Chapter 1

Foundations of Employment Law

1. Employment as a Socio-Legal Relationship

1.1 Employment as Status and Contract

Belated Feudalism

Karen Orren (1991)

[W]hen the United Stated embarked upon full-scale industrialization in the decades following the Civil War, American labor relations were a remnant of the ancient order, in the sense that arrangement established in England in previous centuries were carried forward and enforced in law, often with only slight modification, to form the framework of relations between American employers and their employees.

[C]ertain considerations should be understood as fundamental. The first is that employment relations, being a vestige of the old order, were still governed by the judiciary. As a consequence, historical continuity will be observed in the ancient precedents used by judges to decide disputes between employers and employees, and sometimes also third parties, who came before the American courts. ... [I]n this chapter I discuss the substance of governance, including the *prescriptive* nature of the common law, the enforcement of rules existing a priori, in contrast to the voluntary principles associated with the modern idea of contract. In fact, wage

workers had traditionally worked, or "served," under contracts, but for the vast majority those were what are known as implied contracts, rather than express contracts, the contents of implied contracts being predetermined and legally assumed to have been agreed to by the parties upon the act of hiring. On those occasions when express contracts were entered into, as with respect to the specific time or job for which the contract was to run, courts also interpreted their provisions in light of the older rules. In other words, in settling labor disputes that came before them, the judges were imposing a long-established structure of relations upon employer and employee, not arbitrating between two parties who had entered, de novo as in contract theory, into an agreement.

The order of labor

At the most abstract level, "feudal" refers to the fact that the hierarchical relation of master and servant in nineteenth-century America was a remnant of the larger system of hierarchies that historically had extended up and down medieval society.

Under its own name, the relation of master and servant did not appear in English common law until the promulgation ... of the first Statutes of Labourers ... in 1349. Prior to that time, artisans and wage workers had been regulated by rules and customs of manors, boroughs, and guilds. During the fourteenth century, the law governing wage labor became intermeshed with certain disabilities of the villeins, peasants bound from birth to specified services to a lord. That legal commingling reflect the fact that former villeins, having commuted their labor services to money rents, were gradually coming to make up the great bulk of wage laborers; judges, themselves mostly landed, undertook to protect the lord's powers during the transition. ... [T]he task required greater reliance on a central state to enforce privileges that had earlier been secured by the customs of the manor and the lord's military force; thus the Statutes of Labourers and the new special constables, justices of the peace, appointed to enforce the statutes.

This history is instructive on the persistence of the employment hierarchy at a time when feudal lords were increasingly being replaces by—and were themselves becoming—masters who hired workers under contract, as well as later, when the relation of master and servant persisted after other hierarchies, in religion and commerce as well as government, had been dismantled. ... Blackstone's *Commentaries*, written in the eighteenth century, grouped the

duties and obligations between master and servant with those between husband and wife, parent and child, and guardian and ward, to make up what he referred to as the private economical relations of persons. Those he distinguished from the public relations, between magistrates and people, among whom were included knights, barons, clergy, kind, and other figures in the medieval lawbooks. In his description of the public relations, hierarchy had been overtaken by the functional position of those relations in English government and the emphasis on the supremacy of Parliament. The private relations, however, retained the pattern of personal subordination. By that time, the villein had vanished; Blackstone did not mention him, but instead contrasted the free laborer of England with the condition of the slave.

Let us begin this exploration of the order of master and servant with the structure of compulsion that underlay the industrial system and provided one of the surest and most venerable indications that being a worker in late-nineteenth century America was still a legal *status*. By "status," I refer to an established position in society conferred upon an individual that does not arise from any specific action or from a contract bu from the individual's personal characteristics. Nothing in American law directly stated that being a worker was a status or that there was a legal duty to work. Nevertheless, in every jurisdiction in the United States, not to work or be seeking work, if one was an able-bodied person without other visible means of support, was a crime, punishable by fine or imprisonment. ... Moreover, just as being a worker was a status, this crime, known as vagrancy, was one of the few acknowledged crimes of status in American law—that is, one that was not defined by an action or inaction taken in itself but was committed purely through one's personal condition, by being a member of some predefined legal category. ... [T]he word *personal* must be emphasized. In the same way that an employee's contract of employment was treated by the law as personal, as a relation between particular individuals, not simply and exchange of labor where somebody else without further agreement could person the job, the crime of vagrancy could not be committed jointly or in concert.

[T]he Statutes of Labourers (1349) presented the first comprehensive scheme in which the worker's failure to work was suppressed through the apparatus of the criminal law. In the text, situated between the provision that victualsmust be sold at reasonable prices and the provision that a laborer accepting more wages than customary must pay the surplus to the town, appears the following:

> *Item, because that many valiant [able-bodied] beggars, as long as they may live of begging do refuse to labour, giving themselves to idleness and vice, and sometime to theft and other abominations; none upon the said pain of imprisonment shall, under the coulour of pity of alms, give anything to such, which may labour, or presume to favour them towards their desires, so that therby they may be compelled to labour for their necessary being.*

Those statutes, which were enforced in the British colonies, went essentially unchanged into the eighteenth century, when they were grafted onto the laws of the new American statutes. The same configuration of meanings and policies in the old laws carried on into the nineteenth century. … Over the centuries, the vagrancy laws continued as a moral structure impinging just outside, an element of … the relational dimension of labor relations, the manner in which they bear on and support the activities of other groups in society. The worker must be working; if not working, he or she is bound to lapse into crime; in no case may the worker be allowed to rely on the charity of the community, especially a community away from the worker's original home. That structure, having long preceded the market system under capitalism, later thrived in the era of capitalist development, despite market society's alleged emphasis on the seeking of opportunity, mobility, and the breaking of local ties.

The vagrancy statutes were only one aspect of the labor law that attested to the wage workers' emergence out of the status of villenage. Although the legal relation of master and servant already existed to take them in—just as it would take in the swelling ranks of industrial workers some six centuries later—certain overtly servile principles derived from the old connection were never expunged. Another such principle … was *quicquid acquietur servo acquietur domino* ("whatever is acquired by the servant is acquired by the master"). … [That] principle … was continued in the law of master and servant. A note in Hargrave's eighteeth-century edition of Coke's *Institutes* observed that the rule "about *slaves* holds *in some*

The *Institutes of the Lawes of England* are a series of legal treatises written by Sir Edward Coke, a prominent English barrister, judge and politician in the late sixteenth and early seventeenth centuries.

degree in respect to *apprentices* and *servants*" and that it pertained with certainty to wages a worker earned from other employment when the master had given permission to the other employer without waiving the earnings.

By the late nineteenth century, employers in the United States could sue workers for breach of contract for their earnings in other employment only when it could be shown that the work had been done during hours and activities in which the plaintiff employer had been entitled to the worker's efforts. In an 1877 *Treatise on the Law of Master and Servant*, however, Horace Wood devoted three full pages to Hargrave's "learned note" and concluded that under the rule of *quicquid acquietur servo* the employer could also retain waged earned by a worker in outside activities if the money somehow came into the employer's hands. ... Moreover, even in its diluted American form, the law expressed the employer's proprietary interest not only in the worker's labor performed under the contract but also in all labor that might be performed by the worker's *person*, under a different contract, The remedy went beyond simply dismissing the worker or deducting from his wages for so many hours; it extended to the outside earnings acquired, as if they (as an extension of the worker) belonged to the master. Such a principle would seem incongruous not simply with the market-model morality of enterprising employees, but even with the more sober depictions of nineteenth-century workers as earnest breadwinners for their families. It was eminently compatible, however, ... with other features, likewise ancient, of the hierarchical structure of employment relations during the period.

Wood's treatise was an influential work on the law governing employment in the late 19th century. Among other things, it is widely cited as the primary source of the employment-at-will rule. See Jay M. Feinman, The Development of the Employment at Will Rule, 20 American Journal of Legal History 118, 125-27 (1976).

The judicial governance of master and servant

The links between past and present may be observed in the line of precedents used by American judges to decide the disputes between masters and servants and third parties that came before the courts. Apart from the continuity inherent in precedents, however, their importance in labor relations stems from the prescriptive character of that law. To the extent that even the mere adherence to established procedures may bias decisions in favor of one group in society over another, all law may be said to be prescriptive, if only incidentally so. But in the law of master and servant, the judges imposed its provisions as the content of the contract between employers and employees, unless there was an explicit agreement to the contrary, which was almost never the case.

Regarding whether or not an employee might recover wages if asked by an employer to work on a Sunday, Wood proceeds for several pages citing precedents and authorities that include, among others, practice prior to the year 500, Edward the Confessor, *The Mirror of Justices*, and Lord Coke, reaching the conclusion that the worker may not. The point is not only that the courts followed precedent, and the precedents were ancient, but also that there was a preestablished substance that constituted the legal relations between the parties, which the courts administered in the course of litigation.

Edward the Confessor was the English king from 1042 to 1066.

The Mirror of Justices was an Anglo-Norman law text published in 1642.

As a remnant of feudalism, judicial regulation of labor relations in the nineteenth century maintained that comprehensive sense of governance, in which courts administered, and to a lesser extent, legislated, as well as adjudicated. Thus, for example, by the mid-nineteenth century, American courts, running ahead of the English, no longer permitted employers to beat their employees. Similarly, in the 1880s, judge-made law turned away from the assumption of an annual hiring, based on the English model and on the prevalence of agricultural labor, to a hiring "at-will." Such modifications were no doubt responsible for the system's survival for so long, preempting interference by other agencies of the state in unusually offensive or inconvenient circumstances. Even so, as in the case of at-will employment, the courts continued to prescribe labor relations, not derive them from contracts devised by the parties. In any case, such judicial legislation was the exception; usually courts imposed existing law. ... My claim is not that judges were forced in every circumstance to follow common-law precedent, rather than ignore it, or that they could not have found formal justification in existing law for more innocations. The argument is that in by far the largest share of disputes before them, they did in fact follow precedent. I certainly do not mean to imply that the common-law rules were in any sense "neutral," but quite the opposite, that judges by their ritual enforcement held up a structure of domination that had existed since time out of mind.

Judicial governance of labor relations in the nineteenth century may best be seen in the details of cases that came regularly to the courts for decision and engaged central principles of the law. One principle was the property interest that the master legally had in the worker's labor, and indeed in all labor performed by the worker's person during the hours for which they contracted, as mentioned earlier in regard to the rule of *quicquid acquietur servo*. That property interest was

further enforced in the action *per quod servitium amisit* ("by which the master lost the service"). In that action, the master might claim damages from a third party for injuries to his worker that resulted in loss of value of the worker's services, must as if the injury had been to his chattel or machines or buildings. ... Blackstone, typically, found a parallel action regarding servants in ancient Athens; however, his discussion was more pertinent for its stress on the traditional nonreciprocity (in the *per quod* respect, as in others) of the employment contract: The servant, having no property in the "company, care, or assistance of the superior," has no legal redress for injuries to the master.

A different line of ancient precedent may be observed for a second principle in nineteenth-century labor law, the principle that a contract for labor was "entire." Under that principle, a worker hired for a stated job or period of time was not legally entitled to be paid for any labor performed until the job or term was completed. If he or she quit work without legal cause, nothing could be recovered for the labor performed, unless the employee could prove that the contract had been wrongfully terminated by the employer. In that circumstance, wages could be sought by a *quantum meruit* ("for the amount owed") suit or by a suit for damages for breach of contract. Legal recovery was difficult, not only because of the wide latitude given employers to discharge their workers but also because the courts were willing to accepts as a justification for dismissal virtually any reason, even if that reason had not been stated or even known by the employer himself at the time the dismissal took place. If the suit was for damages, workers were required under the law to seek other employment after their dismissal, and the court normally would deduct any wages they received from what it required the defendant employer to pay.

This rule made it possible for employers to goad employees into quitting near the end of a term or pay period, and thereby benefit from their earlier labor without having to pay. But the "entire" contract principle was also basic to the full range of subject matters in dispute between nineteenth-century employers and employees, because very often other issues presented at law involved the question of whether or not a worker was entitled to, or had been unjustifiably denied, payment for his or her services. The principle was most important during the decades prior to the Civil War, when contracts definite as to term were more common than they would be later, but it retained its vitality after then as well,

particularly with respect to salaried workers. The principle of hiring "at will," under which either party could terminate the contract for any reason, began to take hold in the 1880s; but in the meantime many courts ... continued to apply the English rule of an assumed annual hiring, or else held that the pay period (by the week, month, etc.) would determine the point at which back wages could be accrued and recovered.

The province of work

The principles of hierarchy and obedience imply the existence of jurisdictional boundaries within which authority is organized and enforced. ... Enough has been said by now about the hierarchy of master and servant, and the authoritative endorsement of the master's will by the courts, to identify the workplace as a jurisdiction.

[J]urisdiction was an attribute of the master's property in the servant, just as was the claim over the servant's labor. Concretely, the workplace, and the persons and property that composed it, *was* a jurisdiction. To the extent that workplaces relations under the nineteenth-century law of master and servant were governed by the courts as a unit, the combined workplaces ... constituted, concretely and not metaphorically, a single province of work within the larger territory of American society. It could be put on a map.

Inside the province were the inhabitants: the employer and his employees. Those were real persons, not their alienated labor or functions. ... [I]t was legal cause for immediate discharge to bring in an outside worker without the master's consent to substitute for the one hired to do the work. Once having entered the contract for services, the worker was enlisted to be there and to perform during working hours, upon penalty of losing back pay for an infraction. ... [A]bsense by mistake of a few days could cause discharge. The worker was not released from a tour of duty even under such circumstances as his or her accurate knowledge of the master's imminent bankruptcy.

Beyond the territory of the individual workplace itself, the inhabitants, both employer and employees, engaged in what might be referred to as interworkplace relations, that is, transactions with other employers and employees. Although easy movement across that boundary would seem natural in market-model societies, real crossings encountered fixed barriers. In the case of employees, for example, a kind of passport often was required to move from the hire of one employer to another, which was the testimonial letter. Such

letters were necessary to obtain wage work in the Middle Ages; a statute under Richard II in 1388 imposed forty days imprisonment for forging such a letter and penalized an employer who hired a servant who did not present one. In the late nineteenth century, testimonial letters were required to obtain employment in many major industries, and litigation arose over questions of whether or not previous employers were under legal obligation to furnish them, how complete and truthful they were required to be, and how many times they had to be provided. Another barrier to employees' free movement was that in nineteenth-century America, as in fourteenth-century England, it was illegal to harbor servants of another employer, that is, to employ a worker while knowing that he or she was still under a contract of employment with someone else. It was not essential that it be shown that the new labor had actually commences, or that there had been an intention to deprive the first employer of his worker's services; the mere retention of the employee after learning that service was due the other employer was subject to common-law suit for damages.

Crossings of workplace boundaries met numerous other obstacles. One obstacle was the courts' enforcement of private agreements whereby the employee, upon departing service, agreed not to enter in business competition with his or her former employer for a specified number or years or over a specific territory. Another was the enforcement of what employers claimed were implied (as well as express) contracts that employees would not pass on to other certain "trade secrets," even though the machinery or processes were already known by others and were unprotected by patents. Although contracts like these are certainly familiar in the recent history of American commerce, in relations among businessmen they had a controversial status, being regarded as illegal restraints of trade, and were not enforced consistently until late in the nineteenth century. But contrast, in the master-servant context, such contracts had long been regarded as reasonable exceptions necessary for the educative and confidential relations of employment.

