

## CONTRACT AND DISPOSSESSION

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In the not so distant past, law students often opened their Contracts casebooks to find a quotation from Sir Henry Maine, “The movement of progressive societies has hitherto been a movement from Status to Contract.”<sup>1</sup> The placement of this quotation at the beginning of a Contracts book sets the tone for the semester or the year, providing a theme that the law professor either embraced or critiqued: the idea that contract is liberatory.<sup>2</sup> This Essay, part of a collection of essays on the same theme, argues that contract law has become an instrument of oppression and dispossession rather than liberation. Having offered a critique, the challenge then is to consider whether it is possible to restore the liberatory potential of contract. The symposium, *Post-Marxism, Post-Racialism & Other Fables of the Dispossession*, was an invitation to consider the contemporary relevance of Marxist theory. The aspect of Marxist theory referenced in this particular essay is cultural and ethnographic, a methodology suggested by Robert Sullivan’s

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<sup>1</sup> SIR HENRY MAINE, ANCIENT LAW 5 (1864). See e.g., JOHN EDWARD MURRAY, CONTRACTS: CASE AND MATERIALS (5th ed. 2001). A more expansive selection from Ancient Law can be found in a contracts casebook that is now out of print, FRIEDRICH KESSLER ET. AL, CONTRACTS: CASES AND MATERIALS (1986).

<sup>2</sup> The authors of Kessler’s casebook made the assumptions about the connection between contract and liberty explicit: “As a matter of historical fact, the rise of free and informal contract within western civilization reflected the erosion of a status organized society; contract became, at an ever increasing rate, a tool of change and growing self-determination and self-assertion.” KESSLER, *supra* note 1, at 5.

argument that Marx was anthropological in his epistemology and in his form of argument.<sup>3</sup> Sullivan also argues that the theoretical approach advocated by some anthropologists, a “cultural critique of ourselves,”<sup>4</sup> is Marxist because it is the “modern analogue to Marx’s earlier use of primitive society as both a critique of nineteenth century capitalist economy and as an alternative way of ‘seeing’ reality.”<sup>5</sup> Modern Ethnography, he concludes, “produces its critique . . . by demystifying and denaturalizing cultural texts and ‘reading’ their social meaning.”<sup>6</sup>

There are two reference points in this cultural critique. One is the importance of social position in a jurisprudence that embraces objectivity; the uncritical and unreflective reliance on hegemonic social practices, codes and conventions in determining whether the parties to an agreement meant or intended it to be legally enforceable. Contract law recognizes and regulates status relationships. The resort by judges to hegemonic conceptions of status results in dispossession when a contract which is exploitive is enforced against the less powerful party or when courts refuse to enforce contracts that have liberatory potential. The other aspect of a cultural critique is a focus on the discursive practices used by judges in contract cases. For example, these rhetorical devices may invoke ideals of freedom, autonomy and voluntariness to explain or justify the enforcement of contract terms that disadvantage or defeat the expectations of workers. In other cases, freedom and autonomy are jettisoned in favor of a rhetoric of scarcity, efficiency or market imperatives in order to defeat the contract claims of employees, particularly when the bargaining power of the workers has been enhanced by collective bargaining.

## I. CONTRACT AS DISPOSSESSION: STATUS AND INTENT AS “SOCIALLY LEGITIMATE” EXPECTATIONS

Students of business organizations are drawn to partnership law because of the intimacy of the relationship and the drama

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<sup>3</sup> Robert Sullivan, *Marxism and the “Subject” of Anthropology in MODERNIST ANTHROPOLOGY FROM FIELDWORK TO TEXT* 243 (Marc Manganaro ed., 1990).

<sup>4</sup> See, e.g., GEORGE MARCUS & MICHAEL M. J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* (1986).

<sup>5</sup> See Robert Sullivan, *supra* note 3, at 260.

<sup>6</sup> *Id.*

inherent in struggles between and among partners.<sup>7</sup> There is no other area of law better suited to illustrate the importance of status, which is, for purposes of this analysis, the position each of us occupies in the hierarchical social order that exists in the United States. Once a matter of common law, partnership is now governed by the Uniform Partnership Act. Status is explicit in the definition of partnership as “an association of two or more persons for the purpose of carrying on as co-owners of a business for profit,” in the laundry list of relationships which are not partnership.<sup>8</sup> The courts in the Nineteenth and early-Twentieth century adopted and abandoned various tests for partnership, but the test which currently has pride of place, an inquiry into the intent of the parties, is consistent with the characterization of partnership as a contract and the statutory definition of the relationship as “co-ownership.” The status, “owner,” is a socially constructed identity. The indices of ownership are risk, the potential for profit or loss, and control, but courts are uncritical in their examination of the various ways in which either or both can be shared, unreflective about their *a priori* assumptions and the meaning assigned to the words and behavior of the parties. Judicial analysis of intent does not take place in a vacuum. Part of that analysis, often implicit rather than explicit, is the judges’ understanding of when it is socially and culturally possible or plausible for the parties to consider themselves co-owners.

