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# Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual?

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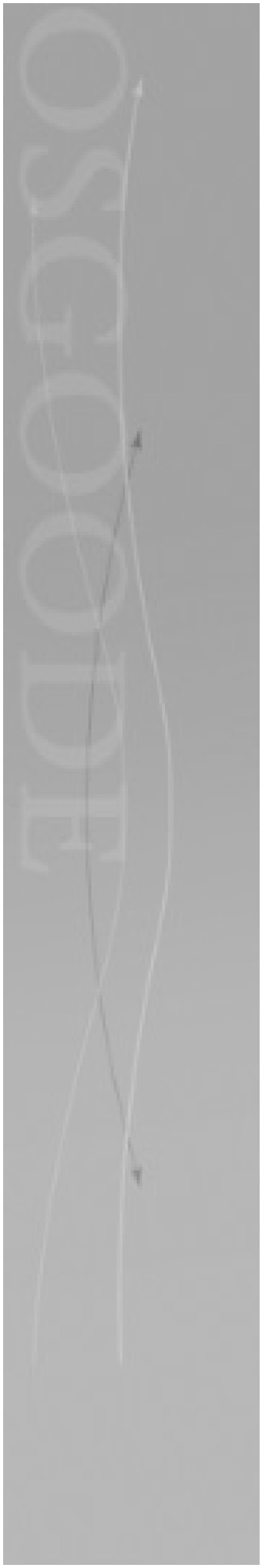

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**Abstract:** "Labour law" is a term of relatively recent invention, imprecise meaning, diminishing power and decreasing salience. One way to reflect on the future of labour law is to conduct a thought experiment: to imagine that labour law had never been invented, and that in its place something called "the law of economic subordination and resistance" had developed. Using this historical "counter factual", this essay speculates on how embedding labour law in a larger analysis, and aligning its goals and methods with those required to protect other economically subordinate groups, might benefit not only workers but tenants, mortgagors, consumers, small business owners and others.

**Key words:** Labour law

## Introduction

Labour law has always suffered from a degree of definitional ambiguity and conceptual and normative incoherence. Ambiguity and incoherence, I argue, have long detracted from labour law's development and efficacy. However, labour law now faces a more significant — an existential — crisis: a future without "labour". In order to assess this crisis, I invite readers to engage in a thought experiment; to consider what historians call a "counter-factual". Imagine, I propose, that labour law had never been invented, or having been invented, that it had formed part of a broader field of legal learning and practice entitled "the law of economic subordination and resistance" encompassing not only relations of employment but all economic relations characterized by comparable asymmetries of wealth and power. After retrieving some fleeting historical glimpses of this "counter-factual", I conclude with a review of its prospects as a possible way forward for labour law.

## The troubled past and tenuous prospects of labour law

Labour law has never had a precise meaning. On the one hand, it might be broadly defined as the norms, processes and institutions by which the state regulates or mediates relations between employers and employed. Such a definition would extend the reach of labour law to include many other fields — taxation, monetary policy, intellectual property, international trade, social welfare, skills training — that shape labour markets and therefore ultimately power relations and legal relations in the workplace. It would, however, exclude important aspects of labour law which do not originate with the state. On the other hand, labour law might mean whatever subject matter is conventionally taught in law school courses, written about by legal scholars or practiced by lawyers who identify themselves as specialists in the field. This second definition would doubtless include some matters encompassed by the first but exclude others. Both definitions, moreover, are likely to vary as amongst different countries and legal cultures and at different historical moments. But it is impossible to think of a definition of labour law that is not, at some level, centrally concerned with relations between workers and employers.

Workplace relations and labour market regulation long antedate the identification of an academic, professional or legislative field known as "labour law" — a term virtually unknown to legal taxonomers until 100 years ago. While industrial disputes, employment contracts, workplace safety, compensation for injuries and a maximum hours of work had all become subjects of legislation, judicial pronouncements and administrative regulation by the end of the 19th century, they were not perceived to constitute a distinct field of professional or academic concern. Scholars in several European countries essentially invented the subject in the early decades of the 20th century. In English-speaking countries, development came a little later. A few common law schools offered courses early in the century — "industrial law" at the LSE, "master and servant law" at Dalhousie, "labour law" at Harvard and Wisconsin . But as English, Canadian and American scholars all testify; labour law effectively emerged as a full-blown academic discipline only in the years before and after the second world war. Then, in the 1960s, as academic labour law appeared to flourish, its scope began to change. First, labour law came to be understood (especially in North America) as the law governing collective labour relations, while

