

Employment Law

An Open-Source Casebook





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Eric M. Fink

Elon Law School

Greensboro, North Carolina

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Eric M. Fink
Associate Professor of Law
Elon University School of Law
Greensboro, North Carolina 27408
<https://www.emfink.net/ElonLaw/>

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“ Workin' 9 to 5, what a way to make a livin'. Barely gettin' by, it's all takin' and no givin'. They just use your mind and they never give you credit. It's enough to drive you crazy if you let it.

 Dolly Parton, 9 to 5

Preface

This book presents judicial opinions, statutes and regulations, and other material pertaining to the law governing employment and labor relations. Topics covered include establishing an employment relationship; recruitment and hiring; supervisory control and employee autonomy; union representation and concerted activity; confidentiality and competition; wages and hours; employee health and workplace injuries; and termination of employment.

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¹See Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017) (proposing "cleaned up" parenthetical for quotations from judicial opinions, to indicate the author "has removed extraneous, non-substantive material like brackets, quotation marks, ellipses, footnote reference numbers, and internal citations; may have changed capitalization without using brackets to indicate that change; and affirmatively represents that the alterations were made solely to enhance readability and that the quotation otherwise faithfully reproduces the quoted text.")

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Chapter 1 Employment as a Socio-Legal Relationship

1.1 Feudal Roots

Regulating Labor in Medieval England¹

“Whereas late against the malice of servants, which were idle, and not willing to serve after the pestilence, without taking excessive wages, it was ordained by our lord the king...that such manner of servants ... should be bound to serve, receiving salary and wages, accustomed in places where they ought to serve... five or six years before; and that the same servants refusing to serve ... should be punished by imprisonment ...”

Between 1348 and 1351 a virulent plague known as the Black Death devastated Europe. Historians estimate that between 30% and 50% of the English population died from the disease. This dramatic loss in population led to great changes taking place. Fields were left unsown and unreaped. Entire villages lay abandoned. Those who had not died of the plague were in danger of dying from starvation.

Food shortages also resulted in much higher prices. The peasants, needing extra money to feed their families, demanded higher wages. The landowners, desperately short of labour, often agreed to these wage demands. The landowners were worried that if they refused, their workers would run away and find an employer who was willing to pay these higher wages.

The feudal system had largely restricted freedom of movement for the poor, especially those who worked the land—the serfs. Landowners had to keep their workforce, the source of the wealth, labouring for them by force, or threat of force, or by law (really the same thing, since the law was entirely in the hands of the ruling elites). They feared rebellion (in retribution for the vicious treatment and grinding poverty of their existence), or gradual or mass absconding to find somewhere better—usually this meant to the towns, where conditions were laxer and some eventually became free.

The labour shortages caused by the Black Death threatened to shatter this tense system; the bargaining power was suddenly with the labouring poor.

In 1348, Ralph, Earl of Stafford, and John Giffard were paying their farm labourers one pence a day. By 1350 they were forced to increase it to two pence a day. Other local landowners were paying three pence a day. John Giffard warned the Earl of

¹Source: “Today in legislative history: Ordinance of Labourers passed to stop plebs bettering wages/conditions, 1349”, Past Tense UK (Jun 18, 2016).

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Stafford that there was a danger that the serfs would leave Yalding in an effort to obtain higher wages.

Landowners like the Earl of Stafford complained to king Edward III about having to pay these higher wages. The landowners were also worried about the peasants roaming the country searching for better job opportunities.

The king issued the Ordinance of Labourers on June 18th 1349, in what is seen as the beginning of English Labour law. It decreed that

- Everyone under 60 must work
- Employers must not hire excess workers
- Employers may not pay and workers may not receive wages higher than pre-plague levels
- Food must be priced reasonably with no excess profit

The Ordinance, however, was largely ineffective—mainly because it flew in the face of the material needs of both landowner and worker. In 1351, Parliament attempted to reinforce the Ordinance, by passing the Statute of Labourers Act. This law made it illegal for employers to pay wages above the level offered in 1346.

Some employers, who were desperately short of workers tended to ignore the law. This was especially true of those employers living in towns. Some freemen who had skills in great demand, such as carpenters and masons, began to leave their villages. Serfs became angry when they heard of the wages that people were earning in towns. Some serfs legged it, heading to towns in search of higher wages. Large numbers of serfs went to London. Most of these serfs could only find unskilled manual work. By 1360 over 40,000 people were living in London, swelling a poor and often rebellious population.

Any serfs who got caught was taken back to their village and punished: however, it was difficult and counter-productive for the lords of the manor to punish them too harshly. Execution, imprisonment and mutilation only made the labour shortage worse, so most runaways were fined. Sometimes runaway serfs were branded on the forehead. The rest of the serfs' tithing group were also fined for not stopping him or her from running away.

The statute's changes failed to take into account the changing economic conditions during the Black Death, and furthermore the period from which wage levels were taken was one of economic depression in England as a result of The Hundred Years' War. Therefore, wages during the Black Death were set even lower to match those during this depression. In practice, the statute was poorly enforced and unsuccessful, but it set a precedent that distinguished between labourers who were "able in

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body” to work and those who could not work for whatever reasons. This distinction was the genesis of ideas that resurfaced in later laws regarding poverty and welfare.

The Ordinance and the Statute naturally enraged the peasants, who wanted higher wages and better living standards. It is undeniable that this ongoing attempt to put the clock back contributed to the general air of resentment and rebellion that preceded and gave birth to the English peasants’ revolt of 1381. Similar processes happened throughout Europe—wage caps following a labour shortage after the Black Death resulting in popular revolts.

The Statute was poorly enforced in most areas, and farm wages in England on average doubled between 1350 and 1450. However, it’s also clear that the breakdown of the rigid feudal system in England was to some extent already underway, stimulated by other economic factors. That the Black Death accelerated a move towards free labour and a more independent class of small farmers is true; but serfdom was inefficient; it also benefitted the King to have freer peasantry rather than serfs, as it produced a larger tax base for national use, where serfs generally enriched the immediate landowner.

Post-Black Death rulers in several countries promulgated laws to tackle the problem. For instance, the French king Jean II, surnamed ‘the Good’, proclaimed his ‘Ordinance sur les métiers de la ville de Paris’ on 30 January 1351. In addition to setting ceilings on prices and wages, the ordinance included an extensive series of measures to curtail begging. Unemployed, able-bodied men and women were required to accept any work offered to earn their keep. Both the mendicants and the inhabitants of Paris were prohibited from giving alms to those capable of working, and this category excluded only the blind, the disabled, and other ‘unfortunate persons’.