Partnership can be the most egalitarian of business relationships. The default terms in partnership law give partners equal rights to control the business and equal shares of the profits. Labor has value in attaining the status of co-owner in a partnership.<sup>9</sup> One early common law test for partnership explicitly acknowledged that partnerships could be formed between or among parties who contributed property, money, or labor.<sup>10</sup> No legal scholar has quantified the number of times courts have concluded that someone who contributed labor to an enterprise was a partner. A review of

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<sup>7</sup> See Deborah W. Post, *Continuity and Change: Partnership Formation Under the Common Law*, 40 VILL. L. REV. 987 (1986).

<sup>8</sup> Uniform Partnership Act of 1914, §§ 6, 7 (2007).

<sup>9</sup> Even though labor was considered sufficient to claim a partnership interest in the Nineteenth century, labor was not monetized for purposes of recording an initial capital contribution in the business. It was only after that labor was expended and profits earned that the person who put in ideas or expertise or management skills would see his interest recorded as capital. If the business lost money, he would lose the value of his labor and “equality” meant that he would have to share in the capital losses.

<sup>10</sup> Post, *supra* note 7, at 1033 n.122.

the cases does, however, show that status is implicated: prior or existing relationships matter in determining whose labor will be sufficient to support a claim of co-ownership—family members, former employees, women, or persons of color.

In the older cases, the social order is explicit. Behavior and words were interpreted in light of cultural expectations. The relationship between wives and husbands may have been negotiated in their everyday lives, but that did not mean the law acknowledged or enforced those agreements. In *Watson v. Hamilton*,<sup>11</sup> a 1912 Alabama case, the autonomy and the expectations of a wife who had negotiated with her husband for an ownership interest in what she supposed was a family business were defeated by a court that refused to give effect to that agreement.<sup>12</sup> Mr. Hamilton might have added his wife's name to the name of the business and acquiesced (or at least he did not contradict her) when, as she worked with him, he heard her tell his customers that she was an owner of the business. The court rejected this evidence of his intention to share the business with her because it knew that he meant only to appease her.<sup>13</sup> He did not intend to make her a co-owner because that would have exposed her to the risk of loss, something no husband would do.<sup>14</sup> As far as the court was concerned, the wife had no interest in the business and her niece, the heir to whom she left her property and the plaintiff in this case, had no claim against the partnership for the value of her aunt's interest.

Despite a shared assumption in contract theory that context matters and in anthropology that cultural assumptions vary over time and regionally in the United States, seventy years later, a federal judge in New York explained his decision in *Sherrier v. Richards*<sup>15</sup> in a way that suggests there is some consistency in the meaning assigned to a species of verbal exchange between men and women in intimate relations. In 1983, Judge Robert W. Sweet described the verbal exchange between a man and woman, a wealthy widow who financed art acquisitions and her married actor/art dealer lover, as an “anything you say, dear” moment.<sup>16</sup> The reasonableness of this interpretation was corroborated, as far as the judge was concerned, by testimony of the woman that in another context, the same or

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<sup>11</sup> *Watson v. Hamilton*, 180 Ala. 3, 7 (1912).

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Sherrier v. Richard*, 564 F. Supp 448, 454 (S.D.N.Y. 1983).

<sup>16</sup> *Id.*

similar language was “a conversational device to diffuse an argument.”<sup>17</sup> The apparent assent of Mr. Sherrier to a proposal that would have transformed a loan from Ms. Richards into equity in a business was dismissed as inconsequential, and therefore insufficient to establish the intent to form a partnership. And, of course, without intent there can be no contract for partnership.

Whether the parties are married or simply lovers, the coexistence of economic and emotional ties alters the way courts understand even the most straightforward expressions of contractual intent. In both *Watson* and *Sherrier*, the courts constructed a presumptive negative intent with respect to a claim of partnership from cultural norms that originate in the status of the parties as intimates.