"employment law" addressed the employment relations of individual, non-unionized workers. Then, in the 1970s and 1980s, employment and labour law began to dissolve into new subspecialties such as discrimination law, pension law and occupational health and safety law which in time emerged as separate domains of teaching, scholarship and practice. By contrast, rather than dissolving into a number of distinct subspecialties, European labour law has continued to form part of a broader array of work-related policy concerns. Leading scholars have taken labour law "beyond employment"; labour law has found its niche within the EU's Social Chapter; and it is increasingly subsumed into or overshadowed by "social law", the law of the welfare state. This may explain why — relative to Canada, the United States and the United Kingdom — it continues to flourish in most continental countries as both an intellectual project and as a focus of political action and public policy.

Conceivably, too the changing meaning and diminished domain of labour law might be attributable to its doctrinal, normative and political incoherence. As Figure 1 suggests, labour law in North America and the UK (as broadly defined) implicates a wide range of legal sources which, in turn, rest on and give effect to very different values and assumptions about social and economic relations and about what legal-institutional arrangements ought to shape those relations.

FIGURE 1

THE SOURCES OF LABOUR LAW BROADLY DEFINED

| SOURCE OF LAW | LABOUR LAW APPLICATION |
|---|---|
| Special Labour Laws | |
| Collective labour legislation | Relations among unions, employers and workers |
| Employment standards legislation | Floor of rights / negotiation over floor |
| Occupational health and safety / workers' compensation legislation | Reduces industrial accidents / illnesses; provides compensation |
| Social legislation | Unemployment / illness / retirement / training |
| Fundamental Law | |
| Human rights legislation | Discrimination / harassment |
| Constitution / Charter of Rights and Freedoms | Regulatory jurisdiction / equality / mobility / access to collective bargaining / strikes and picketing |
| General Law | |
| Criminal law | Picketing |

| | |
|---|---|
| Tort law | Picketing / strikes / boycotts / workplace injury |
| Contract law | Employment contract / internal union affairs |
| Property law | Picketing / union solicitation |
| Trust law | Pension / benefit funds |
| Administrative law | Judicial review of labour tribunals |
| Specific statutory regimes | |
| Competition law | Employer associations |
| Corporate law | Employee voice / management responsibilities |
| Intellectual property law | Non-competition / ownership of inventions |
| Immigration law | Migratory workers |
| Taxation law | Self-employment |
| Trade law | Goods excluded if child / convict labour |
| International law | |
| UN charters of human / social rights | Freedom of association / equality |
| ILO conventions | Directly binds / influences interpretation of domestic labour law |
| NAALC / EU Social chapter | Labour dimension of economic integration |
| Non-state law | |
| Transnational law | Codes of conduct |
| Government procurement policies | Minimum standards / employment equity |
| Custom / usage | Quotidian rules of workplace |

Or perhaps labour law's failure to achieve a comprehensive and coherent system of labour market and workplace regulation in North America particularly had less to do with its many conceptual contradictions and more to do with a series of awkward social facts: forms of workplace relations are proliferating and tending towards precarity; the proportion of workers covered by some form of collective bargaining is rapidly shrinking; state regulation of labour markets (and other markets) is viewed with increasing suspicion and has been made more difficult to achieve by the advent of globalization; and state support for the social safety net is attacked as too costly to sustain. Contrariwise, the relative coherence and continuing salience of labour law in the coordinated market economies of Europe may be a reflection of political, social and historical influences in those countries.

Moreover, labour law may be facing an existential crisis brought on by the diminished salience of "labour". For many of its architects and practitioners, the project of labour law was not just to better integrate diverse legal concepts or to achieve greater coherence in regulatory policies and practices. It was rather an attempt to repudiate the values and assumptions embedded in those concepts and to modify or transform the outcomes achieved by previous regulatory regimes. It was therefore, inevitably, an attempt to protect the rights, advance the interests, and regulate the conduct of "labour"; of "workers", who were assigned that collective identifier as members of a class or movement, as bearers of a shared cultural identity or as a factor of production. But

however described, whether in the language of political economy or sociology or scientific management, the problem is that these terms — "labour" and "worker" — are being emptied of meaning. As Figure 2 suggests, the way in which workers' subjectively perceive themselves has diverged significantly from the objective reality of "labour" that is embedded in all systems of labour law.

