1

A New Labor Law for Deep Democracy

From Social Democracy to Democratic Socialism

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INTRODUCTION

If our goal is to construct workplace relations that maximally empower workers and best sustain ideal forms of industrial democracy and worker-centered political democracy, how should we remake labor law? This chapter argues that the academic field of labor law, if it is to further that goal, must expand far beyond its conventional scope of studying the law of collective bargaining, the employment contract, and workplace standards.[1] And, correlatively, the political work of legal-institutional reconstruction must reach beyond the domain of the legal rules and institutions that directly shape unionization, contracting, and employment standard-setting into other legal-institutional domains not presently constructed with the goal of worker empowerment and democratic deepening in mind. The chapter applies this "new labor law" to two types of regimes: first, the US variant of social democracy – that is, the current incarnation of the New Deal regime that promotes unionization within a capitalist economic system; and second, a democratic socialist regime for a post-capitalist economy centered on fully worker-controlled enterprises.

The argument of this chapter proceeds in four sections. The first sets out the basic problem of sustaining industrial and political democracy in a capitalist economy. In order to flesh out that problem, the second offers a conceptualization of capitalist *political and economic* institutions – and of the disempowerment of workers in both the workplace and politics – that is more multifaceted than New Deal labor law's sole focus on the institution of wage labor. The second then argues that mapping the essential *legal* infrastructure of this panoply of capitalist institutions has been undervalued by leftist labor lawyers and political economists. The purpose of expanding the scope of labor law as a field of legal *study* is, precisely, to examine how legal *rules and institutions* presently construct workplaces in ways that both promote and undermine worker power and democracy and how those rules and institutions could be reconstructed to better realize those values.

[1] For ease of exposition, this chapter uses the term "labor law" to denote what, in the United States, is conventionally divided into two sub-fields: "labor law," which covers the law of collective organizing, bargaining, and striking, and "employment law," which covers regulation of the terms of individual employment contracts, other working conditions, and worker benefits. In Europe and elsewhere, those two sub-fields, plus the law of social insurance, conventionally comprise the field of "social law." This chapter argues that "labor law" as a field must be enlarged well beyond even the scope of "social law."

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The third section therefore applies the new labor law to critique the current version of the New Deal labor policy and many other fields of law and to propose their renovation to support a deepened, worker-centered form of social democracy suited to post-mass-production finance capitalism. The fourth argues that, perhaps unexpectedly, many of the reforms that would strengthen worker power and democracy within contemporary capitalism would also be essential for realizing the same goal within post-capitalist democratic market socialism. That section, again applying the new labor law, then discusses some key additional legal questions that would need to be answered to construct and sustain the worker-controlled enterprises at the heart of the latter regime.

Within the scope of this chapter, all four sections of the argument must necessarily be highly compressed and schematic. The chapter maps in a skeletal and merely illustrative fashion some of the specific elements in just a few of the legal domains outside of conventional labor law that structure contemporary capitalism and that could structure an imagined democratic socialism. The chapter is therefore intended only as a prolegomenon to a more comprehensive treatment of the new labor law, as applied to varieties of both existing capitalism and alternative capitalist and post-capitalist possibilities.[2] The goal here is to persuade the reader that expanding labor law's scope will advance the project of conceiving legal reforms to strengthen worker power and democracy across a range of political economies.

Three prefatory notes, the first substantive, the second and third terminological: First, although this chapter points to certain possible reforms in existing law within capitalism and discusses general problems of legal design raised by democratic socialism, in both cases real reconstruction cannot and should not be specified in an analyst's blueprint but, rather, would be shaped by participants in the political movements and struggles that might bring about the reconstructed institutions.

Second, when this chapter refers to the legal "construction" of political and economic institutions, that word is used in a special and expansive sense. It denotes that a law or legal institution strongly influences the political or economic institutions in question. The means of such influence may be either coercive legal sanctions or the law's non-coercive ideological effects; may be implemented through legislative, judicial, or administrative rules, principles, and processes; and may be either a prohibition or permission of economic or political action. And, reference to legal construction of political and economic institutions does not mean that law and legal institutions are not reciprocally influenced by those institutions and by political and ideological contestation among social actors. This chapter assumes just the contrary: the legal infrastructure of particular political economies must be mapped and analyzed, in order to conceive both radical legal reform to strengthen worker power and democracy *and* the political action to achieve it.

Third, the term "strengthening worker power and democracy" should be read as a shorthand, denoting the individual and collective empowerment of workers in the workplace, and the deepening of industrial democracy and worker-centered political democracy.

THE INHERENT TENSION BETWEEN CAPITALISM AND DEMOCRACY

An unassailable proposition advanced by progressive and socialist theorists and actors at least since Karl Marx is that capitalist economies pose a systematic threat to both industrial and political democracy. In 1936, a year after enactment of the National Labor Relations Act

[2] A book-in-progress by this author undertakes such a treatment.

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(NLRA or Wagner Act), Franklin Roosevelt echoed Marx's diagnosis: "Here in America we are waging a . . . war for the survival of democracy" against the "economic royalists" whose "[n]ew kingdoms were built upon the concentration of control over materials things," who "reached out for control of Government itself," and who took "[t]he hours of men and women worked, the wages they received, [and] the conditions of their labor . . . beyond the control of the people . . ." (Roosevelt 1936).

To understand the tension between capitalism and democracy with enough specificity to criticize and reconstruct labor law, we must ask: what are the core institutions that define capitalism and that determine the degree of worker power and depth of democracy? In many standard Marxist accounts – far more simplified than Marx himself assayed – the defining institution of capitalism is wage labor (just as the defining institution of feudalism is serf labor, and the defining institution of a slavocracy is slave labor): to survive, property-less workers must sell their labor power to the property-owning class of capitalists, and the same necessity disempowers workers within workplace and political hierarchies dominated by the propertied class.

This account of worker disempowerment and domination is also at the center of the decidedly non-Marxist labor policy of the New Deal, which sought to reconstruct, rather than overthrow, capitalist work. Senator Wagner, the architect of that policy, often stated that it was a response to one fundamental injustice – the coercive denial of individual freedom and collective democracy – flowing from the wage-laborer's need to enter employment to survive (Barenberg 1993: 1422–1427). And Section 1 of the NLRA states that legally protected unionization, in and of itself, creates "equality of bargaining power,"[3] with no regard to reconstructing legal institutions outside the Act's narrow field of vision.

THE PANOPLY OF ECONOMIC AND POLITICAL INSTITUTIONS NECESSARY TO SUSTAIN WAGE-LABOR MARKETS AND WORKPLACE HIERARCHIES

The New Deal labor policy thus delimited the scope of the law necessary to solve the problem of worker disempowerment – and the coterminous scope of the conventional study of labor law ever since. That limited scope was not a creature of normative thought but rather of the ideology corresponding to a contingent truce line in the political struggles of the 1930s and 1940s. However, Marx's work, and subsequent writing by Weber, Schumpeter, Keynes, and many other political economists, reveal a complex of additional political and economic institutions that sustain the institution of wage labor. The particular contours of these additional institutions empower or disempower workers, just as does the particular structure of wage labor itself.

What are these additional institutions? In order to realize profit, the capitalist enterprise must sell the goods or services made by the wage-laborer into the product market. This fact alone entails that mass wage labor requires the institution of a monetary system to enable the purchase of both labor power and products (think of the Marxist term "cash nexus" [Marx 1990]). The institutions of property, contract, and corporations[4] are also essential to competition among private profit-taking employers, for obvious reasons (Polanyi 1944; Weber 2003 [1927]). And since continuous capital accumulation and investment are entailed by product-market competition among profit-taking owners, financial institutions and capital markets are also inherent features

[3] 29 USC Section 151.

