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Teaching an Old Dog Old Tricks: *Coppage v. Kansas* and At-Will Employment Revisited

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TEACHING AN OLD DOG OLD TRICKS: *COPPAGE V. KANSAS* AND AT-WILL EMPLOYMENT REVISITED

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How much is that doggie in the window?
I do hope that doggie's for sale.

Curiously, almost seventy years after the decision, commentaries on *Coppage v. Kansas*[1] are reappearing in the legal literature.[2] As recent generations of law students will recall, in striking down Kansas' criminal prohibition against conditioning employment on an employee's refusal to join or remain a union member,[3] the infamous

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1 236 U.S. 1 (1915).

2 L. Tribe, American Constitutional Law § 8-4, at 440 (1978); Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357 (1983); Lesnick, Book Review, 32 Buffalo L. Rev. 833, 843-45 (1983) (reviewing J. Atleson, Values and Assumptions in American Labor Law (1983)).

3 Following the *Coppage* decision such employment conditions, colloquially known as "yellow dog" contracts, were much discussed. See, e.g., Carey & Oliphant, The Present Status of the Hitchman Case, 29 Colum. L. Rev. 441 (1929); Cochrane, Attacking the "Yellow Dog" in Labor Contracts, 15 Am. Lab. Legis. Rev. 151 (1925); Cochrane, Labor's Campaign Against "Yellow Dog" Contracts Makes Notable Gains, 17 Am. Lab. Legis. Rev. 142 (1927); Cochrane, Why Organized Labor is Fighting "Yellow Dog" Contracts, 15 Am. Lab. Legis. Rev. 227 (1925); Hale, Labor Legislation as an Enlargement of Individual Liberty, 15 Am. Lab. Legis. Rev. 155 (1925); Witte, "Yellow Dog" Contracts, 6 Wis. L. Rev. 21 (1930); Comment, The Yellow Dog Contract, 15 Marq. L. Rev. 110 (1931).

Cochrane quotes Ohio labor leader John P. Frey's statement that the yellow dog contract has caused " 'more feeling, more bitterness in the hearts of wage-earners than any other condition which has been established by those who have enjoyed the right of organization and who use that power to devise ways and means which have denied the same right to the mass of the people.' " Cochrane, Attacking the "Yellow Dog" in Labor Contracts, supra, at 151 (1925).

Organized labor's opposition was less to conditioning employment of an irreplaceable (in the short term) labor supply for individual companies on nonmembership (which conditioning was largely unenforceable), than to the later availability of injunctions against unions based on their allegedly tortious interference with contracts in attempts to organize employees of yellow dog companies. This private right to injunctive relief was upheld in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

Coppage decision now appears to be the quintessential artifact of reactionary due process limitations on public police powers—an artifact since rejected by a newer, progressive constitutional jurisprudence.[4]

Yet, as if a *Coppage* would have to be constructed were it not already conveniently available, it is almost always misread and studied for the wrong or for peripheral reasons. The true *Coppage* opinion devotes very little text to defining the limits of public authority or the role of the state in regulating private conduct. Instead, the Court assumed that its conclusion seemed to automatically follow from a proper description of the public power's role to reinforce and extend the primacy of private, consensual conduct:[5] *Coppage* for the most part simply describes the Court's image of the "necessary" social organization of the labor market in civil society.[6]

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[4] See G. Gunther, Constitutional Law 453–58 (11th ed. 1985); L. Tribe, supra note 2, at 440. Other candidates for quintessence would include Lochner v. New York, 198 U.S. 45 (1905), and Adair v. United States, 208 U.S. 161 (1908).

[5] Few judges state in their opinions the image constitutive of their argument as directly as Justice Pitney. The social phenomenon constructed in legal decisions as the exercise of state power usually must be described by the deconstruction of form, styles, models, and rationalizations of the opinion as a text. In the most eloquently direct statement of the role of legal consciousness in social discourse, Karl Klare writes:

> Legal discourse shapes our beliefs about the experiences and capacities of the human species, our conceptions of justice, freedom and fulfillment, and our visions of the future. It informs our beliefs about how people learn about and treat themselves and others, how we come to hold values, and how we might construct the institutions through which we govern ourselves. In these respects legal discourse resembles all other forms of systematized symbolic interaction. The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. The *modus operandi* of law as legitimating ideology is to make the historically contingent appear necessary. The function of legal discourse in our culture is to deny us access to new modes of conceiving of democratic self-governance, of our capacity for and the experience of freedom. Legal discourse inhibits the perception that we have it in our power to alter and abolish existing patterns of domination and denial of human potential. It is, in short, the vocation of legal thought to render radical, nonliberal visions of freedom literally inconceivable.

Klare, The Public/Private Distinction in Labor Law, 130 U. Pa. L. Rev. 1358, 1358 (1982) (citation omitted).

[6] "Civil society" refers to Hegel's conception of the realm of life in which the subject thinks of herself (holds the consciousness) as a universal participant. This realm corresponds roughly to the bourgeois economy, as opposed to the realm of state politics in which the citizen takes on a specific and interest-laden identity. It is, however, as a universalized actor that the subject recognizes the atomized needs of self and others that generate the division of labor and give rise to class conflict. G. Hegel, The Philosophy of Right, ¶¶ 182–208 (T. Knox trans. 1st ed. 1965); see also J. Findlay, Hegel: A Re-examination, 320–22 (1958) (presents elemental systems of Hegelian "civil society" that culminate in distinct social classes accomplishing division of labor through which the individual can achieve "substantiality," and the integration of a public aspect to individual life); C. Taylor, Hegel and Modern Society, 109–11 (1979) (discusses Hegel's "civil society" concept with respect to the unavoidable differentiation of roles in

This Article will first reconstruct the *Coppage* Court's reasoning in order to refocus attention on the judicial images of the employment relation which structured and determined that reasoning and the case's outcome. It will then trace *Coppage's* continued vitality: the *Coppage* image of the organization of the labor market continues to influence both common law doctrines and statutory interpretation governing employment, even though the case is anathema within our ordinary constitutional jurisprudence.[7] In conclusion, this Article explores the familiar critical insight that the public/private[8] distinction in constitutional law fails to distinguish regimes of legal power or to define institutionally based rights and duties. More importantly, this Article suggests that the survival of the *Coppage* image indicates that the public/private distinction functions partly as a decoy. By serving as too transparent a straw figure, the distinction only feebly masks judges' manipulation of public power. Full of false confidence, those who tilt at the distinction's deployment in constitutional law deconstruct the image in an increasingly stylized critique while failing to notice sufficiently the unchecked progress of the *Coppage* Court's program in the so-called private law regime.

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modern society and misplacement of the aspiration to absolute freedom given the concurrent differences in manner in which each modern estate can and wants to relate to the whole). But see The Civil Rights Cases, 109 U.S. 3 (1883) (Bradley, J.) (relying upon an understanding that some market activities by their public nature are the subject of potential regulation and others are constitutionally insulated as private); W. Blackstone, Commentaries (arguing throughout that civil society is a realm of private life as opposed to conduct partly constituted and regulated by law); K. Marx, On The Jewish Question, Karl Marx: Early Writings 211–42 (R. Livingstone, trans. 1975) (critique of Hegel arguing that the realm of the universal citizen is the realm of state politics in which the subject attempts to emancipate herself from the interests of particular wants and needs in order to gain control over self-identity, but also in which, under bourgeouis capitalism, the state reinforces an *artificial* market organization constituting civil society). See generally, The State and Civil Society, Studies in Hegel's Political Philosophy (Z. Pelczynski, ed. 1984) (series of essays that focus on the distinction between state and civil society fundamental to Hegelian political philosophy). This Article asserts that by the time of *Coppage* the Supreme Court had emphasized the Hegelian concept as a matter of assumed legal consciousness. The Article's critique of this phenomenon means to hold onto the Hegelian emphasis on structures of consciousness associated with the historical development of political societies—particularly in the critique's description of legal doctrine—while using Marx's critique of the state legitimizing the constructed character of all discourse and social organization.

[7] See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (overruling *Coppage* so far as inconsistent with National Labor Relations Act, 29 U.S.C. §§ 151–168 (1935), on ground that Congress' power "to deny an employer the freedom to discriminate in discharge," id. at 187, extends to limiting discrimination in hiring); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act on ground that commerce power extends to promotion of industrial peace by protecting employees' right to organize for redress of grievances and for promulgation of agreements with employers).

[8] I am using the term "public/private" as shorthand for the relation between the state and civil society.

Critics frequently and correctly demonstrate that the now-discarded substantive due process of laissez faire judges has simply been deflected into new, less rigid and therefore less coherent forms.[9] The public/private distinction ideology, in the form of doctrines controlling court access[10] and substantive rights,[11] still serves to an extent to insulate the law's allocation of bargainable entitlements from reallocation via public regulation or taxation.[12] Resting upon this triumph, they fail to recover the private by which the public is knowable and known.[13] The defining questions for legal consciousness concern neither the privatization of public power nor the publicization of private relations in any straightforward way,[14] but rather the social meaning contributed by legal articulation of background images of natural social relations organizing the private/public unity, first as they appear in the images of *Coppage* privacy, and then through the images of the public welfare state.

