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Union Improvisation: The Parent of Social Justice

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Michael M. Oswalt, *The Right to Improvise in Low-Wage Work*, 38 **Cardozo L. Rev.** 959 (2017).

In the movie *1776*, Benjamin Franklin infamously remarks to John Dickinson, “Revolutions…come into this world like bastard children—half improvised and half compromised.” The compromise, of course, was slavery. The rest of the dialogue and its context, which explains the improvisation, is often omitted in discussion of this scene. Recall that Franklin asks John Hancock to poll the Pennsylvania delegation on the question of independence. Franklin votes yea; Dickinson, nay. This is how the decision of American independence lands squarely on the shoulders of Judge James Wilson, who ultimately votes yea. As Dickinson incredulously and rhetorically posits, “And is that how new nations are formed? By a nonentity seeking to preserve the anonymity he so richly deserves?”

If we compare the founding of our nation with the foundational federal labor law statutes of the twentieth century, which statute—the Wagner Act or the Taft-Hartley Act—is the labor law compromise? Most American labor scholars would probably say Taft-Hartley. After all, the Wagner Act, as Professor Karl Klare has correctly observed, “was perhaps the most radical piece of legislation ever enacted by the United States Congress.” Moreover, it is Taft-Hartley that, among other things, narrowed the definition of employee by eliminating the National Labor Relations Act’s (NLRA’s) protection of supervisors and independent contractors and diluted the union’s legal economic weapons by eliminating the secondary boycott. But the late Austro-British labor scholar, Otto Kahn-Freund, would argue that the Wagner Act was in fact a compromise by the American labor movement. As Kahn-Freund allegedly explained, “What the law giveth, the law can taketh away.” And taketh away it did—not merely via congressional amendments but via Supreme Court judgments and ultimately by the Board itself.

In his article, *The Right to Improvise in Low-Wage Work*, Professor Michael Oswalt supplies the latest example of a labor law scholar offering insight on how to strengthen labor rights. By focusing on the improvisational portion of the social revolution equation, he brilliantly likens the Fight-for-Fifteen and other recent social justice movements to improvisation in jazz music. He understands that talking amongst workers—comparing injustices—is necessary to harness the power of concerted activity.

This characterization allows Professor Oswalt to see three manifestations of talking amongst workers. First, he sees the legal right to talk and engage in spontaneous concerted action, a legal right that is generally protected (unless waived) under the NLRA qua *Washington Aluminum*. Second, he sees the normative right to combat injustice with spontaneous activity coordinated through talking—a right that Oswalt views as desirable and justifiable. Third, he gleans “in-the-moment resistance” as an essential aspect of Section 7 of the NLRA but points out that the law may not do a good job of “preserv[ing] access to in-the-moment resistance by safeguarding improvisation’s prerequisite: relationships of trust.” Oswalt thinks that the law falls short in this regard because the “key doctrine,” the employees’ Section 7 rights via *Republican Aviation*, in conjunction with the key limitation “working time is for work,” are antiquated.

It is worth a moment to pause here to place Oswalt’s characterization in historical context. The NLRA has stood for decades as a well-intentioned compromise whittled away by all three branches of government to a shell of its former glory. Labor law scholars have asked in vain, how do we fix this? Kahn-Freund understood the answer. Social justice must be taken; it is never fully or freely given by governments. The law serves only to ossify the privileges of the privileged, justifying rules and the need to narrow those rules to accommodate the interests of the ruling class. For the disempowered, extra-legal solutions are needed. That’s the improvise, which members of the working class

themselves must supply. Inequality is the fuel necessary to wake that sleeping giant.

Oswalt spends much of his article showing how labor reformers can fortify Section 7 simply by jazzing up concerted activity. Oswalt relies on “yes-anding”—accepting what comes (yes) then “enthusiastically build[ing] on it” (and)—for workplace reform, just as jazz musicians build upon each other’s melodies while they jam. Oswalt explains his proposal as follows:

> I am proposing a right, grounded in section 7, for at least two employees to spontaneously stop working for a reasonable period and leave the active floor together, probably for no more than four or five minutes. Though there would not be a hard cap on the number of breaks that could be taken during a shift, to be protected the cumulative impact on production would need to be “modest,” meaning something like perceptible but not substantial.

Professor Oswalt predicts that these improv sessions or microbreaks will build trust among co-workers, trust being a necessary foundation for successful concerted activity. The article thus appropriately analogizes workers “hanging out” at the workplace to “trusting” and “yes-anding” and characterizes such moments as the oxygen needed for worker improvisation, the spark that ignites social change.

Of course, this is true. Concerted activity is a form of expressive conduct and typically comes in the form of a grievance that when aimed at the government, would notably be protected by the First Amendment. There is no revolution—political, economic, social, or otherwise—without speech. Oswalt thus contributes to our field by highlighting the importance of these moments and clarifying that it is these moments that create the most imaginative need for successful concerted activity.

Professor Oswalt does not, however, go far enough. As Oswalt concedes, talking is already protected by the Act. But Oswalt seeks further to entrench this protection by interpreting the NLRA to protect microbreaks and, more importantly, formalizing that interpretation. That move, in turn, will predictably ossify and stifle improvisation by opening the door to Board oversight of such activity that is currently left to free market forces. This is the lesson of the Act’s deradicalization, eighty years in the making.

To be fair, Oswalt understands this point, as he spends pages recognizing that the Board and reviewing courts have to, and are apt to continue to whittle away at the scope of protected activity. His solution—microbreaks for engaging in talk and spontaneous activity—doesn’t seem to fix the problem. Indeed, the cases he cites in support of this proposition are currently on the Trump Board’s chopping block, ready to further extinguish the fires of concerted activity.

For workers’ rights to flourish, workers must be sufficiently oppressed, sufficiently bold, and sufficiently bonded to one another to understand their condition; understand that they are not alone and have the willingness to fight—perhaps because they have so little to lose. This is where workers stand today. Witness the wave of teachers’ strikes across the country. In this context, I say, forget about the Board. The Fight-for-Fifteen and other similar movements are successful precisely because they are organically generated, grass-roots grown from legitimate grievances about social injustice and inequality. For improvisation to truly transform workers lives, workers must acknowledge that they’ve already compromised enough.

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