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OF COURAGE, TUMULT, AND THE SMASH MOUTH TRUTH: A UNION SIDE APOLOGIA

Michael C. Duff[*]

INTRODUCTION

For as long as I can recall, I have ruminated over the subject of Julius Getman's recent book, *Restoring the Power of Unions: It Takes a Movement*. My starkest meditations have arisen primarily not in the context of academic writing or teaching – my present work – but in the course of my prior work, first as a blue-collar worker and union organizer in the airline industry, and then in my two roles as a union side lawyer and National Labor Relations Board (NLRB) attorney. The interplay between my present and former work has served both as a rich source of material about which to write and a fomenter of periodic cognitive dissonance.[1] This somewhat ethnographic essay represents, in part, a personal attempt to reconcile dissonant features of that interplay, making grateful use of Professor Getman's provocative book as its springboard. In essence, the project reflects upon my former "lifeworld," to borrow the term of Habermas.[2] I do this with a fair degree of trepidation for, as Habermas has explained, "to make lifeworld assumptions fully reflective—to speak of them explicitly—is already to destroy them."[3] And, of course, I cannot know all of the implications of such destruction. Throwing caution to the wind, I attempt to articulate my understanding of the smash mouth truth of labor conflict.[4]

Some personal biography in advance of this discussion may be in order.

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[1] For an elegant exposition of "the dissonance between the meaning of our national labor law, as decreed primarily by federal judges, and the social and economic realities of workplace relationships addressed by that law . . ." *see* James J. Brudney, *Of Labor Law and Dissonance*, 30 CONN. L. REV. 1353 (1998).

[2] Christopher H. Johnson, *Lifeworld, System, and Communicative Action in* RETHINKING LABOR HISTORY 57 (University of Illinois, Lenard R. Berlenstein, ed.) (defining lifeworld as "the lived day-to-day human experience of communicative interaction.").

[3] Arthur W. Frank, *Habermas Notes*, available at http://people.ucalgary.ca/~frank/habermas.html (last visited December 7, 2010)

[4] A fan of American football may recognize the term "smash mouth" as a conceptual construct of former professional football coach Mike Ditka. "Smash mouth football" is stripped of pretense. A team wins through raw and often brutal physical superiority over its adversary.

Electronic copy available at: http://ssrn.com/abstract=1751662

I set out in the world of work in my teen years while residing in a working-class suburb of Philadelphia during the waning days of the Carter Administration. After being overworked and underpaid in odd jobs for a few years throughout the early portion of the Reagan era, I realized, as did many of my working class contemporaries, that without resources to attend college only a union job was likely to provide any semblance of a living. Unskilled, or even semi-skilled, non-union jobs did not lead anywhere I wanted to go, a verity underscored again and again as I worked at tasks like washing dishes, mopping floors, cooking in fast food restaurants, and doing "over short and damaged" claim work in the air freight industry.

These early experiences nevertheless introduced me to a variety of workplaces and to the workers acting within them. Later jobs and careers broadened my diverse exposure to work. I labored as a unionized airline ramp worker; a union shop steward and organizer of airline ramp workers; a public and private sector labor lawyer; and a law professor focusing on labor and employment law. My somewhat unusual work history has emphasized, on a personal level, the extent of the chasm between flesh and blood workers and labor experts' ideation concerning them.[5] Professor Getman's exposition in *Restoring the Power of Unions* refreshingly eschews superficial analysis and puts some flesh and blood back on the bones of "the labor question," revealing voices, thoughts, and emotions of actual workers and union organizers. I approve of the method, for I think that the nature of union organizing is most powerfully revealed in its immediate human aspect. Yet the approach of labor law writ large often obscures human sentiment. While the excessive abstraction of law may be a criticism not unique to labor law,[6] it feels odd in the context of the NLRA, a statute

[5] Professor Getman has written:

> Few judges, Labor Board members, or academic commentators come from working class backgrounds, and those that do have been through the transformative experiences of law school, judicial clerking, and high level legal practice. Almost nothing in the professional experiences of lawyers and judges is likely to give them understanding of the practical consequences of legal decisions defining the rights of workers or unions.

Julius Getman, *Of Labor and Birdsong*, 30 CONN. L. REV. 1345, 1349 (1998)

Whether legal experiences have transformed me is for others to assess. I like to think I am a counterexample. Perhaps I am fooling myself.

[6] William Lucy, *Abstraction and the Rule of Law*, 29 Oxford Journal of Legal Studies 481, 508 (2009) (arguing that law's abstract judgment stands in need of justification because the moral merits of such abstract judgment are not immediately apparent).

Electronic copy available at: http://ssrn.com/abstract=1751662

upheld as constitutional in large part because of its potential for maintaining industrial peace and diminishing industrial strife,[7] considerations inescapably tied to pathos.

Perhaps intellectual detachment from workers, the subjects of labor law, is desirable or necessary on the plane of policy formulation. However, the tactical method of the Act unflinchingly consists of attempts to eliminate employer practices "reasonably tending to interfere with, restrain, and coerce employees" in the exercise of statutory rights.[8] Under this statutory formulation, enforcement is unavoidably caught up in assessments of quasi-psychological impacts on workers. The National Labor Relations Board (NLRB) considers routinely conduct alleged to be unlawful and repeatedly makes judgments as to the impact of the conduct on workers. As Professor Getman observes, the NLRB pursues this mission without ever *really* explaining the source of its administrative expertness in what amounts to subtleties of mass psychology.[9] The circuit courts, for their part, not too persuasively uphold or overturn NLRB decisions. The courts' explanations of their refusal to defer to agency expertise or their allowance of agency departures from precedent remain unsatisfactory.[10] The machinations are far removed from the day-to-day reality of workers.

Implicit in the foregoing critique is the proposition that, if one wishes to engage in meaningful discussion of restoring union power or reinvigorating the labor movement, the conversation must be joined at the level of the worker. Union density is, at bottom, a function of individual worker choices, considered in the aggregate, concerning whether to join and consistently support unions. While "employee free choice" is bandied about as a chief desideratum of labor policy, only rarely are efforts made to understand how workers decide whether to join unions.[11] Rather, distanced policy analysts tend to construct labor law mechanisms in a vacuum.[12]

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[7] MacKay Radio

[8] *See, e.g.*, Empire State Weeklies, 354 N.L.R.B. No. 91, slip op. at 2 (2009)

[9] Indeed, as Professor Getman points out, the NLRB has not even permitted the introduction of empirical evidence as to whether particular conduct has had actual coercive impact on employees. RESTORING THE POWER OF UNIONS 192 (Chapter 15).

