, "Labour Protest and Organization in Nineteenth-Century Canada" (Fall 1987) 20 Labour/Le Travail 67-76 [Palmer, "Labour Protest"].

[24] *Supra* note 9 at 51-54; Palmer, *Working-Class*, *ibid.* at 106-16.

characters were distinguished by particularity not commonality. But they were all in their way brushing up against the law, pushing against its cobweb-like confinements to expand and stretch, and even break, the boundaries of constraint that were an integral feature of capitalist authority.

V. LABOUR UPHEAVALS AND THE ORIGINS OF LAW IN CIVIL DISOBEDIENCE

A. *1886: The Knights of Labor*

Much of the ritualism, attachment to secrecy and symbolism, and clandestine character of the Knights of Labor, for instance, was not unrelated to the sure grasp that working-class agitators in the 1880s had of the necessity of organizing in ways that skirted the power of employers. In so doing they were challenging tangible hangovers from the pre-1872 legal regime of toleration that narrowed labour's possibilities. The Knights of Labor courts were concrete articulations of attachment to political and ethical strictures, to a notion of law as "right" that nevertheless confronted openly other legal constraints. In their everyday engagements with local bylaws, employer boycotts, early closing legislation, lobbying for factory acts, various protective laws for women and children (whose meaning was always criss-crossed with gender and class content), strikes, and suffrage extensions, members of the Order were constantly both on the cusp of civil disobedience and working to reconstruct the law and legitimize it in the eyes of a working population more and more aware of the ravages of monopolistic power:[25]

> It is now axiomatically manifest that this country will soon be in a condition where its entire wealth is represented by interest-bearing securities, that can be locked up in safety deposit vaults by their plutocratic owners. When this time comes, and it is almost at hand, the whole body of the toiling producers will be the mere serfs of capitalistic drones. The wages allowed them will only be sufficient to enable them to do their tasks, and reproduce themselves, while the great bulk of the wealth created in their hands will go to swell the enormous hoards of the already monstrously rich. A system under which this devastation of humanity can go on, as it is going on today, is not civilized, nor semi-civilized, nor barbaric, nor savage; it is simply infernal, and unless extirpated root and branch will surely bring the nation that tolerates it to merited destruction.[26]

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[25] See Gregory S. Kealey & Bryan D. Palmer, *Dreaming of What Might Be: The Knights of Labor in Ontario, 1880-1900* (Toronto: New Hogtown Press, 1987).

[26] Lester C. Hubbard, *The Coming Climax in the Destinies of America* (Chicago: Charles H. Kerr, 1891) at 459-60. A copy of this book in my possession belonged to the Toronto Knights of Labor figure, A.W. Wright.

Such language, read from the twentieth-century vantage point of revolutionary program or social democratic reform, seems antiquated, easily tarred with the brush of populism. But it was no less a language of recalcitrance and resistance for all that. And it was often directed against the "dead hand" of law that had drawn the boundaries of constraint in narrowly circumscribed, anti-democratic ways. In the words of one of the leading "brainworkers" of the Knights of Labor, Phillips Thompson:

> All the weight of tradition and precedent arising out of altogether different conditions than those which now confront us is thrown against Labor Reform. The battle will be more than half won when we emancipate ourselves from this thraldom to the ghosts and shadows of the past. Why should new questions be judged by old precedents? Why should we on this continent and in this bustling industrial age be ruled by the judicial interpretations, the legislative maxims, or the social and economic formulas originated by the idlers and parasites of society at a time when the world was supposed to have been created for the benefit of the rulers and the rich—and the people to have no rights whatever but that of sweating and fighting for their benefits? How strange that inherited traditions and ideas should have such a hold that men who are themselves workers, themselves sufferers from caste oppression, should be largely guided in their conduct by the public sentiment and code of principles inculcating respect for birth, money, position, vested rights, etc., created by the dead, and no doubt damned, old despots and sycophants of the middle ages.[27]

Less lyrical was the letter one semi-literate Knight of Labor from the small enclave of Alvinston, Ontario, wrote to the Order's figurehead, Terrence V. Powderly, in 1886: "To look after and in speaking of the strikes of the Labouring of those railroads now unsettled as yet I regret that their should been any necesity [sic] to resort to fier [sic] arms as that nearly always results bad. But it is necessary sometimes to fight for your rights."[28]

B. *1919: General and Other Strikes*

If we move forward in time two decades and more to the post-World War I labour revolt, much has changed. The Knights of Labor expanded the boundaries of constraint and challenged the legal and other dimensions of capitalist authority out of the widened zone of toleration that flowed in the wake of 1872 and the *Trades Union Act*. In some senses the Order's legitimacy was a reflection of the newness of massive working-class upheaval, as well as the uncertainty with which the Knights challenged conventional class relations; this necessarily meant that the traditions that Thompson saw as weighing the movement down were also in some senses

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[27] Phillips Thompson, *The Politics of Labor* (New York: Belfort, Clarke & Co., 1887) at 146.