Despite the obvious failure of the post-Black Death labour legislation, repressive laws regulating wages, almost always in favour of landowner, employer and master, continued to be imposed in England; just a few –

- the 1563 Statute of Artificers, which controlled skilled trades by providing a compulsory seven years’ apprenticeship, reserved the superior trades for the sons of the better off, empowered magistrates to force the unemployed to work and regulate all wages, required permission for a workman to transfer from one employer to another,
- Another Statute of Labourers in 1603, which banned workers from being paid more than the rate magistrates set,

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- The 1800 Combination Acts, the last of a succession of laws banning workers from organizing together to improve wages or conditions, or from persuading others to strike...
- the Master and Servant Act 1823, only repealed in 1875, under which any worker could be leaving a job to seek another, without his boss's permission.



Medieval Laborers

Ordinance of Labourers, 1349

The king to the sheriff of Kent, greeting.

Because a great part of the people, and especially of workmen and servants, late died of the pestilence, many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labor to get their living; we, considering the grievous incommodities, which of the lack especially of ploughmen and such laborers may hereafter come, have upon deliberation and treaty with the prelates and the nobles, and learned men assisting us, of their mutual counsel ordained:

That every man and woman of our realm of England, of what condition he be, free or bond, able in body, and within the age of threescore years, not living in merchandise, nor exercising any craft, nor having of his own whereof he may live, nor proper land, about whose tillage he may himself occupy, and not serving any other, if he in convenient service, his estate considered, be required to serve, he shall be bounden to serve him which so shall him require; and take only the wages, livery, meed, or salary, which were accustomed to be given in the places where he oweth to serve, the twentieth year of our reign of England, or five or six other commone years next before. Provided always, that the lords be preferred before other in their bondmen or their land tenants, so in their service to be retained; so that nevertheless the said lords shall retain no more than be necessary for them; and if any such man or woman, being so required to serve, will not the same do, that proved by two true men before the sheriff or the constables of the town where the same shall happen to be done, he shall anon be taken by them or any of them, and committed to the next gaol, there to remain under strait keeping, till he find surety to serve in the form aforesaid.

Item, if any reaper, mower, or other workman or servant, of what estate or condition that he be, retained in any man's service, do depart from the said service without reasonable cause or license, before the term agreed, he shall have pain of imprisonment. And that none under the same pain presume to receive or to retain any such in his service.

Item, that no man pay, or promise to pay, any servant any more wages, liveries, meed, or salary than was wont, as afore is said; nor that any in other manner shall demand or receive the same, upon pain of doubling of that, that so shall be paid, promised, required, or received, to him which thereof shall feel himself grieved, pursuing for the same; and if none such will pursue, then the same to be applied to

any of the people that will pursue; and such pursuit shall be in the court of the lord of the place where such case shall happen.

Item, if the lords of the towns or manors presume in any point to come against this present ordinance either by them, or by their servants, then pursuit shall be made against them in the counties, wapentakes, tithings, or such other courts, for the treble pain paid or promised by them or their servants in the form aforesaid; and if any before this present ordinance hath covenanted with any so to serve for more wages, he shall not be bound by reason of the same covenant, to pay more than at any other time was wont to be paid to such person; nor upon the said pain shall presume any more to pay.

Item, that saddlers, skinners, white-tawers, cordwainers, tailors, smiths, carpenters, masons, tilers, carters, and all other artificers and workmen, shall not take for their labor and workmanship above the same that was wont to be paid to such persons the said twentieth year, and other common years next before, as afore is said, in the place where they shall happen to work; and if any man take more, he shall be committed to the next gaol, in manner as afore is said.

Item, that butchers, fishmongers, hostelers, brewerers, bakers, pulters, and all other sellers of all manner of victual, shall be bound to sell the same victual for a reasonable price, having respect to the price that such victual be sold at in the places adjoining, so that the same sellers have moderate gains, and not excessive, reasonably to be required according to the distance of the place from whence the said victuals be carried; and if any sell such victuals in any other manner, and thereof be convict in the manner and form aforesaid, he shall pay the double of the same that he so received, to the party damned, or, in default of him, to any other that will pursue in this behalf: and the mayors and bailiffs of cities, boroughs, merchant-towns, and others, and of the ports and places of the sea, shall have power to inquire of all and singular which shall in any thing offend the same, and to levy the said pain to the use of them at whose suit such offenders shall be convict; and in case that the same mayors or bailiffs be negligent in doing execution of the premises, and thereof be convict before our justices, by us to be assigned, then the same mayors and bailiffs shall be compelled by the same justices to pay the treble of the thing so sold to the party damned, or to any other in default of him that will pursue; and nevertheless toward us they shall be grievously punished.

Item, because that many valiant beggars, as long as they may live of begging, do refuse to labor, giving themselves to idleness and vice, and sometime to theft and other abominations; none upon the said pain of imprisonment shall, under the

"wapentakes" and "tithings":
Medieval English counties were divided into administrative units known as "wapentakes" or "hundreds"; these were further divided into "tithings".

"tilers": shipwrights.

"hostelers": innkeepers;
"pulters": poultry sellers.

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color of pity or alms, give any thing to such, which may labor, or presume to favor them toward their desires, so that thereby they may be compelled to labor for their necessary living.

We command you, firmly enjoining, that all and singular the premises in the cities, boroughs, market towns, seaports, and other places in your bailiwick, where you shall think expedient, as well within liberties as without, you do cause to be publicly proclaimed, and to be observed and duly put in execution aforesaid; and this by no means omit, as you regard us and the common weal of our realm, and would save yourself harmless. Witness the king at Westminster, the 18th day of June. By the king himself and the whole council.

Like writs are directed to the sheriffs throughout England.

The king to the reverend father in Christ W. by the same grace bishop of Winchester, greeting. "Because a great part of the people," as before, until "for their necessary living," and then thus: And therefore we entreat you that the premises in every of the churches, and other places of your diocese, which you shall think expedient, you do cause to be published; directing the parsons, vicars, ministers of such churches, and others under you, to exhort and invite their parishioners by salutary admonitions, to labor, and to observe the ordinances aforesaid, as the present necessity requireth: and that you do likewise moderate the stipendiary chaplains of your said diocese, who, as it is said, do now in like manner refuse to serve without an excessive salary; and compel them to serve for the accustomed salary, as it behoveth them, under the pain of suspension and interdict. And this by no means omit, as you regard us and the common weal of our said realm. Witness, etc. as above. By the king himself and the whole council.