[10] The "September Massacre" may provide an interesting administrative law study in the continued vitality of the rule that the Board may not depart permissibly from precedent without explanation. *See e.g.* Shaws Supermarkets v. N.L.R.B., 884 F.2d 34, 37 (1st Cir. 1989) ("[T]he Board may not depart sub silentio from its usual rules of decision to reach a different, unexplained result in a single case.")

[11] *See* Harvey Krahn and Graham S. Lowe, *Public Attitudes Towards Unions: Some Canadian Evidence*, Journal of Labor Research, Volume V., No. 2 (Spring 1984) (focusing on the union joining process by examining what attitudinal, personal, and structural characteristics are associated with latent support for union membership among non-unionists.)

[12] Professor Getman has taken this approach in making a serious empirical study of the

Here, I want to engage in a reductionist exercise along the following lines. I first intend to consider how a practical, discerning worker – a worker in "the original position"[13] – might act upon what I adjudge to be first principles of labor realities. Let me be forthright – union organizing among workers who do not accept these first principles is very difficult. I have attempted it personally, and have seldom been successful. The first principles must be sufficiently axiomatic for organizing to proceed. Otherwise, an organizing message is quickly subsumed in an employer's counter–framing. In short, original position workers are "the organizable."

In an ancient case, *Vegelahn v. Guntner*,[14] the Massachusetts Supreme Judicial Court upheld an injunction against picketing and patrolling being carried out by workmen outside a Boston factory. The picketing was essentially peaceful, but the workmen were alleged to have made unlawful threats and to have interfered with contracts and business in a manner deemed unlawful in the 19th century. The Court upheld a very broad injunction. Justice Oliver Wendell Holmes, in dissent, was of the opinion that peaceful labor picketing was not unlawful and that the labor injunction was therefore overly broad. In the course of Holmes' dissent, he offered the following observation,

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[15]

I view these three sentences as a quintessential expression of the axioms accepted by original position workers. Such workers never have to be persuaded of these propositions. Rather, original position workers speculate about inferences to be drawn from these first principles. For example, an original position worker may wonder – albeit in non-technical terms – about

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coercive impact of employer conduct on employees during NLRA representation election campaigns. GETMAN STUDY. I sometimes draw conclusions from the findings of his important study that are somewhat different from his conclusions. But I applaud his efforts to focus upon workers themselves.

[13] To engage in the discussion, I imagine the situation from the vantage point of an individual worker chosen at random from a group of workers in which the differences between them are unknown and where "everyone is equally rational and similarly situated, [and where] each is convinced by the same arguments." See JOHN RAWLS, A THEORY OF JUSTICE 139 (The Belknap Press of Harvard University Press, Cambridge, MA: 1971). I corrupt the process by dictating in advance – based on my personal experience with workers (including myself) – axioms I think a worker could accept as rational.

[14] 167 Mass. 92 (1896)

[15] *Id*. at 108

voluntaristic versus mandatory approaches to management of labor conflict, but will never speculate concerning the existence of the conflict itself.

Workers, including original position workers, have been separated from labor history and blinded by imaginary labor law. Original position workers, in particular, would quickly reject reliance on labor law if they better understood its substantive emptiness, but typically they do not. The reduction of charge filing at the NLRB during the last several years reflects an almost universal apprehension on the part of unions of the barrenness of private sector labor law, and the best unions communicate promptly the true state of affairs to employees they seek to organize. Only so many workers can be organized actively at any given time, however, so most original position workers will not receive clearly enough the message that the law is of limited help. This essay will not delve into particulars concerning the substantive ineffectiveness of labor law. It is enough for my purposes to say that it has been known for a long time,[16] and has now made its way to street-level union organizing.[17]

Similarly, original position workers would be skeptical of the likelihood of employer benevolence with just a bit more exposure to history. Access to history has instilled doubt in many workers respecting the capacity of the law or of beneficent employers to fend for their interests. In the end, workers must defend themselves. My argument is that only vigorous union organizing campaigns will lead to substantial increases in union density. Only the passion engendered by such campaigns will produce a labor movement capable of developing and executing tumultuous economic weapons. Successful production of tumult is what compels honest bargaining over terms and conditions of employment. The potential for the creation of tumult is the *sine qua non* of a bona fide labor law. None of this dynamic is possible, however, without winning over original position workers.

In this essay, I first discuss a prolegomenon for original position workers. Next, I discuss labor movement[18] union organizers as individuals who communicate effortlessly with original position workers. Such organizers carry authentically within them a broad oppositional labor

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[16] *See, e.g.*, Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1788-89 (1983)

[17] *But see* Andrew W. Martin, *The Institutional Logic of Union Organizing and the Effectiveness of Social Movement Repertoires*, AMERICAN JOURNAL OF SOCIOLOGY, Volume 113, No. 4, 1086 (January 2008) ("Although less-institutionalized organizing appears to be superior with respect to victory rate and number of workers recruited, the certification election remains the preferred repertoire for most unions.").

[18] Adjectival use of the term "labor movement" is meant to describe individuals acting with a purpose inuring to the benefit of the labor movement, broadly conceived, and not limited to a single organizing campaign or labor dispute.

perspective. They are persons who are trusted and respected for their qualities of vision, action, and loyalty. I then discuss the enigma of labor movement workers, who in times past have engaged successfully in strategic collective labor activity, seemingly aware of moments of historical import. Labor movement workers have been sleeping for decades. No labor movement can exist unless they awaken. The smash mouth truth is that they must vigorously contest the working life that they have been designated if they prefer liberty. For the current implicit message from employers is that workers should be content simply to survive during an inexorable race to the bottom of standards and life chances. That is the true meaning of acceptance of new economic realities.