[4] This chapter uses the terms "employers," "private enterprises," and "corporations" synonymously. All are short-hand for the many different types of private profit-taking enterprises that employ wage-laborers, not including worker-controlled enterprises which are the basis of the form of post-capitalist regime discussed in the fourth section.

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of capitalism (Schumpeter 1994 [1954]: 78). In addition, all contractual transactions require methods of communication; and the intrinsic capitalist drive to secure and expand markets – as individual capitalist enterprises compete for survival and enrichment – spawns the institutions of marketing and advertising, forms of communication more specific yet more culture-shaping than those required for generic contractual transacting. And the institutions of taxation and of state structures are essential to provide the monetary, financial, corporate, and other apparatus just described (Miliband 1973), as well as the legal system itself. Even further, as Max Weber argued, capitalism is fostered by an international order of multiple competing nation-states, as opposed to a single global state or empire: when independent states must compete for cross-border investment, capitalist private enterprises are, to a substantial degree, protected against comprehensive state discipline (Ingham 2008: 176) or state confiscation. Hence, the institutions of international trade, capital flows, and monetary transactions, and of national security are stanchions of domestic as well as global capitalist institutions, and therefore of capitalist wage labor and workplace hierarchies.

Needless to say, comprehensive mapping of the variety of capitalist economic and political institutions, historical and today's, calls for vastly extended analysis, and the literature on the subject is rich and ranges across many disciplines. Institutions may look quite different but carry out similar functions in each of the "necessary" domains catalogued above (Hyman 2009: 17), and successful reconstruction of one capitalist institution may not require concurrent reconstruction of another (Unger 2009: 14). The new labor law's proposals for institutional reconstruction must be responsive to the highly specific forms of capitalist production systems, enterprise organizations, markets, communication systems, political structures, and international orders that obtain, or might obtain, in various political economies.

Since all the (highly generalized) *economic* and *political* institutions just discussed are, for the reasons sketched, necessary simply to sustain the two (also highly generalized) institutions of central concern to labor lawyers – that is, wage-labor markets and workplace hierarchies – it follows that the *legal* underpinnings of *all* those economic and political institutions are as essential to the disempowerment and domination of workers as are the law of labor-management relations and working conditions within the workplace hierarchy, and the law of employment contracts, whether individual or collective. Hence, if we seek to answer the fundamental question that concerns many progressive and socialist labor lawyers – "What are the legal institutions that determine both worker power and labor's capacity to deepen industrial and political democracy?" – we must look not only to the field of labor law as conventionally defined, as important as that law is to the question of worker power and democracy.[5] We must look also to the laws of property, contract, money, corporations, communication, domestic and international capital markets, taxation, state administration, and so on. Whether these other legal fields are more or less important than conventionally defined labor law in answering the question just asked demands extensive empirical research.

Having said this, the new labor law will not bring together the *entirety* of each of the conventionally defined fields that in some way influence worker power and democracy. That would aggregate nearly all law. Rather, the new labor law will include and examine the particular *elements* or *components* of each conventionally defined legal field that most significantly reach – like tentacles – into the shaping of the relative power of workers and owners and into the determination of workers' capacity to achieve industrial and political democracy.

[5] Forerunners and inspirations for this approach include the legal realist Robert Hale (1923, 1943) and the critical legal theorist Duncan Kennedy (1991), although my conceptual strategy differs from theirs in significant ways.

APPLYING THE "NEW LABOR LAW" TO EMPOWER WORKERS AND DEEPEN DEMOCRACY IN THE CONTEMPORARY CAPITALIST ECONOMY

This section offers illustrations of several elements of multiple fields of law that construct worker power and democracy – including conventional labor law and domestic finance law and their interaction with constitutional law; the law of international trade, global capital markets, and national security; the law of the "social wage;" and various fields that comprise the law of consumption. The illustrations are drawn exclusively from contemporary United States law and political economy.

Conventional Labor Law, and Its Interaction with Constitutional Law

Although a key theme of this chapter is that conventional labor law studies only one field of law that constructs worker power and democracy, it is, needless to say, an important – and possibly the most important – field. This sub-section gives a synoptic picture of the conventional US labor laws and legal institutions most vital to that construction. The sub-section also gives illustrations of how those laws and institutions interact with constitutional law in ways that significantly construct worker power and democracy.

US law constructs great impediments to union organizing. By requiring majority-rule elections to achieve unionization, granting employers the right to run anti-union campaigns in the extended election campaign, and imposing minimal sanctions against employers that coerce workers during the campaign, the law constructs both the opportunity and incentive for employers to engage in such coercion. The startling rate of firings of union supporters in the run-up to the election – between one out of seven and one out of twenty, depending on the study – is an artifact of those legal components.

Union density is also diminished by the law's construction of decentralized bargaining units[6] and, at best, partial or "non-encompassing" unionization of the many employers across product markets or enterprise networks (Rogers 1990). Multi-employer bargaining is permitted only when a union is able to organize multiple individual employers and then win the voluntary consent of each to multi-employer units (Barenberg 2015). This legal construct is the critical foundation for the weakening of worker power via the conversion of vertically integrated enterprises to contractually interconnected supply chains and networks. What was once a permissible primary strike against all phases of production in the integrated corporation becomes an impermissible secondary strike against the very same multiple phases of production now lodged in multiple enterprises within separate bargaining units (Barenberg 2015). In other words, the most basic components of US labor law conspire with, and indeed accelerate, the disintegration of enterprises that is a hallmark of contemporary capitalism, by discouraging the enlargement of worker organizing in fluid, multi-employer bargaining units that match the equally fluid boundaries – in the political economy of post-mass-production finance capitalism – of production-and-distribution networks, geographic clusters, and sectors (Barenberg 1994: 881–884, 977–983; Barenberg 2015). (Recent proposals to mandate rigid sectoral bargaining in the USA do not take account of this fluidity in contemporary capitalism, although a sectoral scope may be the most desirable multi-employer unit in certain quarters of the economy – desirable, because most worker-empowering in context.)

[6] A "bargaining unit" is the group of employees who may, by majority choice, designate a particular union as their collective representative.

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Those basic legal components also construct the very geography of the US economy and society. The legal construction of decentralized and non-encompassing units greatly incentivizes individual employers not only to fight unionization to avoid competition with non-union employers in the same product market, but also to break or escape a union that has successfully organized the employer (Kochan et al. 1994). Other components of conventional labor law construct smooth escape routes for the employer. First, employers are not punished for closing a union facility and opening a non-union facility elsewhere, so long as the employer is not foolish enough to reveal anti-union emotion. Second, the law of successorship permits de-unionization by means of selling a going business, so long as the purchaser follows its lawyer's advice not to recruit the majority of the new workforce from the old.[7] Third, a 1947 Amendment of the NLRA authorizes state laws against compulsory dues payments, generating less unionized states and regions that attract capital from the more unionized.

These escape routes – and others constructed by bankruptcy law, corporate law, constitutional law, and the law of taxation and subsidies discussed below – may be just as important as the legal construction of coercive anti-union campaigns in diminishing union density in the USA (Kochan et al. 1994). The result: employers hopscotch from unionized to non-unionized regions, from urban areas to suburban or rural "industrial parks" where inter-union solidarity is relatively incapacitated, and from less to more racist regions to capitalize on racial divide-and-conquer strategies against worker solidarity (Davis 2018).