FIGURE 2

WHAT MAKES LABOUR LABOUR?

| | OBJECTIVE REALITY | SUBJECTIVE PERCEPTION |
|---|---|---|
| Economic identity | Producer | Consumer |
| Socio-cultural nexus | Class / occupation | Education / lifestyle |
| Primary identity / solidarity | Union membership / party affiliation | Gender / race / religion / region / generation |

To amplify: "labour" as a way of describing a social class and its cultural practices, as a political and industrial movement, as a distinct domain of public policy and of legal theory and practice is disappearing from everyday usage. This is not because workers no longer need whatever power or protection labour law gave them. They do need it, arguably more than ever. Workers in most advanced countries are receiving a shrinking share of GDP; their individual and collective bargaining power vis-à-vis employers has declined sharply; they face declining prospects of finding a job, retaining it for much of their working lives, or earning generous wages and decent benefits. And worse yet: the social safety net on which they depend to weather crises in their employment history has become increasingly inadequate. One might expect that workers would react to these developments by mobilizing aggressively to defend their interests; but the contrary seems to be the case. Trade unions are losing members and power; and parties of the left are generally losing their working-class voters.

The explanation, I suggest, is that "labour" is no longer perceived as a movement, a class or a domain of public policy, though civil servants, managers and economists continue to acknowledge the importance of "human resources". Nor are politicians and the news media much concerned with the plight of "workers", though they bemoan the decline of the "middle class" and exploit fears of a growing underclass. Nor do many large corporate law firms any longer view labour law as a service worth providing to their clients. Most importantly, workers no longer see themselves as "workers" — as a class or collectivity whose members share common experiences, confront a common adversary and perceive

concerted action as the way to advance their shared interests. Nor is the cultural identity of workers still acknowledged by the media (virtually no newspapers have "labour" reporters) or reinforced by traditional signifiers (the cloth cap, the lunch bucket, the working class bar or pub, the Labour Day parade have all but disappeared). Workers now seem to prefer alternative identities: as consumers and investors rather than as producers; as members of families and communities and affinity groups based on religion, sport or sexual preference rather than of unions and labour-friendly political parties; as candidates for, or core members of, the middle class rather than as "workers" engaged in lives driven by aspiration and marked by struggle.

And now to make the obvious point: if workers do not see themselves as a collective entity, if they are not committed to a collective identity and collective action, there is not much collective labour law can do to improve their lot. Can employment law — labour law minus its collective dimension — take up the slack? In principle, individual workers in most developed countries enjoy formal legal protection against wrongful dismissal, harassment and discrimination, unhealthy or unsafe working conditions, non-payment of wages or benefits or wrongful withholding of vacations or pensions. But in practice government agencies charged with enforcing protective labour legislation often lack staff, zeal or remedial powers, while ordinary civil litigation is usually too slow, expensive and uncertain to be much use to rank-and-file workers. "Employment law", in other words, is not the continuation of labour law by other means. So if workers and "labour" are no more, if labour law has run its course, and if employment law offers at best an inadequate substitute, how should we think about the legal regulation of labour markets and workplace relations?

## The law of economic subordination and resistance: A counterfactual

The rise and fall of labour and of labour law in the 20th century was an historical development of great significance. One way to imagine the future of both is therefore to consider what historians describe as a "counter-factual" — something that did not happen but might have. Suppose that during the inter-war years — in, say, 1920 or 1930 — Sinzheimer, Rice, Kahn-Freund and the other pioneers of labour law had decided that abuses attributable to disparities of economic power were not unique to labour markets. Suppose that they had therefore invented not labour law but "the law of economic subordination and resistance"? Suppose that they had developed a body of legal learning that dealt comprehensively not just with the regulation of employment relationships and labour markets, but of all relationships in which individuals are experiencing economic subordination, resisting it through various strategies of self-defence and seeking legal redress against it in various legal forums. Or suppose that having developed labour law's analytical concepts and systemic architecture, they subsequently realized that similar concepts and systems might be useful in protecting other constituencies of vulnerable economic actors against super-ordinate power.