If contract were liberatory, courts would have to acknowledge that private ordering may be subversive of the existing social order; contract law would be a means of dismantling structures of subordination. Contract law is theorized as a system of private ordering, but judges are not particularly receptive to private arrangements that are subversive. A courtroom is not the place where cultural or social transgressions are routinely validated, even when the law as expressed seems sufficiently malleable and capable of accommodating the behavior of outliers on the cultural landscape. The predictable response in contract disputes that have transformative potential is to bring them into alignment with hegemonic assumptions about social status.<sup>18</sup>

A post-reconstruction era partnership case out of Texas is instructive on the relationship between cultural expectations, social norms, and contract. The political and socioeconomic reality in the South included a system of laws and social conventions that expressed and enforced a racial caste system. Yet transgressive social relationships formed during the era of Jim Crow, including

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<sup>17</sup> *Id.*

<sup>18</sup> For an opposing standpoint, see Jay M. Feinman, *Critical Approaches to Contract Law*, 30 U.C.L.A. L. REV. 829 (1983). In this article, Professor Feinman suggests that a plant closing case out of the Sixth Circuit—*Local 1330, United Steel Workers v. United States Steel Corporation*, 492 F. Supp. 1 (N.D. Ohio 1980) and *Local 1330, United Steel Workers v. United States Steel Corporation*, 631 F.2d 1264 (6th Cir. 1980)—“reveal[s] a striking if not fully developed awareness of contract law’s potential as a revolutionary vehicle.” *Id.* at 858.

relationships that involved political or economic cooperation or exchange, were not unknown.<sup>19</sup>

There is a story told in Texas—either fact or fable—about a black man who cornered the market on potatoes. If he wanted to exploit the monopoly he had on the existing supply of potatoes in a way that maximized his profits, he needed to market these potatoes to whites as well as blacks. He was cognizant of the fact that his business acuity might not be well received in the white community. His ability to extract higher prices was certainly constrained by Jim Crow. So this black man struck a deal with a white man who owned a dry goods establishment. He agreed to share the profits from his sales if the white man would provide him with “cover.” The black man painted his wagons the same color as the wagons that delivered for the dry goods store and embellished them with the name of that business. He then drove all over Houston delivering potatoes to white families willing to pay the market price for potatoes.

The verisimilitude of this story, the possibility that such an agreement could have existed, is supported by case law. *Gene Butler v. State*<sup>20</sup> features a black man in Austin, Texas, who, in 1908, apparently was given responsibility for developing business hauling gravel and dirt. The question of partnership was raised as a defense in an appeal after Butler was accused and convicted of embezzling money from a white man named Dillingham.<sup>21</sup> If Butler and Dillingham were partners—if Dillingham put his wagons and horses into a business to which Butler contributed his labor and perhaps any good will associated with his reputation as a driver—there would not have been a crime. As a co-owner of the business, Butler could not be guilty of embezzlement.

In earlier cases, precedent cited by defense counsel and the presiding judge in his dissent, white men who had arrangements like that of Butler and Dillingham were partners.<sup>22</sup> The behavior of the

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<sup>19</sup> One example might be the alliance of whites and blacks in the Alabama Sharecroppers Union, which is described in an oral history of Nate Shaw. NATE SHAW & THEODORE ROSENGARTEN, *ALL GOD'S DANGERS: THE LIFE OF NATE SHAW* (1974).

<sup>20</sup> 111 S.W. 146 (Tex. Crim. App. 1908).

<sup>21</sup> *Id.*

<sup>22</sup> Race is not explicitly mentioned in those cases and because it would be unusual for a black man to sue a white man on a claim of partnership, a social reality acknowledged in *Butler*, the reasonable inference is that the parties were both white in those cases. See *Manuel v. State*, 71 S.W. 973 (Tex. Crim. App. 1903) (money advanced for purchase of saloon); *Ray v. State*, 86 S.W. 761, 761 (Tex. Crim. App. 1905) (alleged embezzlement by one

parties was all that mattered in determining partnership. In *Butler v. State*, however, the majority justified its decision by citing the testimony of the two parties as to their intent.<sup>23</sup> The court admitted that its decision did not comport with prior precedent, but concluded:

The testimony of appellant was to the effect that he did not regard the arrangement between himself and Dillingham as a partnership. Dillingham also testified to the same effect. Under this testimony and in the light of the charge of the court, we think that appellant is absolutely without any ground or cause of complaint.<sup>24</sup>

The defense attorney must have been aware that his reliance on precedent and principle would require the court to validate a relationship that was taboo. In that sense, at least, the analogy he drew between *Butler* and an earlier defendant in a civil suit and the defendants in earlier criminal cases was inapposite.<sup>25</sup> The application of existing precedent would have exonerated Mr. *Butler*, which the majority opinion in the case conceded. An “objective” test, one that looked at the meaning that the parties could reasonably assign to their behavior; the intent that their acts expressed, should have produced a different result.

