

American Labor Struggles and Law Histories

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Edited by

Kenneth M. Casebeer

CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

American labor struggles and law histories / [editor] Kenneth M. Casebeer.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-59460-930-5 (alk. paper)

1. Labor laws and legislation--United States--History. 2. Labor--United States--His-
tory. I. Casebeer, Kenneth M., 1949-

KF3319.A8 2011

344.730109--dc23

2011020196

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*To the mentors who have given me so much,
James J. Unger, Roberto Mangabiera Unger, Soia Mentschikoff,
Morton J. Horwitz, and Laurence H. Tribe,
To the hero of my lifetime, and one before,
Rev. Martin Luther King and Eugene V. Debs,
And to all people who continue to engage in collective action fighting oppression.*

Contents

Editor's Preface	xi
Authors	xv
Introduction • Labor Struggles, Collective Action, and Law <i>Kenneth M. Casebeer</i>	3
Prelude • The Slave Rebellion in New York City of 1712 <i>Kenneth M. Casebeer</i>	17
I • Organization as Criminal Conspiracy The First American Labor Case (1806) <i>Walter C. Nelles</i>	21 21
Interlude • The Lowell Mills “The Oppressing Hand of Avarice Would Enslave Us”: Women, Work, and Protest in the Early Lowell Mills (1834–36) <i>Thomas Dublin</i> Lowell Factory Girls Association Constitution (1836)	33 39
Interlude • The Knights of Labor and Cooperative Production Consensus, Hegemony, and the Case of the Knights of Labor <i>Leon Fink</i>	43 44
II • The Homestead Lockout, The Pinkertons, and the Militia The Citizen Striker: Workers' Ideology in the Homestead Strike of 1892 <i>Linda G. Schneider</i>	51 51
III • Industrial Unions, The Pullman Strike, Injunctions, and <i>In Re Debs</i> (1895) The Debs Revolution <i>Sidney Lens</i> The Pullman Boycott and the Making of Modern America <i>David Montgomery</i> Law and the Shaping of the American Labor Movement: Government by Injunction <i>William E. Forbath</i>	65 65 71 81
Interlude • Industrial Unionism <i>Eugene V. Debs</i>	91

Interlude • The IWW and Free Speech Fights	
<i>Elizabeth Gurley Flynn</i>	101
Spokane, 1909–10	
<i>Philip S. Foner</i>	102
IV • Racial Division in the Labor Movement	107
What's Left of Solidarity? Reflections on Law, Race, and Labor History (1906)	
<i>Martha R. Mahoney</i>	107
“ <i>We Have Just Begun</i> ”: Black Organizing and White Response in the Arkansas Delta (1919)	
<i>Kieran Taylor</i>	113
V • The IWW, Western Radicalism, and Deportation	125
The Bisbee Deportation (1917)	
<i>Philip Taft</i>	125
VI • Open Shops	147
The Open Shop Tested: The Great Steel Strike of 1919	
<i>Ahmed A. White</i>	147
VII • Textiles and Vigilantes in Gastonia	159
Gastonia and Textiles (1929)	
<i>Mary Heaton Vorse</i>	159
The Gastonia Strikers' Case	
<i>Harvard Law Review, 1930</i>	170
Ella May Wiggins	175
VIII • Distinctly American Radicalism in the Depression	179
Distinctly American Radicalism and the Coastwide and General Strike in San Francisco of 1934	
<i>Kenneth M. Casebeer</i>	179
IX • Union and Unemployed Together in Mass Movement	211
The Toledo Auto-Lite Strike of 1934 and the Fight against “Wage Slavery”	
<i>Rebecca E. Zietlow & James Gray Pope</i>	211
X • Organization of a Company Town	225
Aliquippa: The Company Town and Contested Power in the Construction of Law (1935–1937)	
<i>Kenneth M. Casebeer</i>	225
Interlude • Memorial Day Massacre	265
Violence in Little Steel—The Chicago Massacre (1938)	
<i>Mary Heaton Vorse</i>	265
XI • Sit-Downs	271
Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1939	
<i>James Gray Pope</i>	271