[28] Letter from Howard Rickard to T. V. Powderly (12 April 1886) in Kealey & Palmer, *supra* note 25 at 375.

drawn upon. By 1919, new traditions, especially those associated with Marxism and its language of production for use, not profit, were being absorbed into the more revolutionary variants of class struggle, and internationally the actuality of world war and the threat of Bolshevism and Revolution was very much in the air.[29] This hardened the stance of authority ideologically, but equally critically employers were now a more coherently organized force and the state was at this point a far more developed entity, especially on the playing field of labour relations, which had emerged as pivotal in the aftermath of the depression of the 1890s. Canada's political economy was revamped: the flooding of the labour market by a massive influx of immigrants, a huge jump in productive capacity associated with Canada's second industrial revolution, the expansion of workplace size, numbers of corporate mergers, technologies and managerial rigour, the consolidation of a Department of Labor, and the acutely legal role of William Lyon Mackenzie King in mediating class tensions in the pre-World War I years all figured forcefully.[30] When the inevitable clash of class forces occurred in 1917–1925 (with the last gasp occurring in the Cape Breton Coal fields),[31] the zone of legal toleration of class self-activity had in fact been tightened and compressed. State trials in the aftermath of the Winnipeg General Strike were but the most visible flag of a changed climate in which the winds of opposition to civil disobedience now flew directly in the face of so-called enemy alien radicals who were to be deported; Bolsheviks, anarchists, and all "One Big Unionists" who were to be suppressed; as well as returned war vets who opted for dissidence rather than patriotism and were silenced. The stakes in legally constraining all class challenges now appeared much higher than they had been in 1886, and the vehemence of constituted authority was consequently much greater: repression unfolded in the courts, was articulated daily in the press, and was strengthened immeasurably in the consolidation of a national police force, constituted in good part on the claimed need for mechanisms

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[29] This forms a central theme in an older radical historiography, exemplified by Gregory S. Kealey, "1919: The Canadian Labour Revolt" (1984) 13 Labour/Le Travail 11 and Larry Peterson, "Revolutionary Socialism and Industrial Unrest in the Era of the Winnipeg General Strike: The Origins of Communist Labour Unionism in Europe and America" (1984) 13 Labour/Le Travail 115. It is challenged and complicated somewhat by the more moderate, social-democratic cast of some presentations in Craig Heron, ed., *The Workers' Revolt in Canada, 1917-1925* (Toronto: University of Toronto Press, 1998).

[30] Among many sources see, for instance, Paul Craven, *'An Impartial Umpire': Industrial Relations and the Canadian State 1900-1911* (Toronto: University of Toronto Press, 1980); Bob Russell, *Back to Work? Labour, State, and Industrial Relations in Canada* (Scarborough: Nelson, 1990) at 57-126.

[31] On the Cape Breton experience see David Frank, *J.B. McLachlan: A Biography* (Toronto: James Lorimer & Company, 1999).

of counter-subversion. The law of labour and the law of sedition blurred, as the R.B. Russells and J.B. McLachlans of west and east learned the cost of their freedom, and the zone of toleration vis-à-vis class organization was, for a time, pressured into realms, not of conspiracy in restraint of trade, but of treason to the nation, concretized in Section 98 of the *Criminal Code*. Struggles of a class nature widened immeasurably, with battles over collective bargaining rights among Winnipeg building tradesmen and metal workers leapfrogging into the country's most illustrious General Strike; sympathetic strikes erupted across the land, from Amherst, Nova Scotia, to Victoria, British Columbia, as workers used the withdrawal of their economic power not to enhance their wages and lighten the burdens of the daily tasks, but to support their fellows, as a matter of principle.

Not surprisingly, when W. A. Pritchard came to address the jury in the aftermath of his trial for seditious conspiracy and common nuisance in 1919–1920 he spoke in great detail, drawing on the experience of various sectors of the bindlestiff workforce the One Big Union had struggled to organize, and the ways in which the law as codified inevitably came to be stretched and challenged by the working class, precisely because such law had been stretched and challenged in other ways by capitalist employers:

> And suppose, gentlemen, that in addition to the development of the machine I have shown you, the workers were confronted with other conditions; supposing that Laws on the Statute Book respecting health and sanitation, the time of payment of wages, etc., etc., set down in the Provincial Laws, are just a picture book; suppose the conditions in the places in which you work are not at all like what they should be if the Laws on the Statute Book were enforced. Suppose, gentlemen, that there be a Law which tells the Employer in the camp that he must put on the water supply in such and such a fashion; that he can only build bunks in the bunk house of such and such a character; that they must not be tier bunks, one bunk above another; that two men shall not sleep together in what lumber-jacks call double-barreled bunks; that they shall not be built so that you crawl in head first or foot first—what lumber-jacks call muzzle-loading; supposing it says that reports shall be turned in respecting those bunk houses and despite the Law, suppose this: these mattresses are made of a decomposed substance that might at one time have been hay, and suppose all these things are done, and put upon the Statute Book, what are you going to do about it as workers? Would you organize as best you could and force your demands right there upon these chaps where you work, and see if you could not, "by virtue of your industrial strength, make such demands as such workers may at any time consider necessary to their maintenance and well being?" Would you not, gentlemen of the jury, consider it good policy on the part of these workers if they could by their efforts build up an organization which would save themselves to some extent?[32]

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[32] *W.A. Pritchard's Address to the Jury in The Crown vs. Armstrong, Heaps, Bray, Ivens, Johns, Pritchard, and Queen (R. B. Russell was tried previously) Indicted for Seditious Conspiracy and Common Nuisance, Fall Assizes, Winnipeg, Manitoba, Canada 1919-1920* (Winnipeg: Wallingford Press, 1920) at 100-01.