I. THE YELLOW DOG'S BARK: THE EMPLOYMENT IMAGE

At issue in *Coppage* was a Kansas statute that made it a crime for employers to "coerce, require, demand or influence any person or persons to enter into any agreement . . . not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in . . . employment."[15] The *Coppage* Court invalidated the statute on the

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[9] See Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 205, 209–21 (1979); A Symposium: The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).

[10] Such doctrines concern, for example, state action requirements, see Flagg Bros. v. Brooks, 436 U.S. 149 (1978), and standing, see, e.g., City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

[11] For example, enforcement of substantive rights is bounded by purpose and intent inquiries in equal protection jurisprudence. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264–71 (1977). The ideology also tightly circumscribes due process. See Meacham v. Fano, 427 U.S. 215 (1976); Paul v. Davis, 424 U.S. 693 (1976).

[12] See generally Casebeer, Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law, 37 U. Miami L. Rev. 379 (1983) (examining the public/private distinction as developed in the opinions of Justice Rehnquist).

[13] I mean here to connote a Hegelian dialectical identity that denies both the public/private distinction and a stylized deconstruction of it, and that therefore denies the constructive rationality of the opposed relationship of even indeterminate terms like public and private. See C. Taylor, Hegel and Modern Society 135–69 (1979).

[14] See Gabel, The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life, 52 Geo. Wash. L. Rev. 263 (1984); Comment, Cases that Shock the Conscience: Reflections on Criticism of the Burger Court, 15 Harv. C.R.-C.L. L. Rev. 713 (1980).

[15] 236 U.S. at 6-7 (quoting Act of Mar. 13, 1903, Ch. 222, 1903 Kan. Sess. Laws 378).

theory that it interfered with the liberty of contract protected by fourteenth amendment due process.[16]

The West Publishing Company headnotes pronounce that the case set doctrinal limits on the scope of state legislative regulation of private activities pursuant to police powers.[17] Not surprisingly, the case is studied as a key to the content of the legal relationship between the citizen in civil society and the limited state.[18] *Coppage* is made to stand for three propositions which define the classic public/private distinction: (1) personal liberty and property must be pursued within limits that preserve like liberty for all persons; (2) state police powers derive from a legislative obligation to protect such formally equal liberty and therefore must have internal legal limits reflecting their limited purpose; and (3) it is perverse to suppose that a common power aimed at minimally necessary interference with property acquisition could include power to directly redistribute private gains in the name of public good. It follows that interference with liberty of contract is definitionally prohibited by a system of individual rights that are enforced by courts as external embodiments of the principle of limited grants of public authority. The courts' role as the keeper of this separation of law and politics is authoritative interpretation of public power.

While there is a good deal of such talk in *Coppage*,[19] these assumptions do not reflect or, more importantly, credit the Court's emphasis on the factual context it described, and therefore they do not satisfactorily explain the images which structure its argument. The popular or headnoted version of *Coppage* seems to be about *public order*, the organization of universalized politics in which, from the legal standpoint, private liberty is what we leave ourselves as abstract citizens *after* conceding power to the state to prevent the chaos of unlimited competition. This view of *Coppage* is convenient as a straw decision against which to justify a more enlightened and accurate

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[16] Id. at 26.

[17] Headnotes to *Coppage* are found at 35 S. Ct. 240 (1915), and are keyed to the following West subject heading and key numbers:

Constitutional Law (§ 275)—Due Process of Law—Liberty to Contract

Constitutional Law (§ 81)—Police Power

Master and Servant (§ 11)—Police Power—Relation of Statute to Declared Purpose

Constitutional Law (§ 82)—Police Power—Public Welfare

Constitutional Law (§ 275)—Due Process of Law—Liberty—Forbidding Discrimination Against Union Labor.

[18] See, e.g., G. Gunther, supra note 4, at 455–56; L. Tribe, supra note 2, at 440; Epstein, supra note 2, at 1365–67.

[19] See 236 U.S. at 13–19.

view of public good post-1937 *or* to critique the lack of actual reform in modern constitutional law, but it is impossible to square this view with the use of precedent in *Coppage*[20] or the basis of the opinion's logic. *Coppage* is more about how public order reflects, rather than regulates, the needs of "natural" private interests. "Public/private" is not so much a dichotomy as a unity. *Coppage* makes the public simply the extension of its image of the private.

Strikingly, for three-quarters of the majority opinion Justice Pitney described a complex image of the employment relation that constitutes liberty of contract.[21] This image is "natural" in the sense of being unproblematic: consciously held as a starting point of analysis, but not felt to require justification beyond definition as such. This "natural" image structures the concept of the labor market, and, as a corollary, organizes the articulation of deviations from the norm of employment relations produced by external interventions such as legislation. This image, then, allowed the police power's limits to be ignored as a focus of reasoning: there is no need to assess issues such as the contribution of the Kansas statute to the general welfare or abstract questions of public goods traded against personal utility. The point is *never* whether the public power includes regulation of private behavior. The issue is always first phrased: "Does the natural relation of employment include employers imposing conditions on offers of employment?" If so, public power could not have been granted to destroy the fabric of privately organized civil society.[22]

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[20] Cf. The Employers' Liability Cases, 207 U.S. 463, 491–96 (1908) (Congress' commerce clause power extends to the regulation of master-servant relations so long as such regulation is confined to interstate commerce because the master-servant relationship is one of the *private* relationships upon which individual state relationships to their own citizens are derived and diversely constituted and limited).

[21] Justice Pitney ended this extended image with the statement: "So much for the reason of the matter." 236 U.S. at 21.

Future Justice Louis Brandeis was not charitable in appraising the *Coppage* majority's effort: "The Supreme Court of the United States which, by many decisions had made possible in other fields the harmonizing of legal rights with contemporary conceptions of social justice, showed by its recent decision in the *Coppage* case the potency of mental prepossessions." Brandeis, The Living Law, 10 Nw. U.L. Rev. 461, 467 (1916) (citation omitted).

Later, future Justice Felix Frankfurter and Nathan Greene voiced a similar, if more moderated, view:

> Certainly, if a legislature, having due regard to the actual practice of industrial hire and fire and, specifically, to the inequitable provisions of these contracts, should conclude that a wise public policy does not justify their judicial enforcement, the Supreme Court ought not to neglect the truth of such industrial facts, even if this may involve a reëxamination of some assumptions in the *Coppage* opinion.

Frankfurter & Greene, Labor Injunctions and Federal Legislation, 42 Harv. L. Rev. 766, 781 (1929).

[22] Justice Pitney adopted Justice Harlan's words:

> "[I]t is not within the functions of government—at least in the absence of contract

More specifically, the unity of the private/public relationship in *Coppage* depends upon four interdependent premises which together encode in legal discourse the natural employment relation in the form of at-will employment:[23]

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between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another."

Coppage, 236 U.S. at 10 (quoting Adair v. United States, 208 U.S. 161, 174 (1908) (Harlan, J.)). Again, contemporary response is informative:

> The Coppage case recently decided by the Supreme Court illustrates perfectly the present legal conception of labor, and of its relation to capital and to business, and it would be difficult to find a case showing greater confusion in the law or one showing more clearly that this confusion is due solely to the inability to recognize the public nature of labor and capital.

Adler, Labor, Capital, and Business at Common Law, 29 Harv. L. Rev. 241, 269 (1916) (footnote omitted).

[23] In 1877 an obscure treatise writer, H.G. Wood, virtually invented the so-called American rule for construction of employment contracts for an indefinite period:

> The one must be bound to employ, and the other to serve, for a certain definite time, or either is at liberty to put an end to the relation at any time, and there is no contract of hiring and service obligatory beyond the will of either party. A mere promise to work for another, no time or terms being fixed, is not a contract for service . . . . In order to make it binding, there must be mutuality, that is, the one must be bound to serve and the other to pay.

H.G. Wood, A Treatise on the Law of Master and Servant 157-58 (1877 & photo. reprint 1981).

Ostensibly, this doctrine serves the rational principle of employing public power to encourage mutually beneficial transactions by requiring all enforceable terms to be express. However, for Wood such a principle still admits that some enforceable terms may be implied if so tied to the circumstances and course of dealing between the parties as to be unnecessary of statement. Wood further acknowledges that all contracts of hiring are mixed contracts, "because annexed to them all . . . there are certain implied conditions, a breach of which operates as disastrously to the parties as a breach of the express provisions." Id. at 156. However, the indefiniteness of a durational or discharge term apparently cannot be relieved by implying a condition without interfering with the assumption that contract enforcement by the state ensures mutuality of private performance benefits. Interfering with at-will termination would run counter to natural, but unstated, obligations of master and servant. Even so, the limits those obligations impose on an employer's and employee's legitimate expectations of each other in some small ways and at very high cost emancipate the servant, who cannot be tied to an employer other than by express promises.