XII • The Duty to Obey: Sit-Down at Sea, or Mutiny?	303
Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law (1938)	
<i>Ahmed A. White</i>	303
Interlude • The Duty of Fair Representation	321
<i>Steele v. Louisville and Nashville Railroad Company</i> (1944)	
<i>Eric Arnesen</i>	321
XIII • Slowdowns and Worker Control	327
Elk Lumber, Slowdowns, and the Suppression of Worker Solidarity (1950)	
<i>James Atleson</i>	327
XIV • Public Workers Strike and Racial Justice	337
Martin Luther King, Jr., the Crisis of the Black Working Class, and the Memphis Sanitation Strike (1968)	
<i>Michael K. Honey</i>	337
"I Have Been To the Mountaintop," Memphis Speech, April 3, 1968	
Rev. Martin Luther King, Jr.	359
XV • Plant Closing	367
<i>Local 1330 v. U.S. Steel</i> (1977–1980)	
<i>Staughton Lynd</i>	367
XVI • Communities on Strike	377
"Tyng the Knot of Solidarity" The Pittston Strike of 1989–1990	
<i>James Green</i>	377
XVII • Market Fragmentation: Service Workers in the Home	403
Organizing Home Care: Low-Waged Workers in the Welfare State (2002)	
<i>Eileen Boris & Jennifer Klein</i>	403
XVIII • Contracting Out and Low-Wage, Immigrant Worker Voice	415
Of Service Workers, Contracting Out, Joint Employment, Legal Consciousness, and the University of Miami (2006)	
<i>Kenneth M. Casebeer</i>	415
XIX • Plant Occupation in a Corporate Campaign	437
Revolt on Goose Island: The Chicago Factory Takeover and What It Says about the Economic Crisis (2008)	
<i>Kari Lydersen</i>	437
Postlude • Disappearing Public Services	461
"Don't Buy Koch," Dismantling Public Workers Unions and Government Services in Wisconsin (2011)	
<i>Kenneth M. Casebeer</i>	461
Index	465

Editor's Preface

Historians, like the rest of us, tend to “find what we see,” rather than the more aspirational claim to “see what we find.”

As the editor of this book, what I personally “see” over the course of post-revolution American History is: the importance of the labor question—the place of all those who directly produce the wealth of the society by the expenditure of their time and energy (lives) in relation to the social use of their products, and their welfare; the importance of struggle by workers in collective actions contesting power exercised to reduce their social and economic position and security in society; and the involvement of law and legal institutions in constructing the context of those struggles. This Preface is therefore written from my point of view, and should be distinguished by readers from the Introduction, which will be written from the point of view of the book as a collection of authors. Many “points of view” are represented in approaching the past and in the histories of labor they partially tell.

The shared premise of all the contributors, however, is that the History of labor in the United States cannot be captured without acknowledging the ubiquity and centrality of the struggle of workers to gain power otherwise denied to them to achieve the independence allowed by an adequate and just standard of living, and often as importantly, to create the kind of democratic society that included their equal voice and dignity. These struggles have not been uniform, or continuous, or isolated from the aspirations of others for similar aims. But these worker struggles were constant and quite self-conscious. These struggles also met with organized opposition as vicious any other conflicts in America. Finally, it is striking, that workers’ ideas, interests, goals, and achievements almost always took the form of “collective actions.” Collective actions did not always involve unions, or unions of a particular type, or involve politics toward parties, independent or not, or toward the State. This book is about how this range of collective actions intersected with law and legal practices. It therefore addresses power as exercised in American society.