Unlike the earlier cases, the court and the parties to this dispute were constrained by racial ideology and social practices, which made any expression of equality between these two parties impossible. The defense attorney’s brief, from which the dissenting judge quoted extensively, is a case study of the way subjectivity is

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who put in “skill and ability to judge cattle”); *McCrary v. State*, 103 S.W. 924 (Tex. Crim. App. 1907) (alleged embezzlement of proceeds from sale of organ); *Kelly Island & Lime Transp. v. Masterson*, 93 S.W. 427 (Tex. 1906) (defendant was partners with company building roads in Beaumont because he put in money and they put in labor).

<sup>23</sup> According to Dillingham, “‘the defendant, Gean Butler, that negro boy there, was hauling gravel and dirt with a team of mine in said county . . . The arrangement between Butler and myself with reference to this hauling was this: I agreed to furnish the team, wagon and harness, feed the team, keep the mules shod, feed defendant and give him a place to sleep, and he was to take the team and do such hauling as he could get, and we were to divide the money made by him in hauling, half and half.’” This arrangement was one the defense argued constituted a partnership. The court notes that Dillingham “‘further testified he had no intention of creating a partnership between himself and appellant.’” *Butler*, 111 S.W. at 148.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

constructed. In this brief, which refers to the defendant as an “ignorant negro,” the interplay of external and internal “forces” is apparent: the representations and symbols that are extant in any community and individual consciousness and agency, are on display.<sup>26</sup> As the dissent acknowledged, neither the black man nor the white man in *Butler* would have contemplated or admitted in court or in public that they were partners.<sup>27</sup>

The past is always instructive in understanding the present. Status defined by nationality or class has played an important role in the way contract law treats the working class. The contracts casebook I wrote with Nancy Ota and Amy Kastely begins with the nineteenth century contract labor case in Hawaii, *H.J. Coolidge v. Pua'aiki and Kea*.<sup>28</sup> A while ago, I was trying to convince a colleague to adopt the casebook for his class. “You can’t really expect me to use a book that begins with a contract labor case?” he asked with some incredulity. I suppose he thought his objections to a contract labor case were self-evident. For my part, I was sure he did not see the irony of such an assertion at a moment when *United States v. Sabhnanis*<sup>29</sup> was being tried in the federal court across the street. The Sabhnanis starved, beat, and tortured their domestic help, in violation of the Anti-Peonage statute, the Fair Labor Standards Act, the Trafficking Victims and Violence Prevention Act.

One could argue that the law no longer legitimizes the peonage of people of color. To the contrary, as the *Sabhnanis* case shows, the law punishes such behavior. This answer, however, is reassuring but self-deluding. Businesses are built upon the immigration policies of the United States, which facilitate the recruitment of some foreign workers and guarantee cheap labor by excluding others. Global Horizons Manpower Inc., for instance, is a “labor recruiting firm” charged with trafficking four hundred Thai

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<sup>26</sup> *Id.*

<sup>27</sup> According to the defense attorney, Butler testified on cross-examination that “he guessed” he was not a partner of Dillingham’s and “he guessed” the money he received from Dillingham was wages. *Id.* As for Dillingham, the defense attorney argued that it would not have occurred to him that “his contract with the negro constituted them partners. Dillingham would doubtless have scorned such a relationship.” *Id.* The lawyer concluded, and the dissenting judge agreed that the testimony of these two witnesses was “of little, if any, value” in deciding the partnership question. *Id.*

<sup>28</sup> 3 Haw. 810 (1877).

<sup>29</sup> 599 F.3d 215 (2d Cir. 2010).



farm workers forced to work on farms in Hawaii.<sup>30</sup> *H.J. Coolidge*,<sup>31</sup> decided in 1877, involved a statutory scheme that made it possible for large sugar plantations to find the labor they needed—both indigenous Hawaiians and workers recruited in China, Japan, and eventually in Portugal, the Philippines and Korea. The legal context of the Global Horizons Management case is the ability of the labor contractors to obtain or procure H-2A visas for the workers who are transported to the United States.<sup>32</sup>

## II. DISCURSIVE PRACTICES AND DISPOSSESSION: THE RHETORIC OF AUSTERITY OR SCARCITY

*H.J. Coolidge* is instructive not only for its historical interest, but also for the deployment of language and concepts that still have currency in contract law. It relies on the precepts of contractual freedom, voluntariness, and assent to justify the enforcement of the contracts at issue. Voluntariness and assent do much of the heavy lifting when it comes to subordination and exploitation.