However, mutuality at its strongest also prevents an employee from enforcing a permanent employment contract or a "contract for life" as more than an indefinite term or at-will contract unless separate and adequate consideration was given for the permanent term. See infra note 29. In a 1932 case, still cited and the basis of the majority rule, the Supreme Court of Louisiana explained:

> The reason for the distinction is obvious. An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume almost juris et de jure that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of "mutuality."

1. *Mobility*. Relations of exchange maximize property accumulation when appropriately free of restraints on the mobility of labor and capital.

2. *Mutuality*. Legally enforceable restraint depends upon mutuality of contract obligations.

3. *Social Welfare*. The private/public relationship is derived from a consumption-oriented division of labor.

4. *Equity*. There is natural equity in legal enforcement of voluntary contracts.[24]

The starting point of the analysis in *Coppage* is what the parties freely did and *must* naturally have done in their social relations with each other: they engaged in a contract.

> There is neither finding nor evidence that the contract of employment was other than a general or indefinite hiring, such as is presumed to be terminable at the will of either party. The evidence shows that it would have been to the advantage of Hedges, from a pecuniary point of view and otherwise, to have been permitted to retain his membership in the union, and at the same time to remain in the employ of the railway company. . . . But, aside from this matter of pecuniary interest, there is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests.[25]

Thus, the state may prevent contract by coercion as a theft of capi-

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Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 69, 139 So. 760, 761 (1932). For an excellent but more materialist view of the origins of the American discharge rule, arguing that the doctrine developed as an instrumental response to employers' wish to control middle managers, agents, and similar technical employees as firm size and specialization increased with industrial development, see Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118 (1976).

[24] In examining the phenomenological content of the *Coppage* opinion, no assertion is made that Justice Pitney intended, either in an instrumental or teleological way, to *cause* labor markets to be structured around these political and economic premises through the legal forms of contract relations. Rather, Justice Pitney speaks *descriptively* precisely because the reproduction of social activity includes the rationalization of experience as a discourse of appearances and understanding. Social activities are shaped by the ongoing process of such meaning-attribution, as they in turn shape the possibilities of such description. Justice Pitney manifests a consciousness of work not only present in but dominant to his time. Therefore, decoding his natural image of employment need not depend upon finding the premises in a logical model explicit in the opinion. Rather, it depends upon demonstrating that such a rationality appears in the consciousness of the relation of the state to the labor market, that consciousness being necessary to a coherent legal description of work, and making superfluous any policy argument to justify the decision's outcome. See generally Gabel, The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves, 62 Tex. L. Rev. 1563, 1564 n.2 (1984) (describing phenomenology as the study of unreflective intended meanings as they appear or are revealed to the consciousness).

[25] *Coppage*, 236 U.S. at 8–9.

tal—either the employer's resources or the employee's labor power—but it may not prevent the disadvantages that may be necessary concessions to reach a free exchange of capital in an employment contract.[26]

Protection and prosperity meet in a civil society that is constituted by individuals' maximization of the accumulated gains of their labor. The Court took the first premise encoding the image of the natural employment relation—mobility of capital, including labor—from *Adair v. United States*,[27] the earlier, fifth amendment version of the yellow dog contract prohibition:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé.[28]

Because labor time is a form of capital, preserving its mobility demands circumscribing contract interpretation to express limits on other uses of the contracted capital. This leads to the second premise of the image—mutuality of obligation: "Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship?"[29]

Assuming the *Coppage* image, then, the public interest lies in

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26 But, on this record, we have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employé by means unlawful without the act. In the case before us, the state court treated the term "coerce" as applying to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employé.

Id. at 8.

27 208 U.S. 161 (1908).

28 *Coppage*, 236 U.S. at 10–11 (quoting *Adair*, 208 U.S. at 174–75).

29 Id. at 12.

Indeed, mutuality of obligation develops a more surgically precise application than this entitlement to conditions precedent. The stronger requirement is that of mutuality of consideration for specific conditions or promises. This stronger application is, of course, antithetical to the Second Restatement of Contracts familiar to first year law students, see, e.g., Restatement (Second) of Contracts § 79 (1981) ("Adequacy of Consideration; Mutuality of Obligation. If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.' "). However, it is good work law. See supra note 23 (discussion of the construction of permanent employment terms); see also Murphree v. Alabama Farm Bureau Ins. Co., 449 So. 2d 1218 (Ala. 1984) (a contract of permanent employment is not enforceable unless employee supplies valuable consideration independent of the services to be performed). On the general narrowing of

maintaining the division of labor in the economic organization of social relations based upon mutual exchange. Producer-employers consume labor time in order to exchange the resulting products for purchasing power; laborer-employees produce labor time in exchange for purchasing power for themselves. The aggregated set of such exchanges defines a division that is consumption oriented. The social state that is made up of the aggregate of things and services depends solely on the products elicited for exchange in satisfaction of consumer wants; it does not depend on the character or substantive ends or inherent value of what is actually produced.[30] According to the image, the employer must be free to deploy capital both in investment in an enterprise and within the enterprise itself to maximize return as she personally judges best. Only employers can decide what conditions maximize productivity at minimum cost; neither employees who want a greater return for their labor nor judges are in a position to

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the scope of "black letter" contract law, see L. Friedman, Contract Law in America 20–24 (1965).

Yet even the stronger doctrine of mutuality of consideration exhibits the limited emancipatory potential of legal discourse as an arena. Cf. E.P. Thompson, Whigs and Hunters 258–69 (1975) (because law is an institution that has independent characteristics, history, and logic of evolution, it not only mediates, reinforces, and ideologically legitimates existent class relations, but also its forms and procedures may inhibit arbitrary excesses of power, somewhat protecting the powerless, and cannot accomplish the former without the latter, and so allow law to be an arena for social conflicts). The aspect of yellow dog contract doctrine most hated by the unions—the right to injunctive relief against unions for tortious interference with contract created by Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917)—was rendered impotent in New York by a series of decisions distinguishing the employers' *Coppage* right to impose conditions of nonmembership in a union upon continued at-will employment from the judicial unenforceability of such conditions—for lack of consideration— against employees as agents for the union. Interborough Rapid Transit Co. v. Lavin, 247 N.Y. 65, 159 N.E. 863 (1928); Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N.Y.S. 258 (1928). As Edwin E. Witte stated:

> These contracts were artfully drawn, obligating on their face the employer as well as the employes. Upon proof that the employer's promises did not afford the employes any real protection, and opinions from many of the leading students of labor problems of the country condemning yellow dog contracts as anti-social, the court found that no valid contract existed; and that, hence, no action lay against the unions for seeking to persuade employes to join them. Because they do not expressly dissent from the *Hitchman* case, it can be argued that these New York decisions still leave open the possibility that contracts may hereafter be drawn which will meet the tests of mutuality and consideration. As concerns the present forms of such "contracts," however, it seems to be settled in New York that they are to be regarded merely as a condition of employment, which the employer may lawfully insist upon but cannot enforce by any legal process.

Witte, supra note 3, at 26.

[30] H. Arendt, The Human Condition, 118–26 (1958).

second guess the value of the closed shop.[31] For the optimal organization of the consumption-oriented division of labor, investment decisions must be legally insulated from employment decisions because the division of labor for production in service of social consumption must be separated from the distribution of returns arising from the production process.[32]

The third and fourth premises of the *Coppage* image possess a complex interdependency: private interest is maximization of purchasing power; public interest is maximization of aggregate purchasing power; public interest therefore includes minimization of costs of production, including labor costs. Strict enforcement of mutual obligations of contract in service of mobile capital is, therefore, neutral with regard to contracting parties because it enables both employees' and employers' capital to seek its highest-valued market use, even if the result of such contract enforcement is inequality of

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[31] To this line of argument it is sufficient to say that it cannot be judicially declared that membership in such an organization has no relation to a member's duty to his employer; and therefore, if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employé is consistent with the satisfactory performance of the duties of the employment.

Coppage, 236 U.S. at 19.

[32] See Berry v. Donovan, 188 Mass. 353, 74 N.E. 603 (1905). In *Berry* a former employee brought a tort action for malicious interference with his employment contract against a union representative whose union's closed-shop contract required discharge of all nonunion, at-will employees. The *Adair-Coppage* image was so strong that the court held that even though the fired nonunion employee could not prevent his employer from exercising its right to discharge him for any or no reason at all *and* an individual could offer to work the same job for lower wages, thereby displacing existing employees, the closed-shop union counterpart to the *Coppage* yellow dog contract was nonetheless outside the contracting parties' rights to condition exchange of their capital. The court distinguished mutuality of condition in the name of preventing employment contract inroads into ownership control of investment:

> In such a case the action taken by the combination is not in the regular course of their business as employés, either in the service in which they are engaged or in an effort to obtain employment in other service. The result which they seek to obtain cannot come directly from anything that they do within the regular line of their business as workers competing in the labor market. It can only come from action outside of the province of workingmen, intended directly to injure another, for the purpose of compelling him to submit to their dictation.
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> . . . If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employé would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands or give up business.

