

Disloyalty! Does *Jefferson Standard* Stalk Still?

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In Endicott Interconnect Technologies, Inc. v. NLRB, 453 F.3d 532 (D.C. Cir. 2006), the District of Columbia Circuit breathed fresh life into the Supreme Court's 1953 decision in Jefferson Standard Broadcasting. The Court rejected the decision of the National Labor Relations Board to hold that public criticism of an employer's product or the quality of its management is so disloyal as to be cause to dismiss the employee irrespective of the context of the utterance. The Labor Board extended this in Five Star Transportation, Inc., 349 NLRB No. 8 (2007). This Article argues that the legal and ideological underpinnings of Jefferson Standard have become thoroughly eroded over the ensuing half century; that, at best, disloyalty is worthless as a guide to decision; at worst, it chills speech of social value, and ought to be abandoned.

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I.

INTRODUCTION

When the District of Columbia Circuit refused to reconsider its decision in *Endicott Interconnect Technologies, Inc. v. NLRB*,¹ it left standing a mangled exercise in administrative law. Were that all the case to be about it might be worth a footnote in a discussion of the *Chevron* doctrine preceded by the signal *don't see*.² But the case is about a good deal more: it tests the scope of the Labor Act's protection of employee speech in the 21st century. *This* is worth more than a footnote. Let us set the stage.

II.

ENDICOTT INTERCONNECT

The Company, located in upstate New York, was owned by IBM which was interested in divesting itself of that line of business, the manufacture of printed circuit boards. As an IBM operation it was the largest employer in the area with about 4,000 employees. It was also the object of a union organizing drive. A group of local businessmen led by a Mr. William Maines saw a business opportunity in IBM's desire to divest and saw in it as well a means of stemming job loss to the community. They purchased the operation, dubbed Endicott Interconnect Technologies, Inc, with the financial assistance of the State of New York in return for a commitment to maintain jobs in the area. The majority of Endicott's sales were to IBM; the union continued its organizing effort.

Two weeks after the purchase, Endicott laid off about 200 of its 2,000 employees. As one might imagine, this attracted considerable attention in the local press. A reporter called the union's organizer for comment; the organizer asked Richard White, a long time employee and union supporter, to respond to the reporter, which White did. The ensuing press account read as follows, with emphasis given to Mr. White's remarks:

The firing of 200 people at the fledgling Endicott Interconnect Technologies two weeks after its birth was a "pragmatic" decision by James J. McNamara, Jr., president and chief executive officer.

"I have a fiduciary responsibility to make this business profitable," McNamara said, just hours after notifying scores of mid-level managers,

1. 453 F.3d 532 (D.C. Cir. 2006), *petitions reh'g and for reh'g en banc denied* (Nov. 13, 2006).
 2. Richard Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986).

engineers and support people on Friday morning that they no longer had jobs.

* * *

Endicott Interconnect executives said they had no choice in the matter. Depressed production volumes don't support the infrastructure the 15-day-old company inherited from IBM Corp. As an independent company without the corporate bureaucracy of the entrenched computer maker, Endicott Interconnect Technologies could slice off a layer of management without an effect on the consumer, McNamara said.

Some employees disagree, saying the decision made Friday will hurt the company over the long term.

"There's gaping holes in this business," said Rick White, an employee with 28 years at the Endicott plant who, with nearly 2,000 other people, recently transferred from IBM to Endicott Interconnect.

White, who kept his job, said development and support people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business.

McNamara, for his part, doesn't dispute that Friday's action will produce more work and more responsibilities for others in the plant. Managers with one area of responsibility may be asked to oversee one or two other areas, he said. Cutting a management layer, however, will give the remaining workers a larger role in the business, he said.³

Shortly thereafter an IBM official called to inquire if there were indeed "gaping holes" at the Company. Mr. Maines denied that that was so and summoned White to a meeting. White explained and defended his remarks: "I wanted it [the Company] to succeed," he later testified; but, "I felt that the lay-off of those 200 people, the experts, the people who knew what they were doing, was not a good thing." According to Maines, he told White he could not tolerate an employee who "makes unfactual, unfounded, disparaging remarks that are read by customers, that literally could put us out of business. . . ." By both accounts, White said he was "on board" with that, but the testimony conflicted on whether the "that" referred to further contact with the press or to the making of critical remarks.

Meanwhile, because of the intensity of the public's interest the local newspaper had set up a web site, access subject to a user password, as a forum for an exchange of views on Endicott Interconnect's situation. A Mr. House posted an anti-union message to which White posted a rejoinder, set out below,⁴ that accused the new owners of mismanagement ("This

3. *Quoted in* Endicott Interconnect Technologies, Inc., 345 NLRB No. 28 (2005) (emphasis added).

4. *Id.*

business is being tanked by a group of people who have no good ability to manage it.”) and of indifference to the workforce and the larger community (no one other than the union “will help stop the job losses, and root for the workers of the community instead of defending the likes of Bill Maines [and] George Pataki [the Governor of New York].”). For this and for his failure to take the prior warning to heart Mr. White was fired.

The scene now shifts to the National Labor Relations Board to which complaint had been made that the discharge violated the law’s insulation of an employee’s engagement is concerted activity for mutual aid or protection from employer reprisal. The Administrative Law Judge held the discharge to have violated the Act.

The argument before the ALJ, as before the Labor Board and the Court of Appeals, turned on the contemporary significance of the United States Supreme Court’s decision a half century before in *NLRB v. Local Union No. 1229, Int’l Brotherhood of Electrical Workers (Jefferson Standard Broadcasting)*.⁵ Accordingly, for ease of narrative and analytical flow we will briefly hold to one side Board’s and the court’s treatment of what Mr. White said while we take up what the Supreme Court did in *Jefferson Standard*.

A. *Jefferson Standard*

The 1949, the IBEW was locked in hard bargaining for the technicians of the Jefferson Standard Broadcasting Company in Charlotte, North Carolina: the technicians picketed, but did not strike, to secure advantageous terms; they circulated a handbill in the business community for which ten employees who’d circulated it were discharged. The handbill accused the Company of treating Charlotte as a “second-class city” in its programming.⁶ It did not disclose that it was generated by the union, it was

“To Mr. House: Why do you continue to try to bundle reasons why a union is suspect and not so desirable for EIT employees? Why do you site [sic] all the bad things about Unions, and ignore all the bad things that IBM and EIT have done to the employees and their families and the community at large? Isn’t it about time you seriously thought about the fact that no one else will help to stop the job losses, and root for the workers of the community instead of defending the likes of Bill Maines, George Pataki, and Tom Libous? Hasn’t there been enough divisiveness among the people working in this area? Isn’t it about time we stood up for our jobs, our homes, our families and our way of life here? Do you want to sit by and watch this area go to hell and dissolve into a welfare town for people over 70? This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past that were “saved” by Tom Libous and George Pataki, i.e., “Telespectrum”, “IFT (Flex)”. When you are going to get it??? A union is not just a protection for the employees. It’s an organization that collectively fights for improvements and benefits for working people in communities like ours. Forget Jimmy Hoffa and the mob. Those people and situations are stereotypes of fools who chose to undermine the very system they vowed to protect. They are the minority and always have been. Look around. Do you think the government will help you when you lose your job and your house? Think again. A union is the beginning of a community standing up for itself. It’s time is now.”

5. 346 U.S. 464 (1953).

6. The text is set out at *Jefferson Standard Broadcasting Co.*, 94 NLRB 1507, n.9 at 1511 (1951):

signed simply as “WBTV Technicians”; neither did it disclose that it’d been circulated as part of a labor dispute. The Board majority held the speech, even if in furtherance of concerted activity for mutual aid or protection, to be statutorily unprotected: the discharged employees “deliberately undertook to alienate their employer’s customers by impugning the technical quality of its product”; they “purported to speak as experts, in the interest of consumers and the public at large,” about subject matter that “was not geared to their interests as employees”; the tactic was “hardly less ‘indefensible’ than acts of physical sabotage.”

When the case came before the District of Columbia Circuit Judge Bazelon made short work of it:⁷ The Act’s protection of concerted activity for mutual aid or protection can be constrained by the Act itself or by some other law, he reasoned, but the Board’s characterization of speech that falls afoul of a vague test of “indefensibility” differs significantly from a test of “unlawfulness,” which the court took to supply the sole basis for rendering labor speech unprotected. The court remanded for the Board to consider, and explain, in just what way the technicians’ speech was unlawful.