Much can be learned from studying labor struggles—not least is their relevance to workers today as they confront tremendous membership declines in unions, and receding identification with a labor movement. Paradoxically, at the same time, workers experience increasing labor class consciousness of the insecurity of globalized markets, and unprecedented inequalities of income and wealth in America. For the labor movement, experience gained should not be lost. Both lessons of militancy and avoidance of self-defeat can be learned. Based on what did not occur, the generation of new strategies becomes possible, and these lessons expose remarkable continuing, repetitive repressions of labor in the name of capital and the undermining of democracy by capitalism. Collective actions are more necessary for workers than ever before. Workers do win. The losses, while painful, are not lost.

Recovering and investigating labor struggles form all the justification needed for this book. I should stop here. At the risk of becoming too academic, however, I want to put

the book's focus in an ongoing intellectual literature. Why this book now? I believe that what was actually experienced by American workers has increasingly been overshadowed in contemporary academic disputes more concerned with privileging particular narratives and historiography. I personally hope this book will provide something of a corrective balance.

First, as a labor law professor, too much legal writing, including labor law histories, proceed from an unexamined assumption of the legitimacy and State protection of "business unionism"¹ within a social organization reflecting "industrial pluralism."²

I would view Labor Law more broadly. First, American workers have been and are less than unanimous about business unions and their usually top-down and only semi-democratic organization, and their institutional distance from the rank-and-file. Second, unions or not, American workers have engaged continuously in other forms of collective actions than simply collective bargaining, including less tamed struggles for power: rebellions, politics, boycotts, picketing, labor and social movements, and especially strikes. Third, Labor Law as Collective Bargaining regulation thus shortchanges not only the range of collective activities of workers, but recognition of the wide range of legal rules and practices brought to bear on labor struggles—criminal law, antitrust, property law, legislation, court injunctions, petty arrests, murder and treason prosecutions, police and military suppression, vigilantes, and more. Labor Law is much more than the law of collective bargaining.

Second, as a legal history academic, there has been increasing call for a *New* "New Legal History," rejecting the "Law & Society" distinction, the basis of the academic cocoon of the Law & Society Association, which had promulgated the "social science" rejection of progressive or whiggish histories prevailing in legal histories before 1970. Law & Society sought in empirical and ideological study of consciousness and conditions of society a critical purchase on the study of law. The more sophisticated studies acknowledged the reciprocal interdependencies of these two spheres of action, law and society, but critical rationality still depended on at least conventional separation. The *New New* histories deny separation, "seeing" law as just another, although often central, discourse in constructing the "meaning" of society through which all persons understand their acts. The conceptual non-distinction, following post-modernism, is text/context. Power is lodged and deployed in the specialized discourse of legal practices from which in part social, and more specifically cultural, relations emerge. The historiographical problem is still one of "critical purchase," but the historical problem now is that of "imaginings of alternative practices." The former battleground of agency is backgrounded within the dominance of cultures contested between subalterns and empires. Among many problems with this lens on Law, an exclusive study of legal texts (most often court opinions) and the contexts of their deployment, is in a sense, while sometimes shifting, always a "winners" history. Where are the losers accounted? Particularly in labor law history, where are the workers and their consciousness?

The implicit response of the *New* "New Legal" Historians is the necessity of abolishing reductionist, instrumentalist, functionalist, institutionalist, or any other form of determinist explanation of law or any other discourse, or of thought. Historiography must now be indeterminate, discontinuous, contingent, contextual, multi-dimensional, and meaningfully discursive. I don't believe it. History, what actually "happened," is actions. Actions are not imaginings. Actions depend on conditions prevailing in some sense at a

1. See, Victoria Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton University Press, 1992).

2. See, Katherine Van Wezel Stone, "The Post-War Paradigm in American Labor Law," 90 *Yale Law Journal* 1509 (1981).

given point in time, of course including discourse. Workers who have been crushed and live in dismal conditions have not just lost an argument. Sticks and stones do break and have often broken their bones. Gravestones and funeral processions of more than 30,000 marchers, while symbolic, are still marking acts.