Like letters of request are directed to the several bishops of England, and to the keeper of the spiritualities of the archbishopric of Canterbury, during the vacancy of the see, under the same date.

The Statute of Labourers, 1351

Whereas late against the malice of servants, which were idle, and not willing to serve after the pestilence, without taking excessive wages, it was ordained by our lord the king, and by the assent of the prelates, nobles, and other of his council, that such manner of servants, as well men as women, should be bound to serve, receiving salary and wages, accustomed in places where they ought to serve in the twentieth year of the reign of the king that now is, or five or six years before; and that the same servants refusing to serve in such manner should be punished by imprisonment of their bodies, as in the said statute is more plainly contained: whereupon commissions were made to divers people in every county to inquire and punish all them which offend against the same: and now forasmuch as it is given the king to understand in this present parliament, by the petition of the commonalty, that the said servants having no regard to the said ordinance, but to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said twentieth year, and before, to the great damage of the great men, and impoverishing of all the said commonalty, whereof the said commonalty prayeth remedy: wherefore in the said parliament, by the assent of the said prelates, earls, barons, and other great men, and of the same commonalty there assembled, to refrain the malice of the said servants, be ordained and established the things underwritten:

First, that carters, ploughmen, drivers of the plough, shepherds, swineherds, deies,
and all other servants, shall take liveries and wages, accustomed the said twentieth
year, or four years before; so that in the country where wheat was wont to be given,
they shall take for the bushel ten pence, or wheat at the will of the giver, till it be
otherwise ordained. And that they be allowed to serve by a whole year, or by other
usual terms, and not by the day; and that none pay in the time of sarcling or hay-
making but a penny the day; and a mower of meadows for the acre five pence, or
by the day five pence; and reapers of corn in the first week of August two pence,
and the second three pence, and so till the end of August, and less in the country
where less was wont to be given, without meat or drink, or other courtesy to be
demanded, given, or taken; and that such workmen bring openly in their hands to
the merchant-towns their instruments, and there shall be hired in a common place
and not privy.

Item, that none take for the threshing of a quarter of wheat or rye over 2 d. ob. and
the quarter of barley, beans, pease, and oats, 1 d. ob. if so much were wont to be
given; and in the country where it is used to reap by certain sheaves, and to thresh
by certain bushels, they shall take no more nor in other manner than was wont the

"deies": dairy maids;
"sarcling": hoeing.

"2 d. ob.": The old English monetary system used units of pounds ("l."), shillings ("s."), and pence ("d."), with 1 pound = 20 shillings & 1 shilling = 12 pence; "ob." = 1/2. A "quarter" (8 bushels) represented a day's work for a thresher. The maximum rates of 1.5-2.5 d. are roughly equivalent to £5-8 (\$7-11) in 2025.

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said twentieth year and before; and that the same servants be sworn two times in the year before lords, stewards, bailiffs, and constables of every town, to hold and do these ordinances; and that none of them go out of the town, where he dwelleth in the winter, to serve the summer, if he may serve in the same town, taking as before is said. Saving that the people of the counties of Stafford, Lancaster and Derby, and people of Craven, and of the marches of Wales and Scotland, and other places, may come in time of August, and labor in other counties, and safely return, as they were wont to do before this time: and that those, which refuse to take such oath or to perform that that they be sworn to, or have taken upon them, shall be put in the stocks by the said lords, stewards, bailiffs, and constables of the towns by three days or more, or sent to the next gaol, there to remain, till they will justify themselves. And that stocks be made in every town for such occasion betwixt this and the feast of Pentecost.

"knaves": male servants.

Item, that carpenters, masons, and tilers, and other workmen of houses, shall not take by the day for their work, but in manner as they were wont, that is to say: a master carpenter 3 d. and another 2 d.; and master free-stone mason 4 d. and other masons 3 d. and their servants 1 d. ob.; tilers 3 d. and their knaves 1 d. ob.; and other coverers of fern and straw 3 d. and their knaves 1 d. ob.; plasterers and other workers of mudwalls, and their knaves, by the same manner, without meat or drink, 1 s. from Easter to Saint Michael; and from that time less, according to the rate and discretion of the justices, which should be thereto assigned: and that they that make carriage by land or by water, shall take no more for such carriage to be made, than they were wont the said twentieth year, and four years before.

"horse-smiths": farriers;
"spurriers": those who make spurs; "tanners, curriers, tawers of leather": workers involved in the preparation of animal hides.

Item, that cordwainers and shoemakers shall not sell boots nor shoes, nor none other thing touching their mystery, in any other manner than they were wont the said twentieth year: item, that goldsmiths, saddlers, horsesmiths, spurriers, tanners, curriers, tawers of leather, tailors, and other workmen, artificers, and laborers, and all other servants here not specified, shall be sworn before the justices, to do and use their crafts and offices in the manner they were wont to do the said twentieth year, and in time before, without refusing the same because of this ordinance; and if any of the said servants, laborers, workmen, or artificers, after such oath made, come against this ordinance, he shall be punished by fine and ransom, and imprisonment after the discretion of the justices.

"harbergers": those who provide lodging; "exigend": a writ requiring a defendant to appear on pain of outlawry; "capias": a type of arrest warrant; "Quintzime": a tax known as the "Fifteenth".

Item, that the said stewards, bailiffs, and constables of the said towns, be sworn before the same justices, to inquire diligently by all the good ways they may, of all them that come against this ordinance, and to certify the same justices of their names at all times, when they shall come into the country to make their sessions; so that the same justices on certificate of the same stewards, bailiffs, and consta-

bles, of the names of the rebels, shall do them to be attached by their body, to be before the said justices, to answer of such contempts, so that they make fine and ransom to the king, in case they be attainted; and moreover to be commanded to prison, there to remain till they have found surety, to serve, and take, and do their work, and to sell things vendible in the manner aforesaid; and in case that any of them come against his oath, and be thereof attainted, he shall have imprisonment of forty days; and if he be another time convict, he shall have imprisonment of a quarter of a year, so that at every time that he offendeth and is convict, he shall have double pain: and that the same justices, at every time that they come [into the country], shall inquire of the said stewards, bailiffs, and constables, if they have made a good and lawful certificate, or any conceal for gift, procurement, or affinity, and punish them by fine and ransom, if they be found guilty: and that the same justices have power to inquire and make due punishment of the said ministers, laborers, workmen, and other servants; and also of hostellers, harbergers, and of those that sell victual by retail, or other things here not specified, as well at the suit of the party, as by presentment, and to hear and determine, and put the things in execution by the exigend after the first capias, if need be, and to depute other under them, as many and such as they shall see best for the keeping of the same ordinance; and that they which will sue against such servants, workmen, laborers, [and artificers], for excess taken of them and they be thereof attainted at their suit, they shall have again such excess. And in case that none will sue, to have again such excess, then it shall be levied of the said servants, laborers, workmen, and artificers, and delivered to the collectors of the Quintzime, in alleviation of the towns where such excesses were taken.