The case reached the Supreme Court and it, too, made short work of it. Justice Burton, writing for the six member majority, noted that section 10(c) of the Act did not require an employer to retain an employee who’d been “discharged for cause,” and that “[t]here is no more elemental cause of discharge than disloyalty to his employer.”⁸ The handbill did not address any unfair labor practice; neither did it refer to wages, hours, or working conditions. The policies attacked were those “for which management, not technicians, must be responsible.”⁹ An employer is scarcely required to finance an attack on interests the technicians were paid to conserve. Consequently, there was nothing to remand.

Justice Frankfurter, joined by Justices Black and Douglas, dissented. He pointed out that all the court of appeals had done was to seek the Board’s clarification, and he sustained the need for it: “[T]o float such imprecise notions as . . . ‘loyalty’ in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual

“Is Charlotte A Second-Class City?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old? There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn’t the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them? WBTV Technicians.”

7. Local Union No. 1229, Int’l Bhd. of Elec. Workers v. NLRB, 202 F.2d 186 (D.C. Cir. 1952).

8. 346 U.S. at 473.

9. *Id.* at 476.

judgment by Board members and judges.”¹⁰ Insofar as the Court would exempt acts of “disloyalty” from the scope of statutory protection, he pointed out that much of what the Act protects—a strike, for example—would, absent the Act, be considered disloyal. The question is why this tactic, “no more unlawful than other union behavior previously found to be entitled to protection,” should be singled out for non-protection, and that required a good deal more from the Board, or the Supreme Court, than a catchphrase.

B. The Jefferson Standard Connection to Endicott Interconnect

A lot of law has been ground out of the Labor Board’s mill since *Jefferson Standard*. The Board majority in *Endicott Interconnect* opened with a brief summary the Board had previously essayed in *Mountain Shadows Golf Resort*:¹¹ a communication directed to a third party is protected if it indicates its connection to a labor dispute and “is not so disloyal, reckless or maliciously untrue” as to lose protection. It found the connection to a current labor dispute patent in White’s speech when taken in context. Further, and citing to the Board’s decision in *Titanium Metals Corp.*,¹² it found his remarks on both occasions neither “ ‘so misleading, inaccurate, reckless, or otherwise outside the bounds of permissible speech, to cause [him] to lose the Act’s protection.’ ”

The Court of Appeals thought the first reference, to *Mountain Shadows*, to have captured the law. But it found reliance on the second, to *Titanium Metals*, to have “ignored the very attribute that justified discharging the technicians in *Jefferson Standard* for cause: the ‘detrimental disloyalty’ of their assault on their employer.”¹³ According to the Court of Appeals, the Board had made a mistake: it had left a word out of its test—*disloyalty*—and that singular omission was fatal for, to the Court of Appeals, “White’s communications were unquestionably detrimentally disloyal.”¹⁴ It was therefore irrelevant that White’s words were not misleading, reckless, inaccurate, or malicious: it bespoke “disloyalty” and that was enough.

As the Board’s decisional references in its petition for reconsideration—to *Sierra Publishing, Co.*,¹⁵ among others—evidence, *Jefferson Standard* had taken on decades of refinement. In the Board’s view, disparagement of the quality of the company’s product or the quality of its management is not cause *per se* for the loss of the Act’s protection; a

10. *Id.* at 481 (Frankfurter, J. dissenting).

11. 330 N.L.R.B. 1238, 1240 (2000).

12. 340 N.L.R.B. 766 (2003), *enfd on other grounds*, 392 F.3d 439 (D.C. Cir. 2004).

13. *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006).

14. *Id.*

15. *Sierra Pub. Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989).

more nuanced, context-specific analysis had taken root, captured by the Ninth Circuit in *Sierra Publishing Co. v. NLRB*:

[T]he disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, *suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products, or may even affect the company's own viability are not likely to be unreasonable*, particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints.¹⁶

This and related holdings in sister circuits¹⁷ are impossible to reconcile with the District of Columbia Circuit's categorical treatment; *i.e.*, under no circumstance could White's speech be anything other than an unpardonable act of disloyalty giving the employer cause to discharge. Attention accordingly turns to the concept of disloyalty invoked by the *Jefferson Standard* Court in 1953 and echoed afresh in 2006.

III. DISLOYALTY

A. Provenance

"Disloyalty" is a shorthand expression, a catchphrase, and as such incapable of supplying a clear guide to decision, that, at least, being the near universal judgment of contemporaneous and later students of *Jefferson Standard*.¹⁸ Loyalty can mean personal fealty, the subordination of one's

16. *Id.* at 220 (emphasis added).

17. *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634 (1st Cir. 1982); *Cmty Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976); *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808 (2d Cir. 1980).

18. Such was the near universal student reaction at the time (and at a time when faculty comment on student writing was commonly sought)—Comment, *Labor Law – Disloyalty to Employer Held Good Cause for Discharge: NLRB v. Local Union No. 1229*, -- U.S. --, 74 S. Ct. 172, 34 B.U. L. REV. 233, 236 (1954). Case Note, *Labor Law – Disloyalty as Cause for Discharge*, 3 DEPAUL L. REV. 291, 293–94 (1954), Recent Decisions, *Labor Law – Discharge of Employees for Distributing Handbills Impugning Quality of Employer's Product and Making No Reference to Labor Controversy Was Discharge "For Cause" within Meaning of § 10 (c) of Taft-Hartley Act and Hence such Discharge was not Violation of § 8(a)(1) of Act*, 42 GEO. L.J. 470, 474 (1954), Recent Decisions, *Labor Law – Labor Management Relations Act – Disparagement of Employer's Product as Protected Concerted Activity*, 52 MICH. L. REV. 1069, 1071 (1954), "Employee Loyalty" and Section 7, 50 NW. U. L. REV. 220, 228–30 (1955), Comments, *Powers of the NLRB to Reinstate Discharged Strikers*, 7 STAN. L. REV. 382, 386

ends and will to the command of another, sometimes near total as in its military usage; and personal fealty to management has sometimes been an element of corporate policy.¹⁹ But that feudal notion is not quite what Justice Burton seems to have had in mind. Rather, the Court's treatment of disloyalty harkens back to the common law, as it was still in the 1950s, of Master and Servant.

The law of master and servant implied on the servant's part a basic obligation of faithfulness to the master's interests. As Lord Kenyon put in 1799, "A servant while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business. . . ."²⁰ This is the obligation captured by the catchphrase "disloyalty." As the law of master and servant came to be applied in the employment setting well after the Industrial Revolution—that is to workers to whom the ascription of household service is discordant, to say the least²¹—the obligation took firm root in legal treatises though, oddly, the actual catchphrase seems rarely to have been used.²² Fraser's 1882 treatise on the law of master and servant

(1955), Notes, *Labor Relations – National Labor Relations Act – Circulating Handbills Impugning the Quality of the Employer's Product not a Protected Concerted Activity* – NLRB v. Local Union 1229, 346 U.S. 464 (1953), 32 TEX. L. REV. 888, 889 (1954), *per contra* Recent Cases, *Labor Law – National Labor Relations Act – Concerted Activity Must be "Unlawful" Rather than Merely "Indispensable" to Lose Protection under §7*, 66 HARV. L. REV. 1321, 1322 (1953)—and today, Ron Lepinskas, *The NLRA and the Duty of Loyalty: Protecting Public Disparagement*, 60 U. CHI. L. REV. 643 (1993). The then General Counsel of the Labor Board defended the decision. See George Bott, *The Taft-Hartley Act—Its Operation and Development*, 8 ARK. L. REV. 360 (1954). He acknowledged the validity of the "misgivings" expressed about the decision, but was confident in the Board and courts' ability to distinguish between the statutory unprotected and that which he termed "merely unconventional." *Id.* at 363. A leading commentator reflecting on *Jefferson Standard* a generation on found its logic "uncompelling and its reach unclear." ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 315 (1976). That estimation has remained a generation later. ROBERT A. GORMAN & MATTHEW FINKIN, BASIC TEXT ON LABOR LAW 426 (2d ed. 2004).

19. Note a study of the Endicott Johnson Company in the 1920s:

Fundamental to the development of a corporate community was labor loyalty. . . . Company publications constantly repeated the theme. In articles and poems in the *E.-J. Workers' Review*, the employee magazine, the ideal of loyalty was prominently displayed:

May the E.-J. wheel keep turning
As long as the world shall stand;
May each cog prove ever faithful
Under its guiding hand.

