"Precarious" Workers and the U.S. Labor Regime

The term "labor regime" refers to the structural interactions between employers, workers, unions, courts, and the state apparatuses that deal with labor disputes. The regime constitutes the official institutional framework, in which these actors hash out labor struggles, and produces and enforces the dominant discourse of labor relations. Christopher Huxley, David Kettler, and James Struthers further clarify the term as the, "'principles, norms, rules and decision-making procedures around which actor-expectations converge in a given issue area, along with the *constellations of power* on which the arrangement rests" (Lipset; 115). Their "regime" concept is borrowed from international relations discourse, including both the legal system and political action of actors operating under its jurisdiction.

This paper examines some of the underlying systemic contradictions of the American labor regime in an attempt to explain why large categories of workers are still excluded from its primary benefits and protections. The argument that trade unions are unnecessary because a strong legal framework already exists to protect workers' rights carries little weight in light of the following considerations. While trade union power in the American labor market has undergone a precipitous decline over the past several decades, one cannot cite a superior U.S. labor regime as evidence for their waning influence. If anything, the unusual structure of the American labor system is one factor that has prevented trade unions from expanding into other sectors of the labor market. It seems that the laws that exist are not suited for current economic conditions, and are not sufficient to meet the needs of the growing underclass of non-standard workers.

Many commentators have lamented the loss of the factory floor both as a symbol and a reality of worker "class consciousness:" it provided not only the visible physical center of labor struggle, but also fostered strong networks of solidarity and identity that were rooted in specific occupations and opposition to management. The once robust factory system served as a compelling reminder that the working class, when mobilized in large numbers, does have the capacity to challenge the hegemony of the capitalist system of production, to contest the "social control of economic resources" by employers (Lipset; 154). Workers in today's economy no longer have the means to fundamentally challenge the power relationships of the industrial system.

It is important to distinguish between two related but separate developments: the decline in unionization in industries where labor organizations had already been strong (such as coal, mining, or steel), and the inability of unions to expand into new service-sector occupations that have little history of organization but are a much more significant facet of the contemporary labor market. It is true that the labor legislation and New Deal reforms of the 1930s represented great advances for the millions of workers in the strong industrial and manufacturing sectors at the time, but changing economic realities have rendered them increasingly irrelevant to the growing "precariat" of non-standard laborers that scholars such as Ruth Milkman have identified. By "*precarious*" workers, Milkman is referring to laborers who "typically have no employment security and most are excluded from the legal protections that the organized labor movement struggled to achieve for the proletariat over the past century" (Milkman and Ott; 2).

It should be stressed from the start that types of collective action that once applied the necessary pressure to the labor regime to protect workers rights have become all too scarce. Mass strikes, for instance, were the principal source of social power for unions throughout

American history (Milkman and Ott; 19). Labor scholar Gerald Friedman has argued that one of the most noteworthy causes of trade union decline has been the observable stagnation of worker militancy from the late 1970s to the present day. Work stoppages, demonstrations, and other forms of direct resistance not only provided workers with a means to express discontent and confront their employers; such activities also had the effect of sharpening participants' understanding of the class struggle and strengthening workplace solidarity. In the contemporary period the established labor movement overwhelmingly lacks the resources to pursue such methods of struggle. While Friedman and others have suggested a revival of the strike as one of the ways to rebuild the American labor movement, this seems unlikely given that employers can legally and permanently replace workers who engage in such activities, or simply close up shop, as the following example of the Valley Stream Target illustrates.

In the introduction of *New Labor in New York*, prominent labor scholar Ruth Milkman points out that it is relatively easy for employers in today's economy to subvert unionization efforts and violate existing labor law standards. There are many ways that bosses can successfully circumvent the 1935 NLRA and the New Deal legislation that codified workers' essential rights, and established the official collective bargaining procedures of the U.S. labor regime. It seems that this labor regime has failed, generally speaking, to provide legitimate opportunities for representation, organization and service provision for vast swaths of the most oppressed sectors of the new working class. This is especially true for low-wage immigrant workers, although the vast majority of them are employed in sectors that do not have a history of unionization. Neo-liberal economic restructuring, the built-in contradictions of the U.S. labor regime, along with aggressive anti-union posturing of employers, the state, and federal courts,

have prevented certain state agencies and labor unions themselves from defending the rights won in previous decades.