Pritchard continued on in this vein, and virtually no page of his two-hundred-page statement was without reference to this process of how workers struggled for law against law, of how law was abused and resisted, in matters large and small. Pritchard insisted that there was "no more peaceful or Law abiding section of the community under the sun than the industrial worker," yet he acknowledged "there is no man or set of men who have been more goaded by their conditions than these same men."[33] And it was that process of commitment to law in conjunction with law's failure that translated into the making of revolutionaries such as Pritchard. The nature of a mattress was a springboard into support for the insurgent revolutionary working class of St. Petersburg's metal shops. The absurdity of censorship laws that dictated that ownership of a volume of Marx's *Capital* published in London was within the law, but that the same book published by Charles H. Kerr of Chicago was banned, moved Pritchard to a denunciation of censorship and an articulation of large issues of freedom: to read, to associate, to act. From the smallest of issues flowed the largest and most expansive of concerns. Out of the struggle to fight for collective bargaining rights in one city, Winnipeg, came the commitment to the organization of the international working class, to world revolution:

> No more industrial rivalries—this is what I am honestly striving for, gentlemen .... Reason, wisdom, intelligence, forces of the minds and heart, whom I have always devoutly invoked, come to me, aid me, sustain my feeble voice, carry it, if that may be, to all the peoples of the world and diffuse it everywhere where there are men of good-will to hear the beneficent truth. A new order of things is born, the powers of evil die poisoned by their crime. The greedy and the cruel, the devourers of people, are bursting with an indigestion of blood. However sorely stricken by the sins of their blind or corrupt masters, mutilated, decimated, the proletarians remain erect; they will unite to form one universal proletariat and we shall see fulfilled the great Socialist prophecy: "The union of the workers will be the peace of the world."[34]

In one sense, the Committee of 1000, Arthur Meighen, the Canadian Manufacturers' Association, and Robert Borden were not wrong: labour's revolt *was* an uprising of the seditious, if not legally then potentially. Winnipeg's General Strike, which traditionalist labour historiography understands as little more than a mundane struggle for collective bargaining rights that was defeated by a powerful and all-too-paranoid state, was indeed an act of civil disobedience that threatened treason, in as much as the possibility of revolutionary upsurge was buried, albeit deeply, in the conflictual relations of capital and labour. The class struggle always contained within itself this possibility of shattering

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[33] *Ibid.* at 102.

[34] *Ibid.* at 215-16.

boundaries of capitalist authority and erasing law's ultimate constraints.[35] One of those extraordinarily rare moments in our past when this was brought out into the open occured during 1919.

No doubt there were those among the poor for whom the meaning of this uprising was confused. In prison in 1926, for instance, the fiery communist coal miner leader, J.B. McLachlan, was asked by one inmate why he was behind bars. "'Sedition' said Jim. The prisoner drew back in amazement and awe. 'Is that something to do with women?' he whispered! 'Sometimes,' said Jim. 'How many times did you do it?' 'Dozens,' said Jim."[36] But anecdotes of misinterpretation and close-lipped, ironically-poised stoicism aside, the terms of trade vis-à-vis law, class struggle, boundaries of constraint, and capitalist authority shifted in the 1920s, as Judy Fudge and Eric Tucker show in their Canadian study of the regulation of workers' collective action in the first half of the twentieth century.[37]

C. *1936: Depression and Dissent*

By the time that another peak in class struggle climaxed, in the industrial union sit-down strikes and Congress of Industrial Organization (CIO) agitations of 1936–1937, which saw plant occupations and militant outbursts throughout southern Ontario, culminating in the organization of Oshawa auto workers,[38] years of obsolete craft unionism, on the one hand, and of depression and state inaction around the basic provisioning of relief, on the other, had reconditioned the meaning of both accommodation and resistance. In the "dirty thirties," labour law was moving toward an eventual narrowing of boundaries and reification of capitalist authority in contract law, collective bargaining being premised on management rights' clauses and the union being, in part, responsible for policing its members. This was to be a decade in the making, but as the career of perhaps the most significant labour lawyer of the period, J.L. Cohen, reveals, it was in the

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[35] *Ibid.* For the traditional labour history perspective see David Jay Bercuson, *Confrontation at Winnipeg: Labour, Industrial Relations, and the General Strike* (Montreal and Kingston: McGill-Queen's University, 1974).

[36] *Supra* note 31 at 340.

[37] See Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press, 2001) at 104-52 [Fudge & Tucker, *Labour Before the Law*].