GERALD ZAHAVI, WORKERS, MANAGERS, AND WELFARE CAPITALISM: THE SHOEWORKERS AND TANNERS OF ENDICOTT JOHNSON, 1890–1950, 41 (1988). Zahavi explains: "*Loyalty meant a personal allegiance to management as well as a commitment to the good of the corporation.*" *Id.* (emphasis added). Personal fealty to the employer was an express component of labor law in Nazi Germany. TIM MASON, NAZISM, FASCISM AND THE WORKING CLASS 77–103 (Jane Caplan ed., 1995).

20. *Nichol v. Martyn*, 2 Esp. 732 (1799).

21. Otto Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment*, 93 L. Q. REV. 508 (1977); further discussed by SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET 42–43 (2005).

22. The "duty of loyalty" makes no appearance as such in any of the treatises about to be discussed nor in IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED (2d ed. 1890).

simply states as a broad principle that, “The Servant must do nothing to injure his Master’s Business,”²³ citing, among other decisions, *Lacy v. Osbaldson*,²⁴ of which more will be said momentarily. Horace Wood’s 1886 treatise captures the same principle²⁵ and by extensive reference to authority including that decision.²⁶ So, too, does Charles Manly Smith’s treatise of 1906, citing the same case.²⁷ And C.B. Labatt’s eight volume treatise in 1913 supplies even greater detail, with even more extensive reference to authority, to illustrate the general principle that a servant’s conduct that is likely to produce detriment to the master breaches the employment contract and gives cause to dismiss.²⁸ Breach had been found where the servant’s

conduct had been calculated to offend, annoy, or alarm persons having business dealings with his master; where he had made a wilful and deliberate attempt to injure his master’s business; where his acts or words had been such as to injure the master’s standing as a business man; where he had acquired an interest in a business which competed with that of his master; where he had taken part in a strike affecting the employer’s interests; where his behavior was calculated to excite discontent among his subordinates.²⁹

The last referencing *Lacy v. Osbaldson*. The case is instructive.

Lacy had been hired as acting manager of Covent Garden for the theatrical season 1835–36, had been dismissed, and sued for sums due. The employer defended on several grounds one being that Lacy had excited discontent in the workplace by saying to a performer, Miss Romer, singing in the opera *Zampa*,³⁰ “I wonder how you can perform in such rubbish.” That was enough to present a question for the jury, of whether he’d conducted himself in a fashion so injurious to the employer’s interests as to warrant discharge. For our purposes it is irrelevant that Lacy was a

23. WILLIAM CAMPBELL, 1 FRASER ON MASTER AND SERVANT, EMPLOYER AND WORKMAN AND MASTER AND APPRENTICE 88 (3d ed. 1882) (italics omitted).

24. 8 C & P 83, 173 ER 408 (1837).

25. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 166 (2d ed. 1886) (references omitted):

On the part of the servant, there is an implied obligation to enter the master’s service and serve him diligently and faithfully, to obey all his reasonable commands, treat him respectfully, conduct himself morally in his master’s family, and to perform the duties incident to his employment honestly, with ordinary care, and due regard to his master’s interest and business.

26. *Id.* at 211–12.

27. CHARLES MANLY SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT 107 (6th ed. 1906) (treating “conduct calculated seriously to injure his master’s business,” *id.* at 105).

28. 1 C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 285 at p. 869 (2d ed. 1913).

29. *Id.* at 870–72.

30. *Zampa or the Marble Fiancé* (*Zampa ou la Fiancée de marbre*) (1831) was one of Louis-Joseph-Ferdinand Hérold’s (1791–1833) most popular operas. The plot is no more or less risible than a great many others. See HÉROLD LOUIS-JOSEPH-FERDINAND, AIRS DE MONSIEUR LAMBERT, available at http://www.musicologie.org/Biographies/h/herold_ferdinand.html (last visited April 3, 2007).

manager; an employee, Miss Romer, for example, who excited discontent among her coworkers by uttering such remarks would have been equally disloyal.

As Justice Frankfurter noted in *Jefferson Standard*, much that the Labor Act protects would be considered in breach of the implied obligation that a servant do nothing likely to produce detriment to the master's business. As Labatt's treatise pointed out, taking part in a strike would be just such an act and he cited authority to just that effect;³¹ but, as Frankfurter noted, an economic strike is quintessentially protected labor activity. Offending one's employer's customers breaches the duty of loyalty, but the statute allows employees to appeal to customers regarding the evils of their employer's policies;³² and if inciting discontent among coworkers were cause to dismiss today few unions would be able to engage organizational activity. What needs explanation is why White's speech should fail of protection apart from the fact that economic harm might result, for economic harm might well result from any of these other disloyal but statutorily protected acts. What the Board's decision elicited instead of an explanation was the recitation of a catchphrase.

It is not surprising that the *Endicott Interconnect* court declined to supply a rationale for it was the want of a rationale that triggered the dissent in *Jefferson Standard*: the District of Columbia Circuit saw no need to be any more forthcoming on that account than the superior tribunal had been a half century before. But if one reads the opinion through the lens of *Jefferson Standard*, it becomes clearer that the decision tacitly rests on two grounds. The first is a conjunction of legal assumptions. The second draws from an ideology of industrial relations. Let us take each up in turn.

The legal conjunction is this: (1) that the obligation of non-disparagement of an employer's product or of its management is an immutable obligation inherent in the very nature of the employment relationship; and, (2) that *Jefferson Standard* permits no reading of the Labor Act that could extend statutory protection in derogation of it. Note that the strength of the conclusion rests upon the strength of the conjunction: if the meaning of "disloyalty" is mutable—if the law of

31. N.Y., Chi. & St. Louis R.R. Co. v. Schaffer, 65 Ohio St. 414 (1902), although the actual holding in the case was that no tort was worked by blacklisting a brakeman who'd gone out on strike:

If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike. . . . there does not appear to be any good reason why a number of railroad companies might not agree among themselves to not employ such a person.

Id. at 421.

32. Including the District of Columbia Circuit, *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007); *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 684-85 (8th Cir. 1996). See also *Sierra Pub. Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) ("If unions are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision.").

employment in the United States in the first decade of the 21st century is not governed by the law of Master and Servant at the time when Dickens was young—it would be difficult to maintain that the Supreme Court's decision of a half century ago nonetheless makes it so. Accordingly, what the legal and industrial relations landscape is today must first be surveyed and how the jurisprudential foundation of *Jefferson Standard* relates to it needs next to be explored. Once the legal assumptions have been treated the ideological assumption will be taken up. Only after that is done can *Endicott Interconnect* be comprehended.

B. *The Legal Landscape a Half Century On*

Are employees today obligated as they were in 1953 never *ever* to disparage their employers or their products to third parties? Two legal developments in the public and private sectors respectively speak to the question.³³

1. *Public Policy in Public Employment*

Recall that in 1953 the law of master and servant applied to public and private employment equally; as the Tennessee Supreme Court captured it, in relation to its “servants” the public master is no more hampered by the Constitution than a private master is.³⁴ The principle expounded by Fraser, Wood, Smith, and Labatt applied in both settings.

On September 24, 1964, Marvin Pickering, a teacher in Township High School District 205, in Will County, Illinois, published a letter to the editor in the local press. In it he accused the Board of Education of financial mismanagement in connection with a bond issue: “No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. Taxpayers were really taken to the cleaners.” He was dismissed. Before the United States Supreme Court the school board agued to the common law duty of loyalty that Pickering owed to it. The Court rejected the claim. Howsoever time-honored,³⁵ by 1964 the duty of loyalty to the employer abutted freedom of speech. Public employees were thus emancipated publicly to criticize those of their employer's actions that were of social, economic, or other concern to the community.³⁶ The Court agreed that speech directed toward a person with whom the speaker would be in a close personal working relationship

33. The snapshot to follow has been explored in much greater depth and to broader effect by Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101 (1995). See also Ken Mathey & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C.L. REV. 1705 (2004).

34. See *Scopes v. State*, 289 S.W. 363, 364–65 (Tenn. 1927).

35. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (“Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”).

36. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

or that threatened the maintenance of discipline would inject a countervailing consideration. But neither of these factors was present. The questions Marvin Pickering addressed were of “legitimate public concern”³⁷ and Pickering was free publicly to address them even if, in the process, he disparaged the quality of his employer’s management or the educational product, which he did.