According to many scholars, among the goals of the National Labor Relations Act of 1935 and corresponding New Deal legislation was "to galvanize workers to seek the collective empowerment that alone could secure democratic consent and cooperation in both the enterprise and in the polity in the era of mass production" (Barenberg; 1379). The Act seems to have had this effect, at least initially. It represented a progressive piece of legislation that finally allowed the state, as the embodiment of the public good, to produce a legitimate forum in which economic struggles between employers, freely elected trade unions, and workers could be non-violently resolved. The labor laws of the New Deal era, however, were put in place under the expectation that the dramatic political action of workers and trade unions would continue to coerce the labor regime into performing its intended functions. It remains that if such political action ceases, if trade unions become unable or unwilling to challenge employers' unilateral control over the *means of production*, then such laws become ineffective.

Milkman argues that in the context of neo-liberal development, "new business strategies designed to shift market risks from employers to subcontractors, or to individual workers themselves, stimulated rapid growth in nonstandard, *precarious* forms of labor" (Milkman and Ott; 6). As mentioned above, these workers are not protected by the labor regime and rarely receive support from their bosses. Independent contractors, for instance, were excluded from official workplace protections, lacking access to benefits such as health insurance, paid vacation, sick days, and pensions typically provided by management. Milkman points out "most part-time, temporary, and other nonstandard workers – all categories that have expanded dramatically in recent decades – are also denied access to such employer provided benefits" (Milkman and Ott;

6). In the same volume, commenting on the division of workers into legal and "illegal" categories, Milkman's co-editor on the project says:

> That [division] helped set the tone for exclusion on a massive scale, and contributed to the isolation of trade unions. It also set the stage for a political atmosphere in which we have members of an impoverished working class who subsist entirely apart from the standards that the other workers in this country have attained over many decades of struggle (Milkman and Ott, 290).

Labor scholar Dorothy Sue Cobble has pointed out that the new "postindustrial" working class is composed mostly of women and minorities employed in service-sector jobs rather than large commodity-producing businesses. Most of these jobs are transient in nature, so workers cannot expect the kind of job security and employment benefits characterized by the era of "Fordist" production.

In terms of labor law, two fundamental pieces of the labor regime, namely, the NLRA as well as the Fair Labor Standards Act (FLSA) deserve particular emphasis in terms of explaining the zones of exclusion inherent to the American labor market. The first was established in 1935 as part of the Wagner Act, and was enacted to institutionalize labor struggles by establishing a legitimate forum in which employers, employees, and their union representatives could work to freely resolve workplace disputes under the jurisdiction of the National Labor Relations Board (NLRB). The basic characteristics and stipulations of the Wagner Model were meant to achieve some degree of industrial peace in a country that was historically characterized by dramatic and violent labor conflicts. The Wagner Act banned company unions, outlawed the dismissal of workers for being union members, prevented employers from undermining organizing drives, and insisted that companies engage in legitimate collective bargaining arrangements with trade unions.

In theory, the NLRB serves as the primary federal organization responsible for enforcing national labor laws. The five board members are nominated by the President and confirmed by the Senate for five-year terms. The role of the Board is to oversee union elections and issue rulings on charges of "unfair labor practices" issued by employers, trade unions, or individual workers operating under its terms. Such charges are applicable only to workers employed in occupations that are understood to be instrumental in the flow of interstate commerce (NLRA; 1). The enforcement of the Board's rulings on such matters would then be left to the regional federal circuit court of appeals that corresponds to the location of the alleged abuse. The FLSA was established several years later in 1938, and sets the minimum wage and monitors hours, overtime, and conditions for workers in most industries. While it does serve these progressive functions, the FSLA was also, "a limited reform that pegged the minimum wage to the low-paying southern textile and lumber industries and excluded agriculture, domestic service retail, and restaurant trades from coverage" (Fine; 158).

Additionally, the NLRA explicitly excludes certain categories of workers in its list of employees covered by the Act:

> The term 'employee'…. shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor (NLRA; 2).

It is significant that the NLRB does not have the power to actually enforce national labor laws; as mentioned above that task is left to the courts. In practice its power is greatly limited. Any actor within the labor regime seeking the satisfaction of a grievance through the formal collective bargaining process, whether they be employers, individual workers, or trade unions, have to count on the willingness of the regional courts to enforce the rulings of the Board. The NLRB has the power to interpret the stipulations of the NLRA and petition the courts to act on

its rulings, but there is no guarantee that the latter will do so. This "strained relationship" between the federal courts and the NLRB was written into the NLRA itself (Lieberwitz; 1). While Congress did give the Board the power to interpret the Act and thus the power to determine the country's labor policies, the actual enforcement of the decisions was deemed the responsibility of one of the twelve federal circuit courts of appeals.