Of the several protective barriers surrounding the workplace, the most formidable in the law of master and servant was the provision against enticement. The Statutes of Labourers provided for both civil and criminal proceedings against any person who knowingly enticed or persuaded a servant away from his employment by another master. By 1355, an action of trespass on the case had developed; it provided an

independent civil remedy of damages for those same infractions within the common law. The law of enticement is a vivid illustration of the persistence of ancient regulations into the modern period. In the leading antebellum case, *Boston Glass Manufactory v. Binney* (1827), plaintiffs based their argument on cases extending back as far as 1591, and the 1591 case had been based on precedents for the action of enticement dating from the fourteenth century.

Beyond the outer perimeter of the province of work lay the public at large. The relations between the workplace at what in the parlance of contract was called "all the world" may be seen ... in the developing law of employer liability for injuries caused in the course of carrying on a trade or business. With respect to "strangers," third parties outside the company, the rule of *respondeat superior* ("let the mater answer") prevailed ... . That rule meant that the employer was liable for injuries inflicted through the fault of an employee performing his authorized duties, just as if the injury had been caused by the employer's machine or animal. Because prior to that time employees had themselves been held liable, unless the particular negligent act in question had been specifically commanded or implied by the mater, we may speculate that the newer rule, which in any case did not repudiate but broadened the premise of command, was an adaptation to the more attenuated forms of management typical of larger companies.

On the other hand, on the basis of the 1842 landmark case of *Farwell v. Boston & Worcester Rail Road*, when an injury was inflicted on an employee through negligence of a fellow servant, the master was not responsible. That judgment was consistent with the idea that the law must protect the public; however, judges would not intrude in established master-servant relations to protect the employee.

In his opinion in *Farwell*, Massachusetts Chief Justice Lemuel Shaw rested his finding of nonliability of the employer on the nature of the original contract of employment. Averrring that injuries to "strangers" must, for reasons of general considerations of policy and security, be covered by the maxim *respondeat superior*, Shaw distinguished the circumstances at bar:

> *But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.*

Under the rules of liability, then, employees stood in relation to one another as an employee would to a piece of machinery. The employer would be held liable for an injury inflicted by a fellow employee only if the employer had not taken due care to ensure that the employee at fault had been sufficiently skilled to perform the task, just as the employer would be held liable if he or she had neglected to care for a piece of machinery.

Here the worker may be seen to have had less protection than members of the public at large against identical injuries caused by identical accidents. By virtue of one's status as an employee of the … company in the course of whose business the injury occurred, one was unprotected against injuries for which the company would have assumed liability had they been inflicted on an ordinary member of the public. … [T]he evident injustice of the fellow-servant rule, which adversely affected the families and other associates of injured workers, as well as the workers themselves, would eventually lead to a major revolution in torts through the institution of workmen's compensation laws. Those laws would bring new inroads into the domain of master and servant. However, at a time when court decisions in other areas of the law were moving in the direction of universal contracts, the effect of workers' compensation laws was to enhance the status-based responsibilities of the employment relation.

The province and the republic

A final barrier against interference in the workplace was constitutional. Labor relations were bounded by the limits of legislative sovereignty. Regular payment of wages, and in money rather than scrip or credit; reasons for discharge, and wages due and service letters upon departure; removal of the fellow-servant defense against liability for injury; shorter hours of employment—these and other changes in the old law were obtained by workers and their political allies in legislation, through the activities of lobbying and elections. However, as is well known, in the majority of instances those statutes were overturned in review by the judiciary.

[The courts' behavior] demonstrated a concerted institutional defense of the labor remnant of feudal governance against legislative encroachment. That defense has been obscured because it coincided with the judiciary's simultaneous retreat from its earlier deferential position on business legislation and relied on a new theory of substantive due process to obstruct a diversity of economic statutes, not only statutes affecting labor.

[W]ithin the broad doctrine of substantive due process, "liberty of contract" came closest to denying the validity of legislation per se. ... Among the subjects treated by the judges under the doctrine of liberty of contract, labor questions were in the forefront. The initial reference to "undue interference with men's rights of making contracts" appeared as a dictum in an opinion of the Illinois Supreme Court on legislation specifying how coal should be weighed to calculate miners' wages. The first decision to invalidate a statute as an unconstitutional infringement on liberty of contract was *Godcharles v. Wigeman*, overturning a Pennsylvania statute requiring iron mills to pay in cash. The first U.S. Supreme Court decision to invalidate a state statute based on liberty of contract was *Lochner v. New York*.

The opinions in the labor decisions indicate that the judges believed that what was at stake was no less than the moral order of things, not merely the formal division of powers or the privileges of favorite social groups. Their well-known opposition to "class" legislation was based not so much on a sense of insult to republic principles as on their fears that the entire system of society and politics faced imminent demolition should the relation of master and servant be upset. This is revealed, I think, in the continual reasoning by *reductio ad absurdum*, a determination to foresee the worst imaginable logical outcome. In *Lochner*, Justice Peckham said that if an eight-hour law for bakers were condoned, personal liberty under the constitution would become "visionary":

> *Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired.*

Haskins v. Royster

70 N.C. 600 (1874)

Rodman, J.

We take it to be a settled principle of law, that if one contracts upon a consideration to render personal services for another any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we would not find it in the laws of the freest and most

enlightened States in the world. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons.

We are relieved from any labor in finding authorities for this principle, by a very recent decision of the Supreme Court of Massachusetts, in which a learned and able Judge delivers the opinion of the Court. *Walker v. Cronin*, 107 Mass. 555.

That case was this: The plaintiffs declared in substance that they were shoemakers, and employed a large number of persons as bottomers of boots and shoes, and defendant unlawfully and intending to injure the plaintiff in his business, persuaded and induced the persons so employed to abandon the employment of the plaintiff, whereby plaintiff was damaged.

A second count says that plaintiff had employed certain persons named to make up stock into boots and shoes, and defendant well knowing, induced said persons to refuse to make and finish such boots and shoes.

I shall make no apology for quoting copiously from this opinion, because the high respectability of the Court, and the learning and care with which the question is discussed, make the decision eminently an authority.

> *This (the declaration) sets forth sufficiently (1) intentional and willful acts, (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant, (which constitutes malice,) and (4,) actual damage and loss resulting.*
>
> *[...] In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong.*
>
> *Thus every one has an equal right to employ workmen in his business or service; and if by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated, may be held liable for the wrong, although he did it for the purpose of promoting his own business.*
>
> *Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition of the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.*

> *It is a familiar and well established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service known to the defendant. It has sometimes been supposed that the doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description.*

It is suggested, (for we did not have the benefit of an argument for the defendant,) that in the present case the contract between the plaintiff and Eastwood and Wilkerson is unreasonable and therefore void. We cannot suppose it to be contended that this Court, or any Court, when there is no suggestion of fraud, can inquire whether the reward agreed to be paid to a workman is the highest that he might have got in the market, and to declare the contract void, or to make a new one if it thought not to be the highest. No Court can make itself the guardian of persons *sui juris*. That would be an assumption inconsistent with their freedom. We suppose the objection to a point to that part of the contract which is, in substance, that if either party of the second part, or any person for whom they contract, shall misbehave *in the opinion of the party of the first part*, such misbehaving party shall quit the premises *and forfeit to the party of the first part* all his interest in the common crop.

It is said that these provisions make the plaintiff a judge in his own cause, which the law will not allow, and that they are manifestly so oppressive and fraudulent as to avoid the whole contract. This proposition will be found on examination to go much too far even as between the parties to the contract, and to have no application as between one of the parties and a malicious intermeddler, as the defendant must, in this stage of the case, be considered.

It is not necessary to decide what would be the effect of such a stipulation in an action on the contract between the parties to it. But as there seems to be some misconception of the law of such a case, and as although there are numerous authorities on the question, it is not yet of "familiar learning" in our Courts, a few observations will more conveniently lead us to the question actually presented.

The authorities are conclusive that the parties to a contract, if there be no fraud or concealment of the interest, may agree to make a person interested, or even one of the parties an arbitrator to decide all controversies which may arise under the contract, and such agreement will be valid and effectual.

These authorities unquestionably establish that such stipulations are not void or voidable, even as between the parties, and it has never been supposed or contended that they made the whole contract void; as even if void themselves, they are clearly separable from the other parts. Either party, therefore, could maintain an action on this contract.

It is important however to notice, that none of these authorities goes to the length of holding, that if after the contractors had duly performed all or a part of the work, the plaintiff had *mala fide*, or without lawful cause, discharged them, they could not recover upon the contract. [...] The power attempted to be reserved cannot have any greater effect than to make the discharge *prima facie* lawful, if so much as that.

Contracts with such stipulations as we find in the present, are not to be commended as precedents. Such stipulations are unusual; they answer no useful purpose, and suggest an intent (perhaps in this case untruly) to take some improper advantage, and to exact from the employees a degree of personal deference and respect, beyond that civil and courteous deportment which every man owes to his fellow in every relation in life. To this extent, a mutual duty is implied in every contract which creates the relation of master and servant. If the servant fails in due respect, the master may discharge him, and so, if the master fails, the servant will be justified in quitting the employment.

Again it is suggested, that the contractors of the second part in this contract are *croppers*, and not servants. By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop. But such a person is not a tenant, for he has no estate in the land, nor in the crop until the landlord assigns him his share. He is as much a servant as if his wages were fixed and payable in money.

It is unnecessary to discuss the question whether one who maliciously persuaded a *tenant* to abandon his holding, would not be liable in damages for such officious intermeddling.

But whatever may be the effect of the provisions commented on, as between the parties to the contract, the authorities are clear and decisive that a person in the situation of the defendant, can take no advantage from them. As the case now stands, he cannot pretend to play the part of a chivalrous protector of defrauded ignorance. For the present at least, he must be regarded as a malicious intermeddler, using the word malicious in its legal sense.

There is a certain analogy among all the domestic relations, and it would be dangerous to the repose and happiness of families if the law permitted any man, under whatever professions of philanthropy or charity, to sow discontent between the head of the family and its various members, wife, children and servants. Interference with such relations can only be justified under the most special circumstances, and where there cannot be the slightest suspicion of a spirit of mischief-making, or self interest.

To enable a plaintiff to recover from one who entices his servant, it is sufficient to show *a subsisting relation of service*, even if it be determinable at will. In *Keane v. Boycott*, the plaintiff sued a recruiting officer for enticing his servant. The servant was an infant and had been a slave in St. Vincents where he indentured himself to serve the plaintiff for five years. The indenture of course was void upon a double ground, but the Court held the plaintiff entitled to recover. [...] "The defendant in this case *had no concern in the relation between the plaintiff and his servant; he dissolved it officiously*, and to speak of his conduct in the mildest terms, he carried too far his zeal for the recruiting service." [...]

We are of opinion that the complaint sets forth a sufficient cause of action.

Pollock v. Williams

322 U.S. 4 (1944)

MR. JUSTICE JACKSON delivered the opinion of the Court.

Appellant Pollock questions the validity of a statute of the State of Florida making it a misdemeanor to induce advances with intent to defraud by a promise to perform labor and further making failure to perform labor for which money has been obtained *prima facie* evidence of intent to defraud. It conflicts, he says, with the Thirteenth Amendment to the Federal Constitution and with the antipeonage statute enacted by Congress thereunder. Claims also are made under the due process and equal protection clauses of the Fourteenth Amendment which we find it unnecessary to consider.

Pollock was arrested January 5, 1943, on a warrant issued three days before which charged that on the 17th of October, 1942, he did "with intent to injure and defraud under and by reason of a contract and promise to perform labor and service, procure

and obtain money, to-wit: the sum of $5.00, as advances from one J.V. O'Albora, a corporation, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida." He was taken before the county judge on the same day, entered a plea of guilty, and was sentenced to pay a fine of $100 and in default to serve sixty days in the county jail. He was immediately committed.

On January 11, 1943, a writ of habeas corpus was issued by the judge of the circuit court, directed to the jail keeper, who is appellee here. Petition for the writ challenged the constitutionality of the statutes under which Pollock was confined and set forth that "at the trial aforesaid, he was not told that he was entitled to counsel, and that counsel would be provided for him if he wished, and he did not know that he had such right. Petitioner was without funds and unable to employ counsel. He further avers that he did not understand the nature of the charge against him, but understood that if he owed any money to his prior employer and had quit his employment without paying the same, he was guilty, which facts he admitted." The Sheriff's return makes no denial of these allegations, but merely sets forth that he holds the prisoner by virtue of the commitment "based upon the judgment and conviction as set forth in the petition." The Supreme Court of Florida has said that "undenied allegations of the petition are taken as true."

The Circuit Court held the statutes under which the case was prosecuted to be unconstitutional and discharged the prisoner. The Supreme Court of Florida reversed. It read our decisions in *Bailey v. Alabama* and *Taylor v. Georgia* to hold that similar laws are not in conflict with the Constitution in so far as they denounce the crime, but only in declaring the *prima facie* evidence rule. It stated that its first impression was that the entire Florida act would fall, as did that of Georgia, but on reflection it concluded that our decisions were called forth by operation of the presumption, and did not condemn the substantive part of the statute where the presumption was not brought into play. As the prisoner had pleaded guilty, the Florida court thought the presumption had played no part in this case, and therefore remanded the prisoner to custody. An appeal to this Court was taken and probable jurisdiction noted.

Florida advances no argument that the presumption section of this statute is constitutional, nor could it plausibly do so in view of our decisions. It contends, however, (1) that we can give no consideration to the presumption section because it was not in fact brought into play in the case, by reason of the plea of guilty; (2) that so severed the section denouncing the crime is constitutional.

I.

These issues emerge from an historical background against which the Florida legislation in question must be appraised.

The Thirteenth Amendment to the Federal Constitution, made in 1865, declares that involuntary servitude shall not exist within the United States and gives Congress power to enforce the article by appropriate legislation. Congress on March 2, 1867, enacted that all laws or usages of any state "by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," are null and void, and denounced it as a crime to hold, arrest, or return a person to the condition of peonage.

Clyatt v. United States was a case from Florida in which the Federal Act was used as a sword and an employer convicted under it. This Court sustained it as constitutional and said of peonage: "It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness .... Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law .... A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service."

Then came the twice-considered case of *Bailey v. Alabama,* in which the Act and the Constitution were raised as a shield against conviction of a laborer under an Alabama act substantially the same as the one before us now. Bailey, a

Negro, had obtained $15 from a corporation on a written agreement to work for a year at $12 per month, $10.75 to be paid him and $1.25 per month to apply on his debt. In about a month he quit. He was convicted, fined $30, or in default sentenced to hard labor for 20 days in lieu of the fine and 116 days on account of costs. The Court considered that the portion of the state law defining the crime would require proof of intent to defraud, and so did not strike down that part; nor was it expressly sustained, nor was it necessarily reached, for the *prima facie* evidence provision had been used to obtain a conviction. This Court held the presumption, in such a context, to be unconstitutional.