[38] See, for a beginning analysis, Irving Martin Abella, *Nationalism, Communism, and Canadian Labour* (Toronto: University of Toronto Press, 1973) at 1-40 [Abella, *Nationalism*]; Irving Martin Abella, "Oshawa 1937" in Irving Martin Abella, ed., *On Strike: Six Key Labour Struggles in Canada, 1919- 1949* (Toronto: Lorimer, 1975) at 93-128 [Abella, *On Strike*].

mid-1930s that irreversible strides were taken in this direction. Industrial unionism, if weak and wobbly, was nevertheless assured a future stand in Canadian class relations because of events that transpired in the late 1930s.[39]

The point that I want to stress here, however, is that at the same time labour law, narrowly conceived, was constricting the boundaries of class struggle through becoming entrenched, codified, professionalized, and integrated into a state-orchestrated system tending toward the production of labour-capital rapprochement, the actual legal spaces where class was now operative were in fact expanding. Their boundaries were pushed by those human sectors blocked from industrial employment, the high wage, and collective bargaining rights by the economic collapse that threw millions of Canadians out of work and that made the breadwinner wage less and less the touchstone of conflictual class relations and the relief system and its relation to the structure of a wage regime a pivotal factor in everyday life. To be sure, the state continued to use its repressive capacity to construct almost all unionism as a treasonous act and any militancy as seditious conspiracy, especially in terms of the early 1930s when the Communist Party of Canada engaged in a Third Period battle for the streets that resulted in a replay of coercive state trials and arrests of dissidents. Well into the late 1930s, especially in Duplessis' Quebec, legislation like the infamous Padlock Law was trained on communists and industrial unionists in a blatant curtailment of civil liberties.[40]

But the ways that law was actually challenged most directly in the 1930s was in the class-related but union-separated struggles of the jobless, the homeless, and the relief-dependent poor. Such victims of the capitalist marketplace's vicissitudes sustained a creative arsenal of resistance and opposition that flaunted the laws of the land in the same way that the laws of the market had bluntly bypassed their needs. Large grocery stores were subject to mass looting; power and hydro accessibility, cut off by powerful local utilities for non-payment, was reconnected by out-of-work electricians and plumbers; tenants facing eviction blockaded themselves in their buildings in defiance of landlord efforts to put them on the street; and tin-panners and relief protesters routinely marched down city thoroughfares in

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[39] Laurel Sefton-MacDowell, *Renegade Lawyer: The Life of J.L. Cohen* (Toronto: University of Toronto Press, 2001) at 13-108; and, for another vantage point, Cy Gonick, *A Very Red Life: The Story of Bill Walsh* (St. John's, Newfoundland: CCLH, 2001) at 72-123.

[40] Consider the discussion in Fudge & Tucker, *Labour Before the Law*, *supra* note 37 at 153-227; Palmer, *Working-Class*, *supra* note 23 at 226-67; Lita-Rose Betcherman, *The Little Band: The Clashes between the Communists and the Political and Legal Establishment in Canada, 1928-1932* (Ottawa: Deneau, 1981).

defiance of police and authorities, parading without permits and clashing violently with police. Far more than the tramp and vagabond masses of nineteenth-century depressions, who had elicited fear, loathing, and the passage of restrictive local ordinances, these uprisings of the Depression's destitute were well nestled into neighbourhood relations and represented familial continuities, gender conventions, identitites of nation and empire, and cross-age connections that ran through schools, workplaces, and families. These battles struck to the core of law's confinements, because they constantly raised high the banner of universal laws of right and entitlement, which none could deny had taken a beating in the material downturn of the 1930s.[41]

Thus, the battle around labour law in 1936–1937 was not just restricted to the freedom of association of the Oshawa sit-downers, however much that was a critical fight and whatever the ease with which we can conceptualize that struggle in terms of traditional understandings of industrial legality. Equally pivotal was the context in which 400,000 Ontario residents were on relief in that year, in which work payment on municipal relief projects was slashed from 15–50 per cent, in which a morally-ordered regulatory apparatus of state surveillance intruded, often in explicitly gendered ways, into the everyday lives of those designated dependent, particularly women and children, in which angry relief strikers fought pitched battles with police, physically restrained municipal welfare staffers until they rescinded wage cuts, and successfully secured the reinstatement of those chopped from the dole.[42]