Despite the courts' repeated claims that they defer to the expertise of the NLRB regarding the enforcement of labor law, they often disagree with the Board's interpretations and refuse to enforce their rulings. This structural contradiction has prevented many workers from forming labor organizations, and also stymied efforts to lobby for more fundamental labor law reforms. As will be expanded on later, the NLRB was never meant to be a neutral institution, but rather as one commentator put it "an agency that protects and enforces workers' rights to organize into unions and advocate for their interests" (Lieberwitz; 2). However, the reality is that the Board's conflicted relationship with the executive and judicial branches of government has often prevented it from adequately performing this function.

While there are many other examples, one class of cases that perfectly illustrate this significant disjuncture between the Board and the regional courts regards recent attempts by faculty at private universities to form unions. Their inability to do so derives in part from the 1980 US Supreme Court case *NLRB v. Yeshiva University*, in which the school's administration challenged efforts by their faculty to form a union based on the notion that the teachers' control over aspects of the academic environment meant that they constituted "managerial" employees. The administration specifically cited teachers' significant influence over issues such as curriculum content, student admissions, and degree requirements in their argument against unionization. While the Board took the side of the faculty, agreeing that such influence was not

managerial in nature but an exercise of the teachers' "academic freedom," their ruling turned out to be irrelevant. When the case came before the Second Circuit Court of Appeals it disagreed with the NLRB's assertion and took the side of the university administration, claiming that the professors were indeed managerial employees because they were "in effect, substantially and pervasively operating the enterprise" **(**Lieberwitz; 2**)**. The case ended up going before the Supreme Court, which ultimately ruled in Yeshiva's favor. Both courts ignored the issue of academic freedom, and failed to recognize that the control that professors exercise over the aspects of university life mentioned above is a function of their instrumental role in the learning process.

Even under "progressive" administrations such as Obama's, the NLRB has been unable to force employers to post notices informing workers of their basic legal rights, due to opposition from the right-wing Congress and the federal courts (Lieberwitz; 4). While it is true that under Obama the Board has been more willing to examine alternative interpretations of labor law, the foundational contradictions of the American labor regime are too great for even the most liberal-minded Board to overcome.[1] The NLRB does what it can, but ultimately more powerful actors within the social order decide U.S. labor policy.

Other problems with the NLRA can be traced partially to the Taft-Hartley Amendments of 1947 that significantly narrowed the permissible activities and organizational strategies of trade unions. Despite numerous attempts to repeal it,[2] Taft-Hartley remains law to this day, and continues to be a major stumbling block for the organized labor movement. Contemporary labor

[1] It is important here to make note of the legal controversy surrounding Obama's January 2012 "recess appointments" to the NLRB, which completed the Board's five-member requirement while also causing intense reactions from Republicans and federal appeals courts who contested the constitutionality of the Presidential order. The controversy surrounding the appointments has provided expanded opportunities for employers and sympathetic courts to contest NLRB rulings on perceived unfair labor practices, one example being the Supreme Court case *NLRB v. Noel Canning.*

[2] See: "Taft-Hartley Repeal Attempts." In *CQ Almanac 1949*, 5th ed., 06-444-06-455. Washington, DC: Congressional Quarterly, 1950. http://library.cqpress.com/cqalmanac/cqal49-1400386.

historian Philip dray describes the Taft-Hartley Bill, as "a comprehensive denial of the rights labor had won over the past generation" (Dray; 496). It gave management greater say in the process of union elections and allowed individual states to pass anti-union legislation of their own, i.e. the "right to work laws" which have undermined public-sector unions in places such as Wisconsin, Michigan and Indiana in recent years. Taft-Hartley held that union membership could no longer be a requirement for employment, "in effect an undermining of the closed shop" (Dray; 497). It did away with industry wide collective bargaining (replacing it with only firm-based representation), and employers could take legal action against unions who engaged in secondary boycotts.

One example that highlights the significant problems with the firm-by-firm model of unionization enshrined by Taft-Hartley is the recent attempts to form labor organizations in the "big box" retailers such as Wal-Mart and Target. In the summer of 2011, one of Target's locations just outside New York City became the first of the company's stores to attempt a union election in over two decades. The local union attempting to win the vote of the workers was the United Food and Commercial Workers Local #1500 (UFCW). The employees ultimately voted against unionization with a 137-85 count out of 260 eligible voters (Milkman and Ott; 25). In 2012, the NLRB ruled that management had violated employee rights in its attempts to subvert the union drive, discarding the election results and announcing preparation for a new vote. In response, employers decided to take measures of their own, and shortly after the NLRB ruling was issued Target announced a six-month temporary shut down of the store, which "displaced and dispersed" the workers involved (Milkman and Ott; 25).