The warp and weft of public employee free speech, first framed in 1968, has become a rich tapestry of decisional law. For the purposes of this discussion it is important only to note a reversal of values: no longer do we see an employee’s public utterance critical of the quality of her employer’s management or service as an egregious breach of the duty of loyalty, we see it today as an act of responsible citizenship that contributes to a constitutionally valued robust debate on matters of legitimate public concern whatever the potential impact on the employer’s “bottom line.”³⁸

It would cabin the mind by a naked legalism to see this reversal of values as having no broader social emanation. Nor will it due to advert the public’s monopoly of the service provided to distinguish it from private enterprise for public services have come to compete ever more frequently with private sector counterparts—in schooling, health care, security service, and a good deal more—or even to be privatized.³⁹ The potential impact of employee speech on the employer’s reputational or managerial interest cannot invariably be distinguished by the legal setting of the employment; the employer’s concern for the “bottom line” may be no less today in the public than in the private sector.⁴⁰

Note also that the purchase of Endicott Interconnect was enabled by funds from the state, to preserve jobs in the community. Were the state to have become sufficiently entangled with Endicott Interconnect as a result of

37. *Id.* at 572 (“Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”)

38. *See* *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004). *Crue* addressed a prohibition issued by a University against any employee contact with athletic prospects without prior administrative clearance. This prohibition was intended to limit appeals to athletic prospects not to attend the University by a group that believed the University’s mascot was racist. The University defended the prohibition in part on the ground that “intercollegiate athletics is ‘big business’” and that damage to the University’s athletic program, which the plaintiffs’ speech sought, is such damage “to the bottom line” as to allow the University to act. (Appellant Br. at 31). The court of appeals’ majority was not persuaded, declining even to mention the argument.

39. At the state level, this has occurred in parks and recreation, employment security, data processing, vehicle registration, and more. *See* Al Bilik, *Privatization: Selling America to the Lowest Bidder*, 15 LAB. RES. REV. 1 (1990). Scott Shane, *In Washington, Contractors Take On Biggest Role Ever*, N.Y. TIMES, Feb. 4, 2007, at A1.

40. In *Calabro v. Nassau Univ. Med. Ctr.*, 424 F. Supp. 2d 465 (E.D.N.Y. 2006), an investigative reporter contacted an employee of a public hospital for first hand information on its sanitary conditions. The employee’s candid response, which triggered his discharge, was held to be protected by the first amendment. The court noted that communal concern would be no less were the hospital to have been in private hands.

providing and administering these funds⁴¹—if Endicott Interconnect had become ““entwined with government policies”” or if the State of New York had become ““entwined in [Endicott Interconnect’s] management or control””⁴²—the company would have become assimilated with the state for constitutional purposes and its employees’ public speech would then have been protected even as it continued to function as a profit-making entity. Were that to have been the case, whatever action management might then have believed necessary to take in response to Mr. White’s response to the press, the one response it could not have made would have been to discharge him, for, in terms of the legitimacy of the public’s interest, the community’s concern for its school’s doors and foliage would scarcely seem to exceed its concern for the dominant employer’s ability to preserve jobs.

Today’s regnant legalism does result in the following anomaly: absent requisite state entanglement, employee speech critical of the community’s dominant employer’s ability to maintain jobs is egregiously disloyal; with requisite entanglement, the same speech becomes a responsible exercise of citizenship, the reputational impact upon the employer being the same in both cases. But this unstable state of affairs should at a minimum give pause.

2. *Public Policy in Private Employment*

In 1971, a generation after *Jefferson Standard*, the chairman of the board of the General Motors Corporation lamented that,

“...[T]he enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony, and pry into the proprietary interests of the business. However this is labelled [sic]—industrial espionage, whistle blowing, or professional responsibility—it is another tactic for spreading disunity and creating conflict.”⁴³

Public concern about corporate misconduct and encouragement of employee speech to disclose it grew apace nevertheless.⁴⁴ Today, private employment is hedged ‘round with whistleblower laws and common law tort doctrine protecting employees from discharge for speaking out and so encouraging them to do so, *i.e.*, to breach their duty of loyalty.⁴⁵ These vary enormously from state to state in coverage and technical detail, but that an employee in the private sector publicly criticizes her company’s

41. See generally *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

42. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

43. Quoted in Kenneth D. Walters, *Your Employees’ Right to Blow the Whistle*, in *INDIVIDUAL RIGHTS IN THE CORPORATION* 91, 93 (Alan Westin & Stephen Salsburg eds., 1980).

44. *WHISTLEBLOWING! LOYALTY AND DISSENT IN THE CORPORATION* (Alan Westin ed., 1981).

45. See, *e.g.*, DANIEL WESTERMAN & NANCY MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* (2d ed. 2004).

product or management can no longer be said to be such an act of disloyalty as to warrant discharge *per se*.

3. *The Meaning of "Cause"*

As it is no longer true that *any* public criticism of the product or of management is fatally disloyal, the question is whether *Jefferson Standard* must be read as stating a *per se* rule to the contrary—one the Labor Board is not free to modify, one only Congress can correct. The Supreme Court can give the statute a definitive if arguably erroneous reading having just that preclusive effect. It did in the *Lechmere* case⁴⁶ concerning the access of union organizers to solicit employees for union support on company property. The Court, glossing its 1956 decision in *Babcock & Wilcox*,⁴⁷ held that the previous decision had drawn a categorical statutory distinction between the expressive rights of employees, those in an employment relationship with the subject employer, and non-employees, those who are strangers to the enterprise for the want of that proximate relationship.⁴⁸ The Court did so without reference in either decision to the statutory definition of an employee, which would seem to reject that distinction, or to its legislative history.⁴⁹ This definitive reading is nevertheless binding upon the Labor Board and the lower courts; only Congress can correct it. The question is whether *Jefferson Standard* did the same.

The statutory basis for *Jefferson Standard* is § 10(c) of the Act, disallowing the Labor Board the power to afford a remedy for an employee who'd been dismissed for cause. But "cause" is not defined in the Act. As the dissent in *Jefferson Standard* pointed out, cause, or "just cause," is a concept borrowed from the world of industrial relations. The statutory term accordingly draws its sustenance from the common law of the workplace.⁵⁰

46. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

47. *Babcock & Wilcox Co. v. NLRB*, 351 U.S. 105 (1956).

48. *Lechmere*, 502 U.S. at 537.

49. ARCHIBALD COX ET AL., *LABOR LAW* 142 (14th ed. 2006); Matthew Finkin, *Legal Craftsmanship? The Drafting of the Wagner Act*, in PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 381 (1996).

50. This part of what became § 10(c) was contained in the House bill; the Senate had no counterpart. The conference acceded to the House with modifications not relevant here. Conference Report on H.R. Rep. No. 80-510 at 59 (1947) reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947*, 559 at 563 (1985). The Conference Report explained:

Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, *contract violations*, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10 (c).

(emphasis added).

Industrial workers do not commonly have contracts of employment; their labor contracts—the "contracts" referred to—were collective bargaining agreements. Breach of the duty of loyalty as an

If, today, speech to a third party critical of an employer or its product would not be cause to dismiss an employee under a collective bargaining agreement *per se*—if, that is, whether cause is presented is content and context specific—then it follows that it is well within the Labor Board’s discretion to decide that the content and context is such as statutorily to privilege the speech when made in the context of labor organizing or of a labor dispute.

The common law of the workplace does recognize an implied “duty of loyalty,” *i.e.*, to “refrain from *deliberately* interfering with the employer’s business interests.”⁵¹ The question rhetorically put in cases of employee disparagement is whether the employee, like a dog, can “bite the hand that feeds . . . [him].”⁵² Not surprisingly, the answer often given is no. Often, but not inexorably, for cause is a fact-specific and context-driven question even when disparagement is the basis for industrial discipline.⁵³ Let us turn then to the common law of industrial justice, of cause to dismiss.

Malicious or groundless disparagement of an employer’s product is cause to discharge: where an employee published an article in a union newsletter accusing the employer, a defense contractor, of making “bad parts,” of ordering inspectors to let them pass, and so of threatening the lives of servicemen, none of which was true, the arbitrator found just cause to discharge.⁵⁴ And where an employee, whilst making a delivery, told the customer that his employer “‘always screws all their customers—they sell nothing but junk’,” apparently out of personal hostility to the company president, the arbitrator said that such would be cause to dismiss.⁵⁵ “[R]ights as a citizen,” wrote one arbitrator, “must be balanced against his [the employee’s] obligations to his employer”⁵⁶—necessarily to acknowledge that there could be circumstances where the balance weighs in favor of the employee.⁵⁷ The factors to be weighed in the balance were catalogued by another arbitrator, among them consideration of: the audience to whom the employee’s remarks are directed; whether the statements were “known to be or reasonably held” by the employee to be

implied element of the relationship would accordingly be governed by the law of the collective agreement, *i.e.*, by a the body of arbitral law applying the concept of just cause.