Id. at 357–59, 74 N.E. at 605–06. For an approach to the *Berry* conundrum emphasizing a more autonomously legal-reasoning explanation, see generally Kelman, American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers, 58 St. John's L. Rev. 1 (1983) (describing courts' use of legal formalism to develop a set of "fundamental principles" through which the party holding the "superior" right always won).

purchasing power.[33]

> The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. . . . The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.[34]

Public enforcement of such exchanges on their own terms is not taking sides: inequalities are natural and enforcement defines the public good of all, it is therefore naturally equitable.

> No doubt, wherever the right of private property exists, there *must* and will be inequalities of fortune; and thus it *naturally* happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . [F]or the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is *self-evident* that, unless all things are held in common, some persons must have more property than others, it is from the *nature of things* impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights . . . .[35]

Because the public interest lies in maximizing the natural rela-

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[33] It might be objected that rather than minimizing costs of production, including labor costs, the premises are better read as seeking efficient costs of labor as a factor of production. This weaker formulation would take account of the assumption in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), that public interest includes a Keynesian intrusion into the free market's return to labor in order to support short term aggregate demand for existing production stocks and goods.

First, at the time the *Coppage* image was constructed, even justices sympathetic to labor assumed the social interest in aggregate labor cost minimization. See Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896) (Holmes, J., dissenting). Second, as *Coppage* makes clear, it was within the employer's constitutional right to foolishly exploit his or her labor supply in the short term, particularly in competition with other employers. Whether good or bad macroeconomics, the commitment of legal consciousness held no place for an efficiency divergent from cost-minimization. See also infra note 90 (discussing effect of the market on at-will employment contracts).

[34] *Coppage*, 236 U.S. at 14.

[35] Id. at 17 (emphasis added).

tions of private exchange, the public power cannot redistribute private wealth. Rather, public interest may operate only to prevent coercion that interferes with the free mobility of capital to its highest personally, presently valued use, or to provide resources for the benefit of all that cannot efficiently be pursued privately.

> The Act . . . is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare.[36]

That economic leverage is not coercion, and that the public interest does not extend to the personal consequences of leveraged contracts is dictated by this natural image of the relations in civil society. These relations are not typified by universal citizens voting for the public good—a general welfare to which all contribute to receive greater personal benefits than they could pursue personally, and which thereby defines the limits of absolute personal liberty. The basic social relation which defines the civil society, to which limited state interventions are necessary and which those interventions serve, is the at-will employment contract. Such social organization implies a private/public unity, not a public/private opposition between universal and self interest.[37]

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[36] Id. at 16.

[37] Professor Richard Epstein acknowledges the natural employment assumptions driving the Pitney opinion: "The approach of *Coppage* has found modern philosophical support in R. Nozick, Anarchy, State, and Utopia (1974)." Epstein, supra note 2, at 1366 n.29. Nozick's libertarian social philosophy proceeds from an ontology of radical individualism to define a moral and political norm of the minimum state whose just function is limited to prevention of personal coercion and violence and is antithetical to redistributive regulations of individual choice and conduct. Epstein celebrates this ideology by suggesting the utility *and* rightness of the yellow dog contract, id. at 1370–75, 1382–85, apparently on the ground that if unions are efficient organizers of wage contracts, they will render the yellow dog superfluous; if they are not, mobile workers will get the maximum wage "deserved," as indicated by an unregulated mutual exchange of employers and employees. This restatement of *Coppage* mutuality assumes that there is no relevant relation between state power and the position of capital in civil society.

While a detailed new examination of this assertion must await another forum, consider Edward A. Adler's response to those natural employment assumptions, which was contemporary with Justice Pitney's statement of *Coppage* ideology and apology:

> That the members of the community have no interest in how profits from community services shall be divided, no right to participate in the rendering of that ser-

This image exhausts the reasoning of the majority. Curiously, it

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vice, no control of the time, manner and conditions under which that service shall be performed, are seen to be at best modern ideas. And when we take into consideration the special legislation with which modern communities surround business, the protective tariffs, the corporation laws with their guaranties of individual immunity from the consequences of failure or mismanagement, the bankruptcy laws and receiverships by which the community wipes off at a stroke the results of particular business adversities and absorbs the loss by distributing it over the whole range of industry, the inappositeness of such expressions as "*his* business," "*his* capital," "interference with *his* business" becomes all the more apparent. "Capitalist" and "capitalism" also are but vague or figurative expressions, conveying no definite idea and capable of as many connotations as there are persons to employ them.

Adler, supra note 22, at 264–65 (footnote omitted). Another contemporary wrote:

There is no equality before the law, there never has been and it is difficult to conceive how there could be.

The common law interferes with liberty by imposing legal duties and these duties are not the same for all. One of these duties is the duty not to trespass on another's property. We often hear it stated that property is an enlargement of personal liberty; in a certain sense this is true; it is also clearly true that it is a denial of the liberty of the non-owners. But every person is at the same time an owner of some and a non-owner of other property. Hence the institution of ownership constitutes for everyone both a curtailment of some sort of liberty and an enlargement of some other sort of liberty.

. . . .

. . . Consider the situation with respect to modern industrial property of which the owner makes no personal use. In this case it is not the freedom to enter the factory and find it unoccupied that matters to him. His ownership, with its restrictions on the liberty of workers, consumers and others, enables him to derive an income from the production that takes place in the plant. And that income serves to release him from many of the interferences which other men's property rights would otherwise impose on his liberty.

. . . .

But the Justice did not note that the exercise of the right to contract was interfered with by the owners when they insisted on the men leaving the job or leaving the union. Whether this interference by the employer, with the help of the law of property, or the interference attempted by statute, was the more "arbitrary" interference is the question Justice Pitney failed to face.

. . . .

No particular set of inequalities, therefore, can be said to be the *necessary* result of the existence of private property and of (otherwise) free contract. It is failure to recognize this fact which vitiates another statement of Justice Pitney, when he said that, "since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." As there is no one set of inequalities that must necessarily flow from property and contract, it cannot be asserted dogmatically that a statutory rearrangement of the existing inequalities will necessarily involve more restriction on liberty and more impairment of property rights than the reverse. It may merely have the effect of weakening the liberty and property of the more favored to strengthen the liberty and property of the less favored.

did not exhaust the possibilities of public intervention indicated in earlier liberty of contract/labor cases, notably *Holden v. Hardy*.[38] Using *Holden*, both dissents in *Coppage* attempted different reconciliations of public power and private interest. Justice Holmes dissented only briefly, citing his dissents in *Lochner v. New York*[39] and *Adair*,[40] and calling upon the Court to directly overrule those decisions.[41] In a more extensive dissent, Justice Day reasoned that it is the freedom to contract or not to contract that is crucial to private ordering. Therefore, he argued, so long as the at-will mobility of both labor and capital are preserved, the legislative removal of a term from, or imposition of a condition on, a contract offer in the name of general welfare can

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Hale, supra note 3, at 157–60 (footnote and emphasis omitted) (quoting *Coppage*, 236 U.S. at 17).

"Natural" images are constructed. Epstein cannot simultaneously reject the contemporary legitimacy of public power under West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), in a nostalgic lust for the dependency of public power on private "consent," and still insist on the natural neutrality of bargains struck between the legal fictions of organized capital and the publicly affected mobility of "owners" of labor-time commodities. He disingenuously mixes static modeling and economic reality in rhetorically trumpeting: "If inequality of bargaining power had any descriptive power as a model, then why did employers not use their power to reduce wages to the vanishing point, or refuse to accept unionization before the passage of either the Norris-LaGuardia or Wagner Acts?" Epstein, supra note 2, at 1372.

The answer is that once labor is simply a commodity, as Epstein explicitly assumes, the partially state-constituted market will drive commodity prices down to the marginal cost of reproduction of the resource, that cost of reproduction being the minimally acceptable family wage necessary to supply laborers in the form of the labor commodity. This pressure will in turn be resisted by workers and their families through economic, legal, and political responses and within evolving cultural patterns. If Epstein is right in suggesting that the only normative standards are Nozickian rights theories or act utilities, we are all trapped within a poverty of imagination and thought.

[38] 169 U.S. 366 (1898). *Holden* upheld against a fourteenth amendment due process attack a Utah statute that limited an employee's work day in mines, smelters, and refineries to eight hours. The miners' self-interest in bargaining a suitable wage premium for risk to health was not thought to preempt a public concern for safety and health.