Third, as a labor historian, the broadest intellectual context is post-modernism in its increasing prominence in labor histories. Labor history in its classical period almost exclusively focused on the institutional and political history of labor unions, and trade unions at that.³ The new labor history, under the clear influence of E. P. Thompson, turned to discovery of the working class, and thus the forces of culture, politics, and ideology in shaping working class experience and opportunities.⁴ This led in two sub-disciplinary directions, incorporation of the new social histories of largely local studies,⁵ and the relation of class to social relations at the point of production.⁶ Most recently, labor historians have taken their social histories toward the independence of culture by emphasizing worker consciousness and discursively inscribed limitations of alternative opportunities.⁷

The intellectual and strategic problem posed to the relevance of historical work for labor by this turn by historians is an old one—the priority of structure and agency—do conditions determine social relations necessary to production, or does choice determine what social relations are permitted and thus the provisioning conditions required by them.? Marxian reductionism, the priority of the material base generating its ideational superstructure, has been completely marginalized as vulgar within historiography.⁸

To my mind, the content of law (and histories) is of course historically contingent, and relatively indeterminate; the production of ideas is in principle no different than the production of goods, services, technologies, knowledge's, indeed social relations, a continuum rather than categories. Following Thompson, law is both an arena and form of social struggle. But this does not mean that the ideational realm and/or the discursive context has no particularized dependence whatsoever on material conditions at any given moment.

3. John R. Commons, et al., *History of Labour in the United States* (1918–26), Selig Perlman, *The History of Trade Unionism in the United States* (1922).

4. E. P. Thompson, *The Making of the English Working Class* (London: Vintage Books, 1963), Herbert Gutman, *Work, Culture, and Society in Industrializing America* (New York: Vintage Books, 1976).

5. See e.g., Sean Wilentz, *Chants Democratic: New York City & the Rise of the American Working Class, 1788–1850* (New York: Oxford Univ. Press, 1984).

6. David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925* (New York: Cambridge Univ. Press, 1987), David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (1985).

7. “A predominant theme has been the discovery of alternative cultural meanings or distinctive sub-activities in working class expression and behavior,” Leon Fink, “The New Labor History and the Powers of Historical Pessimism: Consensus, Hegemony, and the Case of the Knights of Labor.” *In Search of the Working Class: Essays in American Labor History and Political Culture*, 89 (Urbana: Univ. of Illinois Press, 1994). Emphasizing the role of American culture in restraining labor, see Philip Yale Nicholson, *Labor's Story in the United States* (Philadelphia: Temple Univ. Press, 2004).

8. The vulgar reductionist is a straw Marx. E. P. Thompson replies: “In *Capital* . . . Marx repeatedly uses the concept of the circuit of capital to characterize the structure of the capitalist economy—and, more than that, of capitalist society more generally. But historical materialism (as assumed as hypothesis by Marx, and as subsequently developed in our practice) must be concerned with other “circuits” also: the circuits of power, of the reproduction of ideology etc., and these belong to a different logic and to other categories. Moreover, historical analysis does not allow for static contemplation of “circuits,” but is immersed in moments when all systems go and every circuit sparks across the other.” E. P. Thompson, “Marxism and History,” *The Poverty of Theory and Other Essays* (New York: Monthly Review Press, 1978).

What the post-modern, or linguistic turn, has somewhat dictatorially done is in some sense simply flip Marx. Instead of structure determining discourse, discourse now determines what can be known of the material structure. In its vulgar form this is reverse reductionism—even if the content of discourse at any given moment is perceived as indeterminate, contingent, and afunctional.⁹ As Leon Fink observes, “The yellow-dog contract, criminalization of the boycott, the antistrike injunction, and the gleam of militia bayonets . . . were not the tools of consent.”¹⁰ Recovering as histories the deeds to which these legal enactments responded is emphatically not sentimentality as charged by newer critics of labor histories.