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[41] I have benefitted greatly from discussions with two Ph.D. students, whose research on Vancouver and Toronto has addressed the relief system and the unemployed and underemployed of the 1930s. Todd McCallum's forthcoming Queen's Ph.D. thesis, *'Still Raining, Market Still Rotten': The Early Years of the Great Depression in Vancouver*, has brought me into an acute awareness of the struggles and subjective mindset of the unemployed. Marcus Klee, *Between the Scylla and Charybdis of Anarchy and Despotism: The State, Capital, and the Working Class in the Great Depression, Toronto, 1929-1940* (Ph.D. thesis, Queen's University, 1998) and Marcus Klee, "Fighting the Sweatshop in Depression Ontario: Capital, Labour and the Industrial Standards Act" (2000) 45 Labour/Le Travail 13 are suggestive forays into the relations of the paid and the underpaid, the labour market, and the relief order. See, as well, for the struggles of the unemployed and tenants resisting eviction: Patricia V. Schulz, *The East York Workers' Association: A Response to the Great Depression* (Toronto: New Hogtown Press, 1975); Bryan D. Palmer, ed., *A Communist Life: Jack Scott and the Canadian Workers' Movement, 1927-1985* (St. John's, Newfoundland: Committee on Canadian Labour History, 1988) at 28-56. For background on the state's legislative response to unemployment see James Struthers, *No Fault of Their Own: Unemployment and the Canadian Welfare State, 1914-1941* (Toronto: University of Toronto Press, 1983). The classic account of the unemployed is Ronald Liversedge, *Recollections of the On to Ottawa Trek* (Toronto: McClelland and Stewart, 1973).

[42] Sefton-MacDowell, *supra* note 39 at 55-56; Margaret Jane Hillyard Little, *'No Car, No Radio, No Liquor Permit': The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998) at 76-106.

To grasp the spaces that opened up for labour in the 1930s, then, we need appreciations of not only the CIO, but also of the many federations of the unemployed and their relief-dependent families that mushroomed in a growth that spread from coast-to-coast, and that contextualized class relations in almost every city in the land. Too often telescoped into the highly visible, and violently rebuffed, On-To-Ottawa Trek, this unemployed-relief agitation was by necessity constantly engaged in civil disobedience. And in so doing it framed the union campaigns of this and later periods, their successful outcomes determined somewhat by the actions of the rowdy crowds that made the high-waged industrial organizations of the employed more palpable to capital and the state. The debt owed to this tradition, of course, has yet to be paid by the unions, which managed, in their increasing respectability, to distance themselves from their early relationship to illegality.

D. *1946: The Coming of Industrial Legality*

One reason for this distance was the changed context and complexly ironic outcomes of the next episode of labour upheaval that associated with the immediate post-World War II mass strikes that rocked Canada's manufacturing and resource industries. To begin with, this large-scale national mobilization of workers, fueled by union membership roughly tripling over the course of a decade, culminated in a 1946–1947 strike wave involving 220,000 workers in logging, mining, meatpacking, shipping, auto, rubber, steel, textiles, and electrical products and over seven million lost days of pay and production. The working-class mobilization took place in years of prosperity's optimisms, the rough protests of the unemployed, the evicted, and the relief-dependent having faded far from view. The labour protest of this period thus framed understandings of the zones of social and legal toleration in highly traditional ways. The organized male worker, conceived as stable, employed, and a family breadwinner, was understood as the archetypal unionist.

More critically, this late 1940s upheaval was something of an endnote to a half-century of labour organizing, protest, and overt class struggle, and it sealed a post-war settlement that consolidated a corporate relationship between capital and labour, mediated by a mature state. This was truly the birth of industrial legality, which now hardened, and ironically narrowed, the zone of legal toleration to a space conceived as a seemingly broad, but in actuality quite constricted, industrial pluralism. That that pluralism was politically secured through an unwritten pact, involving an emerging and increasingly conservative trade union hierarchy, an evolving body of law and a judicial and state "community" of personnel dedicated

to its enforcement, and a cohort of capital far-seeing enough to appreciate that stabilizing class relations was indeed the need of the hour, was crucial to industrial legality's meaning. Just as it was pressured into being via channels of explicit class struggle, so too was it premised on driving the very communists who had often pushed that process of contestation from the labour organizations that they had played pivotal roles in building. This purge was one of the bitter fruits swallowed, often with little more than a fleeting taste, by workers and their collective bargaining agents. The late 1940s was thus marked by some of the most momentous class confrontations of the twentieth century at the same time that it harnessed those confrontations.[43]

Civil disobedience was never far from the turbulent strikes of the times, and never were acts of civil disobedience more creative and audacious than in the famous, and legally critical, strike at the Windsor Ford plant, where wildcatters blockaded the struck auto factory with its own product on a cold November morning, stalling their cars, commandeering vehicles of unwary commuters, and seizing the streets with nine Greyhound buses, either parked strategically by sympathetic drivers or taken forcefully by the union's Flying Squad. Automobile owners stranded in the street were left to scratch their heads in bewilderment. "I've never seen anything like it," said one puzzled car owner. Amidst frenzied City Council meetings, in which discordant discussion of public safety boiled over into acrimonious taking of sides, pro- and anti-union, the *Windsor Star* labeled the day's events "an insurrection."[44] In Ottawa, the Congress of Canadian Labour was inundated with telephone calls on the part of irate workers demanding a General Strike. Four hundred union delegates from a range of unions called on Ontario's Conservative Premier, George Drew. No friend of labour, he was reportedly "out to lunch." But among the more cautious of labour leaders there was wide-ranging criticism of what was labelled a dangerous assault on democracy, law, and order. D.N. Secord of the Canadian Brotherhood of Railway Employees pontificated in the language of paternalism: "We must recognize some of our faults and if the mob is ruling here we are wrong ... . You can't deprive women and children of