51. NATIONAL ACADEMY OF ARBITRATORS, *THE COMMON LAW OF THE WORKPLACE* 183 (Theodore St. Antoine 2d ed., 2005) (emphasis added).

52. *Id.* at 183 (citing *Forest City Pub. Co.*, 58 LA 773, 783 (McCoy Arb., 1972)).

53. See generally Roger Abrams & Dennis Nolan, *Toward a Theory of “Just Cause” in Employment Discipline Cases*, 1985 DUKE L.J. 594 (1983).

54. *General Electric Co.*, 40 LA 1126 (Harold Davey, 1963).

55. *Sun Furniture Co.*, 73 LA 335 (Reuben, 1979).

56. *Appalachian Power Co.*, 73-2 ARB. ¶ 8496 at 4841 (McDermott, 1973).

57. *Yellow Cab. of Cal.*, 65-1 ARB. ¶ 8256 at 3928 (Edgar Jones, 1965) (stating “There is evidenced in this case a tension between an employee’s private loyalty to an employer and his public loyalty to his community” in disallowing discharge for reporting his employer’s criminal wrongdoing—this some years before discharge for so doing was recognized in many jurisdictions as a violation of public policy).

true or false; whether the “ ‘tone’ ” or actual language was malicious or inflammatory; and, whether “ ‘substantial personal rights of expression and citizenship’ ” were involved—which the arbitrator characterized as “a forceful mitigating consideration.”⁵⁸

Consequently, a prominent arbitrator refused to sustain the discharge of an employee who’d written a letter of vitriolic criticism to the company’s Operations Superintendent, copying it to his Congressman as well as several company officials.⁵⁹ The award relied extensively on the body of first amendment law governing labor speech in defamation cases. The arbitrator reasoned that speech insulated from reprisal by a suit for defamation as a matter of national labor policy, grounded in the nation’s commitment to “‘robust’ debate in labor disputes,”⁶⁰ must be equally insulated from employer reprisal, by discharge, if that commitment is to have purchase in the workplace. And in a recent case⁶¹ reminiscent of *Lacy v. Osbaldson*, a Pepsi-Cola employee, identified as R., making a delivery at a Wal-Mart, encountered a Wal-Mart employee, Bev, and a Wal-Mart manager, Kevin. Bev told R that she didn’t buy from the “pop machines” as they were too expensive. That prompted a colloquy in which Pepsi’s employee disparaged Wal-Mart, his employer’s customer.⁶² So seriously did Wal-Mart take the criticism that it notified Pepsi that it would not allow

58. Zellenback Paper 6, 75 LA 868, 876 (Gentile, 1980).

59. N. Ind. Pub. Serv. Co., 69 LA 201 (Sembower, 1977). The flavor of the employee’s criticism can be gleaned from just a brief excerpt:

“One fact remains, the jobs and conditions where your incompetence and disregard for cost to the public has resulted in unnecessary and higher than normal or correct costs, simply because you are a monopoly will remain as a monument to your attitude and monopolistic disregard for the Rate Payer and the difficult position this creates for the employee in the field that has to do the work, and is put in the position of being asked by the customer why this company does things the way they do. Needless to say, there is never a satisfactory explanation for your above mentioned practices and procedures.”

Id. at 203. *Contra* San Diego Gas & Elec. Co., 82 LA 1039 (Johnston, 1983).

60. N. Ind. Pub. Serv. Co., 69 LA at 209..

61. Pepsi Bottling Group, 122 LA 899 (Daly, 2006) (*italics omitted*).

62. The colloquy is set out below:

R. That’s Ok I don’t buy anything from Wal-Mart.

Bev. Hey Kevin did you hear that? He doesn’t buy anything from Wal-Mart.

Kevin. What do you mean you don’t buy anything from Wal-Mart, everyone buys from Wal-Mart. Why don’t you?

R. I would [buy at Wal-Mart] if they took better care of you guys on the medical coverage. You guys are the largest company in the US with the most people on medical assistance.

Kevin. So where did you hear that?

R. I just read it somewhere.

Kevin. Well we don’t just get everything handed to us because we are not union.

R. We pay good money for what we get. The only one I ever heard getting into Wal-Mart was in Canada and they closed the door before it opened.

Kevin. Well that’s because they are Canadian.

Id. at 900.

R. access to its premises. Pepsi issued R. a "Last Chance Agreement," a form of discipline that, in lieu of discharge, renders any future misconduct subject to summary termination; the union took the issuance of the latter to arbitration.

The Company argued that R. had breached the duty of loyalty he owed to Pepsi by offending Pepsi's customer; in fact, it claimed he'd "destroyed the relationship" between his employer and its customer. The arbitrator was not persuaded: "This was merely a free expression of ideas," he reasoned, the employee expressed his "political thinking." There was, he concluded, "no connection" between the content of the employee's speech and "'proper [just] cause' for termination."⁶³

By the standards laid down by Frasier (1882), Wood (1886), Smith (1906), and Labatt (1913), R's remarks were certainly contrary to his employer's business interest—in the latter's terms, it certainly "offend[ed] persons having business dealings with his master." By nineteenth century standards R's remarks were cause to dismiss and would be so today *unless* our appreciation of the value of free speech has changed.

From even so cursory a review it is apparent that the contemporary industrial understanding of "just cause" vis-à-vis the duty of loyalty differs meaningfully from the assumption of the *Jefferson Standard* Court a half century ago. The common law of the workplace recognizes an implied obligation to refrain from the *deliberate* infliction of economic or reputational harm—to speak maliciously, falsely, even accurately but gratuitously; but, it also recognizes that a human being does not give up all right to speak to an employer's policies or qualities upon entering upon another's employ. It recognizes that, in appropriate circumstances, a balance needs be struck the very statement of which necessarily implies that, depending upon the circumstances, the balance is not inexorably speech-suppressive.

IV.

THE LEGITIMACY OF EMPLOYEE VOICE

A second but crucial basis for the want of statutory protection the *Jefferson Standard* Court essayed was the illegitimacy of the employees' speech: the policies attacked were those "for which management, not the employees, must be responsible," the Court said, echoing the Labor Board that the employees' speech "was not geared to their interests as employees" and so transcended the Act's protection. This assumes that employees have no legitimate interest as employees in the quality of what they do or in the quality of the management under which they do it. This assumption,

63. *Id.* at 903–04.

questionable even at the time, has been overtaken by managerial ideology and practice.

In the early part of the twentieth century most blue collar workers were viewed by employers as disposable factors of production in an often chaotic workplace. The effort made shortly after the turn of the century to bring rationality into the workplace, identified with Frederick Winslow Taylor and his disciples, was based on the assumption that workers were mindless embodiments of physical power best subject to exacting managerial control.⁶⁴ This conception of the employee is embodied in what Warren Bennis has called the “old fashioned . . . philosophy of management” summed up by the phrase: “DON’T THINK, DUMMY—DO WHAT YOU ARE TOLD!”⁶⁵

The managerial discovery that workers were human beings is customarily attributed to the Human Relations School, identified with Elton Mayo, Fritz Roethlisberger, and others at the Harvard Business School in the 1930s, which rose to prominence, perhaps even to predominance, in the 1950s. As Philip Selznick pointed out, “human-relations theory does not presume that the worker is inert or passive, without a dynamism of his own.”⁶⁶ But to the practitioners of human relations, the “individual’s characteristics” it was eager to recognize are

“facts” to be dealt with by whatever measures are effective and least costly to the end that *management’s* goals may be fulfilled. *The individual is not encouraged to have a will of his own.* The inherent tensions between the goals of the individual and those of the organization are not accepted as continuing parameters of industrial life, to be built into the human engineer’s model of what is a viable and desirable form of organization.⁶⁷

The human relations approach to management was criticized even at the time for focusing more on workers’ feelings and assuming less for their

64. The historical literature on that period is enormous. The leading work includes: DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925* (1987); DANIEL NELSON, *MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES 1880–1920* (1975); SANFORD JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945* (1985).