Later came *United States v. Reynolds* in which the Act of 1867 was sword again. Reynolds and Broughton were indicted under it. The Alabama Code authorized one under some circumstances to become surety for a convict, pay his fine, and be reimbursed by labor. Reynolds and Broughton each got himself a convict to work out fines and costs as a farm hand at $6.00 per month. After a time each convict refused to labor further and, under the statute, each was convicted for the refusal. This Court said, "Thus, under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer." It held the Alabama statute unconstitutional and employers under it subject to prosecution.

In *Taylor v. Georgia* the Federal Act was again applied as a shield, against conviction by resort to the presumption, of a Negro laborer, under a Georgia statute in effect like the one before us now. We made no effort to separate valid from invalid elements in the statute, although the substantive and procedural provisions were, as here, in separate, and separately numbered, sections. We said, "We think that the sections of the Georgia Code upon which this conviction rests are repugnant to the Thirteenth Amendment and to the Act of 1867, and that the conviction must therefore be reversed." Only recently in a case from Northern Florida a creditor-employer was indicted under the Federal Act for arresting a debtor to peonage, and we sustained the indictment. *United States v. Gaskin.*

These cases decided by this Court under the Act of 1867 came either from Florida or one of the adjoining states. And these were but a part of the stir caused by the Federal Antipeonage Act and its enforcement in this same region. This is not to intimate that this section, more than others, was sympathetic

with peonage, for this evil has never had general approval anywhere, and its sporadic appearances have been neither sectional nor racial. It is mentioned, however, to indicate that the Legislature of Florida acted with almost certain knowledge in designing its successive "labor fraud" acts in relation to our series of peonage decisions. The present Act is the latest of a lineage, in which its antecedents were obviously associated with the practice of peonage. This history throws some light on whether the present state act is one "by virtue of which any attempt shall hereafter be made" to "enforce involuntary servitude," in which event the Federal Act declares it void.

In 1891, the Legislature created an offense of two elements: obtaining money or property upon a false promise to perform service, and abandonment of service without just cause and without restitution of what had been obtained. In 1905, this Court decided *Clyatt v. United States,* indicating that any person, including public officers, even if acting under state law, might be guilty of violating the Federal Act. In 1907, the Florida Legislature enacted a new statute, nearly identical in terms with that of Alabama. In 1911, in *Bailey v. Alabama,* this Court held such an act unconstitutional. In 1913, the Florida Legislature repealed the 1907 act, but re-enacted in substance the section denouncing the crime, omitting the presumption of intent from the failure to perform the service or make restitution. In 1919, the Florida Supreme Court held this act, standing alone, void under the authority of *Bailey v. Alabama.* Whereupon, at the session of 1919, the present statute was enacted, including the *prima facie* evidence provisions, notwithstanding these decisions by the Supreme Court of Florida and by this Court. The Supreme Court of Florida later upheld a conviction under this statute on a plea of guilty, but declined to pass on the presumption section, because, as in the present case, the plea of guilty was thought to make its consideration unnecessary. The statute was re-enacted without substantial change in 1941. Again in 1943 it was re-enacted despite the fact that the year before we held a very similar Georgia statute unconstitutional in its entirety.

II.

The State contends that we must exclude the *prima facie* evidence provision from consideration because in fact it played no part in producing this conviction. Such was the holding of the State Supreme Court. We are not concluded by that holding, however, but under the circumstances are authorized to make an independent determination.

What the prisoner actually did that constituted the crime cannot be gleaned from the record. The charge is cast in the words of the statute and is largely a conclusion. It affords no information except that Pollock obtained $5 from a corporation in connection with a promise to work which he failed to perform, and that his doing so was fraudulent. If the conclusion that the prisoner acted with intent to defraud rests on facts and not on the *prima facie* evidence provisions of the statute, none are stated in the warrant or appear in the record. None were so set forth that he could deny them. He obtained the money on the 14th of October, 1942, and the warrant was not sought until January 2, 1943. Whether the original advancement was more or less than $5, what he represented or promised in obtaining it, whether he worked a time and quit, or whether he never began work at all are undisclosed. About all that appears is that he obtained an advancement of $5 from a corporation and failed to keep his agreement to work it out. He admitted those facts and the law purported to supply the element of intent. He admitted the conclusion of guilt which the statute made *prima facie* thereon. He was fined $20 for each dollar of his debt, and in default of payment was required to atone for it by serving time at the rate of less than 9¢ per day.

Especially in view of the undenied assertions in Pollock's petition we cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. The statute laid its undivided weight upon him. The legislature had not even included a separability clause. Of course the function of the *prima facie* evidence section is to make it possible to convict where proof of guilt is lacking. No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the federal statute. The Florida Legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Since the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statute is its extra-legal coercive effect in suppressing defenses. It confronted this defendant. There was every probability that a law so recently and repeatedly enacted by the legislature would be followed by the trial court, whose judge was not required to be a lawyer. The possibility of obtaining relief by appeal was not bright, as the event proved, for Pollock had to come all the way to this Court and was required, and quite regularly, to post a supersedeas bond of $500, a hundred times the amount of his debt. He was an illiterate Negro laborer in the toils of the law for the want of $5. Such considerations bear importantly on the decision of a

prisoner even if aided by counsel, as Pollock was not, whether to plead guilty and hope for leniency or to fight. It is plain that, had his plight after conviction not aroused outside help, Pollock himself would have been unheard in any appellate court.

In the light of its history, there is no reason to believe that the law was generally used or especially useful merely to punish deceit. Florida has a general and comprehensive statute making it a crime to obtain money or property by false pretenses or commit "gross fraud or cheat at common law." These appear to authorize prosecution for even the petty amount involved here. We can conceive reasons, even if unconstitutional ones, which might lead well-intentioned persons to apply this Act as a means to make otherwise shiftless men work, but if in addition to this general fraud protection employers as a class are so susceptible to imposition that they need extra legislation, or workmen so crafty and subtle as to constitute a special menace, we do not know it, nor are we advised of such facts.

We think that a state which maintains such a law in face of the court decisions we have recited may not be heard to say that a plea of guilty under the circumstances is not due to pressure of its statutory threat to convict him on the presumption.

As we have seen, Florida persisted in putting upon its statute books a provision creating a presumption of fraud from the mere nonperformance of a contract for labor service three times after the courts ruled that such a provision violates the prohibition against peonage. To attach no meaning to such action, to say that legally speaking there was no such legislation, is to be blind to fact. Since the Florida Legislature deemed these repeated enactments to be important, we take the Legislature at its own word. Such a provision is on the statute books for those who are arrested for the crime, and it is on the statute books for us in considering the practical meaning of what Florida has done.

In the view we take of the purpose and effect of this *prima facie* evidence provision it is not material whether as matter of state law it is regarded as an independent and severable provision.

III.

We are induced by the evident misunderstanding of our decisions by the Florida Supreme Court, in what we are convinced was a conscientious and painstaking study of them, to make more explicit the basis of constitutional invalidity of this type of statute.

The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms.

Where peonage has existed in the United States it has done so chiefly by virtue of laws like the statute in question. Whether the statute did or did not include the presumption seems to have made little difference in its practical effect. In 1910, in response to a resolution of the House of Representatives, the Immigration Commission reported the results of an investigation of peonage among immigrants in the United States. It found that no general system of peonage existed, and that sentiment did not support it anywhere. On the other hand, it found sporadic cases of probable peonage in every state in the Union except Oklahoma and Connecticut. It pointed out that “there has probably existed in Maine the most

complete system of peonage in the entire country," in the lumber camps. In 1907, Maine enacted a statute, applicable only to lumber operations but in its terms very like the section of the Florida statute we are asked to separate and save. The law was enforcible in local courts not of record. The Commission pointed out that the Maine statute, unlike that of Minnesota and the statutes of other states in the West and South, did not contain a *prima facie* evidence provision. But as a practical matter the statute led to the same result.

The fraud which such statutes purport to penalize is not the concealment or misrepresentation of existing facts, such as financial condition, ownership of assets, or data relevant to credit. They either penalize promissory representations which relate to future action and conduct or they penalize a misrepresentation of the present intent or state of mind of the laborer. In these "a hair perhaps divides the false and true." Of course there might be provable fraud even in such matters. One might engage for the same period to several employers, collecting an advance from each, or he might work the same trick of hiring out and collecting in advance again and again, or otherwise provide proof that fraud was his design and purpose. But in not one of the cases to come before this Court under the antipeonage statute has there been evidence of such subtlety or design. In each there was the same story, a necessitous and illiterate laborer, an agreement to work for a small wage, a trifling advance, a breach of contract to work. In not one has there been proof from which we fairly could say whether the Negro never intended to work out the advance, or quit because of some real or fancied grievance, or just got tired. If such statutes have ever on even one occasion been put to a worthier use in the records of any state court, it has not been called to our attention. If this is the visible record, it is hardly to be assumed that the off-the-record uses are more benign.

It is a mistake to believe that in dealing with statutes of this type we have held the presumption section to be the only source of invalidity. On the contrary, the substantive section has contributed largely to the conclusion of unconstitutionality of the presumption section. The latter in a different context might not be invalid. Indeed, we have sustained the power of the state to enact an almost identical presumption of fraud, but in transactions that did not involve involuntary labor to discharge a debt. *James-Dickinson Farm Mortgage Co. v. Harry.* Absent this feature any objection to *prima facie* evidence or presumption statutes of the state can arise only under the Fourteenth Amendment, rather than

under the Thirteenth. In deciding peonage cases under the latter this Court has been as careful to point out the broad power of the state to create presumptions as it has to point out its power to punish frauds. It "has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law." *Bailey v. Alabama.* But the Court added that "the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to proscribe." And it proceeded to hold that the presumption, when coupled with the other section, transgressed those limits, for while it appeared to punish fraud the inevitable effect of the law was to punish failure to perform labor contracts.

In *Taylor v. Georgia* both sections of the Act were held unconstitutional. There the State relied on the presumption to convict. But it was not denied that a state has power reasonably to prescribe the *prima facie* inferences to be drawn from circumstantial evidence. It was the substance of the crime to establish which the presumption was invoked that gave a forbidden aspect to that method of short-cutting the road to conviction. The decision striking down both sections was not, as the Supreme Court of Florida thought, a casual and unconsidered use of the plural. Mr. Justice Byrnes knew whereof he spoke; unconstitutionality inhered in the substantive quite as much as in the procedural section and no part of the invalid statute could be separated to be salvaged. Where in the same substantive context the State threatens by statute to convict on a presumption, its inherent coercive power is such that we are constrained to hold that it is equally useful in attempts to enforce involuntary service in discharge of a debt, and the whole is invalid.

It is true that in each opinion dealing with statutes of this type this Court has expressly recognized the right of the state to punish fraud, even in matters of this kind, by statutes which do not either in form or in operation lend themselves to sheltering the practice of peonage. Deceit is not put beyond the

power of the state because the cheat is a laborer nor because the device for swindling is an agreement to labor. But when the state undertakes to deal with this specialized form of fraud, it must respect the constitutional and statutory command that it may not make failure to labor in discharge of a debt any part of a crime. It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for.

From what we have said about the practical considerations which are relevant to the inquiry whether any particular state act conflicts with the Antipeonage Act of 1867 because it is one by which "any attempt shall hereafter be made to establish, maintain or enforce" the prohibited servitude, it is apparent that we should not pass on hypothetical acts. Reservation of the question of the validity of an act unassociated with a presumption now, as heretofore, does not denote approval. The Supreme Court of Florida has held such an act standing alone unconstitutional. A considerable recorded experience would merit examination in relation to any specific labor fraud act. We do not enter upon the inquiry further than the Act before us.

Another matter deserves notice. In *Bailey v. Alabama* it was observed that the law of that state did not permit the prisoner to testify to his uncommunicated intent, which handicapped him in meeting the presumption. In *Taylor v. Georgia*, the prisoner could not be sworn, but could and did make a statement to the jury. In this Florida case appellee is under neither disability, but is at liberty to offer his sworn word as against presumptions. These distinctions we think are without consequence. As Mr. Justice Byrnes said in *Taylor v. Georgia*, the effect of this disability "was simply to accentuate the harshness of an otherwise invalid statute."

We impute to the Legislature no intention to oppress, but we are compelled to hold that the Florida Act of 1919 as brought forward on the statutes as §§ 817.09 and 817.10 of the Statutes of 1941 are, by virtue of the Thirteenth Amendment and the Antipeonage Act of the United States, null and void. The judgment of the court below is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

1.2 Employer Control

Private Government

Elizabeth Anderson (2017)

Most workers in the United States are governed by … dictatorships in their work lives. Usually, those dictatorships have the legal authority to regulate workers' off-hour lives as well—their political activities, speech, choice of sexual partner, use of recreational drugs, alcohol, smoking, and exercise. Because most employers exercise this off-hours authority irregularly, arbitrarily, and without warning, most workers are unaware of how sweeping it is. Most believe, for example, that their boss cannot fire them for their off-hours Facebook postings, or for supporting a political candidate their boss opposes. Yet only about half of U.S. workers enjoy even partial protection of their off-duty speech from employer meddling. Far fewer enjoy legal protection of their speech on the job, except in narrowly defined circumstances. Even where they are entitled to legal protection, as in speech promoting union activity, their legal rights are often a virtual dead letter due to lax enforcement: employers determined to keep out unions immediately fire any workers who dare mention them, and the costs of litigation make it impossible for workers to hold them accountable for this.

Employees are pervasively subject to private government, as I have defined it. Why is this so? As far as the legal authority of the employer to govern employees was concerned, the Industrial Revolution did not mark a significant break. Legally speaking employers have always been authoritarian rulers, as an extension of their patriarchal rights to govern their households.

The Industrial Revolution moved the primary site of paid work from the household to the factory. In principle, this could have been a liberating moment, insofar as it opened the possibility of separating the governance of the workplace from the governance of the home. Yet industrial employers retained their legal entitlement to govern their employees' domestic lives. In the early twentieth century, the Ford Motor Company established a Sociological Department, dedicated to inspecting employees' homes unannounced, to ensure that they were leading orderly lives. Workers were eligible for Ford's famous

$5 daily wage only if they kept their homes clean, ate diets deemed healthy, abstained from drinking, used the bathtub appropriately, did not take in boarders, avoided spending too much on foreign relatives, and were assimilated to American cultural norms.

Workers today might breathe a sigh of relief, except that most are still subject to employer governance of their private lives. In some cases, this is explicit, as in employer-provided health insurance plans. Under the Affordable Care Act (ACA), employers may impose a 30 percent premium penalty on covered workers if they do not comply with employer-imposed wellness programs, which may prescribe exercise programs, diets, and abstinence from alcohol and other substances. In accordance with this provision, Penn State University recently threatened to impose a $100 per month surcharge on workers who did not answer a health survey that included questions about their marital situation, sexual conduct, pregnancy plans, and personal finances. In other cases, employer authority over workers' off-duty lives is implicit, a by-product of the employment-at-will rule: since employers may fire workers for any or no reason, they may fire them for their sexual activities, partner choice, or any other choice workers think of as private from their employer, unless the state has enacted a law specifically forbidding employer discrimination on these grounds. Workplace authoritarianism is still with us.