> The former [proprietors] naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.
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> . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.

Id. at 397.

[39] 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

[40] 208 U.S. 161, 190 (Holmes, J., dissenting).

[41] *Coppage*, 236 U.S. at 27 (Holmes, J., dissenting).

be permitted.[42] Thus, Justice Day in effect distinguished *Adair* and invoked *Holden* to allow a term's removal where the removal acts on public perception of undue economic pressure arising from an employee's lack of mobility[43] to relinquish an otherwise legal entitlement to join a union.

Both Justices Day and Holmes distinguished the legal articulation of public power from the articulation of the consequences of Justice Pitney's natural employment image, but neither directly

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42 It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They cannot put in terms that are against public policy either as it is deemed by the courts to exist at common law or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the state. . . .

. . . .

. . . There is a real and not a fanciful distinction between the exercise of the right to discharge at will and the imposition of a requirement that the employé, as a condition of employment, shall make a particular agreement to forego a legal right.

Id. at 35, 37 (Day, J., dissenting).

Thus, Justice Day adopted the Kansas Supreme Court's theory:

> The employer may discharge an employee for the reason that the employee belongs to a labor union, or for the reason that he belongs to a particular church or to no church, or for any reason, or from mere whim without assigning any reason, and the employee is equally free to quit his employment. Yet an employer has no constitutional or inherent right to coerce or compel his employee to make any contract or agreement, written or verbal, which he does not wish to make, whatever may be the condition or purpose.

State v. Coppage, 87 Kan. 752, 760, 125 P. 8, 11 (1912).

The Kansas court explicitly maintained the distinction between investment and employment by upholding management control of the workplace through conditions on both the offer and retention of employment. But the court also suggested that the public's proper concern with the private, legal rights of the citizen employee was beyond the legitimate scope of management's private concern with production maximization.

> The employer and not the employee is the master of the business to be carried on, and it follows that he has the right to impose such terms of employment as within reason and justice seem good to him. The employee must accept the conditions or refuse the employment. The employer has no right by virtue of these relations to dominate the life nor to interfere with the liberty of the employee in matters that do not lessen or deteriorate the service.

Id. at 759, 125 P. at 11.

Here, proper public concern with protecting civil rights as one aspect of personal privacy in competition with economic privacy is a different public extension of private interest than Justice Pitney's private/public unity in which personal interest is subordinated to private market exploitation. However, the Kansas court's view is also foreign to the modern public/private distinction that centers on questions of distribution and (what amounts to the same) regulation.

43 In *Holden*, for instance, the employee lacked mobility because "company" towns at mine sites were in remote areas of Utah. See 169 U.S. at 367.

contradicted it.[44] Day embraced the at-will employment term, with its underlying emphasis on capital mobility as normative, and correspondingly approved judicial or legislative determination of economic or other forms of coercive restriction on true capital mobility in the name of maximized social production.[45] Holmes extended the logic of public intervention to permit changing the at-will form of contract itself in the name of social production.[46] Because Justice Pitney began the majority opinion by admitting that noneconomic coercion is not protected by freedom of contract, it is only the differing interpretations of a shared image of the private organization of the labor market that distinguish the opinions' several derivations of public interest.[47]

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[44] Justices Day and Holmes offered alternative linkages of the second and third premises of the Pitney image, which premises appear supra at text accompanying notes 23–24. Although they both argued that mutuality of obligations does not necessarily result in efficient bargains, Day took a paternalistic stand, asserting that the state can better judge the contract terms that produce maximum productivity and highest labor value. 236 U.S. at 29, 30, 35–36. Holmes, on the other hand, suggested that the transaction costs of individual bargaining prevent *maximum* returns to labor and justify contracting through the political process or through public backing of private organization. Id. at 25–27. (This formulation was contributed by Robert Rosen.)

[45] "In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

> . . . But the fact that the parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.' "

236 U.S. at 41–42 (quoting *Holden*, 169 U.S. at 397).

[46] *Coppage*, 236 U.S. at 27; see also Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting), stating:

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

[47] Similar assumptions about the labor market's organization structure debate about *Adair* and *Coppage* in the secondary legal literature. The debate over *Adair* between Richard Olney and Charles Darling assumes that the question of police-power limits relates to the preservation of a labor market organization legally enforced in the at-will form. Olney argues that the commerce clause power is adequate to regulate combinations of capital (employer organizations) and labor (unions) to lessen the likelihood of strikes. Olney, Discrimination Against Union Labor—Legal?, 42 Am. L. Rev. 161, 165 (1908). Darling supports the *Adair* decision so long as unions are not prohibited from bargaining for a closed shop, i.e., from conditioning the provision of labor in a way parallel to the conditioning of the job offer. See Darling, The Adair Case, 42 Am. L. Rev. 884 (1908). Darling reasons that so long as the economic power is parallel, countervailing strike-avoiding incentives are preserved, but that the Olney position

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Coppage is expressly rejected as an *image* of civil society in *West Coast Hotel Co. v. Parrish's*[48] 1937 overruling of fourteenth amendment freedom of contract doctrine:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[49]

It would be curious to discover that while *Coppage's* natural-work-relation image is consistently rejected as a sound basis for relating contemporary civil and public power—in the passage of regulatory programs like the National Labor Relations Act[50] as well as in consti-

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invites a radical rethinking of the conceptual images legally assumed to organize the labor market.

> As soon as you begin to qualify the [employer's] right [to employ whom he will], to limit the manner of its exercise, to introduce the element of motive and make that material, you have crossed the dividing line that separates us from a state of society where the right of private property is not recognized and protected. . . . The implication of that argument is that the rightfulness of a servant's discharge—the discharge of a servant-at-will—depends, or may be made to depend, upon the master's motive. If that view should prevail it would indeed involve a revolution in legal conceptions.

Id. at 886–87.

Both Olney and Darling critique case decisions in order to maintain countervailing labor and capital power. However, Darling maintains a strong notion of mutuality as the touchstone of contract interpretation, and he regards his maintenance of that notion as dispositive of their debate.

Student notes on *Coppage* in the Harvard Law Review and Yale Law Journal disagree on the decision's merit but not on the centrality of the labor market assumptions which control it. Compare Note, Freedom of Contract Under the Constitution, 28 Harv. L. Rev. 496, 497–98 (1915) ("This presupposes a major premise, which is deduced from the nature of things, that no statute which makes the 'levelling of inequalities of fortune' an end in itself can reasonably tend to promote the public welfare.") with Comment, Legislative Power to Prohibit Certain Restrictive Conditions in the Employment of Labor, 24 Yale L.J. 677, 681 (1915) ("But if this construction was imperatively demanded in order to effectuate the purpose of the amendment, what shall be said concerning that type of legislation which is enacted, not in capricious disregard, but in deliberate repudiation, of the rights of liberty and property, by proceeding on the assumption that these rights, with the inevitably consequent financial inequality, are themselves adverse to the public welfare? This is nothing less than an undertaking to pass judgment on the policy of the constitution itself, which, if admitted at all, could stop at nothing short of the annihilation of the constitutional limitations . . . .").

[48] 300 U.S. 379 (1937).

[49] Id. at 399.

[50] 29 U.S.C. § 151 (1935). Professor James Atleson convincingly demonstrates that the principle of labor and capital mobility and its accompanying insulation of management investment decisions ideologically limits the NLRA's structural reach as well. Thus, even the quintessential public reform of civil society, the Wagner Act, falls under the influence of the

tutional law—the image nonetheless continues to structure the reasoning of labor cases involving unorganized workers. Perhaps the surface logics of the public/private distinction underlying modern constitutional law and the private/public unity of work relations law indicate not so much an incoherence between the fields as a deeper coherence and linkage assumed, but not expressed.

To illustrate this coherence in the following sections, I will limit comparison mainly to examples from two seemingly divorced doctrines representing both sides of the public/private distinction. One side is represented by a common law of private relationships, public policy limitations upon at-will discharge of workers under indefinite term contracts;[51] the other by a keystone of New Deal public programs of redistribution, eligibility criteria for unemployment compensation.[52] Clearly, isolated examples from varying jurisdictions will differ and the limited sample colors the argument's credibility but, whether in divergence from each other or in divergence from the underlying *Coppage* image of work relations, their real significance is the remarkable persistence of the *Coppage* image against which all deviations are played out and delimited.[53]

II. THE YELLOW DOG'S BITE: CONTINUED VITALITY IN THE "PRIVATE" WORK LAW OF AT-WILL EMPLOYMENT DISCHARGE

In at-will contracts, an employee may be discharged or may quit

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Coppage image. See J. Atleson, Values and Assumptions in American Labor Law (1983); see also, Lesnick, supra note 2 (book review of Atleson's Values and Assumptions in American Labor Law). The cases bear Atleson out. Consider, for example:

> Rotation in personnel is a common thing. The employer does not enter the fray with the burden of explanation. With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause.

NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956).

51 Of the many recent articles on at-will discharge, the best analyses remain Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404 (1967); Summers, Individual Protection Against Unjust Dismissal: Time For A Statute, 62 Va. L. Rev. 481 (1976); Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931 (1983) [hereinafter cited as Note, Protecting Employees]; Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335 (1974).

52 For analysis of the statutory structure of unemployment insurance and the doctrinal issues defining eligibility, see Long Lines and Hard Times: Future Unemployment Insurance Alternatives, 59 U. Det. J. Urb. L. 481 (1982); A Symposium on Unemployment Insurance, 8 Vand. L. Rev. 179 (1955); 55 Yale L.J. 1 (1945) (symposium issue).

53 Professor Lesnick first pointed out the centrality of *Coppage* ideology in work law. Lesnick, supra note 2, at 845–46.

for good reason, bad reason, or no reason at all. Doctrinal modifications limiting pure discretion have been developed on several bases: equitable estoppel,[54] implied covenants of good faith and fair dealing,[55] implied contract terms,[56] public policy limitations on motives for contractually enforceable discharge,[57] tortious discharge based on public policy,[58] and abusive discharge.[59]

These modifications' effect is constrained to reflect the *Coppage* image. The last, abusive discharge, is simply an independent tort effectuated by discharge. The first, equitable estoppel, is highly disfavored.[60] The second, implied convenants, is less but still disfavored, except as incorporated into public policy in breach of contract actions, on the ground that, except in extremely unusual circumstances, the four corners of the contract govern the exchange of values and thus exhaust the equitable interests of the parties (mutuality premise). The third, implied terms, is disfavored on the same ground, but retains some independent force, especially when the terms are bargained for and incorporated into an employee handbook (mutuality).[61] However, this handbook phenomenon may only temporarily limit employer choice to the extent employers learn to sanitize their handbooks of discharge procedures or implications of good faith, or expressly make them gratuitous. Only the fourth, public policy exceptions to the right of at-will discharge, seems to change the natural employment relation. Yet these exceptions explicitly rely on the public/private distinction for definition. The change is illusory if the defining image for the public policy exception remains the private/public unity of *Coppage*.

Coppage assumes that economic power cannot be the direct subject of public legislation, but that noncontractual economic or physical coercion can be because it artificially interferes with mobility of the respective capital of employer and employee to its highest present

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54 See, e.g., Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984).

55 See, e.g., Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

56 See, e.g., Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

57 See, e.g., Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

58 See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

59 See, e.g., M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980); Rice v. United Ins. Co., 118 L.R.R.M. (BNA) 2516 (Ala. 1984).

60 Cf. Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967) (finding estoppel doctrine inapplicable because employer provided *some* employment, thereby discharging its obligations to provide employment).

61 Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 613–15, 292 N.W.2d 880, 892 (1980).

value. Because such mobilization is presumed to produce the highest good—the greatest consumption power for each individual—the public interest is defined to encompass such prohibition. Public policy exceptions to at-will discharge similarly involve judgments that certain motives for discharge cannot be reconciled to a legitimate private interest in capital mobility. Defining the line of impropriety in the newer doctrine usually depends upon a distinction similar to the earlier coercion/economic leverage distinction. Importantly, the natural image of the employment relation which organizes the legal argument remains constant regardless of whether the jurisdiction accepts or rejects a public policy exception.

For example, Florida has staunchly refused to adopt a public policy limiting the employer's right to at-will discharge: it holds to the vision of a division of labor organized by contracts of mutual obligations that necessarily tolerates inequality of bargaining power as a consequence of capital mobility. In a recent case, *Muller v. Stromberg Carlson Corp.*,[62] a Florida court stated:

> It may well be—and probably is—that the "balance of power" frequently rests with the employer . . . . But mere unequal relative bargaining power of the parties in business relationships has never been a basis on which to either create or terminate contracts. . . .
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> . . . .
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> . . . Florida law does not reflect those views which appear to be based upon a perception of social or economic policy thought to be beneficial. We would have serious reservations as to the advisability of relaxing the requirements of definiteness in employment contracts considering the concomitant uncertainty which would result in employer-employee relationships. A basic function of the law is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of those relationships.[63]

By certainty, Florida means the right to terminate the capital resources committed to labor at any time for good reason, bad reason, or no reason at all.

In Texas the connection between at-will employment and capital mobility is explicit in *Watson v. Zep Manufacturing Co.*,[64] where the court rejected an implied promise of a steady job as a bar to a day laborer's at-will termination:

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[62] 427 So. 2d 266 (Fla. Dist. Ct. App. 1983).

[63] Id. at 269–70.

[64] 582 S.W.2d 178 (Tex. Civ. App. 1979).

> [Plaintiff's] principal contention is that job security is so important to workers individually and to economic and social welfare generally that the law should impose a duty on employers to deal fairly with workers in terminating their employment, and, therefore, not to discharge them without cause. [Defendant] replies that the policy considerations run the other way. It argues that the privilege to discharge employees at will is an important aspect of management that cannot be denied without sacrificing efficiency of operations and loss of confidence in worker loyalty. It insists that if employers must be prepared to prove to a jury a "just cause" for every discharge, they will be deterred from pruning their organizations of marginal workers whose attitude is uncooperative and whose productivity is low.[65]

The vast majority of decisions adopting public policy exceptions, consistent with the need to promote capital mobility, turn on perceptions that certain motives for discharge undermine the social order necessary to that mobility by connecting employer motive to employee status.

These decisions first slightly expand the *Coppage* definition of "true" coercion to include illegal treatment of the employee's person: sexual harrassment,[66] enlistment in a conspiracy to commit criminal acts or evade regulatory enforcement,[67] requirement that the employee forego public insurance benefits such as workmen's compensation,[68] or interference with a citizen's obligations such as jury duty.[69] Arguably, prohibition of such employer motives is the necessary *quid pro quo* for the legal system's enforcement and facilitation of free contract and capital mobility, its provision of a stable social order that encourages orderly investment.

Second, the employees who gain protection from at-will discharges are overwhelmingly long term, managerial or skilled, and exemplary performers for the company.[70] In terms of the efficient use of labor available to the society, a day laborer like the plaintiff in *Watson* rarely works at one job long enough to trade longevity of performance for a right to question management's prerogative to end his or her job security and force job mobility. The discharge of a dock loader who files suit to recover for the loss of his five year old's eye raises no credibility issue when the discharge occurred in an economic cut-

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65 Id. at 180.

66 Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

67 Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

68 Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

69 Nees v. Hocks, 272 Or. 210, 536 P.2d 512, (1975) (en banc).

70 See Note, Protecting Employees, supra note 51, at 1937–47.

back—such jobs are always at risk.[71]

Paradoxically, if an individual is employed for short periods of time, expects to be discharged for reasons of employer convenience, and is largely fungible with others, the courts find little reason to investigate the motives behind the discharge because discharge is a normal situation in that segment of the labor market. Yet in a primary job market, where an employer has invested considerable resources in training a skilled or managerial employee and the employee's knowledge correlates with longevity in the position, the courts assume that discharge is the result of a history of conflict within the employment entity and that the employer's sacrifice of this mutual interdependence demands an explanation.[72] Although the cause of action nominally remains a personal injury to the employee, in the latter cases it serves as a proxy for society's interest in preventing an irrational or rogue employer from interfering with true market allocation of labor to its most efficient use in maximizing social production for all employers and employees. This image of the employment relation subordinates a derivative public order even as the public policy generated on its logic limits the employment contract. This means the public policy exception will prove, at worst, to be little more than an impetus to formal record-keeping and discharge procedures, and, at best, a very marginal restraint on the mobility of capital.

Faced with such concerns, cases that seem initially to assume an independent public sphere yield to subsequent cases that retreat back into the natural image of the primacy of the private. An early landmark in public policy exceptions to at-will discharge, *Monge v. Beebe Rubber Co.*,[73] was brought as a breach of contract claim. *Monge* assumes the public/private distinction of modern constitutional law as well as the derivative assumptions about private contractual relations in a regulated society, which were already longstanding

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[71] See DeMarco v. Publix Super Markets, Inc., 360 So. 2d 134 (Fla. Dist. Ct. App. 1978), aff'd per curiam, 384 So. 2d 1253 (Fla. 1980).

[72] See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (retail sales representative, 15 years); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (vice-president and member of board, 32 years); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (airport operations agent, 18 years); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (manager, 16 years); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (manager, 5 years); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (director of medical research, 4 years); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (director of promotion services, 8 years); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (salesperson, 14 years); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (district manager, 11 years).