Prolegomenon for Original Position Workers

In the preceding section I claimed that original position workers would reject labor law as a solution to economic insecurity if they knew of its substantive emptiness. But in addition to knowing the present state of the law, original position workers would garner a perspective on the prospect for modifying the law by reviewing events in legal history. The first question from an original position worker willing to engage in a reductionist dialogue is often, "What do unions have to do with me?" On one level the question, usually raised by workers divorced from labor history, implies that "labor law" obviates the original need for unions. On another level, the question intimates that unions, the moving force of labor law's creation, may be left out of the very law they fought to create.

Workers often imagine, without basis, the existence of a natural law of employment that protects them. When I performed public outreach and charge filing assistance duties as an NLRB field attorney, I repeatedly encountered the idea from inquiring, aggrieved workers of an all-enveloping legal protection from workplace injustice. I was required to explain the employment-at-will doctrine and to fence with outraged workers refusing to accept that the doctrine could exist in a civilized society. The belief in broad legal protection in the workplace is of obscure origin, but as an organizer I found it an obstacle to organizing: workers who think they have legal protections also tend to think they do not need a union. In contrast, original position workers would tend to greet the idea of default legal protection with skepticism.

As an organizer I was often surprised to discover that workers sometimes thought they would be treated fairly by their employers because they assumed employers had been fair in the past. Those workers appeared to hear the echoes of the welfare capitalism of an earlier era. In *The Rise and Decline of Welfare Capitalism,* historian David Brody shows that in the

late 1920s certain employers believed in benevolent welfare capitalism.[19] To prove his point, Brody quotes Charles M. Schwab of Bethlehem Steel,

> Our job is primarily to make steel . . . but it is being made under a system which must be justified. If . . . this system does not enable men to live on an increasingly higher plane, if it does not allow them to fulfill their desires and satisfy their reasonable wants, then it is natural that the system itself should fail.[20]

This pre-New Deal utterance by a captain of industry might seem surprising. But the statement was made during a time - the 1920s - in which "concord and plenty seemed within easy reach."[21] By the early 1930s, however, this optimistic view was tempered by "a burst of unexampled industrial strife."[22] Most original position workers would assume that employers are more likely to undertake "socially responsible" positions when it is easiest to do so. As an organizer, I did not attempt to argue that benevolent employers did not exist. Original position workers knew that could not be true. Rather, I argued that voluntary measures would evaporate the moment the employer's "bottom line" was impacted, and informed workers of the extent to which some employers had interfered with workers' rights. Following such an exposition, the questions became, "which type of employer do you have," and "how do you know?"

Original position workers exposed to the policy justifications for labor law would likely change their assessments of present labor dynamics. The stated purpose of the NLRA is "to eliminate the causes of certain substantial obstructions to the free flow of commerce . . ."[23] The law's protection of workers is, therefore, explicitly instrumental. Workers' rights are subordinate to a larger stated policy of commercial stability. To a legal academic this may not seem particularly startling. But as a young union organizer, I found myself surprised when I realized the essence of the subordination. Obviously, further study led me to understand that complex statutes are always admixtures of interests that are frequently in tension. A commercial rationale was perhaps unavoidable if the statute was ever to survive constitutional attack.[24] But an original position worker would be

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[19] DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE, *The Rise and Decline of Welfare Capitalism*, 48-81 (Oxford University Press, 2d Ed., New York, N.Y.: 1993)

[20] *Id.* at 48, quoting *Law and Labor* 10 (January 1928): 19.

[21] *Id.* at 49

[22] *Id.*

[23] NLRA, Section 1.

[24] Jones and Laughlin Steel. I agree, however, with the view that the decision to ground the NLRA in Congress's authority under the Commerce clause rather than under a potentially more expansive 13th Amendment theory is subject to serious criticism. *See*

influenced by the knowledge that labor law has always been subordinate to broader policies. Once the worker understood the subordination, it would hardly be necessary to add that workers would have little control in a legalistic system over judgments concerning the relative importance of competing policies.

A labor statute explicitly linked to prevention of strikes, or other forms of industrial strife, where no industrial strife is at hand, is a strange creature. In the absence of destabilizing industrial strife an original position worker might wonder how present law can be justified. The worker would wonder in an entirely practical manner: why risk affiliating with unions if they are no more than a manifestation of poorly justified, irrelevant labor law? Eventually, the broader legal system may have no interest in protecting union activity if industrial peace, the stated objective of American labor law, has been achieved. A union supporter might be rendered a mere troublemaker and malcontent, subject to harassment-without-remedy at every turn.

The foregoing discussions are quite typical of those in which I participated as a unionized employee-organizer in the airline industry in historically labor-tumultuous Philadelphia.[25] They implicate large questions of continuing union relevance. Such discussions were often linked to a broader historical narrative describing a societal life cycle culminating in the (natural) death of unions.[26] This narrative commenced with an account of a misty past in which Congress enthusiastically enacted a progressive labor law for the benefit of workers. Although employers ideologically (and understandably) opposed the NLRA, the narrative continued, they nobly complied with the law until achieving sufficient political support to eviscerate it lawfully through passage of the Taft-Hartley Act. After Taft-Hartley, labor law was eventually rendered irrelevant, either by the triumph of the American economy, or as a result of court hostility and administrative agency capture. Like the cigar makers of Samuel Gompers' time,[27] airline ramp workers discussed regularly meta-narratives.[28]

Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World–Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L. J. 651, 667 (2004); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law*, 1921-1957, 102 COLUM. L. REV. 1,81-82 (2002).

[25] Cite to 1835 general strike for the ten hour day.

[26] The narrative is based solely on my own memories of arguments I heard repeatedly from workers during organizing activities.