The pro-market egalitarian aspiration toward nearly universal self-employment aimed to liberate workers from such governance by opening opportunities for nearly everyone to become their own boss. Why did it fail? Why are workers subject to dictatorship? Within economics, the theory of the firm is supposed to answer this question. It purports to offer politically neutral, technical, economic reasons why most production is undertaken by hierarchical organizations, with workers subordinate to bosses, rather than by autonomous individual workers. The theory of the firm contains important insights into the organization of production in advanced economies. However, it fails to explain the sweeping scope of authority that employers have over workers. What is worse, its practitioners sometimes even deny that workers lie under the authority of their bosses, in terms that reflect and reinforce an illusion of workers' freedom that also characterizes much of public discourse. Both the theory of the firm, and public discourse, are missing an important reality: that workers are subject to their employers' private government.

The pro-market egalitarian dream failed in part due to economies of scale. The technological changes that drove the Industrial Revolution involved huge concentrations of capital. A steam-powered cotton mill, steel foundry, cement or chemical factory, or railway must be worked by many hands. The case is no different for modern workplaces such as airports, hospitals, pharmaceutical labs, and computer assembly factories, as well as lower-tech workplaces such as amusement parks, slaughterhouses, conference hotels, and big-box retail stores. The greater efficiency of production using large, indivisible capital inputs explains why few individual workers can afford to supply their own capital. It explains why, contrary to the pro-market egalitarian hope, the enterprises responsible for most production are not sole proprietorships.

But economies of scale do not explain why production is not managed by independent contractors acting without external supervision, who rent their capital. One could imagine a manufacturing enterprise renting its floor space and machinery and supplying materials to a set of self-employed independent contractors. Each contractor would produce a part or stage of the product for sale to contractors at the next stage of production. The final contractor would sell the finished product to wholesalers, or perhaps back to the capital supplier. Some New England factories operated on a system like this from the Civil War to World War I. They were superseded by hierarchically organized firms. According to the theory of the firm, this is due to the excessive costs of contracting between suppliers of factors of production. In the failed New England system, independent contractors faced each other in a series of bilateral monopolies, which led to opportunistic negotiations. The demand to periodically renegotiate rates led contractors to hoard information and delay innovation for strategic reasons. Independent contractors wore out the machinery too quickly, failed to tightly coordinate their production with workers at other stages of production (leading to excess inventory of intermediate products), and lacked incentives to innovate, both with respect to saving materials and with respect to new products.

The modern firm solves these problems by replacing contractual relations among workers, and between workers and owners of other factors of production, with centralized authority. A manager, or hierarchy of managers, issues orders to workers in pursuit of centralized objectives. This enables close coordination of different workers and internalizes the

benefits of all types of innovation within the firm as a whole. Managers can monitor workers to ensure that they work hard, cooperate with fellow workers, and do not waste capital. Because they exercise open-ended authority over workers, they can redeploy workers' efforts as needed to implement innovations, replace absentees, and deal with unforeseen difficulties. Authority relations eliminate the costs associated with constant negotiation and contracting among the participants in the firm's production. To put the point another way, the key to the superior efficiency of hierarchy is the open-ended authority of managers. It is impossible to specify in advance all of the contingencies that may require an alteration in an initial understanding of what a worker must do. Efficient employment contracts are therefore necessarily incomplete: they do not specify precisely everything a worker might be asked to do.

While this theory explains why firms exist and why they are constituted by hierarchies of authority, it does not explain the sweeping scope of employers' authority over workers in the United States. It does not explain, for example, why employers continue to have authority over workers' off-duty lives, given that their choice of sexual partner, political candidate, or Facebook posting has nothing to do with productive efficiency. Even worse, theorists of the firm appear not to even recognize how authoritarian firm governance is. Major theorists soft-pedal or even deny the very authority they are supposed to be trying to explain.

Consider Ronald Coase, the originator of the theory of the firm. He acknowledges that firms are "islands of conscious power." The employment contract is one in which the worker "agrees to obey the directions of an entrepreneur." But, he insists, "the essence of the contract is that it should only state the limits to the powers of the entrepreneur." This suggests that the limits of the employer's powers are an object of negotiation or at least communication between the parties. In the vast majority of cases, outside the contexts of collective bargaining or for higher-level employees, this is not true. Most workers are hired without any negotiation over the content of the employer's authority, and without a written or oral contract specifying any limits to it. If they receive an employee handbook indicating such limits, the inclusion of a simple disclaimer (which is standard practice) is sufficient to nullify any implied contract exception to at-will employment in most states. No wonder they are shocked and outraged when their

boss fires them for being too attractive, for failing to show up at a political rally in support of the boss's favored political candidate, even because their daughter was raped by a friend of the boss.

What, then, determines the scope and limits of the employer's authority, if it is not a meeting of minds of the parties? The state does so, through a complex system of laws—not only labor law, but laws regulating corporate governance, workplace safety, fringe benefits, discrimination, and other matters. In the United States, the default employment contract is employment-at-will. There are a few exceptions in federal law to this doctrine, notably concerning discrimination, family and medical leave, and labor union activity. For the most part, however, at-will employment, which entitles employers to fire workers for any or no reason, grants the employer sweeping legal authority not only over workers' lives at work but also over their off-duty conduct. Under the employment-at-will baseline, workers, in effect, cede all of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship. Employers' authority over workers, outside of collective bargaining and a few other contexts, such as university professors' tenure, is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal. The state has established the constitution of the government of the workplace: it is a form of private government.

Resistance to recognizing this reality appears to be widespread among theorists of the firm. Here, for example, is what Armen Alchian and Harold Demsetz say in their classic paper on the subject:

> *It is common to see the firm characterized by the power to settle issues by fiat, by authority, or by disciplinary action. . . . This is delusion. The firm . . . has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people. I can "punish" you only by withdrawing future business or by seeking redress in the courts for any failure to honor our exchange agreement. That is exactly all that any employer can do. He can fire or sue, just as I can fire my grocer by stopping purchases from him or sue him for delivering faulty products. What then is the content of the presumed power to manage and assign workers to various tasks? Exactly the same as one little consumer's power to manage and assign his grocer to various tasks. . . . To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties. Telling an employee to type this letter rather than to file that document is like telling a grocer to sell me this brand of tuna rather than that brand of bread. I have no contract to continue to purchase from the grocer and neither the employer nor the employee is bound by any contractual obligations to continue their relationship.*

Alchian and Demsetz appear to be claiming that wherever individuals are free to exit a relationship, authority cannot exist within it. This is like saying that Mussolini was not a dictator, because Italians could emigrate. While emigration rights may give governors an interest in voluntarily restraining their power, such rights hardly dissolve it.

Alternatively, their claim might be that where the only sanctions for disobedience are exile, or a civil suit, authority does not exist. That would come as a surprise to those subject to the innumerable state regulations that are backed only by civil sanctions. Nor would a state regulation lack authority if the only sanction for violating it were to force one out of one's job. Finally, managers have numerous other sanctions at their disposal besides firing and suing: they can and often do demote employees; cut their pay; assign them inconvenient hours or too many or too few hours; assign them more dangerous, dirty, menial, or grueling tasks; increase their pace of work; set them up to fail; and, within very broad limits, humiliate and harass them.

Perhaps the thought is that where consent mediates the relationship between the parties, the relationship cannot be one of subordination to authority. That would be a surprise to the entire social contract tradition, which is precisely about how the people can consent to government. Or is the idea that authority exists only where subordinates obey orders blindly and automatically? But then it exists hardly anywhere. Even the most repressive regimes mostly rely on means besides sheer terror and brainwashing to elicit compliance with their orders, focusing more on persuasion and rewards.

Alchian and Demsetz may be hoodwinked by the superficial symmetry of the employment contract: under employment-at-will, workers, too, may quit for any or no reason. This leads them to represent quitting as equivalent to firing one's boss. But workers have no power to remove the boss from his position within the firm. And quitting often imposes even greater costs on workers than being fired does, for it makes them ineligible for unemployment insurance. It is an odd kind of countervailing power that workers supposedly have to check their bosses' power, when they typically suffer more from imposing it than they would suffer from the worst sanction bosses can impose on them. Threats, to be effective, need to be credible.

The irony is that Alchian and Demsetz are offering a theory of the firm. The question the theory is supposed to answer is why production is not handled entirely by market transactions among independent, self-employed people, but rather by authority relations. That is, it is supposed to explain why the hope of pro-market pre–Industrial Revolution egalitarians did not pan out. Alchian and Demsetz cannot bear the full authoritarian implications of recognizing the boundary between the market and the firm, even in a paper devoted to explaining it. So they attempt to extend the metaphor of the market to the internal relations of the firm and pretend that every interaction at work is mediated by negotiation between managers and workers. Yet the whole point of the firm, according to the theory, is to eliminate the costs of markets—of setting internal prices via negotiation over every transaction among workers and between workers and managers.

Alchian and Demsetz are hardly alone. Michael Jensen and William Meckling agree with them that authority has nothing to do with the firm; it is merely a nexus of contracts among independent individuals. John Tomasi, writing today, continues to promote the image of employees as akin to independent contractors, freely negotiating the terms of their contract with their employers, to obtain work conditions tailor-made to their idiosyncratic specifications. While workers at the top of the corporate hierarchy enjoy such freedom, as well as a handful of elite athletes, entertainers, and star academics, Tomasi ignores the fact that the vast majority of workers not represented by unions do not negotiate terms of the employer's authority at all. Why would employers bother, when, by state fiat, workers automatically cede all liberties not reserved to them by the state, upon accepting an offer of work?

Not just theorists of the firm, but public discourse too, tend to represent employees as if they were independent contractors. This makes it seem as if the workplace is a continuation of arm's-length market transactions, as if the labor contract were no different from a purchase from Smith's butcher, baker, or brewer. Alchian and Demsetz are explicit about this, in drawing the analogy of the employment relation with the customer–grocer relation. But the butcher, baker, and brewer remain independent from their customers after selling their goods. In the employment contract, by contrast, the workers cannot separate themselves from the labor they have sold; in purchasing command over labor, employers purchase command over people.

What accounts for this error? The answer is, in part, that a representation of what egalitarians hoped market society would deliver for workers before the Industrial Revolution has been blindly carried over to the post–Industrial Revolution world. People continue to deploy the same justification of market society—that it would secure the personal independence of workers from arbitrary authority—long after it failed to deliver on its original aspiration. The result is a kind of political hemiagnosia: like those patients who cannot perceive one-half of their bodies, a large class of libertarian-leaning thinkers and politicians, with considerable public following, cannot perceive half of the economy: they cannot perceive the half that takes place beyond the market, after the employment contract is accepted.

Hemiagnosia, also known as hemispatial neglect, is a neuropsychologial condition, resulting from brain damage after a stroke or injury, in which a person loses awareness of objects and stimuli on one side of their body. Oliver Sacks described one such case in his book, *The Man Who Mistook His Wife for a Hat*.

This tendency was reinforced by a narrowing of egalitarian vision in the transition to the Industrial Revolution. While the Levellers and other radicals of the mid-seventeenth century agitated against all kinds of arbitrary government, Thomas Paine mainly narrowed his critique to state abuses. Similarly, the Republican Party kept speaking mainly on behalf of the interests of businesspeople and those who hoped to be in business for themselves, even after it was clear that the overwhelming majority of workers had no realistic prospect of attaining this status, and that the most influential businesspeople were not, as Lincoln hoped, sole proprietors (with at most a few employees, the majority of whom were destined to rise to self-employed status after a few years), but managers in large organizations, governing workers destined to be wage laborers for their entire working lives. Thus, a political agenda that once promised equalizing as well as liberating outcomes turned into one that reinforced private, arbitrary, unaccountable government over the vast majority.

Finally, nineteenth-century laissez-faire liberals, with their bizarre combination of hostility toward state power and enthusiasm for hyperdisciplinary total institutions, attempted to reconcile these contradictory tendencies by limiting their focus to the entry and exit conditions of the labor contract, while blackboxing what actually went on in the factories. In fact, they did drive a dramatic improvement in workers' freedom of entry and exit. Under the traditional common law of master and servant, employees were bound to their employers by contracts of one year (apprentices and indentured servants for longer), could quit before then only on pain of losing all their accrued wages, and were not entitled to

keep wages from moonlighting. Other employers were forbidden to bid for their labor while they were still under contract. Workers were liberated from these constraints over the course of the nineteenth century.

This liberation, as is well-known, was a double-edged sword. Employers, too, were liberated from any obligation to employ workers. As already noted, the worst the workers could do to the boss often involved suffering at least as much as the worst the boss could do to them. For the bulk of workers, who lived at the bottom of the hierarchy, this was not much of a threat advantage, unless it was exercised collectively in a strike. They had no realistic hope under these conditions for liberation from workplace authoritarianism.

No wonder a central struggle of British workers in the mid-nineteenth century was for limits on the length of the working day—even more than for higher wages. This was true, even though workers at this period of the Industrial Revolution were suffering through "Engels's pause"—the first fifty to sixty years of the Industrial Revolution during which wages failed to grow. My focus, like theirs, is not on issues of wages or distributive justice. It is on workers' freedom. If the Industrial Revolution meant they could not be their own bosses at work, at least they could try to limit the length of the working day so that they would have some hours during which they could choose for themselves, rather than follow someone else's orders.

That was an immediate aim of European workers' movements in the mid-nineteenth century. As the century unfolded, workers largely abandoned their pro-market, individualistic egalitarian dream and turned to socialist, collectivist alternatives—that is, to restructuring the internal governance of the workplace. The problem was that the options open to workers consisted almost exclusively of private governments. Laissez-faire liberals, touting the freedom of the free market, told workers: choose your Leviathan. That is like telling the citizens of the Communist bloc of Eastern Europe that their freedom could be secured by a right to emigrate to any country —as long as they stayed behind the Iron Curtain. Population movements would likely have put some pressure on Communist rulers to soften their rule. But why should Leviathan set the baseline against which competition took

place? No liberal or libertarian would be satisfied with a competitive equilibrium set against this baseline, where the choice of state governments is concerned. Workers' movements rejected it for nonstate governments as well.

To their objection, libertarians and laissez-faire liberals had no credible answer. Let us not fool ourselves into supposing that the competitive equilibrium of labor relations was ever established by politically neutral market forces mediated by pure freedom of contract, with nothing but the free play of individuals' idiosyncratic preferences determining the outcome. This is a delusion as great as the one that imagines that the workplace is not authoritarian. Every competitive equilibrium is established against a background assignment of property rights and other rights established by the state. The state supplies the indispensable legal infrastructure of developed economies as a kind of public good, and is needed to do so to facilitate cooperation on the vast scales that characterize today's rich and sophisticated economies. Thus, it is the state that establishes the default constitution of workplace governance. It is a form of authoritarian, private government, in which, under employment-at-will, workers cede all their rights to their employers, except those specifically reserved for them by law.

Freedom of entry and exit from any employment relation is not sufficient to justify the outcome. To see this, consider an analogous case for the law of coverture, which the state had long established as the default marriage contract. Under coverture, a woman, upon marrying her husband, lost all rights to own property and make contracts in her own name. Her husband had the right to confine her movements, confiscate any wages she might earn, beat her, and rape her. Divorce was very difficult to obtain. The marriage contract was valid only if voluntarily accepted by both parties. It was a contract into subjection, entailing the wife's submission to the private government of her husband. Imagine a modification of this patriarchal governance regime, allowing either spouse to divorce at will and allowing any clause of the default contract to be altered by a prenuptial agreement. This is like the modification that laissez-faire liberals added to the private government of the workplace. Women would certainly have sufficient reason to object that their liberties would still not be respected under this modification, in that it preserves a patriarchal baseline, in which men still hold virtually all the cards. It would allow a lucky few to escape subjection to their

husbands, but that is not enough to justify the patriarchal authority the vast majority of men would retain over their wives. Consent to an option within a set cannot justify the option set itself.