We no longer have slavery or even Jim Crow, but social position still matters in contract. It is expressed in the perversity of the at-will employment doctrine,<sup>33</sup> and in the judicial acquiescence to

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<sup>30</sup> Julia Preston, *Indictment Accuses Firm of Exploiting Thai Workers*, N.Y. TIMES, Sept. 4, 2010, <http://www.nytimes.com/2010/09/04/us/04trafficking.html> (President and three other executives of Global Horizons Manpower indicted for coercing and reducing to peonage the largest number of workers in a recent human trafficking case).

<sup>31</sup> 3 Haw. 810 (1877).

<sup>32</sup> The U.S. Department of Labor requires an application from employers who wish to hire foreign workers. The H-2A is a visa for temporary farm workers. In order to get visas to bring in foreign workers, the employer must state in an application that “there are not sufficient workers who are able, willing, qualified, and available, and that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.” 29 C.F.R. § 501.1(a)(1)(i)-(ii) (2010). In addition, there is a continuing obligation to look for United States workers. See Department of Labor, WORK AUTHORIZATION FOR NON-US CITIZENS: TEMPORARY AGRICULTURAL WORKERS, BASIC PROVISIONS/REQUIREMENTS, <http://www.dol.gov/compliance/guide/taw.htm> (last visited July 15, 2012). Recruiting workers from overseas then becomes a business with great potential for profits. See, e.g., *Team Nursing Servs. Inc. v. Evangelical Lutheran Good Samaritan Soc’y*, 433 F.3d 637 (8th Cir. 2006) (deciding breach of contract claim where recruitment firm had previously earned \$300,000 recruiting nurses to work in the Society’s non-profit nursing home).

<sup>33</sup> *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293 (N.Y. 1983). The New York Court of Appeals refuses to “alter the long standing rule that

the corporate message that downsizing and outsourcing are both necessary and inevitable.<sup>34</sup> For almost thirty years, each recession in a cyclical economy has been used to alter the relationship between employers and employees. The economy may recover from a recession, but workers never do. Each recession brings layoffs or buyouts, downsizing, outsourcing, and the displacement of workers into a contingent workforce.<sup>35</sup> The persistence over the past two decades of troubling employer practices—affecting both the number of people who work for corporations and the working conditions of blue and white collar workers, assembly line, and salaried middle

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where an employment contract is for an indefinite term it is presumed to be a hiring at will.” *Id.* at 300. According to the New York Court of Appeals, “those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal.” *Id.* at 301. The court in *American Home Products* shifted responsibility for reform to the legislature.

<sup>34</sup> A classic example of this language can be found in the decision written by Judge Lambros in *United Steelworkers of America v. United States Steel Corp.* 492 F. Supp. 1, 3 (N.D. Ohio 1980) (“This nation is in the throes of growing pains of similar intensity to the traumatic changes brought by the advent of the steam engine and the Industrial Revolution . . .”). Only this new era presaged a “painful process of relocation and restructuring,” mostly for blue-collar workers. *Id.*

<sup>35</sup> Definitions of contingent workers vary and the most commonplace definitions include those who work in conditions of job insecurity and who have few or no job benefits. The Bureau of Labor Statistics generally considers contingent workers those who do not expect to be employed for a year or more while it classifies as “alternative employment” those who are hired as independent contractors, as temporary workers, on call workers or contract company workers. See Chris Benner, *Contingent & Temporary Workers in Work*, in *WORK IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, POLICY AND SOCIETY* 108 (Carl E. Van Horn and Herbert A. Schaffner eds., 2003). It is possible to chart the restructuring of labor relationships in the reports on the various economic recessions over the past twenty years. See e.g., Cindy Skrzycki, *The Drive to Downsize; Trimming is a Corporate Fact of Life—But there are Hazards*, WASH. POST, Aug. 20, 1989, at H1 (recognition that downsizing was done to “increase productivity” as often as it was done in response to economic downturn.); Ralph A. Pyatt, Jr. *The Big Question of Downsizing: Whose Left to Earn and Spend?*, WASH. POST, Oct. 7, 1993, at B15 (reporting that nearly half of major U.S. companies cut their work forces from July 1992 to June 1993); Louis Uchitelle, *Downsizing Comes Back, but the Outcry is Muted*, N.Y. TIMES, Dec. 7 1998, at A1 (outcries and conflict that characterized the waves of downsizing in the 1980’s and early 1990’s” were gone by the end of the millennium).

management—marks the downward trajectory of the American middle class.<sup>36</sup>

James Galbraith has suggested in his book, *Created Unequal: The Crisis in American Pay*, that “public policies before 1970 largely supported a middle class society” and that this support meant a “broadly equal pattern of social progress was sustained.”<sup>37</sup> The connection between conditions of employment, the creation of an expansive middle class and national pride seems to be lost on everyone except a recent recipient of a bailout. The law affirms, at every turn, the practices which strip workers of the ability to counter the power of employers: multinational corporations and governments.