This book aspires to offer a corrective to all three academic limitations. The book serves to provide law professors a supplemental reader to provide the contexts of collective actions to decisions in labor law texts, to also provide historians a chronology of case studies to illustrate a trajectory of legal history that can accompany thematic American History courses, and finally, above all, to reassert the interconnectedness of the material world and law and consciousness in relation to the possibility of agency (once again foregrounded) in histories. This book re-centers struggles undertaken in collective actions of workers, and experienced in some ways also as legal actions.

The history of actual people is not that of the hegemony of individualism, the taxonomy of Paternalism, or the discourse of the bayonet. That is not the way we live our lives. To my knowledge, workers in American history have not yet given their consent to domination, or accepted their share of the value of what they produce as just, and workers continue to fight to enact alternative social relations in reproducing their society. They have often lost. They have often been beaten, many literally. Many have died. Triumph and Anguish are words but they do not represent discourse, and the past carries memory in deeds that are much more than words. Both old and new labor law histories have a lot to learn.

I want to express particular appreciation to Jim Pope, who has offered important and sage advice throughout, and encouraged the participation of many in this project; and to my assistant, Shannon Maharajh who cheerfully makes appear all I need; and to my partner, Marnie Mahoney, who tired of hearing my complaints about the literature, and challenged me to stop talking and write a book about it, and has been a constant consultant. Marnie has always in her writing and ideas reminded us of the twin couplets—Power and Control, Oppression and Resistance . . .

Kenneth M. Casebeer
Asheville, North Carolina
May, 2011

9. “The history of meaning has successfully asserted the reality and autonomy of its object. At the same time, however, a new form of reductionism has become evident, the reduction of experience to the meanings that shape it. Along with this possibility, a new form of intellectual hubris has emerged, the hubris of word-makers who claim to be makers of reality,” John E. Toews, “Intellectual History After the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience,” 92 *American Historical Review* 879, 906 (1987).

10. Leon Fink, *supra* note 8, at 103.

Authors

Eric Arnesen: Professor of History, The George Washington University, is the foremost scholar of the intersection of labor and civil rights history. His seminal books include *Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality* and *Waterfront Workers of New Orleans: Race, Class, and Politics, 1863–1923*. He is engaged in a biography of A. Phillip Randolph.

James B. Atleson: SUNY Distinguished Teaching Professor of Law, Emeritus, University of Buffalo Law School, authored the acclaimed *Values and Assumptions in American Labor Law* and *Labor and the Wartime State*.

Eileen Boris: Hull Professor and Chair, Department of Feminist Studies, University of California Santa Barbara. Eileen Boris cuts across disciplinary boundaries as if never there. Of her many books are *Caring for America: How Home Health Workers Became the New Face of Labor* (co-authored with Jennifer Klein); *The Practice of US Women's History: Narratives, Dialogues, and Intersections*, edited by S.J. Kleinberg, Eileen Boris, and Vicki Ruiz; *Major Problems in the History of American Workers*, Second Edition, edited by Eileen Boris and Nelson Lichtenstein; *Home to Work: Motherhood and The Politics of Industrial Homework in the United States*—Winner of the 1995 Philip Taft Prize in Labor History. Prof. Boris and Prof. Klein have a book forthcoming, *Organizing Home Care*.

Kenneth M. Casebeer: Professor of Law, Director, Employment, Labor, and Immigration certificate at the University of Miami Law School, is co-author with Gary Minda of *Work Law in American Society*. His recent scholarship focuses on recovering lost voices as part of Critical Labor Law History.

Thomas Dublin: SUNY Distinguished Professor of History, Co-director, Center for the Historical Study of Women and Gender SUNY Binghamton. He is author of the classic, *Women at Work: The Transformation of Work and Community in Lowell, Massachusetts, 1826–1860*, and numerous other books on labor, immigration and women.

Leon Fink: University of Illinois Chicago Distinguished Professor of History, Director of WRGUW (History of Work, Race, and Gender in the Urban World), Editor, *Labor: Studies in Working-Class History of the Americas*. He is author of *Workingmens' Democracy: The Knights of Labor and American Politics* and *The Maya of Morganton: Work and Community in the Nuevo New South*, among other books.