I do not claim that private governments at work are as powerful as states. Their sanctioning powers are lower, and the costs of emigration from oppressive private governments are generally lower than the costs of emigration from states. Yet private governments impose a far more minute, exacting, and sweeping regulation of employees than democratic states do in any domain outside of prisons and the military. Private governments impose controls on workers that are unconstitutional for democratic states to impose on citizens who are not convicts or in the military.

The negative liberties most workers enjoy de facto are considerably greater than the ones they are legally entitled to under their employers. Market pressures, social norms, lack of interest, and simple decency keep most employers from exercising the full scope of their authority. We should care nevertheless about the insecurity of employees' liberty. They work in a state of republican unfreedom, their liberties vulnerable to cancellation without justification, notice, process, or appeal. That they enjoy substantially greater negative liberty than they are legally entitled to no more justifies their lack of republican liberty than the fact that most wives enjoyed greater freedoms than they were legally entitled to justified coverture—or even coverture modified by free divorce.

Suppose people find themselves under private government. This is a state of republican unfreedom, of subjection to the arbitrary will of another. It is also usually a state of substantial constraints on negative liberty. By what means could people attain their freedom? One way would be to end subjection to government altogether. When the government is a state, this is the anarchist answer. We have seen that when the government is an employer, the answer of many egalitarians before the Industrial Revolution was to advance a property regime that promotes self-employment, perhaps even to make self-employment a nearly universally accessible opportunity, at least for men. This amounts to promoting anarchy as the primary form of workplace order.

The theory of the firm explains why this approach cannot preserve the productive advantages of large-scale production. Some kind of incompletely specified authority over groups of workers is needed to replace market relations within the firm. However, the theory of the firm, although it explains the necessity of hierarchy, neither explains nor justifies private government in the workplace. That the constitution of workplace government is both arbitrary and dictatorial is not dictated by efficiency or freedom of contract, but rather by the state. Freedom of contract no more explains the equilibrium workplace constitution than freedom to marry explained women's subjection to patriarchy under coverture.

In other words, in the great contest between individualism and collectivism regarding the mode of production, collectivism won, decisively. Now nearly all production is undertaken by teams of workers using large, indivisible forms of capital equipment held in common. The activities of these teams are governed by managers according to a centralized production plan. This was an outcome of the Industrial Revolution, and equally much embraced by capitalists and socialists. That advocates of capitalism continue to speak as if their preferred system of production upholds "individualism" is simply a symptom of institutional hemiagnosia, the misdeployment of a hopeful preindustrial vision of what market society would deliver as if it described our current reality, which replaces market relations with governance relations across wide domains of production.

Workers in the nineteenth century turned from individualistic to collectivist solutions to workplace governance because they saw that interpersonal authority—governments over groups of workers—was inescapable in the new industrial order. If government is inescapable or necessary for solving certain important problems, the only way to make people free under that government is to make that government a public thing, accountable to the governed. The task is to replace private government with public government.

When the government is a state, we have some fairly good ideas of how to proceed: the entire history of democracy under the rule of law is a series of experiments in how to make the government of the state a public thing, and the people free under the state. These experiments continue to this day.

But what if the government is an employer? Here matters are more uncertain. There are four general strategies for advancing and protecting the liberties and interests of the governed under any type of government: (1) exit, (2) the rule of law, (3) substantive constitutional rights, and (4) voice. Let us consider each in turn.

Exit is usually touted as a prime libertarian strategy for protecting individual rights. By forcing governments to compete for subjects, exit rights put pressure on governments to offer their subjects better deals. "The defense against oppressive hours, pay, working conditions, or treatment is the right to change employers." Given this fact, it is surprising how comfortable some libertarians are with the validity of contracts into slavery, from which exit is disallowed. In their view, freedom of contract trumps the freedom of individuals under government, or even the freedom to leave that government. While contracts into slavery and peonage are no longer valid, other contractual barriers to exit are common and growing. Noncompete clauses, which bar employees from working for other employers in the same industry for a period of years, have spread from technical professions (where nearly half of employees are subject to them) to jobs such as sandwich maker, pesticide sprayer, summer camp counselor, and hairstylist. While employers can no longer hold workers in bondage, they can imprison workers' human capital. California is one of the few states that prohibit noncompete clauses. As the dynamism of its economy proves, such contractual barriers to exit are not needed for economic growth, and probably undermine it. There should be a strong legal presumption against such barriers to exit, to protect workers' freedom to exit their employers' government.

The rule of law is a complex ideal encompassing several protections of subjects' liberties: (a) Authority may be exercised only through laws duly passed and publicized in advance, rather than arbitrary orders issued without any process. (b) Subjects are at liberty to do anything not specifically prohibited by law. (c) Laws are generally applicable to everyone in similar circumstances. (d) Subjects have rights of due process before suffering any sanctions for noncompliance. Not all of these protections, which were devised with state authority in mind, can be readily transferred to the employment context. Most of the solutions to problems the state must address involve regulations that leave open to individuals a vast array of options for selecting both ends and means. By contrast, efficient production nearly

always requires close coordination of activities according to centralized objectives, directed by managers exercising discretionary authority. This frequently entails that the authority of managers over workers be both intensive (limiting workers to highly particular movements and words, not allowing them to pursue their own personal objectives at work or even to select their own means to a prescribed end) and incompletely specified. The state imposes traffic laws that leave people free to choose their own destinations, routes, and purposes. Walmart tells its drivers what they have to pick up, when and where they have to deliver it, and what route they have to take. In addition, managers need incompletely specified authority to rapidly reassign different tasks to different workers to address new circumstances. Finally, excessively costly procedural protections against firing also discourage hiring. All these obstacles to applying rule-of-law protections in the workplace empower employers to abuse their authority, subject workers to humiliating treatment, and impose excessive constraints on their freedom.

At the same time, it is easy to exaggerate the obstacles to imposing rule-of-law protections at work. Larger organizations generally have employee handbooks and standard practice guides that streamline authority along legalistic lines. Equal protection and due process rights already exist for workers in larger organizations with respect to limited issues. A worker who has been sexually harassed by her boss normally has recourse to intrafirm procedures for resolving her complaint. Such protections reflect a worldwide "blurring of boundaries" among business, nonprofit, and state organizations, which appears to be driven not simply by legal changes, but by cultural imperatives of scientific management and ideas of individual rights and organizational responsibilities. Some but not all of these managerial developments are salutary. They are proper subjects of investigation for political theory, once we get beyond the subject's narrow focus on the state.

A just workplace constitution should incorporate basic constitutional rights, akin to a bill of rights against employers. To some extent, the Fair Labor Standards Act, anti-discrimination laws, and other workplace regulations already serve this function. A workers' bill of rights could be strengthened by the addition of more robust protections of workers' freedom to engage in off-duty activities, such as exercising their political rights, free speech, and sexual choices. Similar protections for employee privacy could be

extended in the workplace during work breaks. The Occupational Safety and Health Administration (OSHA) prohibitions of particularly degrading, dangerous, and onerous working conditions can be viewed as part of a workers' bill of rights. Nabisco once threatened its female production line workers with three-day suspensions for using the bathroom, and ordered them to urinate in their clothes instead. It was only in 1998 that OSHA issued a regulation requiring employers to recognize workers' right to use a bathroom, after cases such as Nabisco's aroused public outrage. Workers in Europe are protected from harassment of all kinds by anti-mobbing laws. This gives them far more robust workplace constitutional rights than workers in the United States, who may be legally harassed as long as their harassers do not discriminate by race, gender, or other protected identities in choosing their victims.

There are limits, however, to how far a bill of rights can go in protecting workers from abuse. Because they prescribe uniformity across workplaces, they can at best offer a minimal floor. In practice, they are also grossly underenforced for the least advantaged workers. Furthermore, such laws do not provide for worker participation in governance at the firm level. They merely impose limits on employer dictatorship.

For these reasons, there is no adequate substitute for recognizing workers' voice in their government. Voice can more readily adapt workplace rules to local conditions than state regulations can, while incorporating respect for workers' freedom, interests, and dignity. Just because workplace governance requires a hierarchy of offices does not mean that higher officeholders must be unaccountable to the governed, or that the governed should not play any role in managerial decision-making. In the United States, two models for workers' voice have received the most attention: workplace democracy and labor unions. Workplace democracy, in the form of worker-owned and -managed firms, has long stood as an ideal for many egalitarians. While much could be done to devise laws more accommodating of this structure, some of its costs may be difficult to surmount. In particular, the costs of negotiation among workers with asymmetrical interests (for example, due to possession of different skills) appear to be high.

In the United States, collective bargaining has been the primary way workers have secured voice within the government of the workplace. However, even at its peak in 1954, only 28.3 percent of workers were represented by a labor union. Today, only 11.1 percent of all workers and 6.6 percent of private sector workers are represented. Although laws could be revised to make it easier for workers to organize into a union, this does not address difficulties inherent to the U.S. labor union model. The U.S. model organizes workers at the firm level rather than the industry level. Firms vigorously resist unionization to avoid a competitive disadvantage with non-unionized firms. Labor unions also impose inefficiencies due to their monopoly power. They also take an adversarial stance toward management—one that makes not only managers but also many workers uncomfortable. At the same time, they often provide the only effective voice employees have in workplace governance.

It is possible to design a workplace constitution in which workers have a non-adversarial voice in workplace governance, without raising concerns about monopolization. The overwhelming majority of workers in the United States would like to have such a voice: 85 percent would like firm governance to be "run jointly" by management and workers. In the United States, such a constitution is illegal under the National Labor Relations Act, which prohibits company unions. Yet this structure is commonplace in Europe. Germany's system of codetermination, begun in the Weimar era and elaborately developed since World War II, offers one highly successful model.

It is not my intention in this lecture to defend any particular model of worker participation in firm governance. My point is rather to expose a deep failure in current ways of thinking about how government fits into Americans' lives. We do not live in the market society imagined by Paine and Lincoln, which offered an appealing vision of what a free society of equals would look like, combining individualistic libertarian and egalitarian ideals. Government is everywhere, not just in the form of the state, but even more pervasively in the workplace. Yet public discourse and much of political theory pretends that this is not so. It pretends that the constitution of workplace government is somehow the object of voluntary negotiation between workers and employers. This is true only

for a tiny proportion of privileged workers. The vast majority are subject to private, authoritarian government, not through their own choice, but through laws that have handed nearly all authority to their employers.

Workman v. United Parcel Service, Inc.

234 F.3d 998 (7th Cir. 2000)

Posner, Circuit Judge

This is a diversity suit, governed by Indiana law and resolved in favor of the defendant on summary judgment, for breach of contract and promissory estoppel. The plaintiff is an employee of UPS who claims that the company made a binding promise not to demote him without just cause and broke its promise. [...]

On the merits, the plaintiff relies for both his contractual claim and his claim of promissory estoppel on a handbook that UPS gives its employees explaining its employment policies. Under the law of many states, such a handbook can create a binding contract if it contains clear promissory language that makes the handbook an offer that the employee accepts by continuing to work after receiving it. Indiana has yet to decide whether to follow these states. We need not speculate about whether it will. Even if we assume it will, and even if the UPS handbook could, as we doubt, be interpreted to contain a clear promise not to demote an employee except for cause, the plaintiff's contractual claim is extinguished by the statement in the handbook that "this Policy Book is not a contract of employment and does not affect your rights as an employee of UPS."

Such a disclaimer, if clear and forthright, as it is here [...], is a complete defense to a suit for breach of contract based on an employee handbook. [...] Since an employer is under no legal obligation to furnish its employees with a statement of its employment policies, we cannot think of a basis for holding that any statement it does give them has to be legally binding. The only effect of such a rule would be to extinguish employee handbooks.

We are mindful of cases that hold [...] that it is not enough for the handbook to disclaim creating an employment contract; it must state in addition that the employee can be terminated at the will of the employer. [...]

The decisions that refuse to give effect to the short-form disclaimer strike us as paternalistic in the extreme. Employment at will is the norm in the United States. An employee therefore has no reason to presume that he has tenure, and a disclaimer that a handbook creates a contract is a clear statement that if he is fired he can't sue for breach of contract. What more is needed? But there was more here, enough more perhaps to satisfy the courts that rendered the decisions we just cited: the statement that the handbook gives the employee no rights.

One might wonder what function an employee handbook serves if it does not create enforceable obligations. The answer is that it conveys useful information to the employee. And more—for to the extent that it does contain promises, even if not legally binding ones, it places the employer under a moral obligation, or more crassly gives him a reputational incentive, to honor those promises. Such promises may not be worth as much to the promisee as a promise that the law enforces, but they are worth more than nothing, and it is nothing that the employee can expect if employers must choose between nothing and giving up employment at will.

A disclaimer that is effective against a claim of breach of contract is also effective, we believe, against a claim of promissory estoppel. The function of the doctrine of promissory estoppel is to provide an alternative basis to consideration for making promises legally enforceable. A promise can be legally binding because it is supported by consideration or because it induces reasonable reliance, but in either case the promisor is free by a suitable disclaimer to deny any legally binding effect to the promise. To put this differently, consideration or reliance is a necessary but not a sufficient condition of the enforceability of a promise. Another necessary condition is that the promise be worded consistently with its being intended to be enforceable. Because of the disclaimer, that condition was not fulfilled in this case.

2. Labor Organizing & Collective Bargaining

2.1 Collective Action as an Illegal Conspiracy

Commonwealth v. Pullis (Phila. 1806)

3 Doc. Hist. of Am. Ind. Soc. 59 (2d ed. Commons 1910)

Indictment for common law conspiracy, tried before a jury consisting of two inn-keepers, a tavern-keeper, three grocers, a merchant, a hatter, a tobacconist, a watchmaker, a tailor, a bottler.

The indictment charged in substance:

(1) That defendants conspired and agreed that none of them would work at the shoemaking craft except at certain specified prices higher than prices which had theretofore customarily been paid;

(2) that defendants conspired and agreed that they would endeavor to prevent "by threats, menaces, and other unlawful means" other craftsmen from working except at said specified rates; and (3) that defendants, having formed themselves into an association, conspired and agreed that none of them would work for any master who should employ a cordwainer who had broken any rule or bylaw of the association, and that defendants, in accordance with such agreement refused to work at the usual rates and prices.

Cordwainer is an archaic term for a shoemaker.

Counsel for the prosecution were Jared Ingersol and Joseph Hopkinson. Counsel for the defendants were Caesar A. Rodney and Walter Franklin. During his address to the jury, Joseph Hopkinson, for the prosecution, stated, among other things, the following:

Summary of the Prosecution's Case

If the court and jury shall decide, that journeymen may associate together, and determine that none shall work under certain prices; then, when orders arrive for considerable quantities of any article, the association may determine to

raise the wages, and reduce the contracts to diminish their profit; to sustain a loss, or to abandon the execution of the orders, as was done in Bedford's case, who told you he could have afforded to execute the orders he obtained at the southward, had wages remained the same as when he left Philadelphia. When they found he had a contract, they took advantage of his necessity. What was done by the journeymen shoemakers, may be done by those of every other trade, or manufacturer in the city A few more things of this sort, and you will break up the manufactories; the masters will be afraid to make a contract, therefore he must relinquish the export trade, and depend altogether upon the profits of the work of Philadelphia, and confine his supplies altogether to the city. The last turn-out had liked to have produced that effect: Mr. Ryan told you he had intended to confine himself to bespoke work.