Karen Orren, Belated Feudalism (1991)

When the United States 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 arrangements 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.

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

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system of hierarchies that historically had extended up and down medieval society.

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 but 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. ...

The **Statutes of Labourers** 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 victuals must 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 colour 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. ...

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 eighteenth-century edition of Coke’s Institutes observed that the rule “about slaves holds in some 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.

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.

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 wages 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.

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. ...

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.

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,

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).

Edward the Confessor was the English king from 1042 to 1066. *The Mirror of Justices* was an Anglo-Norman law text published in 1642.

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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. ...

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 servitum 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, much 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 second principle in nineteenth-century labor law [was] 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 accept 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. ...

Jurisdiction was an attribute of the master’s property in the servant, just as was the claim over the servant’s labor. ... To the extent that workplace 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. ...

Inside the province were the inhabitants: the employer and his employees. Those were real persons, not their alienated labor or functions. It 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. Absence 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

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another, which was the testimonial letter. ... 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 commenced, 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.

The relations between the workplace and [the outside world] may be seen in the de-

veloping 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 master 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 master, we may speculate that the newer rule... was an adaptation to the more attenuated forms of management typical of larger companies.

On the other hand, ... 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.

Under the rules of liability, ... 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. The 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

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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.

Within 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 republican 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. ... 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.

Scudder v. Woodbridge, 1 Ga. 195 (1846)

Wyll Woodbridge brought an action on the case against Amos Scudder, to recover the value of a negro boy, by the name of Ned, a carpenter, killed on board the Ivanhoe, owned by the defendant. It was alleged in the declaration that the property was lost by the carelessness and mismanagement of the captain of the boat, who was employed by the owner. This boy had been hired as a carpenter to make the trip from Savannah to St. Mary's, and becoming entangled in the water-wheel, in aiding to get the boat off, he was drowned. Judge Fleming, before whom the cause was tried in Chatham county, charged the jury, that if they found that the death of the slave was occasioned by the negligence or want of skill in the officers of the Ivanhoe, in the employment of Amos Scudder, that he was liable for the loss accruing from such negligence or want of skill. The jury returned a verdict for five hundred dollars. The defendant below excepted to the charge of the court, and now assigns for error that the instruction to the jury was wrong, and that the plaintiff in error is not liable for any carelessness of his agents to those in his employ.

The verdict of the jury having established the fact that the death of the slave was produced by the negligence or want of skill of the officers on board the boat, I shall not pretend to scrutinize the testimony, but address myself at once to the inquiry, whether, conceding the fact as found by the verdict, Scudder is liable to Woodbridge? This question is new in our State, and well deserves the gravest consideration.

"Plaintiff in error": the appellant, i.e. Scudder.

The general doctrine, as contended for by counsel for plaintiff in error, may be correct. It is distinctly laid down in Story on Agency, and other elementary writers, and fully sustained by the adjudications adduced from South Carolina, Massachusetts, New York and England. And we are disposed to recognize and adopt it, with the cautions, limitations and restrictions in those cases. But interest to the owner, and humanity to the slave, forbid its application to any other than free white agents. Indeed, it cannot be extended to slaves, *ex necessitate rei*. The argument upon which the decisions referred to mainly rest is, that public policy requires that each person engaged on steamboats and railroads should see that every other person employed in the same service does his duty with the utmost care and vigilance; that every hand is qualified for his place, and that everything connected with the line is in good order. Moreover, it is urged, that the want of recourse on the principal will not only make each agent more careful himself, but induce him to stimulate others to like diligence. Can any of these considerations apply to slaves? They dare not interfere with the business of others. They would be instantly chastised for their impertinence. It is true that the owner, or employer, of a slave is restrained by the

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Penal Code from inflicting on him cruel, unnecessary and excessive punishment; and that all others are forbidden to beat, whip or wound them, without sufficient cause or provocation. But can any one doubt that if this unfortunate boy, although shipped as a carpenter, had been ordered by the captain to perform the perilous service in which he lost his life, and he had refused or remonstrated, that he would have received prompt correction? and that on the trial on a bill of indictment for a misdemeanor, his conduct would have been deemed a sufficient justification for the supposed offence? No! slaves dare not intermeddle with those around, embarked in the same enterprise with themselves. Neither can they testify against their misconduct. Neither can they exercise the salutary discretion, left to free white agents, of quitting the employment when matters are mismanaged, or portend evil. Whether engaged as carpenters, bricklayers or blacksmiths—as ferry-men, wagoners, patroons or private hands, in boats or vessels in the coasting or river navigation, on railroads, or any other avocation—they have nothing to do but silently serve out their appointed time, and take their lot in the mean while in submitting to whatever risks and dangers are incident to the employment. Bound to fidelity themselves, they do not, and cannot act as securities, either for the care or competency of others. And what can the master know of the condition of the vessel, road, work or machinery, where his servant is employed, or of the skill or prudence of the persons associated with him? No two conditions can be more different than these two classes of agents: namely, slaves and free white citizens; and it would be strange and extraordinary indeed if the same principle should apply to both.