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[43] For a recent sophisticated statement on the 1940s see Peter S. McInnis, *Harnessing Labour Confrontation: Shaping the Postwar Settlement in Canada, 1943-1950* (Toronto: University of Toronto Press, 2002). An older treatment, still invaluable, is Abella, *Nationalism*, *supra* note 38 with my own broad overview, Palmer, *Working-Class*, *supra* note 23 at 268, 305 and Leo Panitch & Donald Swartz, *The Assault on Trade Union Freedoms: From Consent to Coercion Revisited* (Toronto; Garamond, 1988), suggestive of the corporatist contours of what has come to be called "the post-war settlement." For a dissenting view see Sefton-MacDowell, *supra* note 39.

[44] Quoted in Herb Colling, *Ninety-Nine Days: The Ford Strike in Windsor, 1945* (Toronto: NC Press, 1995) at 89.

bread and milk." The words could have come out of the mouths of the Winnipeg General Strike's Citizen's Committee of 1000.[45]

Government arbitrator and Supreme Court Justice, Ivan Rand, worked labour and capital through their impasse, drafting a statement of binding arbitration that was incorporated into the eventual collective agreement signed by the union and the company in February 1946. Rand's "formula" became the basis of labour-capital-state relations for thirty years. It did for the legal zone of toleration in 1946 what the *Trades Union Act* of 1872 had done in a much different era: it legitimized unions at the same time that it constrained them, drawing them into the accommodationist magnetic pull of state mediation and the hegemonic ideas of bourgeois order and its seeming safeguard, democracy. When endorsed by a majority of workers, unions secured the automatic check off of dues by employers, the right to bargain collectively for workers, grieve for them, and, within defined boundaries, strike. But to keep these rights unions had to behave "responsibly," which meant lawfully. To do this, unions were expected to police their members, to end wildcat walkouts, threats to property, and violent picket line behaviour. If they did not, they faced fines from the courts and jailings of their leaders.

By the end of the 1940s, as Ford-like battles in other parts of the country, such as the Asbestos strike of 1949,[46] re-enacted similar class-struggle theatrics, the wisdom of Rand's compromise began to be grasped more and more within the structures of the state and was increasingly embraced by employers once given to recalcitrance in their dealings with organized labour. This rapprochement was also being played out in collective agreements, as studies by Peter Warrian and David Matheson have shown.[47] Matheson notes a generational difference between the pre-1939 agreement, the transitional collective bargaining documents of 1940–1945, and the mature labour-capital contracts of the post-World War II years. The latter might contain as many as seventy provisions, sixty or more sub-provisions, hundreds of pages, and increasingly complicated legal language. Management rights clauses, almost unheard of in 1939, were the norm ten years later, usually ending agreements by conceding to capital

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[45] See David Moulton, "Ford Windsor 1945" in Abella, *On Strike, supra* note 38 at 129-61; Herb Colling, *Ninety-Nine Days: The Ford Strike in Windsor, 1945* (Toronto: NC Press, 1995), see especially 85-114.

[46] See Pierre Elliott Trudeau, ed., *The Asbestos Strike,* trans. by James Boake (Toronto: James, Lewis & Samuel, 1974).

[47] Peter J. Warrian, *Labour is not a Commodity: A Study of the Rights of Labour in the Canadian Postwar Economy, 1944-1948* (Ph.D. Thesis, University of Waterloo, 1986); David W.T. Matheson, *The Canadian Working Class and Industrial Legality, 1939-1949* (M.A. Thesis, Queen's University, 1989).

anything not codified explicitly in the collective agreement. As Ian McKay concludes, before the reign of Rand, workers and their unions had asked themselves simple questions before tousling with a boss: "Are we stronger than our employers? How long can we hold out?" In the aftermath of industrial legality, with the check off separating rank-and-file unionists from shop stewards and other layers of leadership, with the collective agreement an increasingly distant and incomprehensible, yet determinative, document, new concerns were more and more evident: "Does this conflict with the collective agreement? When does this go before the conciliation board? How can we sell this politically?"[48]

VI. LEGACIES OF INDUSTRIAL PLURALISM

Class conflict, labour-capital relations, and the role of the state and its initiatives in the post-1946 years existed very much in the shadow of this post-war compromise.