It must be plain to you, that the master employers have no particular interest in the thing ... if they pay higher wages, you must pay higher for the articles. They, in truth, ate protecting the community. Nor is it merely the advance of wages that increases the price to the consumer, the master must have some compensation for the advance of his cash, and the credit he frequently gives. They have no interest to serve in the prosecution; they have no vindictive passions to gratify ... they merely stand as the guardians of the community from imposition and rapacity.

If this conspiracy was to be confined to the person themselves, it would not be an offense against the law, but they go further. There are two counts in the indictment; you are to consider each, and give your verdict on each. The first is for contriving, and intending, unjustly and oppressively, to encrease and augment the wages usually allowed them. The other for endeavouring to prevent, by threats, menaces, and other unlawful means, other journeymen from working at the usual prices, and that they compelled others to join them.

If these persons claim the right to put the price on their own work, if they say their labour is their own, and they are the judges of its value, why not admit the same right to others? If it is the right of Dubois, and the other defendants, is it not equally the right of Hattison and Cummings? We stand up for the right of the journeymen, as well as of the masters. The last

turn-out was called by a small majority ... 60 against 50, or thereabout: shall 60 unreasonable men, perhaps single men, having no one to provide for but themselves, distress and bring to destruction 50 married men with their families?

Let the 60 put what price they please on their own work; but the others are free agents also: leave them free, or talk no more of equal rights, of independence, or of liberty.

It may be answered, that when men enter into a society they are bound to conform to its rules; they may say, the majority ought to govern the minority ... granted ... but they ought to leave a man free to join, or not to join the society. If I go into a country I am bound to submit to its laws, but surely I may judge, "whether or not I will go there. The society has no right to force you into its body, and then say you shall obey its rules under severe penalties. By their constitution you find, and from their own lips I must take the words, that though a man wants no more wages than he gets, he must join in a turn-out. The man who seeks an asylum in this country, from the arbitrary laws of other nations, is coerced into this society, though he does not work In the article intended to be raised; he must leave his seat and join the turnout.

Turnout is an archaic word for a labor strike.

Recorder Levy, in his charge to the jury, made the following statements, among others:

It is proper to consider, is such a combination consistent with the principles of our law, and injurious to the public welfare? The usual means by which the prices of work are regulated, are the demand for the article and the excellence of its fabric. Where the work is well done, and the demand is considerable, the prices will necessarily be high. Where the work is ill done, and the demand is inconsiderable, they will unquestionably be low. If there are many to consume, and few to work, the price of the article will be high; but if there are few to consume, and many to work, the article must be low.

Much will depend, too, upon these circumstances, whether the materials are plenty or scarce; the price of the commodity, will in consequence be higher or lower. These are the means by which prices are regulated in the natural course of things. To make an artificial regulation, is not to regard the excellence of the work or quality of the material, but to fix a positive and arbitrary price, governed by no standard, controlled by no impartial person, but dependent on the will of the few who are interested; this is the unnatural way of raising the price of goods or work. This is independent of the number who are to

do the work. It is an unnatural, artificial means of raising the price of work beyond its standard, and taking an undue advantage of the public. Is the rule of law bottomed upon such principles, as to permit or protect such conduct?

Consider it on the footing of the general commerce of the city. Is there any man who can calculate (if this is tolerated) at what price he may safely contract to deliver articles, for which he may receive orders, if he is to be regulated by the journeymen in an arbitrary jump from one price to another? It renders it impossible for a man, making a contract for a large quantity of such goods, to know whether he shall lose or gain by it. If he makes a large contract for goods today, for delivery at three, six or nine months hence, can he calculate what the prices will be then, if the journeymen in the intermediate time, are permitted to meet and raise their prices, according to their caprice or pleasure? Can he fix the price of his commodity for a future day? It is impossible that any man can carry on commerce in this way. There cannot be a large contract entered into, but what the contractor will make at his peril. He may be ruined by the difference of prices made by the journeymen in the intermediate time. What then is the operation of this kind of conduct upon the commerce of the city? It exposes it to inconveniences, if not to ruin; therefore, it is against the public welfare.

What is the case now before us? ... A combination of workmen to raise their wages may be considered in a two fold point of view; one is to benefit themselves ...the other is to injure those who do not join their society. The rule of law condemns both. If the rule be clear, we are bound to conform to it even though we do not comprehend the principle upon which it is founded. We are not to reject it because we do not see the reason of it. It is enough, that is the will of the majority. It is law because it is their will—if it is law, there may be good reasons for it though we cannot find them out. But the rule in this case is pregnant with sound sense and all the authorities are clear upon the subject. Hawkins, the greatest authority on the criminal law, has laid it down, that a combination to maintaining one another, carrying a particular object, whether true or false, is criminal... the authority cited does not rest merely upon the reputation of that book. He gives you other authorities to which he refers.

It is adopted by Blackstone, and laid down as the law by Lord Mansfield 1793, that an act innocent in an individual, is rendered criminal by a confederacy to effect it. One man determines not to work under a certain price and it may be individually the opinion of all; in such a case it would" be lawful in each to refuse to do so, for if each stands, alone, either may extract from his determination when he pleases. In the turn-out of last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the price of wages and gone to work; but it has been given to you in evidence, that they were bound down by their agreement, and pledged by mutual engagements, to persist in it, however contrary to their own judgment. The continuance in improper conduct may therefore well be attributed to the combination. The good sense of those individuals was prevented by this agreement, from having its free exercise.

Lord Blackstone was British and the preeminent Anglo-American legal scholar of this era.

The defendants were found guilty and were fined eight dollars each plus costs.

Commonwealth v Hunt

45 Mass. 111 (1842)

Shaw, C.J.

[...] We have no doubt, that by the operation of the constitution of this Commonwealth, the general rules of the common law, making conspiracy an indictable offence, are in force here, and that this is included in the description of laws which had, before the adoption of the constitution, been used and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised in the courts of law. [...] Still, it is proper in this connexion to remark, that although the common law in regard to conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law, in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine, whether the

purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law, or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship–not being adapted to the circumstances of our colonial condition–were not adopted, used or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution already cited. This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this Commonwealth, and show why a conviction in England, in many cases, would not be a precedent for a like conviction here. The *King v. Journeymen Tailors of Cambridge*, 8 Mod. 10, for instance, is commonly cited as an authority for an indictment at common law, and a conviction of journeymen mechanics of a conspiracy to raise their wages. It was there held, that the indictment need not conclude *contra formam statuti*, because the gist of the offence was the conspiracy, which was an offence at common law. At the same time it was conceded, that the unlawful object to be accomplished was the raising of wages above the rate fixed by a general act of parliament. It was therefore a conspiracy to violate a general statute law, made for the regulation of a large branch of trade, affecting the comfort and interest of the public; and thus the object to be accomplished by the conspiracy was unlawful, if not criminal.

"Contrary to the form of the statute", a phrase used in an indictment to indicate that the alleged conduct is criminal because it violates a statute.

But the rule of law, that an illegal conspiracy, whatever may be the facts which constitute it, is an offence punishable by the laws of this Commonwealth, is established as well by legislative as by judicial authority. Like many other cases, that of murder, for instance, it leaves the definition or description of the offence to the common law, and provides modes for its prosecution and punishment. [...]

But the great difficulty is, in framing any definition or description, to be drawn from the decided cases, which shall specifically identify this offence—a description broad enough to include all cases punishable under this description, without including acts which are not punishable. Without attempting to review and reconcile all the cases, we are of opinion, that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two

or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the terms criminal or unlawful, because it is manifest that many acts are unlawful, which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment. Of this character was a conspiracy to cheat by false pretences, without false tokens, when a cheat by false pretences only, by a single person, was not a punishable offence. So a combination to destroy the reputation of an individual, by verbal calumny which is not indictable. So a conspiracy to induce and persuade a young female, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution.

But yet it is clear, that it is not every combination to do unlawful acts, to the prejudice of another by a concerted action, which is punishable as conspiracy. [...]

Several rules upon the subject seem to be well established, to wit, that the unlawful agreement constitutes the gist of the offence, and therefore that it is not necessary to charge the execution of the unlawful agreement. And when such execution is charged, it is to be regarded as proof of the intent, or as an aggravation of the criminality of the unlawful combination.

Another rule is a necessary consequence of the former, which is, that the crime is consummate and complete by the fact of unlawful combination, and, therefore, that if the execution of the unlawful purpose is averred, it is by way of aggravation, and proof of it is not necessary to conviction; and therefore the jury may find the conspiracy, and negative the execution, and it will be good conviction.

And it follows, as another necessary legal consequence, from the same principle, that the indictment must—by averring the unlawful purpose of the conspiracy, or the unlawful means by which it is contemplated and agreed to accomplish a lawful purpose, or a purpose not of itself criminally punishable—set out an offence complete in itself, without the aid of any averment of illegal acts done in pursuance of such an agreement; and that an illegal combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it.

From this view of the law respecting conspiracy, we think it an offence which especially demands the application of that wise and humane rule of the common law, that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged. This is required, to enable the defendant to meet the charge and prepare for his defence, and, in case of acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offence. It is also necessary, in order that a person, charged by the grand jury for one offence, may not substantially be convicted, on his trial, of another. This fundamental rule is confirmed by the Declaration of Rights, which declares that no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him.

From these views of the rules of criminal pleading, it appears to us to follow, as a necessary legal conclusion, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offence, which is intended to be charged, consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood, or other criminal or unlawful means, must be set out in the indictment. Such, we think, is, on the whole, the result of the English authorities, although they are not quite uniform.

With these general views of the law, it becomes necessary to consider the circumstances of the present case, as they appear from the indictment itself, and from the bill of exceptions filed and allowed.

One of the exceptions, though not the first in the order of time, yet by far the most important, was this:

The counsel for the defendants contended, and requested the court to instruct the jury, that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by any specified criminal means, and that the agreements therein set forth did not constitute a conspiracy indictable by any law of this Commonwealth. But the judge refused so to do, and instructed the jury, that the indictment did, in his opinion, describe a confederacy among the defendants to do an unlawful act, and to effect the same by unlawful means; that

the society, organized and associated for the purposes described in the indictment, was an unlawful conspiracy, against the laws of this Commonwealth; and that if the jury believed, from the evidence in the case, that the defendants, or any of them, had engaged in such a confederacy, they were bound to find such of them guilty.

We are here carefully to distinguish between the confederacy set forth in the indictment, and the confederacy or association contained in the constitution of the Boston Journeymen Bootmakers' Society, as stated in the little printed book, which was admitted as evidence on the trial. Because, though it was thus admitted as evidence, it would not warrant a conviction for anything not stated in the indictment. It was proof, as far as it went to support the averments in the indictment. If it contained any criminal matter not set forth in the indictment, it is of no avail. The question then presents itself in the same form as on a motion in arrest of judgment.

The first count set forth, that the defendants, with divers others unknown, on the day and at the place named, being workmen, and journeymen, in the art and occupation of bootmakers, unlawfully, perniciously and deceitfully designing and intending to continue, keep up, form, and unite themselves, into an unlawful club, society and combination, and make unlawful by-laws, rules and orders among themselves, and thereby govern themselves and other workmen, in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did unjustly and corruptly conspire, combine, confederate and agree together, that none of them should thereafter, and that none of them would, work for any master or person whatsoever, in the said art, mystery and occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society or combination, after notice given him to discharge such workman, from the employ of such master; to the great damage and oppression, &c.

Now it is to be considered, that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly to extort great sums, &c.—is mere recital […] and therefore cannot aid an imperfect averment of the facts constituting the description of the offence. The same may be said of the concluding matter, which follows the averment, as to the great damage and oppression

not only of their said masters, employing them in said art and occupation, but also of divers other workmen in the same art, mystery and occupation, to the evil example, &c. If the facts averred constitute the crime, these are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offence, they cannot be aided by these alleged consequences.

Stripped then of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this; that the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman.

The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those, who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretences. It looks at truth and reality, through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement, which makes it so, is to be averred and proved as the gist of the offence. But when an association is formed for purposes actually innocent, and afterwards its powers are abused, by those who have the control and management of it, to purposes of oppression and

injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case, no such secret agreement, varying the objects of the association from those avowed, is set forth in this count of the indictment.

Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is, to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer, who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman, who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skilful but intemperate workman. Still it seems to us, that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy.

From this count in the indictment, we do not understand that the agreement was, that the defendants would refuse to work for an employer, to whom they were bound by contract for a certain time, in violation of that contract; nor that they would insist that an employer should discharge a workman engaged by contract for a certain time, in violation of such contract. It is perfectly consistent with every thing stated in this count, that the effect of the agreement was, that when they were free to act, they would not engage with an employer, or continue in his employment, if such employer, when free to act, should engage with a workman, or continue a workman in his

employment, not a member of the association. If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question. Suppose a farmer, employing a large number of men, engaged for the year, at fair monthly wages, and suppose that just at the moment that his crops were ready to harvest, they should all combine to quit his service, unless he would advance their wages, at a time when other laborers could not be obtained. It would surely be a conspiracy to do an unlawful act, though of such a character, that if done by an individual, it would lay the foundation of a civil action only, and not of a criminal prosecution. It would be a case very different from that stated in this count.

The second count, omitting the recital of unlawful intent and evil disposition, and omitting the direct averment of an unlawful club or society, alleges that the defendants, with others unknown, did assemble, conspire, confederate and agree together, not to work for any master or person who should employ any workman not being a member of a certain club, society or combination, called the Boston Journeymen Bootmaker's Society, or who should break any of their by-laws, unless such workmen should pay to said club, such sum as should be agreed upon as a penalty for the breach of such unlawful rules, &c; and that by means of said conspiracy they did compel one Isaac B. Wait, a master cordwainer, to turn out of his employ one Jeremiah Horne, a journeyman boot-maker, &c. in evil example, &c. So far as the averment of a conspiracy is concerned, all the remarks made in reference to the first count are equally applicable to this. It is simply an averment of an agreement amongst themselves not to work for a person, who should employ any person not a member of a certain association. It sets forth no illegal or criminal purpose to be accomplished, nor any illegal or criminal means to be adopted for the accomplishment of any purpose. It was an agreement, as to the manner in which they would exercise an acknowledged right to contract with others for their labor. It does not aver a conspiracy or even an intention to raise their wages; and it appears by the bill of exceptions, that the case was not put upon the footing of a conspiracy to raise their wages. Such an agreement, as set forth in this count, would be perfectly justifiable under the recent English statute, by which this subject is regulated.

As to the latter part of this count, which avers that by means of said conspiracy, the defendants did compel one Wait to turn out of his employ one Jeremiah Horne, we remark, in the first place, that as the acts done in pursuance of a conspiracy, as we have before seen, are stated by way of aggravation, and not as a substantive charge; if no criminal or unlawful conspiracy is stated, it cannot be aided and made good by mere matter of aggravation. If the principal charge falls, the aggravation falls with it.