65. Warren Bennis, *Forward to the Twenty-Fifth Anniversary Printing*, in *THE HUMAN SIDE OF ENTERPRISE* (Joel Cutcher-Gershenfeld ed., 2006).

66. PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 115 (1969).

67. *Id.* (italics in original). This as Selznick’s measured response to criticism leveled at the human relations school that it

perceives the worker as a deployable instrument rather than as an autonomous being who has needs and objectives of his own. As one critic put it, “the individual is not seen as a goal-setting or goal-achieving creature. Rather, he is considered an inert ‘element’ that does not act unless acted upon and to be manipulated by means of human relations ‘skills.’” The aim of human relations is to produce contented workers much as the dairy farm seeks contented cows. Thus “the social science of the factory researchers is not a science of man, but a cow-sociology.”

Id. (citations omitted).

rationality than was to be taken by successors in industrial as opposed to human relations, though both schools looked to job satisfaction as it bore on productivity.⁶⁸

The general realization that workers had minds as well as emotions, that they might have something to contribute to the firm other than labor and docility, was relatively late in arrival. In 1960, Douglas McGregor challenged the assumption that workers cannot be trusted to do good work without close monitoring and control; but this was only a first if necessary step toward a larger transformation.⁶⁹ In 1967, W. Edwards Deming sought to draw notice in the United States to Japanese developments in quality control.⁷⁰ It fell largely on deaf ears until the early 1980s when America awoke to discover that the Japanese, by incorporating worker concern for product quality into the organization of the work itself, were capturing ever-growing product market share. The intellectual groundwork previously laid thus combined with economic circumstances to flower into a "human capital, knowledge-based" approach to management⁷¹ that finds a variety of expressions today.⁷²

In other words, we have learned since the 1950s that workers care about the quality of what they make and the service they provide. Surveys in the 1980s of employee interest according to areas of concern, *i.e.*, areas where employees seek actively to be involved, showed that between 78%–89% of blue collar workers (depending on other variables) and 96% of white collar professionals care about the quality of the work they do.⁷³

68. IVAR BERG, MARCIA FREEDMAN & MICHAEL FREEDMAN, *MANAGERS AND WORK REFORM: A LIMITED ENGAGEMENT* 13, 33 (1978). By the late 70s, Ivar Berg and his associates were arguing that industrial relations would be better served by eschewing the two-valued logic of human relations that conceived of employees as driven by emotion and managers by rationality, which point they made spiritedly:

To pretend that millions of employees can ultimately be treated far better than they are while consigning them conceptually—*i.e.*, by definition—to a different category from employers, by a taxonomy drawn from the laws of property and from Darwin, may be likened to the errors that would result in a laboratory if the magic of preliterate cultures were confused with Newtonian mechanics. . . .

Id. at 173.

69. Thomas Kochan, Wanda Orlikowski & Joel Cutcher-Gershenfeld, *Beyond McGregor's Theory: Human Capital and Knowledge-Based Work in the Twenty-First Century Organization*, in *THE HUMANSIDE OF ENTERPRISE* 365 (Joel Cutcher-Gershenfeld ed., 2006)

70. W.E. Deming, *What Happened in Japan?*, 24 *INDUS. QUALITY CONTROL* 91 (1967).

71. Thomas Kochan et al., *supra* note 69.

72. EILEEN APPELBAUM, THOMAS BAILEY & PETER BERG, *MANUFACTURING ADVANTAGE: WHY HIGH-PERFORMANCE WORK SYSTEMS PAY OFF* (2000). See *e.g.*, Douglas Miscikowski & Eric Stein, *Empowering Employees to Pull the Quality Trigger*, 39 *QUALITY PROGRESS* 43 (2006).

73. THOMAS A. KOCHAN, HARRY KATZ, & ROBERT MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 211–12 (1994). An earlier study of a single company found that 71% of the workers thought they should have "some" (36%) or "a lot" (35%) to say about maintaining product quality. JOHN WITTE, *DEMOCRACY, AUTHORITY, AND ALIENATION IN WORK* 27 (1980).

The survey data are seconded in sociological or ethnographic fieldwork. Marc Lender repeats the "common understanding" he encountered by reference to the worker-interviewees' own words:

Management was not slow in responding as surveys concluded in the 90s show, reflected in Table 1, even as these efforts may wax or wane.

Table 1
Percentage of Establishments with High-Performance Work Practices Involving at Least Half of “Core” Employees

	1992	1997
Quality circles/off-line problem-solving groups	27.4%	57.4%
Self-managed work teams	40.5%	38.4%
Total quality management	24.5%	57.2%

SOURCE: Paul Osterman, *Securing Prosperity* (1999), Table 4.1 at 99.

We have also learned that workers care about the ability of managers to manage. Surveys in the ‘80s conducted by the Opinion Research Corporations (ORC) and the National Survey of Employee Attitudes showed a decline of worker confidence in “the ability or competence of top management” in the former and a 57% level of confidence in the latter.⁷⁴ The critical point for purposes here is not that the measure is high or low, rising or declining, but that practitioners of industrial relations and the managements they advise think the measure worth taking.

In other words, since the 1950s American management has learned that a company is well advised to organize work in such a way as to take advantage of its employees knowledge and creativity⁷⁵—in which, interestingly, IBM figures prominently⁷⁶—and to be responsive to

NEC worker: “What you hear from the company is quantity, quantity, quantity. I’m from the old school, quality, quality, quality.”

* * *

“What’s wrong with the company can be said in two words: quantity and quality. They want the quantity but they don’t care about the quality.”

MARC LENDER, *JUST THE WORKING LIFE: OPPOSITION AND ACCOMMODATION IN DAILY INDUSTRIAL LIFE* 99, 121 n.20 (1990) (italics in original). A comprehensive review of the ethnographic literature observes that: “Contemporary workplace ethnographies abound with contextually rich accounts of the importance of feelings of pride in one’s accomplishments. . . .” RANDY HODSON, *DIGNITY AT WORK* 45 (2001) (internal citations omitted). Conversely, the lack of ability to take pride in work can be devastating to morale: “There isn’t anyone among us who doesn’t resent how the factory is operated so fast and sloppy, because there’s no way to respect what we’re doing *and what we’re making*. . . . [citing an interview study]” *Id.* (italics added) (internal citations omitted).

74. KOCHAN, KATZ & MCKERSIE, *supra* note 73, at 215.

75. See generally, TIM HINDLE, *THE ECONOMIST GUIDE TO MANAGEMENT IDEAS* viii (2003).

76. IBM has recently created a computerized social network for its employees to “unlock the latent expertise” in the organization. Laurie J. Flynn, *I.B.M. to Introduce Workers’ Networking*

employee evaluation of management.⁷⁷ To take but one example, a study of the hotel industry concluded that its data supported the proposition that “workers evaluation of managers is the most important antecedent of job satisfaction” and that job satisfaction, entailing pride in the employing organization, was a key feature of maintaining customer satisfaction and so competitiveness.⁷⁸ We have even come as a matter of law to enlist employee knowledge and estimation of managerial conduct as a corrective to corporate abuse.⁷⁹ To view an employee’s concerns in regard to these matters today as illegitimate, for want, as the Labor Board viewed it a half century ago, of work-related responsibility or expertise, is not only to perpetuate an anachronism, it is to blink at reality.⁸⁰

V.

ENDICOTT INTERCONNECT REVISITED

Richard White was dismissed for two public remarks made as a union advocate in the context of a union organizing drive.⁸¹ He said that the group of people running the company had “no good ability to manage it,” that they won’t stem the loss of jobs. This in rebuttal to an attack on the desirability of unionization on a media-sponsored web site devoted to discussion of the company’s situation. And he said the company had laid off “people with specific knowledge of unique processes . . . leaving voids in the critical knowledge base” for a high technology business. This in response to a reporter’s request for comment directed to him as a union activist. The Labor Board found these remarks to be neither reckless nor malicious and the Court of Appeals did not take issue with that conclusion.

Software, N.Y. TIMES, Jan. 22, 2007, at C10 (“Called Lotus Connections, the new software, expected later this year, will let employees set up virtual worlds in which they can meet like-minded colleagues within the company and exchange ideas with them, all in the name of improving productivity. And that’s just for starters.”).

77. The literature here is substantial. A bibliography is usefully assembled by FRANK SMITH, *ORGANIZATIONAL SURVEYS: THE DIAGNOSIS AND BETTERMENT OF ORGANIZATIONS THROUGH THEIR MEMBERS* (2003).