[73] 114 N.H. 130, 316 A.2d 549 (1974).

in landlord/tenant contracts of indefinite duration and contracts for commercial goods:

> In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. . . . We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.[74]

Still, this three-corner scheme of employer, employee, and public in *Monge* is not a departure from the perceived natural state of social relations. The court explained that "[s]uch a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably."[75]

Yet in subsequent New Hampshire cases applying the *Monge* rule the image shifts. The public interest in the employee's personal interest in job security ceases to have any importance apart from its contribution to an independently generalized statutory interest of the general community.[76] By 1983, less than ten years after *Monge*, a federal district court[77] noted in a diversity case that "although discharge may be harsh, unfair, or without good cause, unless there is a sufficient showing to support a factual finding that the management decision in question is contrary to a public policy, a discharge for business reasons is not actionable."[78] Bad faith alone is no longer against public policy because, recalling *Monge*, it is against the economic system's interest. A contract action depends upon a distinct

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[74] Id. at 133, 316 A.2d at 551 (citation omitted).

[75] Id., 316 A.2d at 551–52.

[76] Six years after the *Monge* decision the New Hampshire Supreme Court limited that case's holding, stating:

> We [narrowly] construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn. . . . A discharge due to sickness does not fall within this category, and is generally remedied by medical insurance or disability provisions in an employment contract. Nor does discharge because of age fall within this narrow category. The proper remedy for an action for unlawful age discrimination is provided for by statute.

Howard v. Dorr Woolen Co., 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980) (citations omitted).

[77] Vandegrift v. American Brands Corp., 572 F. Supp. 496 (D.N.H. 1983).

[78] Id. at 499.

public policy decision either that some relational actions are not permitted to be economic choices *or* that a contractor's actions interfere with the mobility of resources encouraged by contract relations organizing economic activity. Similarly, protecting capital mobility comports with good faith. The same federal court explained: "Of course, there exists in every contractual relationship an implied covenant that the parties will carry out their obligations in good faith. . . . The implied covenant, however, is dependent upon the contractual relationship of the parties, and does not itself create an independent tort duty."[79] Further, tort duties in the relationship have a similar character to contract obligations and "[t]he claim that defendant owed to plaintiffs a duty of fairness is not that sort of positive legal duty, independent of the contract, upon which public policy rests."[80]

California, with the most extensive case law and farthest reaching recognition of the public policy exception, creates a hybrid action for wrongful discharge mindful of the tort-like source of the legal duty. The leading case is *Tameny v. Atlantic Richfield Co.*,[81] in which the discharge was allegedly due to the employee's refusal to participate in a price-fixing scheme:

> [W]e conclude that an employee's action for wrongful discharge is ex delicto and subjects an employer to tort liability. . . . [A]n employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied "promises set forth in the [employment] contract," . . . but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes.[82]

Resting limitations to discharge upon a social policy-based duty independent of the contract promotes public duty over private obligations only to the extent that the social policy has not been derived from and limited by the *Coppage* image of employment relations in civil society. The aggregate social resource maximization that would suffer from price fixing is dependent upon economic leverage that is unconnected to contract behavior designed to elicit labor in the open market.

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[79] Id. (citation omitted).

[80] Id.

[81] 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

[82] Id. at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844 (quoting Eads v. Marks, 39 Cal. 2d 807, 811, 249 P.2d 257, 260 (1952), which quoted Peterson v. Sherman, 68 Cal. App. 2d 706, 711, 157 P.2d 863, 866 (1945)).

III. THE YELLOW DOG'S TAIL: THE EMPLOYMENT IMAGE IN THE "PUBLIC" LAW OF UNEMPLOYMENT INSURANCE

The image of the employment relation based on mobility of both employers' and employees' capital, given its accompanying consumption-oriented division of labor, *should* rarely tolerate a public interest in job market stability. This should be particularly true where the public insures some degree of labor force availability, despite the disruptions in employees' lives created by employers' capital mobility, by imposing a risk-pooling insurance term in most employment contracts. Consequently, the *Coppage* private/public unity's resilience would be importantly confirmed if arguments and effects similar to those in the public policy exception to discharge doctrine are discovered in the legal structure of unemployment compensation. Analysis using the *Coppage* image reveals why only some workers' purchasing power is publicly insured through enforced employer-employee risk pooling.

According to unemployment compensation doctrine, a worker's insurability against unemployment turns on key assumptions that define the distinction between involuntary and voluntary detachment from the labor force.[83] Involuntary detachment is unemployment

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[83] The underlying requirement for unemployment compensation eligibility is that the claimant be available to work. The threshold question for initial eligibility is: Did the claimant involuntarily leave his or her past employment? If a worker was discharged for cause, she is held to have forfeited or waived her connection to that specific job and thus to have voluntarily left employment. Similarly, a voluntary quit without good cause, which in almost all jurisdictions also necessarily must be good cause attributable to the employer, is a voluntary ending of employment. Good cause, in this context, is more than a good personal reason for refusal of work. The reason must indicate continued involuntariness in the unemployment. See, e.g., Tannariello v. Federation of Pub. Employees, 437 So. 2d 799 (Fla. Dist. Ct. App. 1983) (reasonable fear for safety may be good cause); Gibson v. Rutledge, 298 S.E.2d 137 (W. Va. 1982) (termination for health reasons found involuntary). Voluntary termination establishes ineligibility for compensation at the outset.

The criteria for continued eligibility exhibit the same underlying concern. The compensated individual must demonstrate her continued and current attachment to the labor force, her readiness and willingness to accept suitable work. The availability-for-work requirement demands that the claimant do more than simply register in an employment agency. The claimant must actively seek work, demonstrating a mental attitude which indicates actual availability. An additional component of the availability requirement is that the claimant not refuse suitable work offers without good cause. A question arises whether good cause to refuse suitable work in a continuing eligibility situation is the same as good cause to quit in establishing initial eligibility. Variables weighed in determining whether good cause exists for refusing suitable work include distance, Brenner v. Commissioner, Unemployment Compensation Bd. of Review, 75 Pa. Commw. 428, 461 A.2d (1983); health risks, Alexander v. California Unemployment Ins. Appeals Bd., 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980); past experience, Perfin v. Cole, 327 S.E.2d 396 (W. Va. 1985); training and earnings in the available comparable job, *In re* Fickbohm, 323 N.W.2d 133 (S.D. 1982); likelihood of other work, *In re* Behnke, 97 A.D.2d 679, 469 N.Y.S.2d 176 (1983); and duration of unemployment, Ellwood City Hosp.

through the employer's unilateral action ("discharge without cause") or through the employee's quitting or refusing employment for publicly approved reasons. Voluntary detachment is unemployment stemming from the employee's action ("discharge for cause") or her purely personal reasons for absence. The public will not insure workers against the consequences of unemployment unless those consequences impact the public interest, chiefly the preservation and availability of skills in the marketplace. If the employer is not required to acknowledge the employee's personal reasons for absence or the employee's interest in the job (because no property right inheres in a job while at-will employment is the rule), there is no public interest in insuring the consequences to an employee who voluntarily leaves her employment. Thus the same private/public unity underlying the division-of-labor assumptions of at-will discharges underlie the definition of insurability for unemployment compensation.[84] The leading case of *Dubkowski v. Administrator, Unemployment Compensation*

v. Commissioner, Unemployment Compensation Bd. of Review, 73 Pa. Commw. 78, 457 A.2d 231 (1983).

[84] In California and Massachusetts involuntary detachment is unemployment for any good reason over which the individual is not in control—whether caused by the employer, or a job offer, or the employee's personal circumstances (e.g., transportation inadequacies)—or any good reason which the individual should not be expected to be subjected to the market place (e.g., domestic obligations). See Sanchez v. Unemployment Ins. Appeals Bd., 20 Cal. 3d 55, 569 P.2d 740, 141 Cal. Rptr. 146 (1977); Raytheon Co. v. Director Div. of Employment Sec., 364 Mass. 593, 307 N.E.2d 330 (1974). Such reasons do not, however, allow a sharp public/private dichotomy. Just as in these same jurisdictions a sharp public/private dichotomy was not available to define the public policy exception to at-will discharges, it is not available to determine what constitutes involuntary detachment. Compare cases on at-will discharge: Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (wrongful discharge suit sounds in tort because of employer's ex delicto duty to refrain from coercing employee's participation in criminal activity arises from policy underlying state statutes, but issue whether such suit sounds in contract left open); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employer's discharge of employee without legal cause may violate implied covenant of good faith, thus wrongful discharge suit may sound in contract as well as tort because of public interest in job security serving an interest in social stability); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (employer breached contract by failing to exercise good faith in discharging employee to avoid paying full commission, in spite of apparent authority to withhold payment under the contract, but court declined to decide whether tort remedy was available for wrongful discharge); with cases on involuntary detachment: Sanchez v. Unemployment Ins. Appeals Bd., 20 Cal. 3d at 69–72, 569 P.2d at 749–51, 141 Cal. Rptr. at 155–57 (1977) (because state statutes impose on parents' responsibility to their children, unemployment insurance system must balance parental duties against burdens of work in determining "good cause" qualification to availability for work); Raytheon Co. v. Director Div. of Employment Sec., 364 Mass. 593, 307 N.E.2d 330 (1979) (since employee left employment involuntarily, albeit for personal reasons, and had no means of transportation to job, she was immediately eligible for unemployment compensation). Most jurisdictions, however, treat such reasons for refusal of work as good personal reasons but nonetheless voluntary reasons or incapacities. See infra note 88 on the leading case, Aladdin Indus. v. Scott, 219 Tenn. 71, 407 S.W.2d 161 (1966).