But further; if this is to be considered as a substantive charge, it would depend altogether upon the force of the word "compel," which may be used in the sense of coercion, or duress, by force or fraud. It would therefore depend upon the context and the connexion with other words, to determine the sense in which it was used in the indictment. If, for instance, the indictment had averred a conspiracy, by the defendants, to compel Wait to turn Horne out of his employment, and to accomplish that object by the use of force or fraud, it would have been a very different case; especially if it might be fairly construed, as perhaps in that case it might have been, that Wait was under obligation, by contract, for an unexpired term of time, to employ and pay Horne. As before remarked, it would have been a conspiracy to do an unlawful, though not a criminal act, to induce Wait to violate his engagement, to the actual injury of Horne. To mark the difference between the case of a journeyman or a servant and master, mutually bound by contract, and the same parties when free to engage anew, I should have before cited the case of the Boston Glass Co. v. Binney. In that case, it was held actionable to entice another person's hired servant to quit his employment, during the time for which he was engaged; but not actionable to treat with such hired servant, whilst actually hired and employed by another, to leave his service, and engage in the employment of the person making the proposal, when the term for which he is engaged shall expire. It acknowledges the established principle, that every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract. But whatever might be the force of the word "compel," unexplained by its connexion, it is disarmed and rendered harmless by the precise statement of the means, by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled Wait to decline employing Horne longer.

On both of these grounds, we are of opinion that the statement made in this second count, that the unlawful agreement was carried into execution, makes no essential difference between this and the first count.

The third count, reciting a wicked and unlawful intent to impoverish one Jeremiah Horne, and hinder him from following his trade as a boot-maker, charges the defendants, with others unknown, with an unlawful conspiracy, by wrongful and indirect means, to impoverish said Horne and to deprive and hinder him, from his said art and trade and getting his support thereby, and that, in pursuance of said unlawful combination, they did unlawfully and indirectly hinder and prevent, &c. and greatly impoverish him.

If the fact of depriving Jeremiah Horne of the profits of his business, by whatever means it might be done, would be unlawful and criminal, a combination to compass that object would be an unlawful conspiracy, and it would be unnecessary to state the means. Such seems to have been the view of the court in The *King v. Eccles* [...]. The case seems to have gone on the ground, that the means were matter of evidence, and not of averment; and that after verdict, it was to be presumed, that the means contemplated and used were such as to render the combination unlawful and constitute a conspiracy.

Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved, that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition, that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand

other instances, where each strives to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; and as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment. If the same rule were to prevail in criminal, which holds in civil proceedings–that a case defectively stated may be aided by a verdict–then a court might presume, after verdict, that the indictment was supported by proof of criminal or unlawful means to effect the object. But it is an established rule in criminal cases, that the indictment must state a complete indictable offence, and cannot be aided by the proof offered at the trial.

The fourth count avers a conspiracy to impoverish Jeremiah Horne, without stating any means; and the fifth alleges a conspiracy to impoverish employers, by preventing and hindering them from employing persons, not members of the Bootmakers' Society; and these require no remarks, which have not been already made in reference to the other counts.

One case was cited, which was supposed to be much in point, and which is certainly deserving of great respect. But it is obvious, that this decision was founded on the construction of the revised statutes of New York, by which this matter of conspiracy is now regulated. It was a conspiracy by journeymen to raise their wages, and it was decided to be a violation of the statutes, making it criminal to commit any act injurious to trade or commerce. It has, therefore, an indirect application only to the present case.

A caution on this subject, suggested by the commissioners for revising the statutes of New York, is entitled to great consideration. They are alluding to the question, whether the law of conspiracy should be so extended, as to embrace every case where two or more unite in some fraudulent measure to injure an individual, by means not in themselves criminal. "The great difficulty," say they, "in enlarging the definition of this offence, consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud, by compelling a discovery on oath. It is a sound principle of our institutions, that no man shall be compelled to accuse himself of any crime; which ought not to be violated in any case. Yet such must be the result, or the ordinary jurisdiction of courts of equity must be destroyed, by declaring any private fraud, when committed by two, or any concert to commit it, criminal." In New Jersey, in a case which was much considered, it was held that an indictment will not lie for a conspiracy to commit a civil injury. *State v. Rickey*. And such seemed to be the opinion of Lord Ellenborough, in The *King v. Turner*, in which he considered that the case of The *King v. Eccles*, though in form an indictment for a conspiracy to prevent an individual from carrying on his trade, yet in substance was an indictment for a conspiracy in restraint of trade, affecting the public.

It appears by the bill of exceptions, that it was contended on the part of the defendants, that this indictment did not set forth any agreement to do a criminal act, or to do any lawful act by criminal means, and that the agreement therein set forth did not constitute a conspiracy indictable by the law of this State, and that the court was requested so to instruct the jury. This the court declined doing, but instructed the jury that the indictment did describe a confederacy among the defendants to do an unlawful act, and to effect the same by unlawful means–that the society, organized and associated for the purposes described in the indictment, was an unlawful conspiracy against the laws of this State, and that if the jury believed, from the evidence, that the defendants or any of them had engaged in such confederacy, they were bound to find such of them guilty.

In this opinion of the learned judge, this court, for the reasons stated, cannot concur. Whatever illegal purpose can be found in the constitution of the Bootmakers' Society, it not being clearly set forth in the indictment, cannot be relied upon to support this conviction. So if any facts were disclosed at the trial, which, if properly averred, would have given a different

character to the indictment, they do not appear in the bill of exceptions, nor could they, after verdict, aid the indictment. But looking solely at the indictment, disregarding the qualifying epithets, recitals and immaterial allegations, and confining ourselves to facts so averred as to be capable of being traversed and put in issue, we cannot perceive that it charges a criminal conspiracy punishable by law. The exceptions must, therefore, be sustained, and the judgment arrested.

2.2 Labor Injunctions and Yellow Dog Contracts

In the early 20th century, employers turned to a new strategy against organized labor: the Sherman Antitrust Act of 1890, 15 U.S.C. § 1 et seq. The Sherman Act outlawed "conspirac[ies] in restraint of trade or commerce among the several States"; imposed criminal liability for violations; and authorized civil suits with recovery of treble damages and attorney's fees by "any person who shall be injured in his business or property".

The Supreme Court endorsed the application of the Sherman Act against labor union activity in *Loewe v. Lawlor*, 208 U.S. 274 (1908). The case arose out of efforts by the United Hatters of North America (UHU) to organize fur hat workers. The union called for a boycott of manufacturers who refused to recognize and bargain with the union. D. E. Loewe & Company, a manufacturer that resisted the union's demand, sued more than 200 UHU members, alleging that the boycott interfered with the company's sale of hats. The trial court dismissed the suit, concluding that the Sherman Act did not apply to the union's conduct. But Supreme Court reversed, holding that the boycott fell within the prohibition against conspiracies in restraint of interstate commerce.

In 1914, Congress amended federal antitrust law with the Clayton Antitrust Act. In response to concerns about the impact of *Loewe v. Lawlor* on the labor movement, § 6 of the Clayton Act (15 U.S.C. § 17) sought to exempt union activity from antitrust liability:

> *The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.*

But in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), the Supreme Court, interpreting §6 narrowly, held that it did not preclude courts from issuing injunctions against secondary boycotts (i.e. where a union has a dispute with an employer, the "primary" target, and calls for strikes or boycotts of the employer's customers, the "secondary" targets, so that they will cease doing business with the primary target).

Another legal strategy employers used against labor organizing was the "yellow dog" contract, in which employees promised not to join or remain a member of a union. Labor opposition led to the adoption of statutes outlawing yellow dog contracts. But, following *Lochner*, the Supreme Court struck down those statutes as unconstitutional infringements on liberty of contract. *Adair v. United States,* 208 U.S. 161 (1908) (striking down federal statute making it a criminal offense for a railroad to fire an employee because of union membership); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state statute making it a crime for employers to require yellow dog contracts as a condition of employment).

2.3 Legal Protection for Concerted Labor Activity

In the 1930s, the landscape of U.S. labor law changed dramatically with the passage of two federal statutes.

First, the Norris-LaGuardia Act (1932), 29 U.S.C. §§101 et seq., significantly limited the ability of federal courts to issue injuctions in cases involving labor disputes, and declared "yellow dog" contracts unenforceable. Many states followed suit by adopting "Little Norris-LaGuardia Acts" restricting labor injunctions in state court.

Second, the National Labor Relations Act (1935), 29 U.S.C. §§ 151 et seq., enshrined the right of employees to organize and engage in collective bargaining and other concerted activity (§ 7), prohibited unfair labor practices by employers (§ 8), established a framework for union representation based on majority support of employees (§ 9), and created the National Labor Relations Board to administer and enforce the Act (§§ 3-6, 10-11).

The NLRA was subsequently amended by the Labor-Management Relations Act (1947), 29 U.S.C. §§ 141 et seq. The LMRA added prohibitions against unfair labor practices by unions (§ 8(b)). It also authorized states to adopt so-called "right-to-work" laws (§ 14(b)), which prohibit agreements requiring union membership or payment of agency fees as a condition of employment.

Under the NLRA, once a majority of employees within a designated bargaining unit have opted for union representation, the union becomes the exclusive bargaining agent for all employees within the unit. The union owes a duty of fair representation to all bargaining unit employees, regardless of whether or not they are union members. To compensate the union for the expenses incurred in fulfilling its duty of fair representation, the union and employer may (except where prohibited by state law) enter into an agreement requiring bargaining unit employees to either maintain union membership or pay an agency fee.

Even where employees are not represented by a union, NLRA § 7 protects their right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection".

National Labor Relations Act

Section 1—Declaration of Policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2—Definitions

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor

dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

Section 7—Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8—Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or

administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization [...];

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

[...]

(d) Obligation to bargain collectively.

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession […]

Section 9—Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof […].

Section 13—Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

NLRB v. Washington Aluminum

370 U.S. 9 (1962)

MR. JUSTICE BLACK delivered the opinion of the Court.

The Court of Appeals for the Fourth Circuit, with Chief Judge Sobeloff dissenting, refused to enforce an order of the National Labor Relations Board directing the respondent Washington Aluminum Company to reinstate and make whole seven employees whom the company had discharged for leaving their work in the machine shop without permission on claims that the shop was too cold to work in. Because that decision raises important questions affecting the proper administration of the National Labor Relations Act, we granted certiorari.

The Board's order, as shown by the record and its findings, rested upon these facts and circumstances. The respondent company is engaged in the fabrication of aluminum products in Baltimore, Maryland, a business having interstate aspects that subject it to regulation under the National Labor Relations Act. The machine shop in which the seven discharged employees worked was not insulated and had a number of doors to the outside that had to be opened frequently. An oil furnace located in an adjoining building was the chief source of heat for the shop, although there were two gas-fired space heaters that contributed heat to a lesser extent. The heat produced by these units was not always satisfactory and, even prior to the day of the walkout involved here, several of the eight machinists who made up the day shift at the shop had complained from time to time to the company's foreman "over the cold working conditions."

January 5, 1959, was an extraordinarily cold day for Baltimore, with unusually high winds and a low temperature of 11 degrees followed by a high of 22. When the employees on the day shift came to work that morning, they found the shop bitterly cold, due not only to the unusually harsh weather, but also to the fact that the large oil furnace had broken down the night before and had not as yet been put back into operation. As the workers gathered in the shop just before the starting hour of 7:30, one of them, a Mr. Caron, went into the office of Mr. Jarvis, the foreman, hoping to warm himself but, instead, found the foreman's quarters as uncomfortable as the rest of the shop. As Caron and Jarvis sat in Jarvis' office discussing how bitingly cold the building was, some of the other machinists walked by the office window "huddled" together in a fashion that caused

Jarvis to exclaim that "if those fellows had any guts at all, they would go home." When the starting buzzer sounded a few moments later, Caron walked back to his working place in the shop and found all the other machinists "huddled there, shaking a little, cold." Caron then said to these workers, "... Dave [Jarvis] told me if we had any guts, we would go home. ... I am going home, it is too damned cold to work." Caron asked the other workers what they were going to do and, after some discussion among themselves, they decided to leave with him. One of these workers, testifying before the Board, summarized their entire discussion this way: "And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." As they started to leave, Jarvis approached and persuaded one of the workers to remain at the job. But Caron and the other six workers on the day shift left practically in a body in a matter of minutes after the 7:30 buzzer.

When the company's general foreman arrived between 7:45 and 8 that morning, Jarvis promptly informed him that all but one of the employees had left because the shop was too cold. The company's president came in at approximately 8:20 a. m. and, upon learning of the walkout, immediately said to the foreman, "... if they have all gone, we are going to terminate them." After discussion "at great length" between the general foreman and the company president as to what might be the effect of the walkout on employee discipline and plant production, the president formalized his discharge of the workers who had walked out by giving orders at 9 a. m. that the affected workers should be notified about their discharge immediately, either by telephone, telegram or personally. This was done.

On these facts the Board found that the conduct of the workers was a concerted activity to protest the company's failure to supply adequate heat in its machine shop, that such conduct is protected under the provision of § 7 of the National Labor Relations Act which guarantees that "Employees shall have the right ... to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection," and that the discharge of these workers by the company amounted to an unfair labor practice under § 8 (a) (1) of the Act, which forbids employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

[T]he Board then ordered the company to reinstate the discharged workers to their previous positions and to make them whole for losses resulting from what the Board found to have been the unlawful termination of their employment.

In denying enforcement of this order, the majority of the Court of Appeals took the position that because the workers simply "summarily left their place of employment" without affording the company an "opportunity to avoid the work stoppage by granting a concession to a demand," their walkout did not amount to a concerted activity protected by § 7 of the Act On this basis, they held that there was no justification for the conduct of the workers in violating the established rules of the plant by leaving their jobs without permission and that the Board had therefore exceeded its power in issuing the order involved here because § 10 (c) declares that the Board shall not require reinstatement or back pay for an employee whom an employer has suspended or discharged "for cause."

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working conditions in the shop. These had been more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and which it now says the Board should have treated as nothing more than "the same sort of gripes as the gripes made about the beat in the summertime." The bitter cold of January 5, however, finally

brought these workers' individual complaints into concert so that some more effective action could be considered. Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding that they were not required to make any more specific demand than they did to be entitled to the protection of § 7.

Although the company contends to the contrary, we think that the walkout involved here did grow out of a "labor dispute" within the plain meaning of the definition of that term in § 2 (9) of the Act, which declares that it includes "any controversy concerning terms, tenure or *conditions of employment* ... ." The findings of the Board, which are supported by substantial evidence and which were not disturbed below, show a running dispute between the machine shop employees and the company over the heating of the shop on cold days— a dispute which culminated in the decision of the employees to act concertedly in an effort to force the company to improve that condition of their employment. The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. Moreover, the evidence here shows that the conduct of these workers was far from unjustified under the circumstances. The company's own foreman expressed the opinion that the shop was so cold that the men should go home. This statement by the foreman but emphasizes the obvious— that is, that the conditions of coldness about which complaint had been made before had been so aggravated on the day of the walkout that the concerted action of the men in leaving their jobs seemed like a perfectly natural and reasonable thing to do.

Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant. Section 10 (c) of the Act does authorize an employer to discharge employees for "cause" and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained.

