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Critical Labor Law Theory: A Comment*

Duncan Kennedy†

These two papers illustrate what to my mind is one of the most interesting and important developments in legal scholarship today, namely the emergence of a critical labor law theory. Side by side, the papers also reveal a fundamental cleavage within this new body of work. For while Lynd and Klare agree that labor law does not function in the working class' best interest, they disagree as to the form a critique of liberal legal ideology should take.

Klare and Lynd both view labor law in the years after World War II as a mechanism that coopts the working class and defuses class struggle. There are two aspects of this analysis, often confused. First, the authors claim that the rules in effect — e.g., the rule of *Vaca v. Sipes*[1] — have a coopting and demobilizing effect on working class militancy, quite apart from their justifications. Here the implicit comparison is with other rules that might be applied to the *Vaca* facts, but which would have different results for class struggle. Second, to explain and justify the rules in force, judges, lawyers, union officials, managers and legal scholars use a legal discourse which has its own ideological impact. The arguments, claims, descriptions, premises and other images and representations that supposedly justify the rules in force are false and incoherent. Labor law doctrinal discourse thus is best understood as lies and errors. Furthermore, the lies and errors have a bias in favor of the status quo.

The *Vaca* rule illustrates both aspects of this analysis. The rule itself stultifies class struggle by entrenching union and management bureaucratic power as against the rank and file. *Vaca* discourages worker attacks on management's power by requiring the worker to act through a union which has been vested with a kind of discretionary disciplinary

* This paper was prepared for delivery at the Tenth Annual Meeting of the American Society for Legal History, Philadelphia, October 25, 1980, as a comment on Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981) and Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981). This draft is not to be quoted or reproduced without the author's permission.

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1. 386 U.S. 171 (1967). *See* Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, nn.76-82 and accompanying text (1981).

power that inevitably allies it with management. But the industrial pluralists' justification for *Vaca*, if it persuades militants they should accept the disciplinary as opposed to the insurgent conceptualization of their labor union, compounds the evil worked by the substantive outcome under the rule by making that outcome appear rational and just.

The legal rules direct the application of state force in support of the existing structures of domination and illegitimate hierarchy in the workplace. The justifications offered for the rules disguise their repressive function in the language of industrial peace or workplace democracy. Yet the irony remains that the working class itself, directly and through its intelligentsia, has been deeply implicated in the development of the rules and the elaboration of the justificatory ideology. The current situation must be understood as a perversion of workers' accomplishments as well as the outcome of outright domination by management. Criticism of labor law as a demobilizing ideology does not for a moment imply criticism of the struggles that produced the modern American labor movement. It does imply criticism of the dissolution of left labor theory into the prevailing conservative ideology of American capitalism.

Both of these papers are concerned with the coopting and demobilizing effect of the rules of modern labor law, and with the way labor law as ideology operates to provide rationales for the course of antilabor decisionmaking under the existing labor statutes. But their focus is not on the actual impact of labor law on its victims. It is rather on the preliminary but essential claim that the justifications for the existing rules are false or incoherent or both, and that they are false or incoherent with a bias. The quid pro quo doctrine, for example, misrepresents the character of the arbitration/no strike bargain, and misrepresents it in a particular way: by making worker disarmament look like worker victory.

If there is agreement up to this point among the critical labor theorists, it is only up to this point. For it is here that two quite strikingly different critical strategies present themselves. The choice between them is fraught with implications.

One alternative, represented by Staughton Lynd's paper, is to criticize labor law doctrine on the ground that it is false to the basic ideals and norms of liberal political theory—to argue against labor law doctrine on the ground that it fails to do what liberal theory says all law should do, namely guarantee people their rights. The lie of labor law, then, is that it pretends to guarantee people their rights while in fact sacrificing them to the illegitimate interests of management and union bureaucracy. And Lynd can locate, in the industrial pluralist work of people like Archibald Cox and David Feller, labor law ideologists who

don't even pretend. They openly affirm that labor law has to do not with the rights of individual workers, but with labor peace through the creation of a viable but limited union counterforce to management. In Lynd's view, these ideologists are convicted out of their own mouths of advocating tyranny, and what we need is a view "which begins *and ends* with workers' rights. . ."[2]