These clusters of law – constructing non-union or anti-union regions (the Southern, Mountain, and Plains states) and areas (suburban and rural) – also indirectly weaken worker power and democracy by entrenching right-wing, anti-union blocs in the federal legislative process by reason of peculiarities of US constitutional law, including the electoral college method of electing the President, the constitutional authorization of states to draw congressional district lines, and the Supreme Court's refusal to review state governments' partisan "gerrymandering" of those districts.[8] In a vicious cycle, constitutional law's undemocratic empowerment of regions to which non-union capital has already moved enables federal policy-making that turns those non-union regions into even stronger magnets for the mobile capital that conventional labor law, in the ways just explained, permits and encourages (Hertel-Fernandez 2018). Without understanding this – and many other – interlocks of conventional labor law and constitutional law, the legal system's full force in disempowering workers by encouraging capital mobility cannot be critically analyzed and leftists' political energies cannot be well-directed.

The same goes for the US law of political spending. Conventional labor law permits political spending by unions, although yet another interaction of constitutional and conventional labor law now bars unions and employers from agreeing to require non-consenting bargaining-unit members to pay an increment of dues to fund that spending; each worker must consent to pay that increment.[9] But, compared to revision of those rules, imaginable constitutional and legislative rules of political spending – beyond the scope of conventional labor law – could be just as or more important in building workers' power to democratize a capitalist polity in the interest of working people, and to win substantive policies that would, reciprocally, strengthen unions and their political power, in a virtuous cycle.

The discussion above has focused on the law that constructs union organizing, capital's escape from unions, differentiation among pro- and anti-union regions, and political spending –

[7] *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 US 27 (1987).
[8] *Rucho* v. *Common Cause*, 588 US —, 139 S. Ct. 2484 (2019).
[9] *Communication Workers* v. *Beck*, 487 US 735 (1988); *Janus* v. *AFSCME*, 585 US —, 138 S. Ct. 2448 (2018).

a network of law that interlaces strands of conventional labor law, constitutional law, and election law. Internal to conventional labor law, rules governing strikes, obviously, are also a key component in determining the relative degree of worker empowerment. Startlingly, US law permits employers to fire workers for all forms of slowdowns and work stoppages, other than full primary strikes and only when no contract is in effect. Even in the latter instance, employers may permanently replace strikers, who retain the right only to return to a job if a position reopens.

Finally, the exclusion of large swaths of workers from even the limited federal legal protections discussed above constructs worker disempowerment in two key ways. First, by excluding managers and supervisors from protections against employer retaliation, employers can effectively conscript those workers into participating in the employer's anti-union-organizing campaign and strike-breaking efforts. That is, the employer starts a union election campaign with a large campaign organization in place, one that – unlike the union's campaign organization – reaches every voter in the electorate for forty hours per week and that may lawfully require workers, on pain of discharge, to attend anti-union speeches during work time, an infrastructure that candidates running for political office could only dream of. And the employer has a large corps of conscripted strike-breakers – every manager and supervisor – at the ready in the event of a strike.

Second, workers excluded from protections under federal labor law are placed at the tender mercies of state governments, reinforcing and reinforced by the legal construction of regional variation in pro- and anti-union politics in the US federal system discussed above. Here again, conventional labor law intermeshes with constitutional law, in this instance the constitutional jurisprudence on "preemption." The predictable and well-documented result is yet another vicious cycle, this time at the level of state rather than federal policy-making – a cycle of right-wing state governments enacting laws that weaken or repress unions, and of weakened unions lacking the power to prevent the enactment of further such laws or to gain their repeal (Hertel-Fernandez 2018).

Laws of International Trade, Global Capital Markets, and National Security

The relevant components of the law of international trade, global capital markets, and national security must also be folded into the "new labor law," if capital mobility and product-market competition and their damaging consequences for worker power and democracy are to be fully analyzed and resisted.

The international dimension of conventional labor law does address trade legislation and trade agreements, along with the core "International Labor Code" of the International Labor Organization. But the study of these bodies of law must be redirected, in quite specific ways, if they are to be radically reformed to genuinely empower workers in the USA and globally. Surprisingly perhaps, US trade legislation is the most pro-labor in the world. One provision of the Trade Act of 1974 as amended – Section 301(b)[10] – requires the President to impose remedies to ensure that every government that trades with the USA enforces internationally recognized labor rights. Another set of provisions – the Generalized System of Preferences (GSP)[11] – authorizes the President to withdraw trade benefits from certain developing countries if they fail to take steps to enforce the same rights. Any "interested party" can file a petition; there is

[10] 19 USC Section 2411(b).

[11] 19 USC Sections 2461–66 (2000). The European Union also has a GSP program, but has not deployed or threatened to deploy the program with nearly the vigor and sanctions of the US GSP program.

neither a standing nor a case-or-controversy requirement. The potential remedy includes the exercise of any or all Executive powers. And, of greatest note, the petition may demand inquiry into conditions across entire labor markets and into a multiplicity of legal institutions in the foreign country. This process and inquiry are wholly unlike other forms of US litigation, which invoke narrowly bounded judicial or administrative processes to determine whether remedies should be granted to redress violations of rights of particular parties to a factually focused dispute.

If the President systematically enforced these US trade statutes as constitutionally required, we would see the kind of floor placed under global worker rights and standards that multilateral institutions have neither the authority nor political will to impose. Indeed, as erratic and hesitant as it has been, the President's use of these statutory powers has been the most powerful state tool for enforcing transnational labor rights. (The International Labor Organization promulgates but, unlike the US government, does not deploy sanctions to enforce international labor rights.) Even the mere filing of a GSP petition by a worker organization can cause a trading partner to improve its labor rights record in order to avoid a potential collapse in its exports to the enormous US consumer market (Douglas et al. 2004).

It behooves labor law scholars to formulate detailed proposals for radically strengthened enforcement of these statutes, akin to the insistence on stronger enforcement of domestic worker rights. By way of example, here are two: although any interested party can file a Section 301 or GSP petition demanding a Presidential inquiry, the courts have ruled that that party cannot obtain judicial intervention when the President fails to carry out his or her constitutional duty to enforce internationally recognized labor rights under those statutes.[12] Congress could straightforwardly mandate judicial enforcement of the President's obligation (Barenberg 2009).

A second, more far-reaching proposal: Congress could create an International Labor Rights Commission that would, instead of the President, enforce the trade statutes. The Commission might be composed of worker representatives and jurists, charged with developing specific, revisable indicators of compliance with internationally recognized labor rights, well-adapted to countries' variegated economic conditions; applying those indicators to trading partners' worker-rights enforcement records; and ordering calibrated sanctions for non-compliance with benchmarks of improvement (Barenberg 2009: 23–28). Most boldly, the Commission members might include worker representatives of all trading partners, not just domestic worker representatives, to mitigate the imperialist nature of unilateral US enforcement of global labor rights and, from an international standpoint, to democratize the Commission's decisions.

The weak worker rights provisions in US trade agreements could be strengthened by incorporating analogous enforcement mechanisms. The reforms would respond to the question that leftists who are all-out opponents of trade agreements have not fully put their minds to: can we imagine reforms of trade agreements that would actually succeed in enforcing global worker rights and standards? Until that question is deeply explored and answered in the negative, there is no justification for ruling out trade agreements altogether. After all, US leftists did not turn their backs on federal unionization rights in the 1930s on the ground that such rights would inevitably fail if lodged in the competitive multi-state market constructed by US constitutional law; nor did they press for the US common market to be fragmented into separate state markets in order to better enforce worker rights.