[27] HAROLD C. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA (Boston: Little, Brown and Company 1978)

[28] For an extended discussion of the union organizing culture of airline ramp workers *see* LIESL MILLER ORENIC, ON THE GROUND: LABOR STRUGGLE IN THE AMERICAN AIRLINE INDUSTRY (University of Illinois 2009)

The meta-narrative of the "natural" erosion and obsolescence of unions – largely accepted by even original position workers – suffers from serious deficiencies, and it is the perpetual challenge of organizers to identify and discuss them. First, the NLRA has been only marginally protective of workers and their unions. Even where the statute is meant explicitly to improve workers' bargaining power,[29] the nominally co-equal policy has always yielded to elite judgments of what is in the interests of commercial stability.[30] Moreover, even if the statute had offered a greater range of formal protection of labor activity, it is quite unlikely that the statute would have been enforced. Indeed, many employers never accepted gracefully the NLRA, *even in its weak form*, or acquiesced one whit to the bare notion of union legitimacy.[31] While employer resistance to the NLRA, prior to the Court's declaration of its constitutionality, is widely known, the degree of resistance is not always fully appreciated. Original position workers evaluating the arguments of labor movement advocates in support of direct economic action would no doubt be influenced by the smash mouth reality that coexisted with the "golden age" of labor law.

The smash mouth opposition of employers to unionization during the New Deal is illustrated in the 1937 report of the Committee on Education and Labor, Subcommittee Investigating Violations of Free Speech and the Rights of Labor, popularly known as the LaFollette Civil Liberties Committee, named after its chair, Senator Robert M. LaFollette of Wisconsin. The Committee found that employers had prepared to meet the "union threat" with more than just reasoned persuasion.[32] Throughout the

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[29] *See* NLRA § 1

[30] Senator Wagner decided to rely on Congress's commerce power as a constitutional justification of the National Labor Relations Act to escape criticism from middle-class reformers and judges. This was seemingly the beginning of the felt need to justify all NLRB action through appeals to social peace and the prevention of commerce disruption rather than honestly balancing expedient pacification against the labor freedom that was also an important component of the architects' original vision. For a convincing exposition of this view *see* James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 524 (2004).

[31] I find "new governance" discussions unsettling in the context of labor law. I think, following commentators like James A. Gross, that the NLRB was so quickly emasculated by a conservative counterinsurgency that it is difficult to speak of vigorous "old governance" needing to be superseded. *See* JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947 (Albany, State University of New York Press 1981). Professor Lobel has recounted arguments that a gap between law-on-the-books and law-in-action is, in reality, a sign of strength in a regulatory system. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 451 (2004). The labor law on the books is sufficiently weak, however, to render the question entirely academic.

[32] MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA: A

1930s, several major American corporations had collectively spent nine and a half million dollars for labor spies, strikebreakers, and munitions.[33] General Motors' expenditures in this regard of $830,000[34] in the period 1933-36[35] strongly suggest that the company intended confrontation with paramilitary and not just economic weapons. These revelations place the GM sit down strikes of 1937 in an entirely different light. During that landmark conflict, striking workers were at risk of suffering physical injury at the hands of law enforcement officials and the National Guard.[36] But, as LaFollette's committee appeared to demonstrate, the strikers were additionally vulnerable to direct corporate intervention. Workers engaging in the strikes displayed great courage in the throes of tumult and smash mouth opposition.

Few imagine, of course, that the New Deal was not fraught with fits and starts of policy implementation, or believe that innovative approaches to large social problems would not occasion opposition.[37] But opposition to the point of arms is sharply at odds with notions of eventual dignified resignation by employers to the spirit of history and the rule of law. The picture that emerges is one of opposition to unionization teetering on the edge of warfare during a historical period of supposed unparalleled support for unions. Against this picture, the story of the natural erosion and obsolescence of unions appears quite infirm.

HISTORY, 262-64 (7th Ed., Wheeling, IL, 2004) [hereinafter LABOR IN AMERICA]

[33] *Id.* It is interesting to match the names of these armed employers, which came to light during the investigation of the 1937 "Little Steel" strike, to some of the more notable labor law court cases of the era:

> The Youngstown Sheet and Tube Company had on hand eight machine guns, 369 rifles, 190 shotguns, and 450 revolvers, with 6,000 rounds of ball ammunition and 3,950 rounds of shot ammunition, and also 109 gas guns with over 3,000 rounds of gas ammunition. The Republic Steel Corporation had comparable equipment, and with the purchases of tear and sickening gas amounting to $79,000, was described as the largest buyer of such supplies - not excepting law enforcement bodies - in the United States. LaFollette declared that the arsenals of these two steel companies "would be adequate equipment for a small war."

Id. at 263

[34] The figure is not adjusted for inflation.

[35] *Id.*

[36] Only the refusal of Michigan Governor Frank Murphy to call out the National Guard appears to have averted carnage. LABOR IN AMERICA at 286-87.

[37] The immensely complex subject is well beyond the scope of this short essay, even in outline. For a lively and exhaustive discussion of the "First New Deal," the "Second New Deal," the "Court Packing Drama," and other discrete New Deal topics *see* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L. J. 2165 (1999).

An original position worker might contend that, acknowledging widespread and even violent anti-union opposition since the New Deal, unions ceded the moral high ground they might otherwise have enjoyed by abusing what powers the NLRA initially conferred. For this reason, the contention might continue, subsequent Taft-Hartley and Labor Management and Disclosure Act restrictions were necessary to level the playing field between unions and employers.[38] But original position workers must consider the timing of the retrenchment and decide for themselves whether it came as a result of actual abuses or was simply the product of reactionary forces subsequently gaining the upper hand.

The retrenchment began as early as 1939, when a Special House Committee to Investigate the NLRB, the "Smith Committee," named after Virginia representative Howard W. Smith,[39] was formed in response to perceived activist tendencies of the NLRB in support of newly emerging industrial unions.[40] A "Smith Bill" resulted from the committee's deliberations, which was intended to rein in the NLRB's aggressive enforcement of the NLRA. The bill passed the House but died in the Senate. However, the bill was a fairly transparent precursor to the Taft-Hartley amendment.[41]

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[38] As a young, cynical, marginally educated employee-organizer, I confess that I presumed uncritically that the "abuses" amounted to little more than successful primary strikes backed by superior intra-union solidarity.

[39] Smith was also the author of the anti-communist "Smith Act," and was a notorious opponent of civil rights legislation.