"The general doctrine, as contended for by counsel for plaintiff in error": The court is referring to the "fellow-servant" rule, which precluded suits by an employee against the employer for workplace injuries caused by co-workers. See *Farwell v. Boston & Worcester Railroad Co.* (Mass. 1842), in WORKERS COMP CHAPTER

Again: a large portion of the employees at the South are either slaves or free persons of color, wholly irresponsible, civiliter, for their neglect or malfeasance. The engineer on the Ivanhoe was a colored man. Had the accident been attributable to his mismanagement, to whom should Woodbridge have looked for redress? But we think it needless to multiply reasons upon a point so palpable. There is one view alone which would be conclusive with the court. The restriction of this rule is indispensable to the welfare of the slave. In almost every occupation, requiring combined effort, the employer necessarily intrusts it to a variety of agents. Many of those are destitute of principle, and bankrupt in fortune. Once let it be promulgated that the owner of negroes hired to the numerous navigation, railroad, mining and manufacturing companies which dot the whole country, and are rapidly increasing—I repeat, that for any injury done to this species of property, let it be understood and settled that the employer is not liable, but that the owner must look for compensation to the co-servant who occasioned the mischief, and I hesitate not to affirm, that the life of no hired slave would be safe. As it is, the guards thrown around this class of our population are sufficiently few and feeble. We are altogether disinclined to lessen their number or weaken their force. We are, there-

fore, cordially, confidently and unanimously agreed, and so adjudge, that the judgment below be affirmed, with costs.

Haskins v. Royster, 70 N.C. 600 (1874)

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

"wholly irresponsible, *civiliter*": Enslaved persons, having the legal status of chattel property, could neither sue nor be sued and were thus not subject to civil liability. See, *Wood v. Wood*, 2 Flip. 336 (Circuit Court, S.D. Ohio 1879).

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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

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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 officially, 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)

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,

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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

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“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 gen-

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eral 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 enforceable 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,

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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 The Employment Contract and Employer Control

Elizabeth Anderson, Private Government (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.

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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

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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

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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

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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

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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

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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 neuropsychological 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 mas-

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ter 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

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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.

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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

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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.

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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 func-

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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 rep-

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resented. 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.

Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minn. 1936)

Plaintiff is a consulting engineer, a specialist in the field of heating, ventilating, and air conditioning. As such he had developed a clientele bringing him a weekly income of approximately \$200.

Defendant operates a paper manufacturing plant at Grand Rapids, this state. It had employed plaintiff in his professional capacity in 1926 and again in 1930. He was paid at the rate of \$200 per week while so employed. Defendant was planning extensive enlargements of its plant, the estimated expense being about \$1,000,000. Ordinarily a consulting engineer's fees for doing the necessary planning and supervision of the contemplated improvements would involve from \$35,000 to \$50,000. During plaintiff's employment in 1930 there was some discussion between the parties with respect of plaintiff's employment to take this work in hand. At that time, too, he was negotiating with the executive officers of Purdue University relative to taking a position as associate professor in its department of engineering, particularly that branch thereof relating to heating, ventilating, and air conditioning.

The Purdue position carried a salary of \$3,300 per year and required only nine months' work in the way of instructions. This would leave plaintiff free to continue his practice as a consulting engineer during a period of three months of each calendar year. He was also privileged, if he entered that position, to continue his practice as a consulting engineer at all times insofar as his professional work at the university permitted him so to do. In addition thereto, he was privileged to contribute to engineering magazines and other publications. All income from such outside engagements was to be his in addition to the stated salary. Plaintiff considered this opportunity as one especially attractive to him. Defendant had full knowledge of all the foregoing facts.

On October 13, 1930, plaintiff, having received a telegram from Purdue University offering him the position and requiring immediate acceptance or rejection thereof, at once called an officer of defendant over the long-distance telephone informing him of the offer and the necessity on his part of making immediate response thereto. Defendant's officer agreed that if plaintiff would reject the Purdue offer and also agree to purchase the home of defendant's power superintendent it would give plaintiff permanent employment at a salary of \$600 per month. Relying thereon, plaintiff rejected the Purdue offer and immediately thereafter moved to Grand Rapids and there entered upon the performance of his duties under this arrangement. He later entered into a contract for the purchase of the superintendent's home. Appropriate to note is the fact that these negotiations

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were entirely oral and over the long-distance telephone, plaintiff being at Minneapolis and defendant's officer at Grand Rapids. The only writing between the parties is a letter written on October 14, 1930, reading thus:

Blandin Paper Co. "Grand Rapids, Minn."Attention: Mr. C.K. Andrews "Gentlemen:

In accordance with our conversation yesterday when our agreement was settled regarding my position with your company, I have wired Purdue rejecting their offer. Under the circumstances it was impossible for us to get together on a written agreement; I had to wire Purdue at once. However, I am making this move on the assumption that there will be no difficulty in working out our agreement when I get up to Grand Rapids.

Propositions like the one Purdue made are very rare and I am turning it down since I feel that the opportunities with you for applying my past experience are very attractive, the essential consideration being, however, that the job will be a permanent one.

According to the understanding we have, I am to take over Mr. Kull's duties as Power Superintendent and serve also as Mechanical Engineer for your plant, supervising the mechanical construction and maintenance work and other mechanical technical matters. Mr. Kull is to remain for long enough period, about six months, to permit me to get my work organized and get acquainted with the details of his work. If the proposed new construction work is started within that time it may develop that Mr. Kull may remain until that is completed after which he will leave and I take over his duties. As an accommodation to him when he leaves town I am to purchase his house.

My salary is to be six hundred dollars (\$600.00) per month and you are to pay my moving expenses to Grand Rapids.

Very truly yours, "RS/m R. Skagerberg.

Plaintiff rendered the services for which he was thus engaged "dutifully, faithfully and to the complete satisfaction of the defendant and was paid the agreed salary, except as to a voluntary reduction, up to September 1, 1932," when, so the complaint alleges, he was "wrongfully, unlawfully and wilfully" discharged from further employment, although "ready, willing and able to perform." By reason of the alleged breach of contract he claims to have suffered general damages in the amount of \$25,000, and for this he prays judgment.

From what has been stated it is clear that the issue raised by the demurrer is simply this: Do the allegations set forth in the complaint show anything more than

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employment of plaintiff by defendant subject to termination at the will of either party?

The words “permanent employment” have a well established meaning in the law:

In case the parties to a contract of service expressly agree that the employment shall be ‘permanent’ the law implies, not that the engagement shall be continuous or for any definite period, but that the term being indefinite the hiring is merely at will.

The difficult question presented is whether the allegations set forth in the complaint bring this case within an exception to the rule stated. We find in 18 R.C.L. p. 510, the following statement:

Under some circumstances, however, ‘permanent’ employment will be held to contemplate a continuous engagement to endure as long as the employer shall be engaged in business and have work for the employe to do and the latter shall perform the service satisfactorily. This seems to be the established rule in case the employe purchases the employment with a valuable consideration outside the services which he renders from day to day.