In Appendix A, I have developed a crude model depicting this "counter-factual". It identifies as its potential beneficiaries not only organized but unorganized workers; the self-employed, the precariously employed and the unemployed; independent professionals and autonomous workers; consumers, debtors and mortgagors; small investors and owners of small business franchises; and farmers, tenants and welfare recipients. It also shows how laws might (and sometimes do) protect members of these groups from their powerful market adversaries in rather similar ways: by guaranteeing them the right to collective voice, to engage in collective negotiations and to mobilize concerted pressure; by requiring the super-ordinate power to treat subordinate parties in accordance with at least minimally decent, non-derogable standards; by establishing formal or informal procedures for resolving disputes between the super-ordinate and subordinate parties; by providing alternative arrangements for individuals whose circumstances are not appropriate for resolution within the new system; and not least by legally entrenching the new regulatory architecture while allowing for the possibility that the subordinate party can improve upon it through social and political mobilization.

The model, Appendix A, suffers from significant deficiencies. The list of potential beneficiaries — individuals experiencing economic subordination — is almost certainly incomplete. The many forms of self-help and legal regulation used by subordinated groups to resist or limit subordination are only partially captured. The model does not explain why some subordinate groups fail to develop successful legal, social or political strategies of resistance while others succeed or why once-successful strategies — like collective bargaining — ultimately prove inadequate. And of course I have committed the cardinal sin of transforming the Wagner Act — the quintessence of North American exceptionalism — into a template that arguably has little salience for workers in Italy or France, or for that matter, farmers or tenants in Canada or the United States.

These are serious deficiencies indeed. Nonetheless, the model at least enables us to think about our counter-factual, about an academic subject or professional specialty or policy discourse that — had it developed — might have been called "the law of economic subordination and resistance". It allows us, moreover, to focus on its most salient characteristic: the integration of what have up to now been separate subjects, specialties or discourses. For both workers and other subordinated groups, integration may hold considerable appeal

Labour law's claim to uniqueness has always rested on some version of the proposition that "labour is not a commodity". However, this claim has also opened labour law up to the criticism that workers were seeking unique privileges not available to other people: to the right to commit what in other contexts might be torts or crimes, to the enjoyment of economic advantages not available to non-labour groups such as small business owners or farmers, to direct representation in the political process. But suppose instead labour law had adopted a different foundational proposition: "the subordination of workers in the employment relation is but one representative example of the experience of many groups

under capitalism, for all of whom there should be some protection". This might have (a) removed the stigma of special pleading by labour (b) given other groups a stake in the success of labour's resistance and (c) made possible a comprehensive theory of protection and resistance that would have benefited all groups. It would also have provided workers with a continuing logic for resistance and the law with a continuing rationale for regulation and protection, despite the collapse of labour as a significant legal, political and sociological category.

**What then might have been the basic content of a counter-factual or hypothetical "law of economic subordination and resistance"?**

To make explicit what is implicit in Appendix A: the elements of such a law have long existed, although they are seldom collected under a comprehensive rubric that underlines their normative and functional connectedness. Labour standards legislation was first enacted in the United Kingdom two hundred years ago and collective bargaining and industrial action have been lawful to some extent in most advanced economies since the late 19th century. Tenants began to enjoy security of tenure and protection against rent gouging in most countries during the first, and especially the second, world war. Procedural due process for welfare recipients — though not deemed a constitutional right in America — is enshrined in principle in many welfare regimes. Consumer protection laws go back to the 19th century and beyond, and have proliferated since the 1960s. Farmers have participated in purchasing and marketing cooperatives since the 19th century, and in legislatively-sanctioned supply management schemes for much of the 20th. Laws against insider trading and the oppression of minority shareholders were adopted in many jurisdictions during the financial crash of the 1930s. At least since the 1930s, governments have been enacting regulations to protect defaulting mortgagees against foreclosure and especially against the illicit pressure tactics of lenders. Self-governing professions in some countries have had the legal right to fix prices for standard services; in others they have used union-like tactics to secure favourable terms for services rendered in the context of state-sponsored health care or legal aid schemes. Cab-owners, self-employed truck drivers and fishers have either been "deemed" to be employees eligible for collective bargaining, or (competition laws notwithstanding) allowed to apply concerted economic pressure to defend themselves against their "super-ordinate other" or a public regulator.