The law of global capital markets is, for purposes of the new labor law, a confederate of the law of international trade. It is the combination of liberalized trade flows and liberalized capital flows that has constructed global labor markets, which often intensify the downward pressure on

[12] *International Labor Rights and Education Fund* v. *Bush*, 752 F. Supp. 495 (DDC 1990).

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workplace standards and worker power in the current era of globalized capitalism.[13] Workers in other countries produce goods that are exported to the USA, taking advantage of liberalized trade rules; thanks to capital-market liberalization, the USA sends capital overseas to build the factories (so-called export platforms) that produce goods for shipment back to the US, European, or other consumer markets; and US owners rely on cross-border allocation of their enterprise investments and profits for tax arbitrage or repatriation, thanks again to capital-market liberalization. One critical function of free trade and free investment agreements is assuring US capitalists that they can continue to reap and relocate overseas profits and continue to export from overseas platforms. These legal constructs are therefore foundations of product-market and labor-market competition on a global scale and, like domestic laws constructing product and labor markets, encourage capital mobility that often flows from unionized to non-unionized production.

The law of global capital flows constructs US workers' empowerment (or disempowerment) in yet another critical way – demonstrated vividly in the financial crisis of 2008. One source of that crisis was the sequence of explosive growth in (and implosion of) toxic assets held by US financial institutions and investors and traded in Wall Street's casino capital markets. That process was fueled, in part, by a bountiful inflow of foreign investment, including from China, with whom the USA had effectively swapped the transfer of US manufacturing facilities in return for such capital exports to the USA.

But the much-criticized China-USA trade imbalance was only part of the story. In fact, the global financial system is not coterminous with trade imbalances; the 2008 financial crisis was in significant part driven by the entanglement of US and European financial institutions and capital markets (Tooze 2018). This is another reason why it is critical for analysts of law's disempowerment of workers to focus not just on the usual suspect – international trade agreements – but also on the law that constructs global finance.

How do these sorts of capital flows – and the crises that are likely to continue punctuating our age of financial disequilibrium – disempower workers? The 2008 crisis is exemplary. First, the crisis transferred income and savings from working people to bailed-out financial institutions (Hockett 2009). Second, the shock led ultimately to a politics of austerity that diminished the social wage and, hence, worker power. But third, and less visibly, global imbalances were a means of transferring wealth extracted from exploited workers in countries like China – which, like the United States, fails to enforce and actively suppresses worker rights – to sustain debt-fueled consumption of US households whose income was abated by the corrosion of worker rights. As discussed below, this mode of consumption in turn weakens worker power and democracy.

Yet another sprawling body of law constructs global capital markets and their potentially worker-disempowering effects: the US and international law of national security. Three illustrations must suffice here. First, many components of national security law construct the global military power of the United States, which provides insurance that US parties' foreign investments will not be confiscated by host governments. Here, one of countless legal instruments is the International Emergency Economic Powers Act, the progeny of legislation invoked to

[13] Depending on the circumstances, liberalization of trade and capital flows may also boost workers' power and conditions, through technology and capital transfers, transmission of organizational practices across borders, and other mechanisms.

impose an embargo – cautionary to all governments – against the country (Cuba) that effected the first large-scale confiscation of overseas property of US businesses.[14]

Second, the same legally constructed global power makes US assets comparatively safe investments, underwriting the inflow of capital to the USA of the sort that fueled Wall Street's creation of toxic assets. Third, that geopolitical power also enables the USA to negotiate trade and investment agreements on terms favorable to the USA, requiring signatories to meet US metrics on pain of withdrawal of US trade or other benefits.

These are necessarily spare illustrations of the main point: to call the domestic law of collective bargaining and international trade agreements "labor law," but not so label the law of global finance and national security, is not just artificial; it also diverts left legal scholars' analysis away from many significant mechanisms through which law constructs worker power and democracy.[15]

Laws of Domestic Financial Institutions, Capital Markets, and the Constitution

The domestic law of financial institutions and capital markets constructs worker power and democracy in ways that parallel the international laws just discussed. Rather than repeating the domestic analogues of those international laws, I will offer additional relevant components of domestic law, again merely illustrative of the chapter's main thesis.

First, the basic role of financial institutions and capital markets, in theory, is to aggregate the savings of individuals and enterprises and channel those resources to individuals and enterprises that will use them most productively. In practice, our financial institutions and capital markets do not play that role well. They are instead often devoted to creating and trading complex assets at several removes from production in the real economy (Admati & Hellwig 2013: 162; Lothian 2017). This detachment of finance from production – driven in part by the last forty years of legally encouraged consolidation of big banks and hypertrophic growth of the financial sector – weaken community-based finance of local and worker-centered production systems (Krippner 2011; Wilmarth 2013). Proposals for radical legal reform that would reconstruct financial markets to foster worker-empowering enterprises therefore include laws that promote community banks, cooperative banks, union-owned banks, non-profit banks, and localized, government-subsidized variants of venture-capital funds that would direct capital to unionized and worker-controlled firms (Block 2014; Unger 2001: 149–150). We see experimental legal institutions of this sort in regional "social economies" or "cooperative economies" around the world (e.g. Bourgue et al. 2013).

Second, when the law constructs private banks', corporations', and institutional investors' control over investment decisions, there is an anti-democratic, systemic bias against law reforms designed to strengthen unions and other worker-empowering, social democratic programs. This bias, theorized by Michał Kalecki, rests on the fact that, when investment decisions are under the control of private profit-seeking actors, the level of investment in an economy depends on the degree of those actors' confidence that government policy will be business-friendly in the

[14] 50 USC Sections 1701–1707.

[15] Of course, leftist political economists and scholars from other disciplines have produced an enormous body of literature on these questions (e.g., Shefner & Fernandez-Kelly 2011), but that makes all the more striking the paucity of scholarship that, in depth and detail, connects their research with questions of specifically *legal* infrastructure of worker power.

near future (Kalecki 1943). Leftist parties will therefore hesitate to enact labor-empowering policies, since their reelection will be put at risk by the expected decrease in investment – "capital strikes," in effect – that would diminish economic growth, employment, and wages.

Note that, by contrast, most political strikes by unions are both illegal under the NLRA[16] and "unprotected" – that is, the employer may fire workers for engaging in them. Yet, capitalists' power to engage in political strikes – just described – is fully constructed by law; and, unlike labor strikes that require solidaristic co-action among workers, capital strikes require no coordination among enterprises, which reduce investment when they separately but simultaneously lose business confidence.

If legal reform placed limitations on private control over investment decisions, this intrinsic constraint on worker-empowering democracy would be loosened. Indeed, historically, social democratic legal reforms have occurred precisely when that constraint has been relaxed, as during the Great Depression, when business confidence and investment were already so low that the threat of an additional capital strike to block such reforms was weak (Barenberg 1993: 1397).

Third, the existing law of finance constructs "short-termism" among institutional investors and executives whose compensation or continued employment depend on the price of their corporations' shares. To inflate share prices by "pleasing the markets," executives implement mass layoffs or finance-driven restructurings that undermine worker power, not just through the direct effect of job loss but also by disrupting hard-won workplace communities of solidarity and labor-centric collaboration with local production managers (e.g. Kristensen & Zeitlin 2005).