For many years now, contract law courses have included cases that feature employment contracts, including wrongful termination and plant closing cases. For an individual worker, the presumption of at-will employment is a juridical thumb on the scales of justice that dooms most wrongful termination cases. After a brief interlude in which courts used employee handbooks and public policy to constrain the at-will doctrine, a retreat was sounded in the face of employer resistance.<sup>38</sup> Employers altered the language and content of the employee handbooks to deny contractual intent. Retrenchment was assured once traditional contract jurisprudence, including formalism and the consideration doctrine, were deployed.<sup>39</sup>

Plant closing cases were a different matter, however. At least where collective bargaining agreements governed the relationship between workers and employers, the disparity in power

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<sup>36</sup> Edward Luce, *The Crisis of Middle Class America*, FIN. TIMES MAG., July 30, 2010, <http://www.ft.com/cms/s/2/1a8a5cb2-9ab2-11df-87e6-00144feab49a.html#axzz1J89hCKaH>; Catherine Ramell, *Will Today's Unemployed Become Tomorrow's Unemployable*, N.Y. TIMES, Dec. 02, 2010, <http://economix.blogs.nytimes.com/2010/12/02/will-todays-unemployed-become-tomorrows-unemployable/> (exploring the idea that cyclical unemployment can become structural unemployment).

<sup>37</sup> JAMES K. GALBRAITH, *CREATED UNEQUAL: CRISIS IN AMERICAN PAY* 10 (2003)

<sup>38</sup> Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345 (2008).

<sup>39</sup> In the case of employer/employee relations, an employer can modify the terms in a handbook with a need for further consideration other than continued employment. An employee who wishes to prove that he or she has job security has to show that the employer has received additional consideration besides continued service by the employee. *Id.*

between the two parties was reduced and blue collar workers in the United States enjoyed a standard of living that made the United States a world leader in a meaningful way. Beginning in the 1970's and 1980's, a mere forty years after federal legislation was passed to end labor strife and to "erect a system of industrial self-government," the economic security of union workers was diminished as companies breached contracts with the complicity of courts that refused to enforce promises to keep plants open.<sup>40</sup> The justification offered for plant closings was the competitive disadvantage suffered by American manufacturers in the global market because of high labor costs in the United States. The focus was on the bottom line—on the lack of profits. In retrospect, it would be fair to say that plant closings not only reduced the costs of production for corporate enterprises, a savings to multinational corporations, but they also weakened immeasurably the economic health of the nation and dealt an almost fatal blow to unions.<sup>41</sup>

The success that the private sector had in crippling unions is now being played out in the public sector and the strategy is much the same.<sup>42</sup> No one can dispute the fact that the federal, state, and

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<sup>40</sup> Consider the decision in *Abbingdon v. Dayton Malleable, Inc.*, 561 F. Supp. 1290 (S.D. Ohio 1983), *aff'd*, 738 F.2d 438 (6th Cir. 1984), where a judge rejected a union claim that the CEO promised to keep a plant open for a minimum of two years if the Board approved of the modernization of the plants. According to the judge deciding the case, "In the Fall of 1979, the financial condition of DMI continued to deteriorate." *Id.* at 1294. However, the President of the company, the one who had persuaded employees to give up suspend cost of living adjustments and to accept a wage freeze and to sever their bargaining unit from that of the Ironton plant, stated in a 1984 interview, "In 1979, the industry was running at capacity. Our company had peak sales of \$184 million that year." The company made a net profit of \$3.12 million but it was committed to a "growth plan" which involved moving its operations from Ohio and opening one in Meridian, Mississippi. CONTRACTING LAW 307-16 (Amy Kastely, Deborah Waire Post & Nancy Ota eds., 2006).

<sup>41</sup> *Abbingdon*, 561 F. Supp. at 1290.