[40] A magazine article from the period captured the sentiment of the time:

> In the 18 months before the [Jones and Laughlin Steel] decision, NLRB had been able to hold only 76 plant elections in which workers chose their own unions. In the next 12 months there were 1,142. The rush was on. In the rush, A. F. of L. brother fought C. I. O. brother. To rule between hard-boiled employers and hard-boiled union chiefs, NLRB sent many a radical young theorist, many an idealist who saw everything in black (employers) & white (workers). No Abraham Lincoln was on hand to design a just and tolerant reconstruction. The carpetbaggers swarmed in, and the night riders. NLRB ruled with a high hand and little regard for feelings. Soon businessmen big & little who agreed on nothing else agreed in hatred of NLRB. Congress began to feel the way the wind was setting.

Time Magazine, March 18, 1940 available at http://www.time.com/time/magazine/article/0,9171,763627-1,00.html#ixzz18avGPc6E.

[41] The Bill, among other things, would have:

> Created a new NLRB board of three members; created a new Administrator, who would receive complaints, make investigations; allowed the NLRB only

The retrenchment continued in 1941, before the United States' entry into World War II. In the wake of a successful coal strike engineered by John L. Lewis, in direct defiance of the no strike pleas of President Roosevelt, the House of Representatives passed a bill banning strikes in defense industries.[42] A mere six years after first granting employees the right to engage in concerted activities as a matter of federal law,[43] Congress had undertaken two serious attempts to restrict the right.

Scaling back the right to strike on the precipice of war might be seen as merely an adaptation to extraordinary times and not as a broader retreat from peacetime labor policy, at least as the policy stood prior to 1937. But the nature of that peacetime policy remains open to question. Some scholars have made a case for the later corruption of the true intent of the Wagner Act.[44] Original position workers have a surprisingly good grasp of the potential for the erosion of law through politico-legal processes such as "capture"[45] and "nullification."[46] During my blue-collar days I would not have been able to throw a rock without hitting a rank-and-file worker who could have alleged, in surprisingly vivid and defensible terms, how federal agencies had been "bought off" and how courts had refused to apply clear law. Depending on various factors including, in my experience, geographic locale,[47] workers may accept such accounts of labor law failure much more

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judicial functions, with no powers of administration, initiation, prosecution or enforcement; allowed the NLRB to apply for Court enforcement of its rulings only through the Administrator; denied the NLRB the right to enter disputes between union units in a plant except on an employers' application, or 20% of the workers in a proposed bargaining unit; stripped from the Act the statement that it is the policy of the U. S. to encourage the practice & procedure of collective bargaining; granted employers the right to propagandize their workers or the public; limited to six months the period for which the Board may order back pay to reinstated workers. *Id.*

[42] LABOR IN AMERICA at 310. The measure, which was passed on December 3, never reached the Senate because the attack at Pearl Harbor intervened four days later.

[43] The NLGA had declared the right in 1932 but in negative terms: federal courts were not authorized to interfere with peaceful labor activity, including strikes.

[44] Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMPL. & LAB. L. 223, 229 (2005) ("NLRA policies matter . . . [because] . . . they say that work and the way workers are treated is central to determining the sort of country the United States will be [and because] [t]hey provide the tools so workplaces can operate on principles consistent with those of a democratic country")

[45] By capture I mean instances in which an administrative agency fails to an unauthorized degree to implement the law it has been entrusted to execute for transparently political reasons.

[46] By nullification I mean instances in which courts interfere in an illegitimate manner with an administrative agency's efforts to execute a statue in accord with its mandate.

[47] I am thinking anecdotally of cities like Philadelphia and Pittsburgh. The spillover effect of regional labor union attitudes is inadequately researched. *See Caleb Southworth*

readily than triumphal narratives of conflict-free worker rejection of unions premised on the evident success of a laissez faire economy.[48] Unqualified triumphal narratives are not likely to resonate with workers whose families have struggled across generations just to survive; they similarly gained little traction with my co-workers on the airline ramp who lived through the underbelly of the Reagan era. A gut level rejection of triumphalism is not explanatory, however. How does one explain, to an original position worker, what went wrong with labor law?

One explanation is that the NLRA was never meant to succeed. It is certainly true that employers played a role in framing the statute for the general public as evidence of a governmental plot to impoverish capital and as some terrible end of history.[49] Such framing probably eroded popular support over time. That motif draws on a theme of corruption of originally pristine congressional motives, however. As Professor Karl Klare has explained, however, congressional "intent" in enacting the NLRA may have amounted to an exercise in political survival:

> [M]any Senators, convinced that the bill was unconstitutional, shifted the onus of its defeat to the Supreme Court. . . . [T]hey felt certain that the measure would not take effect since employers would withhold compliance until the Court declared it void.[50]

For those senators who anticipated from the beginning the NLRA's evisceration the only thing that may have "gone wrong" with the statute was that it took so long to undermine. I have little doubt of the originally strong popular support for the NLRA.[51] I do seriously question, however, the

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and Judith Stepan-Norris, American Trade Unions and Data Limitations: A New Agenda for Labor Studies, 35 ANNUAL REVIEW OF SOCIOLOGY 297, 307 (2009) available at http://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-070308-120019 (Despite substantial literature that shows state and city-level variation in politics, employment, religion, and labor force composition, little research on unions takes geography into account).

[48] I recall discussions with my classmates at Harvard when Professor Paul Weiler was teaching the *Electromation* case. The case raised the question of whether employer "quality circles" were unlawfully dominated labor organizations within the meaning of the NLRA. An important background policy issue was whether the ultimate finding that an employer's "direct dealing" with employees concerning terms and conditions of employment presumed a conflict model of labor-management relations that was anachronistic. As a union steward who had been involved in physical altercations during recent organizing drives, I found serious entertainment of the question ludicrous.

[49] LABOR IN AMERICA at 261.

[50] Karl E. Klare, *The Crisis of Collective Bargaining Law*, 44 MD. L. REV. 731, 775 (1985) quoting I. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 116 (1950).

[51] LABOR IN AMERICA at 261

existence of broad-based support for the statute by more than a handful of "the establishment." One need not doubt the sympathies of the law's architects to also accept that other elites were simply waiting out a wave of short-term popular favor.

This prolegomenon might lead an original position worker to accept my view that labor law was, from labor's perspective, weak and problematic, from its inception. It is no great distance from acceptance of that claim to agreement with Professor Getman's conclusion that workers and their unions will determine the labor movement's future, and not law.[52] In light of the weakness of the law, the original position worker may wonder, with me, whether labor's survival through the last seven decades has resulted directly from its exertion of economic strength, or from the fear of such exertion. In the absence of law, what other explanation suffices?