It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent, or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities. The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct. Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

We hold therefore that the Board correctly interpreted and applied the Act to the circumstances of this case and it was error for the Court of Appeals to refuse to enforce its order. The judgment of the Court of Appeals is reversed and the cause is remanded to that court with directions to enforce the order in its entirety.

NLRB v. City Disposal Systems

465 U.S. 822 (1984)

JUSTICE BRENNAN delivered the opinion of the Court.

James Brown, a truck driver employed by respondent, was discharged when he refused to drive a truck that he honestly and reasonably believed to be unsafe because of faulty brakes. Article XXI of the collective-bargaining agreement between respondent and Local 247 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which covered Brown, provides:

> *The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified.*

The question to be decided is whether Brown's honest and reasonable assertion of his right to be free of the obligation to drive unsafe trucks constituted "concerted activit[y]" within the meaning of § 7 of the National Labor Relations Act (NLRA or Act). The National Labor Relations Board (NLRB or Board) held that Brown's refusal was concerted activity within § 7, and that his discharge was, therefore, an unfair labor practice under § 8(a)(1) of the Act. The Court of Appeals disagreed and declined enforcement. At least three other Courts of Appeals, however, have accepted the Board's interpretation of "concerted activities" as including the assertion by an individual employee of a right grounded in a collective-bargaining agreement. We granted certiorari to resolve the conflict, and now reverse.

I

The facts are not in dispute in the current posture of this case. Respondent, City Disposal Systems, Inc. (City Disposal), hauls garbage for the city of Detroit. Under the collective-bargaining agreement with Local Union No. 247, respondent's truckdrivers haul garbage from Detroit to a landfill about 37 miles away. Each driver is assigned to operate a particular truck, which he or she operates each day of work, unless that truck is in disrepair.

James Brown was assigned to truck No. 245. On Saturday, May 12, 1979, Brown observed that a fellow driver had difficulty with the brakes of another truck, truck No. 244. As a result of the brake problem, truck No. 244 nearly collided with Brown's

truck. After unloading their garbage at the landfill, Brown and the driver of truck No. 244 brought No. 244 to respondent's truck-repair facility, where they were told that the brakes would be repaired either over the weekend or in the morning of Monday, May 14.

Early in the morning of Monday, May 14, while transporting a load of garbage to the landfill, Brown experienced difficulty with one of the wheels of his own truck — No. 245 — and brought that truck in for repair. At the repair facility, Brown was told that, because of a backlog at the facility, No. 245 could not be repaired that day. Brown reported the situation to his supervisor, Otto Jasmund, who ordered Brown to punch out and go home. Before Brown could leave, however, Jasmund changed his mind and asked Brown to drive truck No. 244 instead. Brown refused, explaining that "there's something wrong with that truck. ... [S]omething was wrong with the brakes ... there was a grease seal or something leaking causing it to be affecting the brakes." Brown did not, however, explicitly refer to Article XXI of the collective-bargaining agreement or to the agreement in general. In response to Brown's refusal to drive truck No. 244, Jasmund angrily told Brown to go home. At that point, an argument ensued and Robert Madary, another supervisor, intervened, repeating Jasmund's request that Brown drive truck No. 244. Again, Brown refused, explaining that No. 244 "has got problems and I don't want to drive it." Madary replied that half the trucks had problems and that if respondent tried to fix all of them it would be unable to do business. He went on to tell Brown that "[w]e've got all this garbage out here to haul and you tell me about you don't want to drive." Brown responded, "Bob, what you going to do, put the garbage ahead of the safety of the men?" Finally, Madary went to his office and Brown went home. Later that day, Brown received word that he had been discharged. He immediately returned to work in an attempt to gain reinstatement but was unsuccessful.

On May 15, the day after the discharge, Brown filed a written grievance, pursuant to the collective-bargaining agreement, asserting that truck No. 244 was defective, that it had been improper for him to have been ordered to drive the truck, and that his discharge was therefore also improper. The union, however, found no objective merit in the grievance and declined to process it.

On September 7, 1979, Brown filed an unfair labor practice charge with the NLRB, challenging his discharge. The Administrative Law Judge (ALJ) found that Brown had been discharged for refusing to operate truck No. 244, that Brown's refusal was covered by § 7 of the NLRA, and that respondent had therefore committed an unfair labor practice under § 8(a)(1) of the Act. The ALJ held that an employee who acts alone in asserting a contractual right can nevertheless be engaged in concerted activity within the meaning of § 7:

> *[W]hen an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1) [of the Act].*

The NLRB adopted the findings and conclusions of the ALJ and ordered that Brown be reinstated with backpay.

On a petition for enforcement of the Board's order, the Court of Appeals disagreed with the ALJ and the Board. Finding that Brown's refusal to drive truck No. 244 was an action taken solely on his own behalf, the Court of Appeals concluded that the refusal was not a concerted activity within the meaning of § 7.

II

Section 7 of the NLRA provides that "[e]mployees shall have the right to ... join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. § 157. The NLRB's decision in this case applied the Board's longstanding "*Interboro* doctrine," under which an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as "concerted activit[y]" and therefore accorded the protection of § 7. The Board has relied on two justifications for the doctrine: First, the assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement; and second, the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement.

We have often reaffirmed that the task of defining the scope of § 7 "is for the Board to perform in the first instance as it considers the wide variety of cases that come before it," and, on an issue that implicates its expertise in labor relations, a

reasonable construction by the Board is entitled to considerable deference. The question for decision today is thus narrowed to whether the Board's application of § 7 to Brown's refusal to drive truck No. 244 is reasonable. Several reasons persuade us that it is.

A

Neither the Court of Appeals nor respondent appears to question that an employee's invocation of a right derived from a collective-bargaining agreement meets § 7's requirement that an employee's action be taken "for purposes of collective bargaining or other mutual aid or protection." As the Board first explained in the *Interboro* case, a single employee's invocation of such rights affects all the employees that are covered by the collective-bargaining agreement. This type of generalized effect, as our cases have demonstrated, is sufficient to bring the actions of an individual employee within the "mutual aid or protection" standard, regardless of whether the employee has his own interests most immediately in mind.

The term "concerted activit[y]" is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals. What is not self-evident from the language of the Act, however, and what we must elucidate, is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity. We now turn to consider the Board's analysis of that question as expressed in the *Interboro* doctrine.

Although one could interpret the phrase, "to engage in other concerted activities," to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning. In fact, § 7 itself defines both joining and assisting labor organizations — activities in which a single employee can engage — as concerted activities. Indeed, even the courts that have rejected the *Interboro* doctrine recognize the possibility that an individual employee may be engaged in concerted activity when he acts alone. They have limited their recognition of this type of concerted activity, however, to two situations: (1) that in which the lone employee intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee. The disagreement over the

Interboro doctrine, therefore, merely reflects differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for § 7 to apply. We cannot say that the Board's view of that relationship, as applied in the *Interboro* doctrine, is unreasonable.

The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process — beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement — is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

Furthermore, the acts of joining and assisting a labor organization, which § 7 explicitly recognizes as concerted, are related to collective action in essentially the same way that the invocation of a collectively bargained right is related to collective action. When an employee joins or assists a labor organization, his actions may be divorced in time, and in location as well, from the actions of fellow employees. Because of the integral relationship among the employees' actions, however, Congress viewed each employee as engaged in concerted activity. The lone employee could not join or assist a

labor organization were it not for the related organizing activities of his fellow employees. Conversely, there would be limited utility in forming a labor organization if other employees could not join or assist the organization once it is formed. Thus, the formation of a labor organization is integrally related to the activity of joining or assisting such an organization in the same sense that the negotiation of a collective-bargaining agreement is integrally related to the invocation of a right provided for in the agreement. In each case, neither the individual activity nor the group activity would be complete without the other.

The *Interboro* doctrine is also entirely consistent with the purposes of the Act, which explicitly include the encouragement of collective bargaining and other "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U. S. C. § 151. Although, as we have said, there is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in enacting the "concerted activities" language, the general history of § 7 reveals no inconsistency between the *Interboro* doctrine and congressional intent. That history begins in the early days of the labor movement, when employers invoked the common-law doctrines of criminal conspiracy and restraint of trade to thwart workers' attempts to unionize. As this Court recognized in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33 (1937), a single employee at that time "was helpless in dealing with an employer; ... he was dependent ordinarily on his daily wage for the maintenance of himself and family; ... if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; ... union was essential to give laborers opportunity to deal on an equality with their employer."

Congress' first attempt to equalize the bargaining power of management and labor, and its first use of the term "concert" in this context, came in 1914 with the enactment of §§ 6 and 20 of the Clayton Act, which exempted from the antitrust laws certain types of peaceful union activities. There followed, in 1932, the Norris-La Guardia Act, which declared that "the individual . . . worker ... shall be free from the interference, restraint, or coercion, of employers . . . in self-organization or in *other concerted activities for the purpose of collective*

bargaining or other mutual aid or protection." 29 U. S. C. § 102 (emphasis added). This was the source of the language enacted in § 7. It was adopted first in § 7(a) of the National Industrial Recovery Act and then, in 1935, in § 7 of the NLRA.

Against this background, it is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process. Instead, what emerges from the general background of § 7 — and what is consistent with the Act's statement of purpose — is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining and enforcement of collective-bargaining agreements.

The Board's *Interboro* doctrine, based on a recognition that the potential inequality in the relationship between the employee and the employer continues beyond the point at which a collective-bargaining agreement is signed, mitigates that inequality throughout the duration of the employment relationship, and is, therefore, fully consistent with congressional intent. Moreover, by applying § 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace.

To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7. Indeed,

it would make little sense for § 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.

In practice, however, there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial refusal to perform a certain job that he believes he has no duty to perform. It is reasonable to expect that an employee's first response to a situation that he believes violates his collective-bargaining agreement will be a protest to his employer. Whether he files a grievance will depend in part on his employer's reaction and in part upon the nature of the right at issue. In addition, certain rights might not be susceptible of enforcement by the filing of a grievance. In such a case, the collective-bargaining agreement might provide for an alternative method of enforcement, as did the agreement involved in this case, or the agreement might be silent on the matter. Thus, for a variety of reasons, an employee's initial statement to an employer to the effect that he believes a collectively bargained right is being violated, or the employee's initial refusal to do that which he believes he is not obligated to do, might serve as both a natural prelude to, and an efficient substitute for, the filing of a formal grievance. As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance.

The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7. Furthermore, if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods. No-strike provisions, for instance, are a common mechanism by which employers and employees agree that the latter will not invoke their rights by refusing to

work. In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted. Whether Brown's action in this case was unprotected, however, is not before us.

B

Respondent argues that the *Interboro* doctrine undermines the arbitration process by providing employees with the possibility of provoking a discharge and then filing an unfair labor practice claim. This argument, however, misses the mark for several reasons. First, an employee who purposefully follows this route would run the risk that the Board would find his actions concerted but nonetheless unprotected, as discussed above.

Second, the *Interboro* doctrine does not shift dispute resolution from the grievance and arbitration process to NLRB adjudication in any way that is different from the alternative position adopted by the Court of Appeals, and pressed upon us by respondent. As stated above, the Court of Appeals would allow a finding of concerted activity if two employees together invoke a collectively bargained right, if a lone employee represents another employee in addition to himself when he invokes the right, or if the lone employee invokes the right in a manner that is intended to induce at least one other employee to join him. In each of these situations, however, the underlying substance of the dispute between the employees and the employer is the same as when a single employee invokes a collectively bargained right by himself. In each case the employees are claiming that their employer violated their collective-bargaining agreement, and if the complaining employee or employees in those situations are discharged, their unfair labor practice action would be identical to an action brought by an employee who has been discharged for invoking a collectively bargained right by himself. Because the employees in each of these situations are equally well positioned to go through the grievance and arbitration process, there is no basis for singling out the *Interboro* doctrine as undermining that process any more than would the approach of respondent and the Courts of Appeals that have rejected the doctrine.

Finally, and most importantly, to the extent that the factual issues raised in an unfair labor practice action have been, or can be, addressed through the grievance process, the Board may defer to that process. There is no reason, therefore, for the Board's interpretation of "concerted activit[y]" in § 7 to be constrained by a concern for maintaining the integrity of the grievance and arbitration process.

III

In this case, the Board found that James Brown's refusal to drive truck No. 244 was based on an honest and reasonable belief that the brakes on the truck were faulty. Brown explained to each of his supervisors his reason for refusing to drive the truck. Although he did not refer to his collective-bargaining agreement in either of these confrontations, the agreement provided not only that "[t]he Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition," but also that "it shall not be a violation of this Agreement where employees refuse to operate such equipment, unless such refusal is unjustified." There is no doubt, therefore, nor could there have been any doubt during Brown's confrontations with his supervisors, that by refusing to drive truck No. 244, Brown was invoking the right granted him in his collective-bargaining agreement to be free of the obligation to drive unsafe trucks. Moreover, there can be no question but that Brown's refusal to drive the truck was reasonably well directed toward the enforcement of that right. Indeed, it would appear that there were no other means available by which Brown could have enforced the right. If he had gone ahead and driven truck No. 244, the issue may have been moot.

Respondent argues that Brown's action was not concerted because he did not explicitly refer to the collective-bargaining agreement as a basis for his refusal to drive the truck. The Board, however, has never held that an employee must make such an explicit reference for his actions to be covered by the *Interboro* doctrine, and we find that position reasonable. We have often recognized the importance of "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." As long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. In the context of a

workplace dispute, where the participants are likely to be unsophisticated in collective-bargaining matters, a requirement that the employee explicitly refer to the collective-bargaining agreement is likely to serve as nothing more than a trap for the unwary.

Respondent further argues that the Board erred in finding Brown's action concerted based only on Brown's reasonable and honest belief that truck No. 244 was unsafe. Respondent bases its argument on the language of the collective-bargaining agreement, which provides that an employee may refuse to drive an unsafe truck "unless such refusal is unjustified." In the view of respondent, this language allows a driver to refuse to drive a truck only if the truck is objectively unsafe. Regardless of whether respondent's interpretation of the agreement is correct, a question as to which we express no view, this argument confuses the threshold question whether Brown's conduct was concerted with the ultimate question whether that conduct was protected. The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated. No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement. On the other hand, if the collective-bargaining agreement imposes a limitation on the means by which a right may be invoked, the concerted activity would be unprotected if it went beyond that limitation.

In this case, because Brown reasonably and honestly invoked his right to avoid driving unsafe trucks, his action was concerted. It may be that the collective-bargaining agreement prohibits an employee from refusing to drive a truck that he reasonably believes to be unsafe, but that is, in fact, perfectly safe. If so, Brown's action was concerted but unprotected. As stated above, however, the only issue before this Court and the only issue passed upon by the Board or the Court of Appeals is whether Brown's action was concerted, not whether it was protected.

IV

The NLRB's *Interboro* doctrine recognizes as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective-bargaining agreement. We conclude that the doctrine constitutes a reasonable interpretation of the Act. Accordingly, we accept the Board's conclusion that James Brown was engaged in concerted activity when he refused to drive truck No. 244. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion, including an inquiry into whether respondent may continue to defend this action on the theory that Brown's refusal to drive truck No. 244 was unprotected, even if concerted.