And in 35 A.L.R. 1434, it is said:

It has been held that where an employe has given a good consideration in addition to his services, an agreement to hire him permanently should, in the absence of other terms or circumstances to the contrary, continue so long as the employe is able and willing to do his work satisfactorily.

Plaintiff cites and relies upon *Carnig v. Carr*, 167 Mass. 544; *Roxana Petroleum Co. v. Rice*, 109 Okla. 161; *Pierce v. Tennessee C. I. R. Co.* 173 U.S. 1, and other cases of similar import. A brief discussion of the cited cases upon which plaintiff relies may be helpful.

In *Carnig v. Carr*, plaintiff had been engaged in business for himself as an enameler. Defendant was a business competitor. Being such, and for his own advantage, defendant persuaded plaintiff to give up his business and sell his stock in trade to him. As consideration, in part at least, for entering into this arrangement, defendant agreed to employ plaintiff permanently at a stated salary, his work for defendant being the same as that in which plaintiff had been engaged. It is clear that what defendant sought and accomplished was to get rid of his competitor in business upon a promise on his part to give plaintiff permanent employment. The resulting situation amounted to the same thing in substance and effect as if plaintiff had purchased his job. Under such circumstances there can be no doubt that the exception

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to the general rule was properly invoked and applied and furnishes an illustration thereof.

In *Pierce v. Tennessee C. I. R. Co.*, plaintiff had received an injury while employed by defendant. To settle the difficulty defendant promised employment to plaintiff at certain stated wages and was also to furnish certain supplies as long as his disability to do full work continued by reason of his injury. In consideration for these promises plaintiff released the company from all liability for damages on account of the injuries which caused his disability. Here, too, it is clear that plaintiff purchased from defendant his employment.

In *Roxana Petroleum Co. v. Rice*, plaintiffs Rice and Lyons were attorneys and rendered professional services for defendant over a period of time. They had other clients who paid them large annual retainers, one of these being the Pierce Oil Company, from which client they received an annual retainer of \$17,500. The attorneys were prevailed upon by defendant to sever their connections with other clients and were promised and paid an annual retainer of \$15,000, later increased to \$20,000. Some time thereafter the petroleum company claimed that the expense bills were unsatisfactory. A controversy arose, and to settle same a compromise agreement was made. "In this compromise agreement a new employment contract was made. The general offices of the company had been moved to St. Louis. Plaintiffs were to continue their services in representing defendant in 40 or 50 lawsuits that were then pending in the courts of Oklahoma and Texas, and they were to continue in the services of the company in these two states as long as the defendant operated therein and as long as the services of the plaintiffs were satisfactory, and pay them reasonable fees for legal as well as other services. Later on new difficulties arose respecting the new contract. The court in distinguishing this form of contract from the ordinary contract of permanent employment came to the conclusion that because plaintiffs had compromised their claims against the company, changed their position in relation to their general practice, incurred expenses in maintaining an office for the special services of defendant, that thereby there was a permanent contract of employment. The court said:

We are of the opinion that from the facts and circumstances attending the making of the contract of employment in the instant case it was the intention of the parties that the employment was to continue as long as the defendant was in business in Oklahoma and Texas, and the plaintiffs were not subject to discharge without cause.

With regard to that part of the new agreement which provided that plaintiffs were to be paid as long as their services were "satisfactory" to defendant, the facts were such as to justify the court in holding that defendant's claimed dissatisfaction was

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not genuine but rather and only pretended. The court quoted with approval the following statement from *Electric Lighting Co. v. Elder Bros.*:

But the dissatisfaction must be in good faith and with the performance of the contract. A plea of dissatisfaction with the work agreed to be satisfactorily completed must allege the facts from which the dissatisfaction arises. He must be in good faith dissatisfied. He cannot avoid liability by merely alleging that he is dissatisfied. The dissatisfaction must not be capricious nor mercenary nor result from a design to be dissatisfied. It must exist as a fact. It must be actual, not feigned; real, not merely a pretext to escape liability.

That the court did not intend to go beyond the general rule pertaining to such form of contract is clearly shown by the subsequent opinion rendered in *Dunn v. Birmingham S. R. Co.*, where plaintiff was hired as defendant's exclusive agent for the sale of its products in Tulsa, no time limit as to term of service having been provided for in the agreement. Five months later defendant, without notice to plaintiff, began selling its products to other retailers in Tulsa. Judgment for plaintiff in nominal damages only was sustained on appeal.

This court has had occasion to pass upon similar questions in various cases. Thus in *Horn v. Western Land Assn.*, plaintiff had been appointed as attorney for defendant "at a salary of \$1,000 per year, payable quarterly," and was so informed in writing. Plaintiff wrote a letter "accepting the appointment upon the terms offered." The court determined that this constituted a contract as to which neither party, without the other's consent, could lawfully rescind without cause during the year.

In *Bolles v. Sachs*, two written agreements were involved, neither showing upon its face mutuality of obligation or other consideration. The court held that the two instruments could be considered together so as to show that one was given in consideration for the other. As thus construed the contract amounted to one of employment providing in substance that plaintiff was to render services for defendant as long as he might elect to serve. The employer breached the contract and sued for damages. The court held that the employe, never having fixed by his election the period of service, could not recover substantial damages, the obligation violated being too uncertain to furnish a basis for assessment of substantial damages.

In *Smith v. St. Paul D. R. Co.*, plaintiff had been injured in the line of his employment. In settlement of the injury he was promised employment. In respect of the validity of such contract the court said:

The consideration for defendant's agreement to employ was paid by the release of plaintiff's claim for damages quite as much and as effectually as if plaintiff had actually paid cash. By releasing his claim for damages, the plaintiff paid in advance

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for the privilege or option of working for the defendant; and, having done this, he had the right to have it remain optional with him how long he would continue to work for the company, while it remained obligatory upon the latter to furnish the opportunity so long as he chose to work, and was able to properly perform the same. The plaintiff had parted with value for the optional contract, and there was owing to him a reciprocal duty and obligation on the part of the company.

In *McMullan v. Dickinson Co.*, the first syllabus paragraph of the second opinion reads:

Plaintiff and defendant, a corporation, entered into an agreement by the terms of which the latter employed the former as assistant manager upon a stated yearly salary, payable in monthly instalments, said employment to continue so long as the business of the corporation should be continued, provided plaintiff properly and efficiently discharged his duties, and only so long as he should own and hold in his own name 50 shares of capital stock, fully paid up, in defendant corporation. Held, that the period of employment was for such time as plaintiff continued to own and hold the stock shares, not exceeding the period during which the corporate business was being transacted, and was fixed with sufficient definiteness; and, further, that there was no lack of mutuality of consideration.