It might also follow for that worker, as it does for me, that legal reform of the NLRA, while helpful in the short term, is not adequate to ensure the self-organization of workers. As Professor Getman explains, employers remain free under proposed reforms to engage in delaying tactics that would sound the death knell of traditional organizing campaigns. A labor movement built on a reliance on statutory tinkering seems contrary to history. The labor movement was created not by statutes, but by workers and their unions. In many respects, Samuel Gompers was right.[53] Still, for me it would go too far to assert that law has played no role on the ground in labor relations. At a minimum law signals society's view on labor's legitimacy. Following enactment of the Norris-LaGuardia Act in 1932 and Section 7(a) of the National Industrial Recovery Act in 1933, for example, a burst of organizing involving millions of workers commenced; the activity could not be ascribed to positive legal protection of unions.[54] That protection would not come until the passage of the NLRA in 1935.[55] Workers, nevertheless, got the message, real or imagined, that belonging to

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[52] RESTORING THE POWER OF UNIONS 307 (Chapter 25) ("Unions throughout history have been able to organize and strike successfully, even in the face of repressive laws, as long as they have had the determination and willingness to take chances.")

[53] Gompers, the early, great leader of the American Federation of Labor, thought that the law could be useful in setting a floor for basic working conditions premised on general humanitarian principles; but any amount of government regulation could, he believed, set the stage for broad societal repression of labor through a process of cooption. See RUTH L. HOROWITZ, THE POLITICAL IDEOLOGIES OF ORGANIZED LABOR: THE NEW DEAL ERA 32 (Transaction Books 1978)

[54] Norris-LaGuardia forbade the federal courts from issuing injunctions to stop peaceful labor activity but created no private right of action for workers alleging employer interference with such activity. Section 7(a) of the NRA was administered by a series of administrative boards lacking authority to petition courts to compel employers not to interfere with the organizational rights nominally created by the NRA.

[55] *See* LABOR IN AMERICA at 252-53.

a union was legitimate, and even desirable.[56]

In the wake of extended arguments of the type I have advanced above, workers may reject theories of legal determinism and employer benevolence as solutions to the problems acknowledged in the original position. But intellectual acceptance of the arguments merely sets the stage for organizing. The intellect reveals the smash mouth truth, but it cannot supply the courage required to follow through with the implications of a new paradigm. Leadership and motivation are the domains of labor movement organizers.

Labor Movement Organizers

Labor movement organizers require original position workers to develop the critical mass necessary to transform workplaces. Professor Getman's exposition in *Restoring the Power of Unions* provides a glimpse of the essence of these organizers. In organizing discrete workplaces they do not operate in microcosm. Like the CIO organizers of old,[57] they implicitly press a broader social-democratic vision, even if they are not always clear on the best organizational tactics to employ.[58] They understand the need to organize entire communities, if necessary, to achieve workplace objectives.

Labor movement organizers communicate a visceral apprehension of the deeply oppositional character of labor relations and instinctually look askance at attempts to downplay conflict. This is important, for in my experience management seldom fails to understand the fundamental nature of the conflict entailed when workers challenge its hegemony. Commentators have noted the distinctive intensity of American business to maintain managerial control at all costs.[59] Original position workers apprehend intuitively the essential, unavoidable reality of conflict in any dispute between workers and managers over control of the workplace.

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[56] As Robert Kuttner noted in an online magazine post, John L. Lewis used to tell workers that President Roosevelt wanted them to join the union. Although Lewis' claim was probably an exaggeration, the powerful pro-union signaling in the era was widespread and unmistakable. Robert Kuttner, *President Obama Wants You to Join the Union*, The Huffington Post, February 1, 2009, *available at* http://www.huffingtonpost.com/robert-kuttner/pesident-obama-wants-you_b_162975.html (last visited January 30, 2011).

[57] ROBERT H. ZEIGER, THE CIO, 1935-1955, 1 (The University of North Carolina Press, 1995)

[58] I am not about to launch into hagiography. The CIO, for all its legendary prowess and militancy, was largely at the mercy of social forces entirely beyond its control reacting to the hostility of "bitter-end" employers. *Id.* at 2. I am speaking of the energy of the CIO, which is a necessary but not sufficient condition for a labor movement.

[59] Karl E. Klare, *The Crisis of Collective Bargaining Law*, 44 MD. L. REV. 731, 778 (1985)

Indeed, it is what defines the original position.[60] Organizers appearing to gloss this reality can quickly lose credibility with an original position work group fully accepting of the prolegomenon I have set forth.

Professor Getman's organizer-protagonists are authentic. Workers follow them because they know the organizers are "bitter-enders" who will zealously pursue workers' objectives. A labor movement organizer's indispensible credibility is purchased dearly and often derives from the organizer's formative life experiences. This credibility permits the organizer to continue to lead even when there are differences of opinion on tactics.

Consider my oppositional pedigree, which is an accident of birth. My mother, a coal miner's daughter, tells the following story.[61] Her father worked in a coal mine in Harlan County, Kentucky, during the 1930s. When he and his coworkers sought representation by the United Mine Workers,[62] the mine operators reacted violently, intimidating and coercing union sympathizers on a daily basis. When my grandfather left his house in the morning for the mining camp, company operatives of the "Lynch mine" shot at him from behind trees. My grandmother became accustomed to living in a war zone.[63] In daily anticipation of the morning sniping, she and my grandfather would tip a large kitchen cook table over onto its side. Behind this table, my grandmother and her seven children – including my mother – would crouch. The table served as cover from the ricocheting bullets that penetrated the kitchen walls as my grandfather fled the house and headed for a nearby protective tree-line. He hugged his way from tree to tree, slowly, perilously heading toward his mining camp. I knew this story by heart by the time I was eleven years old.[64]

I probably do not need to explain why I am skeptical of the idea of benevolent employers.[65] The seeds of my bias were sown well before I

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[60] *See supra* n.15 and accompanying text.