In an article he wrote for *The Register*, the official news publication of UFCW Local #1500, union president Bruce W. Both expressed his frustration and disappointment with

Target's conduct in the union election process, and with the process itself. He reported that in May 2012, one year after the union election was officially filed, the administrative law judge (ALJ) found the NLRB's initial findings to be accurate regarding charges of employer violations of workers' rights, and pushed for a new vote. The Board supported this decision, but Target further delayed the second election by appealing to the regional U.S. Court of Appeals (Both; 1)**.** Both concludes his piece with some grim observations:

> Target was found guilty of a laundry list of federal labor violations: it closed its store for eight months, offered workers buyouts and forced workers to sign a document pledging they wouldn't release any details to the press. It was then awarded for being the most ethical company in the world…This isn't a fair or democratic process; if it were the brave workers from Valley Stream Target who decided to band together and demand more from our nation's second largest employer, would all still be employed and protected by a union contract.

Such discussions regarding the contradictions of the U.S. labor regime and the problems with the NLRB's "firm-by-firm" model of shop organizing have become glaringly obvious in recent years with other squashed organizing attempts at "big-box" retailers such as Wal-Mart.

While the "Wagner Model" may have represented some form of cooperative "industrial democracy" at the time it was passed, it seems that organized labor's tremendous victories of the 1930s were eventually rolled back by a number of interrelated developments. Economic restructuring, labor law reform, and increased hostility from employers, the state, and the federal courts have rendered trade unions ineffective and produced a growing "precariat" of marginalized workers who are excluded from the primary benefits of the labor regime. There can be little debate that the "Wagner Model" and corresponding New Deal Legislation encouraged a "higher form of labor action" and worker militancy in the context of accelerated industrialization, but as socio-economic conditions have shifted and rank-and-file action has faded, such laws have lost their progressive functions.

Rather than engaging with the formal collective bargaining process, many members of the "precariat" have turned to alternative means and institutions to improve their lives as working people. One such alternative is to become involved in unofficial community labor organizations such as "worker centers." Hundreds of these organizations have emerged in the country over the past three decades. Political scientist Janice Fine has produced the most comprehensive study to date on these new experiments in worker power. While these institutions are not unions in the traditional sense, they have assumed many of the "formal responsibilities" of the official labor unions such as organizing low-wage workers by using whatever methods of struggle they can, including strikes and demonstrations, to fight with and in many cases win concessions from the employers. Most of these centers are typically formed around a single issue, such as "wage theft," especially when it comes to immigrant workers who are often entirely ignorant of the laws and regulations in place that supposedly exist to protect them from unlawful or immoral business practices (Fine; 28, 2006). Many of these centers display a zeal and militancy that has not been characteristic of official unions for many decades. It is important that while these alternative models of resistance and organization are often rooted in workplaces excluded from the benefits of the labor regime, they are also not as significantly constrained by the Taft-Hartley laws that have severely undercut the power of traditional trade unions. They are able, with varying degrees of success, to go on strike regardless of craft and sector, for political and social justice reasons, and in solidarity with each other. While such strikes may be illegal in most contexts, without official funds to seize in the event of a wildcat work stoppage, alternative labor organizations typically do not have much to lose at least from a fiscal standpoint. This does not make them immune to the aggressive anti-union strategies that many employers utilize. However, their lack of financial resources is also an obvious disadvantage, especially in terms of

dependencies on external actors such as foundations and NGOs. It is likely that such dependencies have a tendency to erode the internal democratic character of worker centers, as Janice Fine and others have suggested.

In his book *The State and the Unions*, prominent labor scholar Christopher Tomlins argues that concerns for "industrial stability" within the American labor movement itself, and encouraged by the liberal state, eventually put to rest the more radical and militant tendencies and ideologies that animated unions in their class conscious phase. The primary battleground for labor struggle would shift from the streets and factory floors to the boardrooms and regional courts. His basic argument is that the federal government and courts have had a relatively consistent interest in limiting the intensity and scope of industrial collective action throughout American history.

Tomlins concludes with the assertion that, "a counterfeit liberty is the most that American workers and their organizations have been able to gain through the state. *It's reality they must create for themselves*" (Tomlins; 328, emphasis added). In short, if the trade unions and state agencies that are meant to ensure workers' rights are no longer able to do so, then the focus must shift to the mobilization of social power by the workers themselves and their community supporters to try and change those laws and policies. While worker centers certainly represent interesting experiments in this direction, any revitalization of the American labor movement would require a fundamental restructuring of the country's labor regime.

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