78. Dennis Arnett, Debra Laverie & Charlie McLane, *Using Job Satisfaction and Pride as Internal-Marketing Tools*, 43 CORNELL HOTEL & RESTAURANT ADMIN. Q. 87 (2002).

79. Richard Moberly, *Sarbanes-Oxley’s Model to Encourage Corporate Whistleblowers*, 2006 B.Y.U.L. REV. 1107 (2006).

80. In late January, 2007, the president of one of U.S. Airways pilots’ unions wrote to CEO Douglas Parker complaining of management’s preoccupation with its proposed takeover of Delta Air Lines. ““We have begun to lose confidence in your ability to successfully run U.S. Airways”” wrote union president John McIlvenna. *Pilots concerned about U.S. Airways’ focus*, U.S.A. TODAY, Jan. 30, 2007, at 1B. The legitimacy of this expression of concern seems patent. That it should be of concern to management and to the public is apparent. But to the District of Columbia Circuit would it smack of disloyalty?

81. The *Jefferson Standard* Court saw no connection between the technicians’ handbill and the labor dispute incited by the union’s course of action that concealed—or, less strongly, failed to reveal—the connection to the public. But in *Endicott Interconnect* the connection was demonstrable. Such was the holding of the Board’s majority and a majority of the Court of Appeals did not differ.

But to the court they could not be uttered: as they might tend to harm the employer's business they were egregiously disloyal. Let us look at each.

A. *"no good ability"*

Words uttered by a union and its supporters in an organizational campaign, akin to words uttered in a political campaign, may be "uninhibited, robust, and wide-open, caustic and sometimes unpleasantly sharp," though they may not be uttered with knowledge of falsity or with reckless nor wanton disregard of the truth.⁸² Such is our national labor policy. A union supporter may therefore publicly accuse an employer of using "fascist Gestapo tactics,"⁸³ of maintaining a "plantation" with "slave labor" conditions,⁸⁴ of being a "Dictator" and a "Robin Hood of the Rich, taking wages away from the poor"⁸⁵—but, according to the District of Columbia Circuit, the one thing he may *not* say is that management has "no good ability" to run the company.

Inasmuch as Mr. White's remarks were run on a web site devoted in part to the discussion of the impact unionization would have on the company, it is beyond peradventure that in that venue his defense of the union was "labor speech" within the meaning of this body of law. Accordingly, the only perceptible distinction for the difference in statutory protection is that the former cluster of remarks were heated and exaggerated while White's were cool and even understated. A curious rule of law results: national labor policy licenses hyperbole because it is unlikely to be believed, but it disallows dispassionate assessment because it is likely to be believed. In the catchphrase that drives the court's decision: credible criticism is disloyal, invective is not. This is in need of explanation.

B. *"leaving voids in the critical knowledge base"*

White was called upon by the press because he'd been identified to the reporter as a union activist. He spoke in that capacity even though the reporter did not identify him as such, a lacuna for which White cannot be responsible. Insofar as context plays a role, it is significant that White was contacted by the press and not the other way 'round: that goes to the non-gratuitous character of White's remarks as well as of the importance of the company's actions to the local community.⁸⁶

82. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1996) (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

83. *NLRB v. N.Y. Univ. Med. Ctr.*, 702 F.2d 284, 286 (2d Cir. 1983).

84. *Polynesian Cultural Ctr.*, 222 N.L.R.B. 1192, 1205 (1976).

85. *San Juan Hotel Corp.*, 289 N.L.R.B. 1453, 1454 (1988).

86. The importance of media-initiated contact is noted in *Calabro*, 424 F. Supp. 2d 465, and *Thomas v. Guardsmark, Inc.*, 381 F.3d 701 (7th Cir. 2004). In foreign jurisdictions as well the totality of the circumstances of public utterance regarding one's employer is a weighty consideration in whether or not critical speech is "disloyal." In France, it is of critical importance that the press initiated an

The *Pickering* Court saw the essentiality of allowing teachers publicly to address those matters of concern to the community on which they are “likely to have informed and definite opinions.”⁸⁷ As the previous section has shown, employees are often most likely to have informed and definite opinions of product or service quality, of how the loss or assignment of staff is likely to affect it. The Labor Act’s protection of speech has given content to this reality thus far in cases arising out of nursing. *I.e.*, public complaint of inadequate patient care—by letter to a local newspaper,⁸⁸ in response to a television reporter,⁸⁹ by submission of an *ad hoc* report to an accrediting agency⁹⁰—tied to inadequate levels of staffing have been held to be protected labor speech, in all three instances in the face of arguments to *Jefferson Standard*. These holdings can be reconciled with *Endicott Interconnect* only on the unspoken assumption that, from the perspective of speech on labor issues, bad patient care as a result of poor staffing is of greater statutory concern, notwithstanding any financial losses to the hospital resulting from the nurse’s disparagement, than is the economic viability of the community’s dominant employer resulting from poor choices of persons to lay off. In the catchphrase that drives the court’s decision: calling attention to the economic threat to the community because of a manufacturer’s level of staffing is disloyal, calling attention to the medical threat to the community because of a hospital’s level of staffing is not. This, too, would seem to be in need of explanation.

VI.

CONCLUSION

In 1912, Justice Holmes, no novice at the seductive aphorism, observed: “It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”⁹¹

So it is with “disloyalty.” The catchphrase, whose defects were apparent even as it was uttered in 1953, has become a ghostly anachronism haunting the law: it substitutes for reason; its legal and ideological bases have been thoroughly undermined; it opens “the door wide to individual

interview. Jean-Emmanuel Roy & Jacques Rojot, *Loyalty and Non-Competition in France*, 20 COMP. LAB. L. & POL’Y J. 225, 232 (1999). In Italy, the courts consider the importance to the community of what was said, its truthfulness, and the proportionality of disclosure. Marco Biagi, *Employee Loyalty in Italian Labor Law*, 20 COMP. LAB. L. & POL’Y J. 249, 256–57. And in Germany a comprehensive evaluation of the totality of the circumstances would be implicated. Manfred Weiss, *Employee Loyalty in Germany*, 20 COMP. LAB. L. & POL’Y J. 237, 243–45.

87. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

88. *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634 (1st Cir. 1982).

89. *Cnty. Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976).

90. *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808 (2d Cir. 1980).

91. *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

judgment,”⁹² a euphemism for judicial tendentiousness. Just how wide open is testified to by the decision in *Endicott Interconnect* itself.

Richard White has been left remediless, discharged after twenty-eight years of service for speaking without hyperbole, without malice or recklessness with regard to the truth, in answer to a reporter and in reply to a critic respectively, concerning a matter of deep concern to him, to his co-workers, and to his community. But the larger and surely intended effect is to chill other union activists in their willingness publicly to address co-worker and communal concerns about an employer’s managerial capacities and decisions that are closely tied to organizational efforts or to labor disputes.⁹³

Has the time not come to inter *Jefferson Standard*? If the courts—or the Labor Board⁹⁴—wish to allow employers to suppress Mr. White’s and like speech on grounds of disloyalty they should be required to come to grips with the questions it begs: they should explain how the suppression of this speech squares with the statute’s purpose and application in the modern work setting instead of seeking shelter behind an anachronistic catchphrase.

VII.

CODA

As the foregoing was proceeding to press a three-member panel of the National Labor Relations Board decided *Five Star Transportation, Inc.*⁹⁵ As in *Endicott Interconnect* the vote was two-to-one. In this case, however, Chairman Battista, who dissented in *Endicott Interconnect*, was in the majority; and Board Member Liebman, who was in the majority in *Endicott Interconnect*, dissented. The decision illustrates the conceptual emptiness of “disloyalty”—its openness to tendentious manipulation—argued to in the preceding, this time at the hands of the Labor Board instead of the courts. Let us look to it.

A school district in Massachusetts contracted for school bus service with First Student, Inc., a unionized company. When the contract expired a non-union company, Five Star, was selected in its stead. The union protested the district’s decision and called a meeting of the drivers in an

92. *Jefferson Standard*, 94 N.L.R.B. 1507 (Frankfurter, J., dissenting).