[61] Betty Parker Duff, *Stand by Your Man: Gender and Class Formation in the Harlan County Coalfields*, *in* BEYOND HILL AND HOLLOW: ORIGINAL READINGS IN APPALACHIAN WOMEN'S STUDIES 152, 165 (Elizabeth Sanders Delwiche Engelhardt ed., 2005)

[62] Although the time line is not entirely clear to me, based as it is on oral history, I suspect that the activity in question transpired between 1931 and 1933 during UMW organizing of previously non-union coalfields in Kentucky and Alabama. *See* LABOR IN AMERICA at 253.

[63] Duff, *Stand By Your Man* at 165.

[64] This is obviously one side of the story. I refer the reader questioning my bias to an extensive account. JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESSENCE AND REBELLION IN AN APPALACHIAN VALLEY, 84-121 (University of Illinois Press, Urbana, 1980).

[65] From the beginning, I was thrust *in loco Yossarian*:

learned about the railroad strikes of 1877; the Haymarket Riot of 1886; Homestead; the Ludlow Massacre; and so forth. When I learned more history, and connected it with family experiences – all establishing employers' willingness to shoot at workers – I was on the road to becoming the kind of organizer I am describing: one aspiring to be like Getman's protagonists. My family history posed a simple organizational question that proved useful in discussions with original position workers: if it does not matter whether workers select a union – the typical employer claim – then why have employers been shooting at them? Much energy has been expended to oppose that which does not matter.

Many – perhaps all – labor movement organizers have been lied to. In the early 1980s, I was a young ramp serviceman working for the now-defunct, Philadelphia-based Altair Airlines. At the time, Altair found itself on the wrong side of a competitive battle with Allegheny Airlines (now U.S. Airways) in the brave new world of airline deregulation and filed for bankruptcy. Many companies experienced similar fates in the bankruptcy rich period of 1980 to 1984. Just prior to the Altair filing, one of the company's high-ranking executives hopped up in the cargo belly of an F-28 jet, startling me and my perspiring co-workers. He wore a white dress shirt with the sleeves rolled up. It appeared he was trying to demonstrate his "solidarity" with us. He was a very bad loader. Though he could not lift much, he could talk quite a lot. I asked him the question on everyone's mind about our employer – "Are we going to be ok?" Looking me in the eye, he responded without hesitation, "Everything will be fine." Two days later, the expiring airline towed its planes to a storage hanger. Maybe the executive did not know of the impending filing, but I believe he did. He had his reasons for lying. In his world, reasons for concealing facts important to a worker's next meal will probably always trump reasons for the worker needing to know about a layoff six weeks before Christmas. I carry that story in my heart.[66] Labor movement organizers carry such

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> "They're trying to kill me," Yossarian told him calmly.
> "No one's trying to kill you," Clevinger cried.
> "Then why are they shooting at me?" Yossarian asked.
> "They're shooting at everyone," Clevinger answered.
> "They're trying to kill everyone."
> "And what difference does that make?"

JOSEPH HELLER, CATCH 22, Chapter 2

[66] Altair was privately owned by the Colket family, founders of the Campbell Soup Company. The company's 39-year old president, Henry P. Hill, opined publicly that most of the company's stranded 652 employees "will never work in aviation again." Tom Belden, *Altair Suspends its Flights – Phila. Airline Files for Bankruptcy*, Phila. Inquirer, Nov. 10, 1982, at A1 (copy on file with author). This opinion turned out to be inaccurate. Most Altair employees, including me, worked again in aviation, many with U.S. Air in

stories and original position workers sense the existence of the stories without knowing their details. The essence of a labor movement organizer is refusal based on bitter experience to view any labor conflict as insignificant.

Labor Movement Workers

A worker in the original position ably led by a labor movement organizer is ultimately faced with the decision of whether to *be* a labor movement worker. The power of unions will never be restored without the basic courage of a worker to create tumult in the workplace when necessary. I think of this as a "Middletown question."

Middletown, a book published by Robert and Helen Lynd in 1929,[67] analyzed the social structure of middle-sized, middle-class Muncie, Indiana. The anthropological treatment of a middle-class, largely white[68] American town was revolutionary for its time. One of the more interesting findings from the study was that workers had an extremely negative outlook on the future and yet had no inclination to change it. The attitude was characterized in Dubofsky & Dulles' *Labor in America*:

> Yet not a hint of class consciousness or rebelliousness stirred among Muncie's workers. However much their lives and behavior differed from those of the business class, local workers shared similar values and drives and measured success mostly in terms of money; they thought that the promise of wealth was open to all and valued education for its income producing potential.[69]

The difficulty is that the workers seemed to hold those views while, at the same time, "expect[ing] advancing age to rob them of work and wages, and fe[eling] themselves powerless to shape their communities and futures."[70]

I experienced similar attitudes when attempting to organize workers at U.S. Air in a number of drives during the 1980s. Workers, particularly in former Piedmont Airlines cities,[71] would consistently express a gloomy outlook for the future, but decline to sign union authorization cards. The rationale for not signing was quite pragmatic. Despite their low wage

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Philadelphia.

[67] HELEN MERRELL LYND AND ROBERT STAUGHTON LYND, MIDDLETOWN: A STUDY IN AMERICAN CULTURE (Harcourt, Brace 1929)

[68] For an account of the African-American experience in Muncie during the same period *see* THE OTHER SIDE OF MIDDLETOWN (Luke Eric Lassiter et al. eds., 2004)

[69] LABOR IN AMERICA at 229.

[70] *Id.*

[71] U.S. Air and Piedmont, an airline based largely in the south, announced in 1987 an intention to merge. The merger was finalized in 1989.

structure relative to U.S. Air workers, former Piedmont workers were grateful to have a job and to own a car and house. It did not seem to matter to them that their major purchases were made on credit and that their equity position made them dangerously vulnerable to an economic downturn. They also did not attach significance to the fact that their employment was at will. In short, they were not original position workers.