<sup>42</sup> The New York Times reported that "State officials from both parties are wrestling with ways to curb the salaries and pensions of government employees, which typically make up a significant percentage of state budgets." Steven Greenhouse, *Strained States Turning to Law to Curb Labor Unions*, N.Y. TIMES, Jan. 3, 2011, <http://www.nytimes.com/2011/01/04/business/04labor.html>. It soon became obvious, at least to union members, that the legislation was not about budgets, but the existence of unions. Legislation limiting the bargaining power of unions, depriving them of union dues and forcing them to the certifying elections on an annual basis was framed initially as reforms driven by fiscal and budgetary needs. See also Steven Greenhouse, *Strained States Turning to Laws to Curb Labor Unions*, N.Y. TIMES, Jan. 3, 2011, available at <http://www.nytimes.com/2011/01/04/business/04>

local governments are operating at a deficit, but the austerity is a false austerity, created by a conscious decision to reduce revenues. Still, the rhetoric of scarcity and austerity has been effective in the states where legislatures have eviscerated public unions. These public unions were one of the last bastions of the middle class where workers were guaranteed some measure of job security, health benefits and a living wage.<sup>43</sup>

In an economy that has become addicted to speculation and paper profits, ironically enough the importance of labor is acknowledged only in advertisements aimed at the working class, designed to persuade the public to go out and buy the quintessential product of American culture: the Chrysler 2010 Jeep Cherokee.<sup>44</sup> This advertisement expresses sentiments that evoke an emotional response; it deploys symbols associated with deeply held American values: our identity as “builders” who create skyscrapers and complete transcontinental railroads. The commercial evokes the sense of personal satisfaction and national pride that can be found in the production of beautiful, well designed and well made goods. It evokes nostalgia for the good old days of assembly line production of cars:

The things that make us Americans are the things we make. This has always been a nation of builders, craftsmen, men and women for whom straight stitches and clean welds are a matter of personal pride.

They made the skyscrapers, the cotton gins, colt revolvers and jeep 4x4s. These things make us who we are.

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labor.html (reporting Wisconsin Governor Scott Walker’s statement in a speech, “We can no longer live in a society where the public employees are the haves and the taxpayers who foot the bills are the have-nots”).

<sup>43</sup> See, e.g., Jeffrey Poole et al. v. City of Waterbury et al, 831 A.2d 211 (Conn. 2003) (oversight board created by state legislation has the power to arbitrate labor contract and limit the benefits of retired firefighters); Boston Hous. Auth. v. Nat’l Conf., Local 3, 935 N.E. 2d 1260 (Mass. 2010) (reinterpreting state legislation to invalidate arbitrator’s upholding a minimum staffing requirement that preserved the jobs of sixteen men working for the Boston Housing Authority after the arbitrator had rejected the justification offered by the BHA that it would save \$1.2 million a year if it could fire these employees, noting that the BHA operated with a deficit since 1996 and that the deficit that year was lower than it had been at various time in the past).

<sup>44</sup> See DCHCJD of Temecula, *2011 Jeep Grand Cherokee Manifesto Commercial from DCH Chrysler Jeep Dodge of Temecula*, YOUTUBE (June 10, 2010), <http://www.youtube.com/watch?v=Mi0SbrrGaiw>

As a people, we do well when we make good things, and not so well when we don't. The good news is this can be put right. We just have to do it. So we did it.

This, our newest son, was imagined, drawn, carved, stamped here and forged here in America. It is well made, and it is designed to work.

This was once a country where people made things, beautiful things. And so it is again.<sup>45</sup>

One can laugh at this commercial and the identity it creates between assembly line work and national pride. It is not as easy to dismiss the idea that work, pride and dignity are connected, particularly as we struggle through what is now sometimes called the Great Recession.<sup>46</sup>

What was lost in the transformation from an industrial to an information economy was not just knowledge, or the wages that lifted up a significant part of the American workforce to the middle class, but self regard and dignity. Capitalism is now, in the words of one scholar, "the space of the anti-market where financiers, speculators, and the political power of states come together to make profits without the constraints of competition."<sup>47</sup>

The recovery from the Great Recession has been described as "bifurcated" because those who have higher education, college graduates, are the only people who are being hired. The jobs many of these college graduates are taking are those that were filled in the past by people who did not have the benefit of a higher education. In this new economy, education is corporatized and those who have an education and a job may not have the upward mobility or the social status that is associated with higher education. In what is sometimes labeled an "information" or "knowledge" economy, intellectuals are just an "academic" workforce.<sup>48</sup> Something close to

<sup>45</sup> *Id.*

<sup>46</sup> The economist and columnist Robert Samuelson says that the current economic crisis is "widely called" the Great Recession. Robert J. Samuelson, *The Great Recession's Stranglehold*, WASH. POST, July 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/11/AR2010071103038.html>.

<sup>47</sup> Michael Blim, *Capitalism in Late Modernity*, 29 ANN. REV. ANTHROPOL. 25, 32 (2000) (drawing from FERNAND BRAUDEL, *THE WHEELS OF COMMERCE: CIVILIZATION AND CAPITALISM, 15TH-18TH CENTURY VOLS. 1-3* (1984)).