In a final illustration, constitutional jurisprudence propels capital movement. The "dormant commerce clause" fashioned by the Supreme Court prohibits state laws that discriminate against out-of-state economic actors on behalf of in-state interests. The Court has, however, carved out a wholly unprincipled exception to that rule.[17] A state is permitted to engage in open discrimination if it uses as its means the granting of subsidies paid out of the state's general revenue to particular in-state businesses or sectors, and states in practice grant tax rebates and credits as well.[18] The practical consequence of this exception is predictable. States compete with one another to attract or retain footloose capital by granting subsidies and tax incentives, in a race to the bottom that disempowers workers in at least three ways: the incentives redistribute resources from workers and other ordinary taxpayers; the systematic bite from the state treasury requires cuts in the state's social wage; and capital's hop-scotching batters communities of solidarity in and out of workplaces.

Through these three labor-disempowering mechanisms, the particular federalist structure of US constitutionalism again amplifies the incentives created by conventional labor law for regions and states to adopt anti-union policies and cultivate political cultures designed to attract capital from unionized areas. The new labor law's proposed reform is simple: the Supreme Court, or Congress, should overturn the exception for competitive subsidies and tax breaks.

[16] Political strikes generally violate Section 8(b)(3) of the NLRA on the grounds that the subject of the strike is a "permissive" rather than "mandatory" subject of bargaining. *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 US 342 (1958).

[17] *New Energy Company of Indiana* v. *Limbach*, 486 US 269, 273–274 (1988).

[18] As distinct from imposing penalties or regulations on out-of-state actors, which remain barred by the dormant commerce clause, even though such state laws have the same discriminatory effect as subsidies and tax reductions for in-state businesses.

The Law of the "Social Wage"

When workers decide whether to organize a union or to strike, they fear that they face the risk of retaliatory discharge – and that fear is justified, as the data mentioned above show. Workers' willingness to empower themselves therefore turns in significant part on the personal cost they face should they lose their job. For that reason, workers' bargaining power is constructed in part by the law of the social wage – that is, the panoply of social insurance and other government-provided "public goods" that soften the blow for workers who lose their jobs: unemployment insurance, welfare benefits, healthcare, childcare, higher education, subsidized housing and food, worker retraining, pensions, low-cost public transportation in working-class neighborhoods, and many more.

Other legal programs can empower workers in a manner similar to the way that public goods reduce the cost of discharge. An increase in the minimum wage pushes up wages of all low-wage jobs and therefore generates more living-wage jobs that a worker, if discharged, could expect to find. A law mandating government provision of jobs when the private sector fails to achieve full employment would greatly empower workers. For decades, winning such a full employment mandate was a high political priority of the AFL-CIO,[19] and proposals for a jobs guarantee have been renewed with the recent resurgence in the progressive movement (Sanders 2020). A universal basic wage, also on the progressive-labor agenda, would have analogous empowering effects.

Since lower rates of unemployment empower workers and higher rates disempower, macro-economic policy (both monetary and fiscal) has a critical effect on workers' willingness to organize and strike – as both unions and employers well know. As for monetary policy, an effective (rather than just paper) legal mandate that the Federal Reserve give higher priority to lowering the rate of unemployment than to protecting against inflation would inflect the law of macro-economic policy-making in a worker-empowering direction. Episodes of expansionary fiscal policies have done and would continue to do likewise, but labor law researchers should systematically formulate proposals to construct automatic counter-cyclical increases in spending across all legal domains.

The law of the social wage, if reconstructed in the ways just mentioned, may have greater labor-empowering and democracy-fortifying impact than many of the standard proposals for reforming elements of conventional labor law.

The Law of Consumption: Communication, Household Finance, Education, Zoning, Discrimination, and Taxation

Consumption and work are not often studied in conjunction, including in legal scholarship. But the relationship between the two is a critical determinant of worker power; therefore, the "law of consumption" is yet another field that constructs the strength of worker power and democracy. The relevant law is often studied in sub-categories such as the law of telecommunications, the internet, advertising, the new media, legacy media, household finance, taxation, and education, among others.

[19] In fact, when the Democratic Party failed to win union-strengthening labor law reform in 1977–78, the party gave the labor movement the second best piece of legislation, a full employment law – second rather than first best, only because the full employment program was precatory, not mandatory. Full Employment and Balanced Growth Act of 1978. 15 USC Sections 3101–3152.

Before turning to the legal infrastructure of consumption, the antecedent socioeconomic question is: how does consumption affect worker empowerment? A key mechanism is illustrated by late nineteenth-century industrialists' practice of hiring so-called family men rather than single men or women. Employers preferred to hire workers with greater obligations to support household consumption, since they were less likely to risk discharge by supporting unions and strikes and, in individual negotiations, less able to hold out for better terms. The general phenomenon illustrated by that one historical practice is this: the more urgent a worker's felt need to consume – or, put more starkly, the greater the desperation for wage income – the weaker the worker's bargaining power. Consider the following: if one had no need to consume, one would have no material need to work and would have maximum bargaining power relative to the employer.

The importance of the law that constructs the urgency of workers' private consumption is a close cousin of the importance of the social wage. One can view the social wage as the public payment for consumption needs, reducing the urgency of the workers' felt need to earn through market employment (depending, of course, on the distribution of tax burdens to fund those goods, pointing to yet another legal domain that the new labor law must encompass). In part for this reason, it is misguided for analysts to "blame" low-wage workers for "undisciplined" private consumption, which, in the USA, is rooted not so much in personal indulgence as in the burden workers have increasingly borne for spending on needs previously met by public-goods provision; on basics such as education, healthcare, and housing, the prices of which have increased relative to median wages in recent years (Nutting 2018); and on new socially constructed labor-market necessities such as laptops, smart phones, and associated service-provider contracts.

But worker power and democracy are constructed by the entire body of law, not just the law of the social wage, that calibrates the urgency of household expenditure. The background to that law is the political drive for ever-increasing consumption, which is, nearly universally across the political spectrum, pronounced the core of the "American Dream" (Sanders 2019; Tankersley 2016). Even when commentators and politicians claim to define the "dream" as equality of opportunity rather than raw consumption, they measure opportunity by upward mobility, comparing children's material consumption to their parents' (e.g. Kristof 2014).

The felt need for constant growth in purchasing power of course has psychological propulsions. One is the continuous conversion of discretionary consumption into necessary consumption. That is, worker-consumers initially experience desires for certain goods and services as less urgent, but over time experience those goods as more urgent or even as absolute needs. Another is the free-floating nature of desire; that is, once one object of desire is obtained, desire is only temporarily satiated, resurging and attaching to new objects (Zizek 2009).

But, clearly, there are important legal mechanisms at work too, tied to the institutions of contemporary capitalism that so dramatically unleash the desire to consume. I have already discussed many domestic and international legal institutions that construct the product-market competition that is a key driving force behind the ever-increasing production and consumption inherent in a capitalist economy. Here are just a few more examples of laws and legal institutions – outside the bounds of conventional labor law – that drive the cult of consumption and weaken worker power in the contemporary period:

Consider, first, the law that constructs our advertising-driven culture. In the USA, before the recent rise of commercial-free streaming services, the average person watched four hours per day of network and cable television commercials – nearly equivalent to an astounding eight weeks of eight-hour workdays per year. The advent of streaming services has cut that by more than half – but the total time spent viewing advertisements is still remarkable, especially when taking

account of large concurrent increases in time viewing online websites populated with advertisements (Nielsen 2018; Staff 2020). The average person sees at least two million advertisements in their lifetime.