In *Newhall v. Journal Printing Co.*, action was brought upon a written contract. Plaintiff's assignor, in consideration of \$135 paid to defendant, was by the latter given the exclusive right to sell its publications within certain specified territory. Provision was made in the contract that either party thereto might terminate the same upon 30 days' written notice to the other. Upon the expiration of the 30-day period from the date of service of such notice "all the rights of said second party [plaintiff] under said contract shall cease, except the right of reimbursement as hereinafter provided; provided, however, that said first party [defendant] shall not terminate this contract, except for the dishonesty, incompetence, negligence, inattention, or irresponsibility of said second party." The court held upon plaintiff's action to recover damages for its breach that the parties intended (and the contract clearly expressed such intention) that defendant could not terminate the contract "except for the dishonesty, incompetence, negligence, inattention, or irresponsibility" by the other party thereto.

From the cases discussed, and the discussion is limited to but a few of the many available, the rules of law applicable to the facts in the instant case do not seem to be in doubt, nor do we understand that counsel for either side criticize the rules of law laid down in these cases. Division or difference of opinion arises entirely by reason of the difficulty in application of these rules to the facts pleaded.

Plaintiff maintains that four different items of consideration entered into the contract relied upon, in addition to the promised service to be rendered, namely: (1)

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The rejection of the Purdue offer; (2) the agreement to purchase the superintendent's house; (3) that plaintiff gave up an established business; and (4) that defendant saved the commission that it otherwise would have to pay engineers on new construction work.

Plaintiff obviously could not accept both the Purdue and the defendant's offer. It was for him to take one or the other. He could not possibly serve both masters.

A man capable of earning \$600 per month necessarily must be possessed of both learning and experience in his particular line of endeavor. The fact that he was able to command such salary at the time of entering into defendant's service is convincing proof that there must be more than one person or enterprise seeking his talents and services. If plaintiff had elected to go to Purdue and, after having been there employed the same length of time as he was by defendant, was then discharged, does it follow that he could successfully sue Purdue University upon the same theory that he is here making a basis for liability against defendant? We have found no case fitting into plaintiff's claim in this regard.

What has been said in respect of the Purdue opportunity applies with equal force to the third point raised by plaintiff. His capacity as a specialist in his line of endeavor had built up for him a lucrative practice. That practice he could not take with him when he entered defendant's employment. Is not this exactly what every person having any line of employment must do when he seeks and obtains another? If plaintiff had been engaged in the practice of the law and as such had established a clientele bringing the same income and had later taken on a contract to act for a corporate enterprise at a fixed salary of \$600 per month upon the same basis as here, do his counsel think, in virtue of the well established rules of applicable law, that he would have a lifetime job? Would not counsel have insisted upon a more definite agreement than that relied upon here?

Plaintiff's claims in this regard are ably discussed and disposed of in *Minter v. Tootle, Campbell Dry Goods Co.* In that case plaintiff was employed by defendant for a term which plaintiff supposed to be permanent. About two years thereafter he was discharged and brought this action to recover his expenses and unpaid salary. There the employe in order to enter into defendant's employment gave up his other employment. This was the basis for his theory of the case. The court said:

The reported cases which deal with contracts of employment in commercial business, where no other consideration than a promise to perform the service passes from the employe to the employer, are almost unanimous in applying the general rule that the words permanent, lasting, constant, or steady, applied to the term of employment do not constitute a contract of employment for life, or for any definite period, and such contracts fall under the rule 'that an indefinite hiring

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at so much per day, or per month, or per year, is a hiring at will and may be terminated by either party at any time, and no action can be sustained in such case for a wrongful discharge.' The general rule that the assurance of permanent employment will be construed as meaning an indefinite, as distinguished from a special, or merely temporary employment, is a common sense inference founded upon common knowledge of the customs and usages of business. The effort of plaintiff to show an additional consideration passing from him to defendant was abortive since it shows that he merely abandoned other activities and interests to enter into the service of defendant—a thing almost every desirable servant does upon entering a new service, but which, of course, cannot be regarded as constituting any additional consideration to the master.

With regard to purchase of the superintendent's house, note should be made that in plaintiff's letter written the day following the alleged making of the contract he said:

According to the understanding we have I am to take over Mr. Kull's duties as Power Superintendent and serve also as Mechanical Engineer for your plant, supervising the mechanical construction and maintenance work and other mechanical technical matters. Mr. Kull is to remain for long enough period, about six months, to permit me to get my work organized and get acquainted with the details of his work. If the proposed new construction work is started within that time it may develop that Mr. Kull may remain until that is completed after which he will leave and I take over his duties.

As an accommodation to him when he leaves town I am to purchase his house.

It is difficult to find anything in this language indicating a consideration for, going to, or in any way benefiting defendant to induce it to enter into such contract. Plaintiff's own statement is that "as an accommodation to Kull when he leaves town I am to purchase his house." How this could be of any material interest to or concern of defendant in view of plaintiff's own letter and stipulation is not apparent. Nowhere in the complaint is there any allegation that the purchase of the house from the superintendent in any way benefited defendant or damaged plaintiff. A man in plaintiff's position would necessarily be interested in acquiring a place of abode upon leaving Minneapolis for Grand Rapids. In the very nature of his requirements he entered into the purchase for his own use and accommodation rather than for any benefit to or advantage of defendant. Nowhere is there any suggestion that defendant was to furnish him with a place of abode or do anything whatever in respect of finding or providing such.

Workman v. United Parcel Service, Inc., 234 F.3d 998 (7th Cir. 2000)

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

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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.

Chapter 2 Labor Organizing & Concerted Activity

2.1 Concerted Activity as 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.

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.

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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.

It is adopted by Blackstone, and laid down as the law by Lord Mansfield, 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 con-

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duct may therefore well be attributed to the combination. The good sense of those individuals was prevented by this agreement, from having its free exercise.

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

Commonwealth v Hunt, 45 Mass. 111 (1842)

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.

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.

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.

William Blackstone
(1723-1780) was a British lawyer, judge, and legal scholar. His treatise on the common law, *Commentaries on the Laws of England*, was frequently cited as an authority by 19th century U.S. courts. William Murray, 1st Earl of Mansfield (1705-1793) was a prominent British lawyer and judge.