For a time I became quite discouraged by what I thought to be a simple dearth of the kind of courage my grandfather possessed and without which no labor movement can exist. Subsequent events at U.S. Air restored at least some of my hope. Sometime in the mid-1980s, U.S. Air and my union, Local 732 of the International Brotherhood of Teamsters, agreed to a two-tiered wage arrangement for fleet service employees – an "A" scale and a "B" scale. The agreement came during significant U.S. Air expansion in Philadelphia. The number of fleet service workers doubled in less than a year. I was hired in 1986 at the starting B scale rate of $6.36 per hour. Newly-hired "B-scalers" worked side-by-side with senior "A-scalers," often earning $10 per hour under the A-scale rate. Harmonious working relations between the two groups were difficult to achieve in these circumstances. The B-scalers became deeply resentful of their second-class status within the fleet service group.

A B-scaler named George Nestor emerged as unofficial leader of the group. Nestor, a big, fast, strong competitive kick boxer, was physically and psychically fearless. He was also a natural leader who inspired confidence in others, and in me. On one occasion, B-scalers arranged to have a large number of "protest" buttons made. The buttons bore the message, "stop the B/S Ed."[72] One night, a roundly disliked supervisor ordered me to remove one of the buttons from my uniform shirt. I refused, gambling that the supervisor did not have actual discharge authority, a suspicion that was vindicated. The supervisor ordered me to the office of the airline's station manager, the highest ranking airline official in an airport.[73] The station manager instructed me, on pain of discharge, to remove the button. I complied. The (A-scale) shop steward, present at the meeting, said nothing. I was ashamed. Nestor greeted me at the office. With a defiant look in his eye, he lifted me into the air, in the presence of the station manager, and said, "I love you brother." He meant it.

On another night, not long thereafter, Nestor was discharged. He was alleged to have attacked a supervisor. B-scalers demanded to be shown the body, for an actual attack by Nestor would surely lead to death or grievous

[72] Referring to Edward Colodny, then CEO of U.S. Air, and requesting cessation of the B-scale as a form of bull excrement.

[73] Supervisory authority cases have always been excruciating for me to plod through because in the usual workplace everyone knows who the real wielders of authority are.

injury. We were not long in detecting the ruse. Without the slightest hesitation or coordination hundreds of fleet service agents walked off the job, leaving several unloaded aircraft stranded at their gates. As a newly appointed shop steward, I had no idea what to do. I made some attempt to instruct everyone to go back to work. My co-workers smiled. In the end, no one could bear the thought of remaining silent in the face of Nestor's discharge. The workers had families, and bills, and obligations. But for that group, some things could not be tolerated. In the end, no one was fired for the action, for the solidarity of the group had been established, and discipline would without doubt have been met with further worker action.

The dramatic actions of B-scalers had the long term effect of galvanizing the entire ramp group, A-scalers included. The union subsequently lost a nationwide representation election ordered by the National Mediation Board[74] after another in the seemingly endless round of airline mergers.[75] When a smiling upper management group uncharacteristically strolled through the ramp break room, moments after announcement of the loss, all thoughts of A and B scale were forgotten. After the Teamsters Union had been decertified, Philadelphia ramp agents continued to engage periodically in sporadic concerted activities. For example, on one occasion I drafted a petition protesting the requirement of driving open vehicles through clouds of cement dust created by construction. On another occasion, ramp workers wore red shoe laces to protest the company's increasingly strict uniform policy. One rainy, cold winter's evening the air conditioning came on in the ramp break room. Not one of us in the room thought it was a malfunction. Nothing could have brought us closer together.

Professor Getman has written eloquently about the struggles of paper workers during the infamous strike against International Paper in Jay, Maine.[76] During my time as an associate with a Maine law firm,[77] I had the

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[74] There were actually multiple elections. For a record of the tumultuous proceedings, and the final order of decertification, *see* International Brotherhood of Teamsters and USAir, Inc., 18 NMB 290 (1991)

[75] In the late 1980s, U.S. Air merged with Piedmont and Pacific Southwest Airlines. Prior to that, however, the company had been about the business of assembling a motley collection of commuter operations. The organizing dynamic was always simple: including large numbers of quasi-rural workers in the unit resulted in union losses. Subsequent to my departure for law school in 1992, the Communication Workers of America (CWA) became the nationwide certified representative of all U.S. Airways "passenger service" workers. [Need to check into this further – the IAM was also involved and I don't understand the time line] When U.S. Airways later merged with America West Airlines, in 2005, workers overwhelmingly selected a joint CWA-Teamsters Association to represent the combined bargaining unit of —ratified by the more than 8,000 workers. I like to think that in the late 1980s my union brothers and sisters were fighting a holding action.

[76] JULIUS GETMAN, THE BETRAYAL OF LOCAL 14: PAPERWORKERS,

privilege of meeting and representing some of those workers as part of my workers' compensation practice. I was impressed not only by the obvious courage of the workers, but also by their firm understanding and acceptance of original position axioms. I realized throughout my dealings with them that their battles had transpired during the same historical window as the battles I had been waging with my co-workers at U.S. Air. A kid from Philadelphia and paper workers from the woods of Maine had a surprising amount in common. We had been labor movement workers and, despite our respective setbacks, we knew that an effective labor movement grew out of countless workers willing to fight against long odds.

CONCLUSION

I do not depart from the path of the law when I speak of original position workers embracing the inevitability of conflict, of labor movement organizers possessing an unshakable oppositional ethic, or of labor movement workers willing to fight courageously for labor rights. On the contrary, I am speaking of a return to the law. One advocates for law by insisting on the reestablishment of the necessary conditions to ensure that the fight between labor and capital can be "carried on in a fair and equal way."[78] The need to restore the power of unions follows from the realization that "nothing endures but change."[79] The question is whether change, and the conflict it produces, will be managed according to rules agreed upon in advance by the broader society – in other words by the rule of law. Conflict will come because workers – in the end – have no choice but to defend themselves. The law will then – again – have to decide whether short term commercial gain justifies attempted annihilation of the labor movement. If the law answers in the affirmative, it embarks on a fool's errand. Only one who has not walked where I have walked could believe the labor movement will "go away."

POLITICS AND PERMANENT REPLACEMENTS (Cornell University Press 1999)

[77] I was with the Topsham-based firm of McTeague, Higbee, MacAdam et al. from 1995-1997.

[78] Vegelahn at 108 (Holmes, J, dissenting)

[79] A statement attributed traditionally to the ancient Greek philosopher Heraclitus of Ephesus.