Most of us take for granted that the predominant business model of both old and new media is profit earned by advertising. But the law deeply constructs this world of continuous commercial inflaming of desires attached helter-skelter to commodity after commodity. Most deeply, when each major medium was aborning – radio, television, the internet – there were very real political debates about whether advertising would be permitted (Briggs & Burke 2020). Alternative models, including local and national community funding, were proposed and actually put into practice, briefly in the United States (in community radio stations, and in the early non-commercialized years of the internet), longer-term in other countries (think of the BBC in the UK) (Briggs 1986; Wu 2016). If these alternatives or if novel legal constructions of social ownership and funding of media now seem distant or aberrant, consider that there are traces of such "aberrations" in several areas of existing law: the law that provides some, if minimal, community funding of public broadcasters; the law that allocates the broadcast spectrum; the law that delegates to corporate owners of private media the general power to choose and censor the advertising and other messages they display (Zuboff 2019: 191); laws that regulate specific forms of advertising, such as false advertising, certain advertising directed toward children, certain types of obscene or pornographic advertising, and other categories; laws that authorize and regulate subscription-funded rather than advertising-funded broadcasting, such as certain types of cable television networks and streaming services; and many others.

Does all of that law matter for worker empowerment? It certainly does: the authorization of commercial advertising and delegation of power to private profit-making enterprises to choose its content and frequency – a legal construct – has had radical consequences. From the standpoint of inflating material consumption and therefore deflating worker bargaining power, the broad difference between a profit-driven culture and a hypothetical non-profit-based culture is obvious enough. Not only does each advertisement encourage heightened or wholly new desires, but it also anthropomorphizes the corporate producer as a caring friend with only the consumer's and society's best interests at heart. There is no "equal time" given to messages about the advertiser's exploitation of workers, environmental depredations, fraud, and other legal wrongdoings that are pervasive among capitalist corporations. In this respect, advertisements, individually and in the aggregate, present a relentless picture of capitalist enterprise as the best of vehicles, as the natural and inevitable means, for meeting our needs and our wants. Advertising sells capitalism itself.

This legal construct, then, has a triple impact on worker power. First, the ratcheting of desire and ever-greater urgency of private consumption reduces worker bargaining power in the way described above. Second, nearly all media are owned by capitalist corporations. It would be astounding if their shows, texts, and images did not, overall, convey negative images of unions or other organizations that challenge the profitability of capitalist enterprise, and there is ample evidence that their messaging does just that, when it does not exclude text and images about worker organizations or other opponents of corporate capitalism altogether, turning unions into an "absence" or an alien presence in the culture (Martin 2003; Puette 1992). Third, when workers seek to organize a union, they face a steep burden of persuasion, in light of co-workers' lifetime of viewing commercial advertising – which, as just argued, is a lifetime of messaging about the immutability and virtue of capitalist enterprise, of which their employer is an emblem.

Of course, workers, unlike viewers of their employer's advertising, have seen behind the employer's door and know, by hard experience, at least patches of their employer's darker side – hence, the activation of change agents within the workplace and the reality of union organizing

and of powerful labor movements in certain times and places. Still, the cultural and psychological burden of persuasion facing the union activist is heavy, and it is not coincidental that the decline in union density and worker bargaining power followed a cultural shift in the balance between people's identity as workers and as consumers.

Numerous other legal fields intermesh with communication law to construct people's felt imperative to consume. Just two examples: first, a high, but progressive, tax on consumption would dampen that imperative, in contrast to our present reliance on taxation of income. Second, changes in zoning, education, and anti-discrimination law would abate the arms race among families in bidding up the prices of housing, which leaves households struggling to meet their monthly mortgage payments. Today, out of love for their children, many parents overstretch their budget on housing, as they compete to live in more affluent neighborhoods with better schools – a competition caused by zoning laws that generate residential segregation based on home valuations; by weak legal remedies for racial segregation in schools, which propelled suburbanization and residential wealth segregation when racist white families fled cities; by public education and property tax laws that create wide disparities in the quality of schools in wealthier and poorer neighborhoods; and by constitutional law that permits such disparities (Warren & Tyagi 2016).

So far, I have mentioned the general law that constructs profit-driven means of mass communication, and particularities of tax, zoning, anti-discrimination, and education law that further enlarge personal spending needs. The new labor law must also attend to the complex legal rules and institutions that regulate each medium of communication (print, radio, television, internet) in labor-disempowering ways that are specific to each and that evolve over time. In our time, the baleful consequences for labor politics of the more particular nature of the various legally constructed media – especially new media – have become stark.

Social media and other forms of online communication have fragmented and polluted the sphere of public discourse in profoundly anti-democratic ways (Sunstein 2017). The more specific effect on labor politics has been equally corrosive. One of the deepest challenges for a renewal of labor-centered democracy is the substantial number of largely non-unionized workers who have been drawn into right-wing, ethno-nationalist, populist movements (Isser 2020). The convergence of *disorganized* capitalism (Offe 1985) and the new media has manifestly propelled this phenomenon. When large segments of the working classes are disorganized (non-unionized), and when they experience the fear and anxiety rooted in a half-century of persistent crises in capitalist labor markets, they are more receptive to the demagoguery that social media greatly enables.

Social media, although relatively new, has the core characteristic of past means of authoritarian leaders' communication to atomized citizenries: it enables direct communication from the demagogue to the individual without intermediation by independent media organizations, by civic organizations and, especially, by worker organizations. Those organizations encourage workers to deliberate in public settings in which hateful communication is discouraged, to participate together in political education programs, and to engage with electoral and coalitional politics across ethnic and racial differences. Donald Trump decisively lost the votes of members of union households by a margin of 16 percent, showing the continuing importance of unionization for left-leaning political forces (Isser 2020).

The upsurge in right-wing populism has shaken labor politics not only in the wider democracy. It has also impeded organizing, and attendant democratization, at the workplace level; in order to achieve collective solidarity, unions in many sectors and workplaces must now navigate the caustic divide in political allegiances within the relevant workforces.

Elaborating the new labor law and applying it in the service of worker power and democracy therefore calls for mapping, and proposing deep reform of, the existing legal rules and institutions (a) that enable direct, unmediated communication from the demagogue to the individual, non-unionized worker, and (b) that encourage the metastasis of online sites and networks of rage-filled, unreasoned responses to workers' plights.

Again, let me offer mere illustrations of the rules that call for radical reform. First, consider again the rules that authorize advertising-driven business models. To maximize profits, social media companies entice advertisers by attracting the greatest number of users or "eyeballs" (Wu 2016). One now-familiar technique for keeping users' attention is feeding them extremist variants of messages to which they have shown a predisposition (Zuboff 2019). These techniques encourage "horizontal" communication among disorganized workers that, subsequent to the demagogic leader's "vertical" messaging to them, amplifies that message through online person-to-person networks – amplification that is, again, unmediated by unions or other intermediary organizations.

These techniques point to a second well-known, pertinent cluster of legal rules – namely, the body of rules that authorize social media and other online sites to collect, bundle, and sell personal data from which the social-media companies and would-be advertisers can determine users' predispositions, and the rules that shield the companies against liability for the content they publish (Sunstein 2017; Zuboff 2019). If this cluster of laws of privacy, data-collection, data-usage, third-party tracking, liability protections, and so on, were overturned or significantly modified, the horizontal amplification of the demagogue's messages, and the social media companies' stoking of those messages, would be, at least to some substantial degree, diminished.