<sup>48</sup> In 1997, the coalition on the Academic Workforce was formed by "learned societies in the humanities and the social sciences." Am. Ass'n of

seventy percent of the professionals teaching in colleges and universities are contingent workers.<sup>49</sup> If the accreditation standards for law schools are revised as proposed, law professors may soon join the ranks of other contingent workers.<sup>50</sup>

We live in a time with no name, a period that we locate historically and chronologically with reference to the past. We are post-modern, post-Marxist, post-racial, post-paradigmatic. We are uncertain about our present and anxious and insecure about our future. I admit to a dystopic vision of what is to come. In this world, consent is found in the powerlessness of those who have no choices. In the most extreme cases, people make desperate choices that involve the sale or lease of their bodies<sup>51</sup> and judges affirm the right of doctors, and the research facilities in which they work, to patent the cells and DNA of their patients and sell them for profit.<sup>52</sup>

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Univ. Professors, *About the Coalition on the Academic Workforce*, <http://www.aaup.org/AAUP/issues/contingent/caw.htm> (updated May 2010).

<sup>49</sup> Finally one academic attributes the rise in contingent faculty to the corporatization of education, the growth of for-profit educational institutions. Peter Conn, *We Need to Acknowledge the Realities of Employment in the Humanities*, CHRON. HIGHER EDUC. (April 4, 2010), <http://chronicle.com/article/We-Need-to-Acknowledge-the/64885/>.

<sup>50</sup> The ABA Standards Review Committee website no longer has the reports of subcommittees and the Chair explaining its argument that accreditation standards never required tenure. The proposed revisions that would have made it possible for universities to eliminate tenure in law schools are explained and discussed in letters of opposition found under the heading “Comments on the Comprehensive Review “and the subheading “Terms and Conditions of Employment, Clinical Faculty and Security of Position.” [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html)

<sup>51</sup> Already there is a global market in gestation, with the outsourcing of surrogacy to India. It has been documented in a film called *Google Baby*. See Gina Bellafonte, *Surrogate Pregnancy Goes Global*, N.Y. TIMES, June 16, 2010, <http://www.nytimes.com/2010/06/16/arts/television/16google.html> (review of the HBO2’s *Google Baby*). Following a court decision that declared surrogacy an “industry,” the Indian Parliament passed the Assisted Reproductive Technology Bill, which regulates the industry. Poonam Taneja, *India’s Surrogate Mother Industry*, BBC NEWS (Oct. 12, 2008), [http://news.bbc.co.uk/2/hi/south\\_asia/7661127.stm](http://news.bbc.co.uk/2/hi/south_asia/7661127.stm); Shilpa Kannan, *Regulators Eye India’s Surrogacy Sector*, BBC NEWS (March 18, 2009), <http://news.bbc.co.uk/2/hi/business/7935768.stm>.

<sup>52</sup> *Greenberg v. Miami Child. Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (parents of children with the rare disease and a foundation which initiated research to identify the gene and create a screening test for the disease Canavan sued research institute that patented the genetic information); *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120 (Cal. 1990)

If the liberatory potential of contract is to be salvaged or resurrected, legal scholars and judges may find it in the methodology of cultural critique and in the subversive behavior of their fellow humans. The virtue of a cultural critique is that it invites us to ask whether something is truly impossible or simply unimagined because of what we think we know and what we believe to be true. As long as I can find cases like *Butler v. State*,<sup>53</sup> where an injustice certainly was done, I am also able to see evidence of our willingness as human beings to transgress, to subvert existing norms. I am referring not just to Butler and Dillingham, but to the defense attorney who argued that Butler and Dillingham had a partnership and the presiding judge, who reprinted the defense brief in his dissent. They held fast to what they knew the law required even though it meant that the state would have to acknowledge and enforce the agreements of private citizens, which subverted the social inequality that they understood and believed would continue to exist. It is their ability to subvert their own beliefs that fuels my own “freedom dream[.]”<sup>54</sup>

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(patients do not own their own cells once they are removed and research scientists can patent the genetic information they obtain using the patients tissues); *but see* Ass’n for Molecular Pathology v. United States PTO, 669 F. Supp. 2d 365 (S.D.N.Y. 2009) (breast cancer gene not patentable).

<sup>53</sup> 111 S.W. 146 (Tex. Crim. App. 1908).

<sup>54</sup> See Anthony Farley, *When the Stars Begin to Fall: Introduction to Critical Race Theory and Marxism*, 1 COLUM. J. RACE & L. 226, 235 (2012).