True, these experiments in the protection of subordinate groups have been scattered across time and space. True, they have not been integrated into a coherent body of legal theory, principles, rules and institutions. But — I argue — they should be acknowledged as being related to each other.

Take the right of economically subordinate groups to protect their interests through the use of concerted economic pressure: why do we not consider rent strikes, consumer boycotts and welfare sit-ins as not only the functional and moral, but also the legal, equivalent of industrial action by union members? Or take strategies adopted by governments to structure countervailing power in different parts of the economy: there are important similarities between agricultural marketing agencies and self-governing trades and professions, on the one hand, and the Wagner model of collective bargaining on the

other. Or take the statutory implication of terms or the regulation of prices in order to protect the weaker party to a contractual relationship: why do we not perceive the link between rescission clauses in consumer contracts or the regulation of automobile insurance rates on the one hand, and on the other labour standards legislation that forbids derogation from the minimum wages and maximum working hours laid down by statute?

In retrospect, recognition of a comprehensive "law of economic subordination and resistance" — making visible and explicit the connections between labour law and related regimes — might have had certain advantages.

In the first place, it would have carried labour law farther along the trajectory on which it was launched when it broke free of contract, tort and criminal law and began to develop its own distinctive analytical categories and discursive conventions. Instead of relying on special pleading to the effect that the unique character of employment relations requires, in effect, a semi-autonomous legal subsystem, labour law might have presented itself as part of a larger array of "unique" but related subsystems that collectively challenge some core conceptions of the law of post-industrial capitalism. This might arguably have given labour law a stronger claim to legitimacy, made its claims seem less anomalous, and enriched it with insights from adjacent domains of legal resistance. And it might have allowed labour law's progeny and siblings, such as human rights law, to find a more comfortable place within the larger and more heterogeneous category of "the law of economic subordination and resistance" than their present location in labour law's shadow or in the dream world of constitutional rights. Conversely, innovative features of labour law might have been used as a model or precedent for, say, tenant unions or shareholder caucuses.

**The counter-factual in the historical narrative of North American labour law**

While I have described "the law of economic subordination and resistance" as a counter-factual, the United States and Canada have on several occasions come tantalizingly close to embedding labour law in an integrated network of legal regimes that protect not only workers but other economically subordinate groups.

In the US the Progressive era — roughly the 1880s through the 1920s — was one in which workers, farmers and small business sometimes found common cause in opposing a particularly rapacious and notoriously unregulated form of capitalism. Anti-trust laws and regulation of utility rates were often espoused by the same politicians and commentators that espoused labour's demands for safer workplaces and collective bargaining. For a variety of reasons, however, progressive initiatives succeeded only sporadically and at the local level.

The most ambitious and successful attempt to align labour law with other legal initiatives to protect a broad spectrum of economically subordinate people occurred only towards the end of this era, during the Great Depression. Roosevelt's National Industrial Recovery Act

(NIRA), enacted in 1933, bore a striking resemblance to "the law of economic subordination and resistance". It established codes of fair competition for numerous industries, protected consumers and small businesses from predatory practices, introduced debt relief for farmers, regulated the price of many consumer products and created a program of public works to provide the unemployed with a chance to earn a living. The same legislation also guaranteed workers minimum wages and decent working conditions, and provided a template for the subsequent Wagner Act and Fair Labor Standards Act. There are many reasons to be critical of the politics, design and execution of the NIRA, which was struck down by the U.S. Supreme Court in 1935 on federalism grounds. However, the NIRA did attempt to comprehensively address the disparate concerns of economically subordinate victims of a capitalist economy that itself was experiencing a moral, structural and operational crisis.