Imagine a world in which our culture were shaped by exchange of meaningful, other-regarding words and images in public arenas that discourage hateful appeals, and not by expansion of material desire and ethno-nationalist rage. Such a world – constructed, in part, by a renovated law of consumption – would give significantly greater support to worker bargaining power, worker organizing, and worker-centered democracy. The law of consumption therefore falls within the ken of the new labor law.

* * *

Obviously, the new labor law must include elements of many other fields: corporate law, antitrust law, criminal law, property law, contract law, immigration law, administrative law, family law, and others. In light of space limits here, it must be left to future publications to comprehensively map and apply the new labor law by examining the full body of particular elements of those fields that strengthen or weaken worker power and democracy in the contemporary capitalist political economy.

THE LEGAL INFRASTRUCTURE OF WORKER POWER UNDER DEMOCRATIC SOCIALISM

From Social Democracy Underpinned by Collective Bargaining to Democratic Socialism Underpinned by Worker Cooperatives

The previous section suggests radical reforms of several fields of law in the service of a form of social democracy suited to contemporary economic organization, but it assumes the continuation of the defining capitalist institutions of wage labor, capital-controlled enterprises, and

relatively competitive product markets, together with the multiple economic and political institutions without which those defining institutions could not function. In such a regime, worker power and democracy are strengthened through legal construction of (a) the institutions of unionization, collective bargaining, and channels of political action by worker organizations, and (b) worker-empowering variants of the many political and economic institutions that sustain wage labor.

In the shift from a capitalist social-democratic to a post-capitalist democratic-socialist political economy, the central institutional transformation is the end of wage labor in enterprises controlled by their capital suppliers. What replaces that central institution of capitalism? Louis Brandeis answered the question simply, though he did not use the term "socialism." He wrote that the ultimate aim of industrial democracy was workers' assumption of "full responsibility for business, as in cooperative enterprises" (Strum 1984: 192, quoting Brandeis' letter to Henry Bruère). In US history, Brandeis' conception of a non-capitalist, worker-controlled enterprise is traceable to the post-Civil War decades, when the Knights of Labor led the opposition to what appeared then as a strange new social order based on an economy of mass wage labor.

The Normative Argument for the Replacement of Collective Bargaining with Full Workers' Control

For the Knights of Labor and for labor-progressives like Brandeis, wage labor was incompatible with political democracy – at least if the wage-laborers were employed by capital suppliers and not by worker-owned enterprises. Indeed, the Knights of Labor argued that the subordination inherent in wage labor violates the Constitution's vision of independent citizens unbeholden to others (Forbath 1985).

While that normative argument rests on the commitment to political democracy, a second argument for full workers' control rests on the commitment to workplace democracy, reflected in Brandeis' proposition quoted above. The latter argument begins, as does the argument for unionization in a social-democratic capitalist economy, with the understanding that workplaces have the key feature that defines a political system. The enterprise makes workplace rules (analogous to the legal rules of a political regime) and enforces those rules under the coercive penalty of discharge (analogous to the coercive legal sanctions imposed by a political regime).

Proponents of collective bargaining in capitalist enterprises argue that unionization achieves industrial democracy by giving workers a collective voice in negotiations with managers, who are the collective representatives of the enterprise's second stakeholder: the capital suppliers. Democratic socialists riposte that, while collective bargaining represents a step toward democracy in a capitalist economy, it fails to achieve the deepest democracy in either the workplace or the polity. As for deepening industrial democracy, workers are the *only* "citizens" of the workplace political system, since they alone live day to day under the enterprise's coercively enforced rules. External capital suppliers – shareholders or other owners – do not. Yet collective bargaining enables workers – the workplace citizenry – to participate in making and enforcing workplace rules only by means of exerting the coercive power of the strike against the putative capitalist stakeholder, not by means of one-citizen-one-vote rule-making. The unionized enterprise is analogous to a political system in which the citizenry influences legal rule-making only through tax strikes or other modes of inflicting economic harm against an authoritarian government. The workplace must instead be governed entirely by workers, to fulfill the principle of industrial democracy, while concurrently deepening political democracy in the manner articulated by the Knights of Labor, Karl Marx, and many others.

Legal Construction of Worker-Controlled Enterprises

An enterprise fully controlled by workers can be governed either by directly deliberative meetings of the entire workforce, or by managers elected by the entire workforce (Wolff 2012). At first glance, therefore, it appears that corporate law and the law of finance are the decisive fields in the legal construction of worker power and democracy in a democratic socialist regime. Under existing law, capital-suppliers – that is, shareholders, in the types of corporations that employ most of the workforce, and the institutional investors, private equity firms, and other entities that own or invest in corporations – either themselves act as managers or elect and control managers, whose fiduciary legal obligations run predominantly to the shareholders and other investors alone and not to other stakeholders, including non-shareholding workers.

These legal obligations presume that the overweening goal of natural persons is to maximize their monetary benefit and that the legally created "persons" in which natural persons invest – that is, corporations and institutional investors – should also act immoderately toward that goal. The law therefore constructs millions of artificial actors that are required to act as sociopaths (Bakan 2005), in the sense that no psychologically and morally healthy person would make every plan and take every action to maximize monetary interests with minimal regard to the well-being of others (unless the other's well-being is a precondition or by-product of fulfilling the monetary interests of the actor) and to humans' full range of other ethical considerations, such as not exploiting or manipulating others, caring selflessly for those we love, giving due regard to the rights of others (including future generations), fulfilling civic and communitarian values, avoiding harms to the natural environment, and so on. The legal system constructs millions of entities that not only behave that way, but are legally required to, and that exert overwhelming power in politics, notwithstanding that they are not only sociopaths but are not even citizen-voters (that is, not members of the "demos"). This legal and social analysis augments Marx's and Roosevelt's normative arguments against capital suppliers' domination of the political system by virtue of their concentrated economic power.

For democratic socialists, then, the shift from workplace control by suppliers of capital to workplace control by suppliers of labor brings democracy to fruition not only in the workplace but also in the polity, for one and the same reason: the power of concentrated capital, embodied in a political army of artificial behemoths, is neutralized by eliminating capitalist enterprise itself.

If these simple syllogisms are correct, then it might seem, from the point of view of radical legal reform, that the master key to unlocking industrial and political democracy is simply to reconstruct the law of corporations and finance to prohibit control of management by capital and to mandate instead that that control be vested in those who work in the enterprise.

But things are not as simple as this legal silver bullet, as economic and political analysts of market socialism have known and debated for a long time (e.g. Bardhan & Roemer 1993). The success of industrial and political democracy in a democratic socialist regime would depend on many other institutions, even if enterprises were cooperatively controlled by workers. Therefore, applying the new labor law to democratic socialist institutions requires attention not just to the law of corporate ownership and of investment in the enterprise, but to many other legal fields.

Legal Reconstruction of Other Institutions in Support of Worker Cooperatives

The assumption of many proponents of democratic socialism, including myself, is that the worker-controlled enterprise would, like the unionized capitalist enterprise, earn profit by selling goods and services into a relatively competitive product market, even though that profit flows to

workers and not capital suppliers (see, e.g. Dreze 1993; Fleurbaey 1993; Ranis 2016). This is, then, a form of market socialism. The continuing commitment to the market mechanism, even in a post-capitalist regime, is based in part on the failed historical experiments in centralized coordination of economic activity – failures that, in some instances, came at incalculable human cost. It is true that those experiments were undertaken by authoritarian, not democratic, political regimes. But there is little reason to believe that democratic governance of a centralized coordination mechanism would solve the fundamental problem of a central actor's incapacity to aggregate and process local information about vast numbers and varieties of ever-changing work arrangements, product selection and design, production methods, technologies, interactions among enterprises, and other basic processes of a complex, large-scale, densely networked, locally diverse, and socially embedded economy.