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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 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 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.

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, etc.

Now it is to be considered, that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly

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to extort great sums, etc.—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, etc. 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

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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.

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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, etc; 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, etc. in evil example, etc. 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.

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; es-

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pecially 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, etc. 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.

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 es-

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tablishment, 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.

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

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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 weapon against organized labor: the [Sherman Antitrust Act of 1890](#),¹ which outlaws “conspiracies in restraint of trade or commerce among the several States”. The Supreme Court endorsed the application of the Sherman Act against labor union activity in the Danbury Hatters’ case, [Loewe v. Lawlor](#).² The case arose out of organizing efforts by the United Hatters of North America. 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 union 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 the Supreme Court reversed, holding that the boycott fell within the prohibition against conspiracies in restraint of interstate commerce.

The impact of Danbury Hatters was devastating for organized labor. The unions, and many others, felt that the statute had been interpreted improperly, inasmuch as organized labor was not the focal point of congressional debate that took place prior to the enactment of antitrust legislation. Moreover, because the Sherman Antitrust Act provides for treble damages rather than the actual amount of the losses incurred (as well as criminal sanctions), the final judgment after fourteen years of litigation in Danbury Hatters awarded a substantial amount of money (\$250,000). What was particularly troublesome about the judgment was that the members of the union were individually and personally liable. Though the case was settled in 1917 for slightly over \$234,000³ and the AFL was able to obtain \$216,000 in voluntary contributions from union members, the fact that labor had to “pass the hat” to avoid the foreclosure of members’ homes made the case unforgettable.⁴

In 1914, Congress amended federal antitrust law with the Clayton Antitrust Act,⁵ which included provisions that union leader Samuel Gompers hailed as “labor’s Magna Carta and Bill of Rights and the most important legislation since the abolition of slavery.”⁶

Section 6 of the Clayton Act sought to exempt labor activity from antitrust liability:

¹15 U.S.C. § 1

²208 U.S. 274 (1908)

³Equivalent to about \$6.5 million in 2023.

⁴William J. Gould, *A Primer on American Labor Law* at 14-15 (4th ed. 2004).

⁵15 U.S.C. § 1 et seq.

⁶Gould, *A Primer on American Labor Law* at 15-16.

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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.

Section 20 of the Clayton Act sought to restrict the use of injunctions in labor disputes:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

But in *Duplex Printing Press Co. v. Deering*,⁷ the Supreme Court, interpreting these provisions narrowly, held that they did not prohibit the issuance of 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

⁷254 U.S. 443 (1921)

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“secondary” targets, so that they will cease doing business with the primary target). Like the Danbury Hatters’ case, Duplex Printing involved an organizing campaign in which the company resisted the union’s demand for a closed shop.

When only a few of the workers joined in the union’s efforts, the union attempted to boycott the company’s products by warning customers that it would be better for them not to purchase from the company, threatening customers with sympathetic strikes, and inciting the employees of customers to strike against their employers. It also notified repair shops not to do repair work on Duplex presses and threatened union men with the loss of their union cards if they assisted in the installation of Duplex presses. The Duplex company brought an antitrust action against the union for unlawful restraint of trade.

The Court stated that a distinction between a primary and a secondary boycott was material to the question of whether union conduct was immunized by virtue of the Clayton Act. The Court first examined section 6 and stated the following:

The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination of conspiracy in restraint of trade.

The Court then focused on section 20 of the Clayton Act, noting that the provision specifically forbade the issuance of restraining orders or injunctions in U.S. courts where there was a labor dispute between an “employer and employees” and that the first paragraph’s prohibition of orders in such circumstances “unless necessary to prevent irreparable injury to property, or to a property right” where there was no adequate remedy of law (that is to say, where the wronged party could not be adequately compensated through damages) was merely “declaratory of the law as it stood before.” ... The Court noted that the second paragraph referred to cases where the parties were “standing in proximate relation to a controversy” of the kind designated in the first paragraph. Noting that the majority of the circuit courts of appeals had previously concluded that the words “employers and employees” should be treated as referring to “the business class or clan to which the parties litigant respectively belong,” the Court nevertheless concluded that any construction of the statute that would preclude employer relief where union secondary activity was involved against employers “wholly unconnected” with the Battle Creek factory was a statutory construction “altogether inadmissible.” ... Significantly, the Court made clear its condemnation of

2.2 Labor Injunctions and Yellow Dog Contracts

the damage done to “many innocent people”—secondary employees and employees who were “far remote” from the “original” dispute.⁸

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 v. New York*,⁹ the Supreme Court struck down those statutes as unconstitutional infringements on liberty of contract. *Adair v. United States*¹⁰ (striking down federal statute making it a criminal offense for a railroad to fire an employee because of union membership); *Coppage v. Kansas*¹¹ (striking down state statute making it a crime for employers to require yellow dog contracts as a condition of employment).

⁸Gould, A Primer on American Labor Law at 16-18.

⁹198 U.S. 45 (1905)

¹⁰208 U.S. 161 (1908)

¹¹236 U.S. 1 (1915)

2.3 Legal Protection for Concerted 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)¹² declared “yellow dog” contracts unenforceable and significantly limited the ability of federal courts to issue injunctions in cases involving labor disputes. Many states followed suit by adopting “Little Norris-LaGuardia Acts” restricting labor injunctions in state court.

Second, the National Labor Relations Act (1935)¹³ 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 Labor-Management Relations Act (1947) amended the NLRA, including the addition of § 8(b) prohibiting unfair labor practices by unions.

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.

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”.

¹²29 U.S.C. §§ 101 et seq.

¹³29 U.S.C. §§ 151 et seq.,

National Labor Relations Act, 29 U.S.C. §§ 151 et seq.

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

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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.

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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

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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

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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)

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,

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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." The 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.

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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 heat in the summer-time.” 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

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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 concertededly 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

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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)

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 activity" 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

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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 truck-drivers 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. Something 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 "we'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

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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:

When 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).

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 "employees 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 activity" and therefore accorded the protection of § 7. The Board has relied on two justifications for the doctrine: First, the assertion of a right

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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 activity” 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

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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

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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 partic-

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ular 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

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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

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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 activity" 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 "the 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

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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

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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.

Sources

Cases

Books, Articles, & Other Publications

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Colophon

Set in Literata and Adelle Sans by Veronika Burian and José Scaglione; LFT Etica Mono by Leftloft.