93. In the recent strike by the United Steelworkers against Goodyear, the union circulated an electronic “Consumer Safety Alert” cautioning against the use of tires made by strike replacements and citing a “Princeton University study.” The circular did not give the citation, but it would be to Alan Krueger & Alexandre Mas, *Strikes, Scabs and Tread Separation: Labor Strife and the Production of Defective Bridgestone/Firestone Tires* (Nat’l Bureau of Econ. Research, Working Paper No. 9524, 2002). The posting was made over the union’s logo; like the leaflet in *Jefferson Standard*, no Goodyear employee was identified with it. But if any Goodyear worker could be found to have been engaged in its preparation or circulation could he or she be fired for disloyalty? For truthfully alerting the public of a potential safety hazard connected to the labor dispute?

94. See CODA, *infra*.

95. 349 N.L.R.B. No. 8 (2007).

effort to have the district cancel the contract. The union distributed press accounts of some years before concerning Five Star's having hired unqualified drivers—a sex offender, a driver who drank on the job. Fifteen drivers wrote to the district to urge rescission of the contract. The district refused.

Seventeen of First Students' drivers sought employment with Five Star including eleven who'd written to protest the award of the contract. Five Star secured the letters of protest from the district and refused to hire any of the authors. A charge of unfair labor practice ensued.

It is as much an unfair labor practice to refuse to hire a person because she had engaged in statutorily protected activity as to fire a person for that reason. To secure a remedy in either event the activity must be: concerted; for mutual aid or protection; and, not fail of protection by reason of some other ground such as, according to *Jefferson Standard*, disloyalty.

Obviously, in this case there was concert of action; but the ALJ found that two of the drivers did not act for "mutual aid or protection." The Board majority agreed; that, however, is for another day. The ALJ did order a remedy for the remaining nine finding all the conditions of protection to have been met.

The Board majority parsed their letters closely. It agreed with the ALJ as to six; they were afforded a remedy. But it disagreed with regard to the remaining three. Their protest was concerted and it was for mutual aid or protection; but it was disloyal, citing *Jefferson Standard*, because instead of addressing Five Star's working conditions, as had the protected six, these three addressed Five Star's probity, by reference to the news accounts the union had circulated to them:

The individuals here attacked the capacity of the Respondent to safely drive school children, a matter that would be of the utmost concern to the school board. It matters not whether the communications were true or false. Indeed, we may applaud these individuals for raising a matter of public concern. But the issue here is whether the National Labor Relations Act affords protection to those individuals. Where, as here, the drivers' letters implicate the safety of children, *not the common concerns of employees*, and those letters are aimed at keeping the Respondent from becoming the new bus service contract provider, we conclude that the NLRA does not offer protection to the drivers. [Emphases both omitted and supplied.]⁹⁶

Because this passage could be read to conflate a lack of mutual aid or protection with the question of disloyalty, the former needs briefly to be clarified. Employee appeals to legislative, administrative, or judicial fora are protected where there is a sufficient connection between the purpose of the appeal and the employees' common interests as employees. Where that connection exists the conduct is for "mutual aid or protection"; where the

96. *Id.* at 7.

speech is unconnected to the speakers' common interests as employees it is unprotected.

Two cases nicely illustrate the distinction. In *Petrochem Insulation v. NLRB*,⁹⁷ construction unions filed objections on environmental grounds to the issuance of zoning and construction permits to non-unionized contractors. The union's avowed purpose was to use the permit process to force the companies to meet union wage and benefit standards. The purpose was thus for mutual aid or protection even though the means to achieve it involved the invocation of environmental law. In *Tradesmen Int'l. Inc. v. NLRB*,⁹⁸ a company that supplied labor to contractors refused to hire a union activist because he'd attempted to have a municipality require the company to post a bond required of contractors. The Court of Appeals held the activity unprotected for want of mutual aid or protection: it emphasized that there was no conceivable connection between bond posting and labor standards or unionization.

The *Five Star* majority did not find the drivers' letters to want for mutual aid or protection as the purpose of their campaign was, obviously, to protect their jobs and their unionized wages and benefits. Their speech is indistinguishable in that regard from the construction unions' protest under the Clean Air Act, an environmental protest made to protect the wages and benefits of unionized workers. Instead, the majority invoked *Jefferson Standard*; the Board focused in particular on that element of the Court's opinion that scoffed at the legitimacy of the technicians' employment-related basis publicly to criticize program quality despite the labor dispute that generated it.

Disloyalty could not be grounded in malicious falsehood. There was no finding that that was so; and, indeed, the Board majority concedes as much. The Board does criticize the sharpness of the letters' language, for calling Five Star a "sub-standard company . . . reckless" in hiring, echoing the *Endicott Interconnect* court; but were this the ground of decision it would be inconsistent with the Board's own decision in that case, a decision on which the Board continued to rely. Nor can disloyalty be grounded in the public nature of the speech, *i.e.*, for the infliction of reputational harm that survives the resolution of the labor dispute, because the letters were sent only to the school committee. In fact, Five Star secured knowledge of what the letters actually said by resort to the state's Freedom of Information Act. None of these elements were present.

In the Board's view the speech was disloyal because, just as in *Jefferson Standard*, the drivers spoke to a matter that is not their proper concern as employees. Just as, to the District of Columbia Circuit, Richard White and his co-workers have no concern as employees in the quality of

97. 240 F.3d 26 (D.C. Cir. 2001).

98. 275 F.3d 1137 (D.C. Cir. 2002).

what they make, Donald Caouette, Patty Grasso, and Andrea MacDonald, the three denied employment, have no concern *as school bus drivers* for the safety of the children they transport. Can this be true, that school bus drivers have no common concern for the safety of the children they transport? It is not so because speech critical of their own employer's laxness in hiring unsafe drivers would be *per se* cause to dismiss, the actual statutory basis of *Jefferson Standard*, because, today, such speech might well not be cause to dismiss. Nor is it so because employees as employees have no concern in the quality of management in making those decisions for that, too, is, today, simply not so as a matter of sound industrial relations as well as public policy. But we are given no other ground for this extraordinary proposition.

Alas, there is more. Member Liebman pointed out that as these three were not in the employ of Five Star they scarcely could owe it a duty of loyalty. This the majority dismissed peremptorily:

[J]ust as an employer legitimately wants extant employees to be loyal, so a prospective employer legitimately wants prospective employees to be loyal. In both cases, the goal is the same—not to have disloyal employees on the payroll.⁹⁹

In this way “disloyalty” becomes uncoupled from its legal mooring. The *Jefferson Standard* Court rested on the contractual obligation implied by the common law of master and servant: to do no act nor utter any word detrimental to the master's business. It has never been the law that a servant, even in Dickens' time, owed a duty of loyalty to a competitor of one's employer or to the entire universe of potential employers, *i.e.*, to persons with whom there is no contractual relationship.

Consider the consequences should the theory of loyalty embraced by the *Five Star* Board take root: Unionized workers seeking to protect their jobs or working conditions by criticizing the product or management of a non-union (or anti-union) competitor—by non-gratuitous, non-reckless reliance on the public record—may not only be denied future employment by that competitor, in the unusual event they should seek it, but, because their speech was “disloyal” they may be denied employment by any other employer. This may well be the larger significance of this Board's expanded theory of loyalty: inasmuch as the decision rests on the proposition that no prospective employer would wish to retain a *potentially* disloyal employee, the Board's approach is intended to facilitate the ability of prospective employers to effect that end.¹⁰⁰ In this way, the labor law of

99. *Five Star Transportation*, 349 N.L.R.B. No. 8, at 7.

100. While this discussion was in proof, the Labor Board handed town Toering Electric Co., 7-CA-37768, 39093, 39205 (Sept. 29, 2007). In a 3–2 decision the Board held that no unfair labor practice was worked by an employer's refusal to hire “salted” applicants—persons sent by unions to apply for jobs who had no interest in actually taking them. The soundness of that holding is beyond the scope of this discussion. But the Board majority bolstered its reasoning by citation to and reliance on *Jefferson Standard*: “The Board does not serve its intended statutory role . . . if it must litigate hiring

the 21st century is brought in compliance with the labor law of the nineteenth century, but then the practice the law abetted was called—blacklisting.¹⁰¹

discrimination charges filed on behalf of disingenuous applicants who intend no service and loyalty to a common enterprise. . . .” *Intending* no loyalty to a prospective employer now exempts not only the applicant from the Act’s reach, it exempts the employer from scrutiny of its hiring policies. Note how much hard work a catchphrase can be made to perform.

101. N.Y., Chi. & St. Louis R.R. Co., 65 Ohio St. at 414, discussed in the text accompanying *supra* note 31.