Affluence helped grease the wheels of accommodation, although there were signs of skidding, even derailment, throughout the 1950s and into the 1960s. An overt challenge to the so-called post-war settlement was raised explicitly in 1965–1966. Some 369 wildcat strikes pitted Canadian rank-and-file workers against a triumvirate of employers, bosses, and state officialdoms at the same time that a militant war against injunctions raged in union circles, rocking the legal regime of class incorporation to its core. Union bureaucracies weathered this storm, however, and the twin process of the trade union tops beating down youthful labour dissidents and courts and judges defending the sanctity of injunctions and the class Rule of Law, as they did in 1966, jailing a number of union protesters in Peterborough's infamous Tilco strike, helped to tame labour-capital relations. Justice Ivan Rand was called upon to play a different role than he had in 1946, and the 1966 Royal Commission investigating industrial disputes and injunctions placed the lid firmly on class conflict in ways that would have been impossible in 1946.[49]

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[48] Ian McKay, *The Craft Transformed: An Essay on The Carpenters of Halifax, 1885-1985* (Halifax: Holdfast Press, 1985) at 82. McKay actually extends the coming of industrial legality in the Halifax building trades back into the 1930s, even the 1920s, citing legislation such as *Industrial Standards Act* as pivotal breakthroughs. Whatever the fine points of historical dating and argument, Rand codified industrial legality in the late 1940s in ways that marked something of a turning point in class relations and state involvement in them. See the argument as well in Fudge & Tucker, *Labour Before the Law*, *supra* note 37 at 263-315.

[49] Stuart Marshall Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-1966* (Ottawa: Government Printing, 1968) at 431-33; Palmer, *"Working-Class," supra* note 23 at 315-16; Joan Sangster, " 'We No Longer Respect the Law': The Tilco Strike, Labour Injunctions, and

Yet a decade after the Tilco strikers fought a recalcitrant employer and unionists rallied to their cause to face prison cells for their refusal to concede that the courts had the right to curtail labour protest, the terms of class trade had shifted very much in favour of capital and the state. Global uncertainties associated with the 1973 oil crisis, and growing state deficits and capital flight in the advanced capitalist economies of the West, spelled the end of the boom cycle of what has come to be known as the Fordist regime of accumulation. This boom had always been the plush context in which the post-war settlement's legal negotiations of class struggle had been successfully bartered. This reversal of economic fortunes effectively ended capital and the state's willingness to abide by the old terms of industrial pluralism, but labour, its interests now defined as those of trade union officials and associated with bureaucratic structures, remained a captive of its contractual commitments. Even as the premises and practices of industrial pluralism came to be overridden in a different climate in the 1970s,[50] the ideology of industrial pluralism permeated the spontaneous, popular consciousness of class relations within which organized workers often found their thought suspended, and this same truncated, increasingly mythological, foundational perspective was adhered to by a more and more entrenched layer of labour officialdom that both owed its material being and privileges as well as its broad political allegiance to the legalistic pluralism of the post-World War II industrial order. Precisely because the Left in the unions had been vanquished in the Cold War decade of the 1950s, and isolated from and marginalized within the unions in the New Left upheavals of the 1960s, labour's trajectory in these decades was right-leaning within its general social-democratic field of force. The trade union bureaucracy was anti-communist in the 1950s and early 1960s, less than warmly received as the Co-operative Commonwealth Federation adapted to liberalism in the making of the New Democratic Party (NDP), and, with some exceptions (most prominent in the Canadian affiliates of the United Automobile Workers, where a 1965 Canada-United States Automotive Products Agreement constructed union politics differently), highly dubious of left-nationalist currents in the social democratic milieu in the late 1960s and early 1970s; during this time, it marked its distance from political formations such as the Waffle, currying closer and closer favour with the rightward inclinations of the NDP establishment.[51]

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the State" Labour/Le Travail [forthcoming in 2004].

[50] This is the fundamental argument of Panitch & Swartz, *supra* note 43.

[51] A curiously skewed presentation of this period appears in Sam Gindin, *The Canadian Auto Workers: The Birth and Transformation of a Union* (Toronto: James Lorimer, 1995) at 139-62.

As the small revolutionary Left of the 1920s and 1930s virtually passed into non-existence and the ephemeral leftism of the 1960s imploded in programmatic confusion in the 1970s, the last decades of the twentieth century were the first of the century in which a trade union bureaucracy, now stronger than it had ever been and sustained very much by law, lawyers, the courts, and the state, faced almost no critique from the Left. The result was that while labour leadership was capable of sustaining Left positions and encouraging militancy and combativity within the ranks of the organized workers, more common was a public face of the trade union hierarchy that oscillated between a kind of episodic confrontationalism and a more continuous accommodation. Specific leaders such as Jean-Claude Parrot, nurtured in enclaves of the Left and working-class militancy, like the Canadian Union of Postal Workers and Montreal's Common Front unionists, were willing to struggle to expand the zone of legal toleration by defying injunctions, refusing to curtail wildcats, and organizing massive protests across the spectrum of organized labour.[52] But for the most part, labour's leadership was either ossified and cautious or cynically performative, turning the tap of class struggle on when pressured from the base, but snapping it back off when mobilization threatened to actually overreach the inadequacies of a tepid leadership. By the late 1970s, with former United Automobile Workers' President, Dennis McDermott, heading the Canadian Labour Congress, this oscillation between militance and quiescence had come to characterize labour's leadership. It would produce an eerily anticlimactic denouement to one of the most widespread politicized mobilizations of Canadian workers in the 1980s, British Columbia's 1983 Solidarity uprising against the New Right Social Credit government, a four and a half month battle that threatened an all-out General Strike, featured patently-illegal teacher walk outs and other state-defiant work stoppages, and gave rise to widespread coalition-building, left-union educational efforts, and massive public protests involving hundreds of thousands of increasingly militant citizens and workers. But to the extent that such upheavals were led by the labour bureaucracy they were also, in the end, terminated by them, as the again politicized and illegal strikes of Ontario teachers in the fall of 1998 and the subsequent unravelling of the left-militant potential of the Ontario Federation of Labour-orchestrated Days of Action campaign revealed.[53]

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[52] *Ibid.* at 162-65; Daniel Drache, ed., *Quebec–Only the Beginning: The Manifestoes of the Common Front* (Toronto: New Press, 1972).