The alternative point of view, represented by Karl Klare's paper, is that labor law is an instance of the incoherence of liberal theory, and of its conservative bias in practice, rather than an instance of betrayal of liberal ideals. Klare argues that industrial pluralist ideology attempts to adapt earlier forms of rights theory to modern conditions, and that it fails because there exists no coherent rights theory to be adapted. We study labor law not to detect deviations from the line dictated by a genuine adherence to the ideal of workers' rights, but to demystify all attempts to justify the status quo by manipulation of the empty liberal categories. For example, Klare points out that coherent reasoning from liberal premises requires one to be clear whether the entity one is talking about is public or private, since all kinds of consequences flow from the characterization. But liberal theory can't tell us whether labor unions are public or private. The theory provides good arguments either way, as well as for a hybrid classification. In consequence, labor ideologists can and do manipulate the liberal rhetoric, switching unions back and forth, between public and private, as legitimation needs vary from case to case.[3]

At first blush, it may seem that all the advantages lie with Lynd's choice of strategy rather than with Klare's. There are weighty advantages to the workers' rights critique, and weighty disadvantages to the outright rejection of liberal rights theory. First, Lynd's analysis has a unity that Klare's lacks. Lynd first shows that labor law denies workers' rights and then asks for development of a view that begins and ends with workers' rights. Since Klare's analysis denies the coherence of liberal rights theory, he cannot generate a positive program out of his critique. Critique is just critique: it frees us of the constraints of the reified liberal categories like "public" and "private" but cannot tell us what to do next. If "you can't beat something with nothing," and if the something we need is a liberal rights theory of a new society, then Klare's approach is at best incomplete.

Second, liberal rights rhetoric is ingrained in our political culture, including the political culture of both the working class and the bureaucracy that wields decisionmaking power. We need the rights slo-

2. Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 494 (1981) (emphasis added).

3. *See* Klare, *supra* note 1, at 470-73.

gan to mobilize people to defend their vital interests and human needs; we need rights rhetoric as a means to manipulate judges and administrators into granting through the courts gains the workers are not strong enough to win on the shop floor or the picket line.

I think both these points are well taken, but they don't end the argument. Ultimately, I agree with Klare's approach, and think it can be defended. First, the argument that there will be bad consequences for the left if liberal rights theory loses its plausibility is a weak one. The point is that the theory is wrong and incoherent. This is just *true*, as far as I can tell, and no amount of lamenting the consequences of his fall will put Humpty Dumpty back together again. Marx and the pragmatist supporters of the American labor movement long ago demonstrated the inadequacies of liberal rights theory.[4]

Second, the left doesn't need a counter-theory that *ends* with rights. We need utopian thinking, but the short-term, practical and creative manner, rather than in the form of rationalist "end-of-history" deductions of the ideal state of mankind. It is desirable rather than tragic that our program for the future must emerge dialectically from our past, rather than as a deduction from it. Even if the critique of labor law as ideology can do nothing more than free us for this kind of utopian enterprise, the critique is well worth doing.

Finally, the critique of rights as liberal philosophy does not imply that the left should abandon rights rhetoric as a tool of political organizing or legal argument. Embedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom. We need to work at the slow transformation of rights rhetoric, at dereifying it, rather than simply junking it. And on this plane, it seems to me that Klare and Lynd are once again in complete accord. They represent the emergence of a new left intelligentsia committed at once to theory and to practice, and to creating a radical left world view in an area where once there were only variations on the theme of legitimation of the status quo.

4. K. MARX, CAPITAL 81-96 (Moore & Aveling trans. 1960); K. MARX, THE POVERTY OF PHILOSOPHY (1963); Marx, *Critique of the Gotha Programme*, in MARX AND ENGELS: BASIC WRITINGS ON POLITICS AND PHILOSOPHY 115-20 (L. Feuer ed. 1959); Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 24 (R. Tucker ed. 1972). *See also* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1923); Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). *See generally* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 354-62 (1979).