This is not to say that greater – sometimes centralized – social regulation and redistribution than at present is unwarranted, either in our existing economy centered around capitalist wage-labor enterprises or in an imagined future economy centered around worker-controlled enterprises. Quite the contrary. The preceding section of this chapter offers many illustrations of new legal regulations and institutions – whether public or public-private hybrids, whether centralized or decentralized – that respond to the worker-disempowering pressures generated by private profit-seeking enterprise, by product-market competition, and by the many collateral institutions that sustain them. Market socialism, because it retains the basic institutions of profit-seeking enterprise and product-market competition, will generate many of the same worker-disempowering and democracy-threatening pressures – as confirmed by the experience of even the most successful cooperatives, both contemporary and historical, such as the well-documented struggles of the Mondragon complex of Spanish cooperatives which, while maintaining much of their original structure and ethos, have turned to two-tier employment and increasingly technocratic management in order to succeed in the marketplace (Duncan & Raymond 2018). These pressures must therefore be countered by legal infrastructure resembling the legal proposals in the preceding section, albeit adapted to the new core institution, the worker-controlled enterprise.

For example, interaction between consumption and worker empowerment will still characterize democratic socialism, since workers in a worker-controlled enterprise will seek to ensure the survival of their jobs and their accumulated savings (held as shares in the enterprise they own, in the simplest model of finance in a cooperative economy), both of which depend on the success of their enterprise in competition with other worker-controlled enterprises. Worker-controlled businesses, just like unionized capitalist firms, will therefore seek to maintain or expand their market share and profitability. Hence, worker-empowering legal reconstruction of marketing, advertising, media ownership, public education, taxation, anti-discrimination law, and zoning, such as the reforms discussed in the previous section, will be just as warranted as in an economy of capital-controlled firms.

Likewise, the legal construction of the international movement of capital, goods, and services will strengthen or weaken worker empowerment and democracy in a democratic socialist economy much the same as in a unionized capitalist economy – since, again, that body of international law constructs the larger product, capital, and labor market to which the worker-controlled enterprise must respond.

Indeed, even though worker-controlled enterprises in themselves mark a leap forward in industrial and political democracy, a market socialist economy contains new, potentially worker-disempowering features, well-known to political economists. One of these was just alluded to. The members of a worker cooperative face severe undiversified risk, compared to

the workers in a unionized wage-labor economy. The former's two most valuable assets – their employment and their savings – are dependent on the firm's success, so long as they must hold an equity stake in their cooperative or their share of profits must be reinvested in it. For the unionized (or non-unionized) workers in the capitalist economy, their employment is vested in their workplace, but they can diversify their savings across an array of assets other than shares in their own enterprise.

Political economists and policy-makers have discussed a variety of mechanisms for mitigating this problem of a democratic socialist economy. But the full extent of the possible mitigation must rest on experimentation of the sort that awaits a deeper transition from wage labor to workers' control than we have yet seen, though there is already much to be learned in regions that have adopted collaborative forms of production short of full-fledged market socialism. The point here is that the various mitigation strategies must be addressed by legal scholars, not just by political economists, through rigorous legal design of various proposed means of financial pooling across a diverse range of worker-controlled enterprises (e.g. Bardhan & Roemer 1993). As shown by the erratic experience of many "solidarity" banks in regional social or collaborative economies, we cannot expect legally well-designed financial institutions in support of worker power and democracy to spring forth by simply mandating that enterprises be controlled by workers instead of capital suppliers.

In addition, whether the worker's savings are vested in their own cooperative or diversified across a local or regional network of cooperatives, the design of social wage programs in a democratic socialist regime may be as important as in a capitalist political economy. If the economic security of workers' co-workers and community are tied to the success of workers' own cooperative or a local or regional network of cooperatives, they may feel inhibited from engaging in acts of militancy against worker-disempowering decisions that expert managers claim are dictated by technological and market imperatives, notwithstanding that workers have elected those managers or perhaps even *because* workers have elected the managers, whose decisions therefore wear a halo of democratic legitimacy. To challenge the manager is, in effect, to challenge one's co-workers in the cooperative or, assuming diversification of ownership, one's "co-workers" across the network of local or regional cooperatives in which all workers are invested. It is therefore important that workers who are wondering whether or not to make trouble by acting individually or collectively against entrenched or imperious managers, or against the complicity of a majority of co-workers with such managers, have a cushion outside the cooperative or network of cooperatives.

The flip side of this problem is similar to a familiar problem in political economies that have decentralized systems of unionization. In the latter regime type, unions face incentives to protect the jobs in the particular enterprise-level bargaining unit represented by the union, even when the welfare of the broader community, and the bargaining-unit members themselves, might be better served by greater fluidity of work processes and greater worker mobility. Note that this problem is not inherent in unionism; it is an artifact of laws, like those in the USA, that excessively decentralize worker organization and that provide a weak social wage that does not give workers adequate financial support and retraining to enable them to move across enterprises without significant personal spending. Similar, if not even more pressing, problems of legal construction arise in the democratic socialist economy, in the absence of a well-designed solution to the problems generated by both the jobs and savings of workers being vested in their own enterprise or network of enterprises. Hence, the importance for legal scholars to design a social wage that supports, and is reciprocally supported by, the particular legal infrastructure of the financial pooling mechanisms mentioned above.

* * *

Again, these are mere illustrations of the wide scope of legal fields and of questions of legal-institutional design that must be brought within the new labor law, to develop proposals for a legal infrastructure to strengthen worker power and democracy by building a democratic socialist regime. If a post-capitalist political economy seems utopian, the sketch of legal questions in this section is intended as a "real utopia," in the sense that it points toward a span along the political and legal horizon toward which pragmatic legal reforms, small or big, might be directed.

CONCLUSION

Empowering workers serves the goal of enlarging worker freedom – that is, enabling each worker to choose which capacities to develop, to select a life path that exercises those capacities, to continuously enlarge and reimagine the self, and to engage in risky but mutually empowering, transformative engagements with others (Unger 2001). It also serves the goals of deepening collective democracy at work and in politics. In a capitalist economy, those goals are served by worker organizations, typically unions, that strengthen workers' voice in the workplace and in the polity and, correspondingly, weaken capital-suppliers' and corporations' domination of daily life at work and of political processes and outcomes. The ambition of a democratic socialist economy – so far, only a dream – is to give workers more comprehensive control over making and enforcing workplace rules and sovereign law.

This chapter launches the project of, first, mapping a "new labor law" that encompasses the full range of legal domains – in and out of the scope of conventional labor law – that construct the strength or weakness of worker power, industrial democracy, and political democracy; and, second, developing legal proposals for reconstruction in the service of empowerment and democratic deepening, both in (capitalist) social democratic and in (post-capitalist) democratic socialist political economies. Given limits of space, the chapter is only that – a start to the project, offering only illustrations of legal fields outside of conventional labor law that are critical to the construction of worker power and democracy, and illustrations of proposed renovations of certain elements in each of those fields. The ambition of the chapter is to persuade the reader, through these illustrations, that the new labor law is worthy of comprehensive development.

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