[53] See Bryan D. Palmer, *Solidarity: The Rise and Fall of an Opposition in British Columbia* (Vancouver: New Star, 1987); "Halloween in Harrisland: Teachers, Bureaucrats, and Betrayal" *Canadian Dimension* 32 (Sept./Oct. 1998) 29; "Where Ya At, General Strike?!" *Canadian Dimension*

VII. THE HERITAGE OF CIVIL DISOBEDIENCE

In this context, civil disobedience has been handcuffed on the Labour Left, and its capacity to extract concessions, secure victories, and expand the zones of legal and social toleration in an era of state and employer illegality, of governments' and capital's willful breaking of agreements, defying established law, and dictating exceptions to past rules of conduct, curtailed markedly. As economic recession curbs possibilities, and as moments of ideological construction such as September 11, 2001 (9/11) pressure the political climate to the Right, the labour bureaucracy has adapted by truncating class struggle, retreating into the legalisms of collective bargaining, and abandoning commitments to wide-ranging struggles and protests that demand more than organized workers treading water in pursuit of wage and work condition benefits. Few unions at this point engage in civil disobedience and the militant core of Canadian trade unionism and labour leadership, the Canadian Automobile Workers (CAW) and Basil 'Buzz' Hargrove, have of late gravitated more and more to the mainstream. Hargrove treats the combative Flying Squadrons of the CAW a little like a personal armed guard, dismantling them when they threaten to use their muscle on behalf of forces he questions and struggles he backs away from, but turning them loose when a union cause, such as striking workers in southwestern Ontario, rationalizes their revival. A measure of Hargrove's retreat was registered in 2002 with his cutting of the modest annual CAW contribution to the Ontario Coalition Against Poverty (OCAP), ostensibly on the grounds that OCAP was guilty of engaging in unnecessarily violent acts of civil disobedience. Speaking increasingly in the language of law and order, Hargrove is sidling up to the NDP, a political force he had recently criticized as spent in its possibilities through its incorporation into the logic of the liberal democratic order. When anti-globalization activists challenged the symbol of transnational, imperialist power at the Quebec City Summit protests in April 2001, it was the labour hierarchy that led its union masses away from struggle and refused to march up the hill to confront the fence and the state violence that defended it with police, tear gas, rubber bullets, and chemical sprays.[54]

Unless thwarted, this acquiesence will prove the death of the unions and the left. For no successful struggle against capital and the state on our

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32 (Sept./Oct. 1998) 20. A more positive view of this later 1990s period appears in David Rapaport, *No Justice, No Peace: The 1996 OPSEU Strike Against the Harris Government in Ontario* (Montreal: McGill-Queen's University Press, 1999).

[54] Kevin MacKay, "Solidarity and Symbolic Protest: Lessons for Labour from the Quebec City Summit of the Americas" (2002) 50 Labour/Le Travail 21.

home ground, let alone internationally, can be successful with the working class inhibited by a leadership fearful to lead and antagonistic to the one force that has historically insured humanity's advance: civil disobedience. To be sure, civil disobedience does indeed require deft development and a leadership that can negotiate law's limits and convey a sense of people's need for new law—law that sustains justice rather than refuses to recognize the need for justice. Even the rough Irish canallers of the pre-Confederation era understood this well, prefacing an 1843 strike with the statement that, "notwithstanding the hopes entertained by our enemies, we are fully determined to steer clear of any infraction of the law."[55] Of course, in their actions the canal labourers stretched this statement of intent beyond its legal limits. The zones of legal and social toleration willed to labour and the Left, the people and our environment, by a century of bourgeois order demands further stretching and redefinition, just as, in 1872, 1886, 1919, 1937, 1946, and 1965–1966, the law of labour was in need of new codes, legislation, and freedoms. To the extent that change happened, it came about because of civil disobedience. Those afraid to protest in ways that challenge law will never remake the law. They will never be a part of the creation of law that all can live with profitably, rather than law that the few profit from richly. And, finally, without civil disobedience we can never even imagine that society in which law, like the state itself, withers away, its presence no longer necessary to constrain human beings who can, in circumstances barely imaginable in our times, be truly free. To give up that utopian longing for a society finally liberated from law is to give up the vision of human perfection without which living is reduced to the most base of self-centered propositions. Succumbing to that would indeed be an ultimate act of an unfortunately blinkered, constrainingly individualistic and acquiescently subdued, *civil* disobedience.

[55] Cited in Palmer, *Working-Class*, *supra* note 23 at 61.