The 1960s — a social rather than an economic crisis for America — arguably represented another such moment. The civil rights, anti-war and youth movements, by challenging hierarchy and orthodoxy of all kinds, produced a profound social upheaval. That upheaval did not spare the labour movement. The 1960s marked the end of the New Deal coalition; many union voters migrated to the Republican Party; and unions experienced a decline in bargaining power and political influence from which they have never recovered. On the other hand, the labour movement contributed greatly to the organizing strategies and legislative aspirations of other economically subordinate groups. The civil rights movement adopted the sit-in strategy that labour had used to good effect in the 1930s; tenant unions organized rent strikes; procedures developed by unions to ensure due process at work were adapted to welfare and mental health systems; and in many cases union leaders, lawyers and funds played a key role in the struggles of these parallel movements. It must also be said that notwithstanding the decline of the labour movement from the 1960s onwards, American workers gained increased protection against discrimination on grounds of race and gender (1964), against hazards to their health and safety in the workplace (1970) and, subsequently, against discrimination on grounds of disability (1990). Here again we see ephemeral evidence of what might have been: an interweaving of labour and non-labour legal, political and intellectual initiatives.

Canadian labour law history also offers tantalizing glimpses of what might have been. For example, the Combines Investigation Act of 1889 sought to protect farmers, consumers and small businesses against the same rapacious corporations that were seen to oppress workers. Both the Combines Act and labour legislation (enacted two decades later) were administered by the Department of Labour and its founding Deputy Minister, Mackenzie King, and both for a time placed primary reliance on strategies of investigation, conciliation and public reporting. In the mid-1930s the so-called Bennett New Deal proposed to provide public works programs and minimum employment standards for workers; grants and supply management schemes for farmers; and pensions, health insurance and deposit insurance for everyone. Of course, Bennett's version of a compendious "law of economic subordination and resistance" was never implemented: it was partially struck down by the courts and partly appropriated by the opposition Liberals who defeated him shortly after he announced his New Deal program. But it shows that even highly conservative public figures could perceive that the problems encountered by these groups were related,

arguably mutually reinforcing, and required an integrated response. In the 1930s as well, legislation at the provincial level — sometimes cautious, sometimes ill-considered — can be seen in retrospect as a patchwork quilt of related protections. Ontario's Industrial Standards Act and Québec's Collective Agreements Extension Act allowed workers and employers to establish industry-wide standards for sectoral labour markets while legislation in those and other provinces gave farmers comparable control over specified commodities markets. In the early 1940s (as during the first world war) comprehensive regulation of labour, housing, consumer, financial, commodities and other markets was adopted, not only to mobilize the resources needed for the war effort, but to protect vulnerable individuals against exploitation by dominant corporations, and to forestall the social unrest that their resistance might trigger.

These counter-factual episodes often ended in disappointment. The common law doctrine of restraint of trade, the progenitor of the Combines Act, was frequently used to delegitimate collective bargaining. Elements of the Bennett New Deal were struck down by the courts; provincial legislation protecting debtors was disallowed; supply management survived for some time in some sectors, but now seems likely to be swept away entirely as an impediment to free trade; and other wartime interventions in markets — rent control for example — remain only in vestigial form. Finally, the same wartime regulations that conferred rights on unions also subjected them to significant constraints, which have become "normalized" as essential elements of our labour law. Nonetheless, looking back on these counterfactual developments scattered through the first half of the 20th century, we can see how labour law was briefly, and might have become in the long term, part of a larger, more ambitious strategy to protect vulnerable individuals from super-ordinate corporate power.

Of course, no such ambitious strategy actually took hold. Ironically unions, in their heyday, functioned to some extent not only as advocates for some subordinated workers but also as gatekeepers, restricting the labour market opportunities of other subordinated workers such as women, members of visible minorities and immigrants.

Now that that heyday is past, the unions that have survived more or less intact tend to serve a relatively privileged worker elite, rather than those most accurately described as "economically subordinate". A few Canadian examples: Unions in the public sector — whose members hold relatively well-paying, relatively secure jobs — now account for n absolute majority of all union members. Unions of professional athletes have secured fabulous wealth for their members, and made them in fact if not in law part-owners of the means of production. Union pension and benefit funds now comprise one of the largest pools of investment capital, but the financial leverage they possess is seldom used to advance the interests of workers who lack who lack pensions and other benefits. Nor do aspects of labour law designed to protect unorganized "employees" reach those who need protection most. To the contrary: the Supreme Court's recent progressive decisions on wrongful dismissal largely benefit highly-paid executives, managers and professionals —

not rank-and-file workers. Less than 50% of Canadian workers are eligible for employment insurance, and those who qualify — those who have been employed the longest — are by definition less needy than those who do not. Fewer and fewer non-union workers are covered by defined benefit pension plans; but such plans remain available to privileged employees at the top of the corporate hierarchy.