Philip S. Foner: Prof. of History, Lincoln University, now deceased. Prof. Foner was a distinguished and prolific materialist historian, author of the ten-volume *History of the Labor Movement in the United States*, among many other books.

William E. Forbath: Lloyd M. Bentsen Professor of Law and History, University of Texas—Austin, is one of the foremost legal historians working today. He is author of *Law and the Shaping of the American Labor Movement*.

James Green: Professor of History and Labor Studies at the University of Massachusetts—Boston. Jim Green is a past President of the Labor and Working Class History Association and an editor of its Journal, *Labor: Studies of Working Class History in the Americas*. He has authored six books, most recently, *Death in the Haymarket: A Story of Chicago, the First Labor Movement and the Bombing that Divided Gilded Age America*.

Michael K. Honey: Fred T. and Dorothy G. Haley Endowed Professor of the Humanities, Professor, Labor and Ethnic Studies and American History, University of Washington—Tacoma, Past President, Labor and Working-Class History Association. Michael Honey is an author of breathtaking scholarship, ten years of which culminated in *Going Down Jericho Road: The Memphis Strike, Martin Luther King's Last Campaign*.

Jennifer Klein: Professor of History, Yale University, is the author of *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State*. She is also on the Editorial Board of the journal *International Labor and Working Class History*.

Sidney Lens: Labor leader, activist, and author of many progressive books, including *The Labor Wars*.

Kari Lydersen: A journalist who writes for the *Washington Post*, *The New York Times*, *In These Times*, and other publications, Kari authored, *Revolt on Goose Island: The Chicago Factory Takeover and What it Says About the Economic Crisis*.

Staughton Lynd: Attorney, Legal Services of Youngstown, Ohio, formerly Professor of History, Yale University. A well-known pacifist and labor activist, he is the author of numerous books, including *The Fight Against Shutdowns*, *Solidarity Unionism*, and with Alice Lynd, *Rank and File*.

Martha R. Mahoney: Professor of Law at the University of Miami, is co-author with Stephanie Wildman and John Calmore of *Social Justice: Professionals, Communities and Law*.

David Montgomery: Farnam Professor of History Emeritus, Yale University. Professor Montgomery is the dean of American Labor History. His numerous seminal books include: *Citizen Worker*, *The Fall of the House of Labor*, *Workers' Control in America*, *Beyond Equality*, etc.

Walter C. Nelles: A Professor of Law at Yale Law School, Nelles was the first General Counsel of the American Civil Liberties Union. He died in 1939.

James Gray Pope: Professor of Law and Sidney Reitman Scholar, Rutgers Law School—Newark. James Pope is a former member of the IAM and the Industrial Union of Marine and Ship Builders. A prolific historian of Labor Law, he forcefully argues for the contemporary relevance of the Thirteenth Amendment.

Linda G. Schneider: Professor of Sociology Emeritus at SUNY—Nassau Community College. She is the co-author with Arnold Silverman of *Global Sociology*.

Philip Taft: Professor and Chair, Department of Economics, Brown University. Taft, an old school labor union institutionalist who died in 1976, wrote the two-volume study, *The A.F. of L. in the Time of Gompers*, and *The A.F. of L. from the Death of Gompers to the Merger*.

Kieran Taylor: Assistant Professor of History, The Citadel, specializes in twentieth-century US, Labor, and Civil Rights history. He is Coordinator of the Citadel Oral History Program and co-editor of volumes 4 and 5 of *The Papers of Martin Luther King, Jr.*

Mary Heaton Vorse: Labor Journalist. Vorse, who died in 1966, was everywhere labor was in the 1930s. She wrote *Labor's New Millions* about the formation of the CIO.

Ahmed A. White: Professor of Law at the University of Colorado Law School, specializes in the intersection of Criminal and Labor Law history.

Rebecca E. Zietlow: Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law, writes about the Reconstruction Era and congressional protection of individual rights. Her work includes the book- *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights*.