**Conclusion: The counter-factual as the narrative of labour law's future?**

Interest in labour law's reconceptualization as part of a comprehensive "law of economic subordination and resistance" has tended to rise during moral or social crises or crises of political economy. Today's crisis of capitalism is arguably less extreme than the one that produced the NIRA and the Bennett New Deal, less pervasive than the social crisis of the 1960s. Nonetheless, it has still engendered a mobilization of what Daniel Drache calls "defiant publics": the Indignants of Madrid and Athens, the Occupy Wall St. movement in New York, the 99% movement in Vancouver, the anti-greed movement in Rome. However, the "defiant publics" have so far failed to come together in an anti-capitalist movement of any sort: they have no organization, no ideology, no program, no strategy, no legal or institutional panacea. They know that they are economically subordinate; they want to resist; but they have so far neither a cure for capitalism nor an alternative to it. I note especially that none of these movements is calling for "a new NIRA" — a comprehensive and coherent program to deal with widespread economic subordination. In fact, if asked many members of these defiant publics would say that an NIRA is the last thing they want: that it reinforces the political economy, the political system and political class that have brought us to our present discontents. Quite likely, then, if my counter-factual "law of economic subordination and resistance" were available, it would be rejected by the Occupy movement and the Indignants, by the very people — in other words — that it is designed to help.

This is not to deny that here and there, for brief moments economically subordinate people have been able to come together for limited purposes: product boycotts organized by students, consumers and religious groups to help end the exploitation of foreign workers; local community organizations, racial groups and labour unions working together to secure job opportunities, decent working conditions and living wages in American cities; online networks of activists revealing the shoddy employment, consumer and environmental practices of large corporations. Perhaps out of these small victories, a new and larger vision of labour law will emerge, a vision that looks forward rather than backward, that is expansive and not exclusionary. Perhaps this new vision of labour law will even draw on "economic subordination and resistance" as a unifying theme. Or perhaps the idea itself will just remain a counter-factual.

APPENDIX A

| | Unionized Workers (North America) | Unorganized workers | Professionals | Consumers | Farmers | Tenants | Small investors |
|---|---|---|---|---|---|---|---|
| Voice: recognition of representatives | Certification | Employee associations; caucuses; OHSA committees/ class actions | Professional associations / licensing bodies | Class actions | Marketing boards; co-ops | Tenant unions; Legal clinics | Proxy battles; oppression actions |
| Collective negotiation | Duty to bargain in good faith | "Going rate"; work rules and customs | Self-regulation / ad hoc negotiation | Litigation settlement | Collective purchases / sales | | Litigation settlement |
| Concerted economic action | Limited right to strike / picket | Refuse to work in unsafe conditions; work stoppage; online info campaign | Work stoppages / work-to-rule | Boycotts | Demonstrations, crop destruction | Rent strikes, demonst-rations | --- |
| Formal / informal dispute resolution | Rights disputes: arbitration Interest disputes: mediation | — | Ad hoc mediation / arbitration | --- | --- | Tribunals | Courts |
| Agreement | Formal, enforceable collective agreement | Individual contracts; codes of conduct; Litigation settlement | Agreement with government agencies (legal aid / health care) | Codes of conduct | --- | Litigation settlement | Litigation settlement |
| Minimum / Standard terms | Non-derogable collective agreement / OHSA / | Employment standards / OHSA | Agreement with government agencies (legal aid / health care); Professional tariffs | Consumer legislation; Anti-trust | Monopoly protection | Minimum terms; rent fixing; tenure protection | Securities regulator; stock exchange; industry codes |
| Political action / affiliation | Formal / weak / intermittent | Ad hoc community action / | Strong lobbying | Lobbying | Lobbying | --- | --- |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | lobbying | | | | | |
| Social safety net | Workplace pensions and benefits / weak state provision | Weak state provision | Strong self- / group-provision | Weak regulation | Weak state provision | Limited tenure | Weak regulation |
| Constitutional / human rights claims | Speech / Assembly / Association / Due process | Race / gender / disability | Mobility rights / right to practice | --- | --- | --- | --- |

Other groups:

Racialized and/or gendered minorities; immigrants; independent and franchised owners of small businesses; debtors; mortgagors; self-employed; unemployed; welfare recipients, the precariat.