Act[85] makes this explicit:

> The development and preservation of worker skills and the advancement and utilization of employee training are of general public concern. The unemployment compensation law is designed to protect rather than depress the present social status and standard of living of a claimant.
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> ". . . Employment which may not be suitable while there is still a good present expectancy of obtaining other employment more nearly proportionate to the ability of the worker may become suitable if that expectancy is not realized within a reasonable time. Employment which may be unsuitable in a period of full employment may be suitable in a period of depression or of falling wages." . . . "To force a worker to accept a job at less than his highest skill at the peril of losing his unemployment compensation might result in the loss of this skill and is economic waste which should be avoided as long as there is a reasonable probability of its not being necessary." . . . "It seems reasonable, therefore, that work at a lesser skill and lower wages should not be deemed suitable unless a claimant has been given a reasonable period in which to compete in the labor market for available jobs at his highest skill or related skills * * *."[86]

Even a direct public intervention in the contractual organization of the labor market fosters rather than corrupts the private nature of the consumption society. Unemployment insurance represents a publicly imposed risk-pooling term of the wage contract that reinforces at-will employment contracting and thus employers' and employees' capital mobility. Employers need not tie themselves to durational contracts to ensure the preservation and availability of skills, and employees are insured to some extent in job searches that will result in their skills' use. However, insurable mobility cannot include employees' personal restrictions on job continuance or acceptablity without trenching upon management's prerogative to control investment by defining and offering positions in the labor market.[87] A reserve labor

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[85] 150 Conn. 278, 188 A.2d 658 (1963).

[86] Id. at 282–83, 188 A.2d at 660–61 (quoting respectively Pacific Mills v. Director of Div. of Employment Sec., 322 Mass. 345, 350, 77 N.E.2d 413, 416 (1948); Freeman, Able to Work and Available for Work, 55 Yale L.J. 123, 127 (1945); Menard, Refusal of Suitable Work, 55 Yale L.J. 134, 142 (1945)).

[87] The distinction between personal, and thus voluntary, absence from the labor market and publicly sanctioned, insurable reasons for absence makes refusal of suitable work because of child care responsiblities voluntary absence. Only in California are domestic obligations recognized as good cause for refusal of suitable work. Sanchez v. Unemployment Ins. Appeals Bd., 20 Cal. 3d 55, 569 P.2d 740, 141 Cal. Rptr. 146 (1977). More typical is Tennessee, where a woman who refused a transfer to a night shift for child care reasons was held to have voluntarily left her employment:

> To uphold the decision of the Board of Review would be placing in the hands of

pool tailored to include only readily available workers aids workers' capital, labor, to move to its highest market-valued use at the same time that consumption demand is stabilized.[88] The reserve pool therefore falls into the category of a public resource inadequately provided or provided at high cost by the market.

IV. OLD TRICKS

A division of labor that is conceptually structured to maximize consumption extends logically to the limitation of the costs of production, including returns to employees for their labor.[89] Structurally

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> the employee the right to determine when and under what conditions she would work. Such a holding would unduly restrict the employer and could conceivably, under certain circumstances, make it almost impossible to carry on a business during certain hours.

Aladdin Indus. v. Scott, 219 Tenn. 71, 78, 407 S.W.2d 161, 164 (1966).

[88] Chief Justice Burger, in California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971), describes the program in terms Justice Pitney would recognize and Justice Day could embrace:

> It is true, as appellants argue, that the unemployment compensation insurance program was not based on need in the sense underlying the various welfare programs that had their genesis in the same period of economic stress a generation ago. A kind of "need" is present in the statutory scheme for insurance, however, to the extent that any "salary replacement" insurance fulfills a need caused by lost employment. . . .
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> . . . .
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> . . . Further, providing for "security during the period following unemployment" was thought to be a means of assisting a worker to find substantially equivalent employment. The Federal Relief Administrator testified that the Act "covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job." Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. "Their only distinguishing feature is that they will be specially earmarked for the use of the unemployed at the very times when it is best for business that they should be so used." Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.

Id. at 130–32 (quoting respectively S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935); Hearings on H.R. 4120 Before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 214 (1935) (statement of Federal Relief Administrator and Member of the Committee on Economic Security); Hearings on S. 1130 Before the Senate Comm. on Finance, 74th Cong., 1st Sess. 1311 (1935) (statement of Senator Robert F. Wagner)).

[89] See supra note 33. It may be argued that while this articulation may have been unproblematic at the time of *Coppage*, the New Deal radically altered a legal consciousness committed to labor-cost minimization. In fact, unemployment insurance, insofar as it is rationalized as maintaining aggregate demand, seems to directly support such a view. But stabilized demand is merely an incidental effect if eligibility criteria are formulated: (1) to insulate from legal responsibility investment decisions concerning employees' deployment, so that neither employer nor state need take account of an employee's personal interests in conditioning her availability for employment; or (2) to insulate those decisions from any need to calculate risks in return on the employer's capital due to instability in the supply of skills. An

and logically, employers, as society's agents, need control over investment decisions and the maximum potential mobility for their capital. Such mobility would be sacrificed if public regulation of employment relations either directly or implicitly broke down the separation between organizational production decisions and inducement of workers to provide their capital, labor, to production processes. Instead, legal mechanisms maintain and enforce the separation of invested resources' allocation and exchange relations eliciting labor time.[90]

It must be borne in mind, however, that the circumstance that a contract for labor time gives labor the legal form of a commodity, rather than an investment,[91] does not of itself support an argument that labor must or should be so treated. Rather, it is a demonstration of how the phenomenology of law imagines labor in the simultaneous mirroring and constructing of reality.[92] The argument is not that ideologies are constructed like dreams and then sold to a gullible public as rules of law. For an image to be accepted as natural, and thus as a structure for purposive and persuasive conceptual argument, it must correlate to the actual social relations it manifests. The image may be central, as in *Coppage*, when the ideology it prefigures in its descriptions of natural social relations can be deployed in programs that are politically palatable. It may be peripheral, merely the logical extension of legal forms of contract and property entitlements, when the politics of legal phenomena seem constructed and conflicted, as in public policy exceptions to discharge. It may appear solely as an unconscious limit on the conceivable uses of public power, as in the skilled labor pool insured by an unemployment program of limited eligibility.

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insured skilled-labor supply makes the at-will contract more tolerable, minimizes the individual employer's labor costs, increases employers' ability to react to market changes by adjusting their utilization of labor, and supports employees' capital (labor) mobility as a public good rather than as a redistribution of marginal consumption propensities. See Kennedy, Cost-Reduction Theory As Legitimation, 90 Yale L.J. 1275, 1277–81 (1981).

[90] K. Marx, 1 Capital 81–96 (1919).

[91] See, e.g., International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979), in which Justice Powell wrote:

> Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. His decision to accept and retain covered employment may have only an attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.

Id. at 560 (footnote omitted).

[92] Gabel, supra note 24, at 1564–72.

The public/private distinction can mask the direction of political processes—for example in cases limiting police power, enforceable interests, or public provision for the needs of labor market exchanges—but it cannot unhinge the relationship between social structure and the reproduction of society, both of which include conceptual understanding.

I do not assert that ideas cause the form of social relations or the reverse. Rather, the constructed nature of both claims of knowledge and of conceptions of the social world and the representations of material conditions in ideas result from the struggle of individuals and groups. Legal discourse is one arena of such struggle. Justice Pitney could have constructed a policy argument perfectable to the facts of *Coppage* based on the four premises that embody the employment relation.[93] Notably, he did not, and all evidence suggests a directly political argument never crossed his mind. The stronger assertion is that had such an argument occurred to him, its occurrence would have been due to its appropriateness to the phenomenology of the labor market which constituted his understanding:

> The abstract concept of the world is a necessary condition if communicatively acting subjects are to reach understanding among themselves about what takes place in the world or is to be effected in it. Through this *communicative practice* they assure themselves at the same time of their common life-relations, of an intersubjectively shared *lifeworld*. This lifeworld is bounded by the totality of interpretations presupposed by the members as background knowledge.[94]

It may be that continued structuring of *legal* consciousness according to an artificial image of the labor market, and the impoverished polity which it suggests, is not necessary and is vulnerable. But the choice made long ago has continued, masked by a double false consciousness of a discarded private/public unity in constitutional law that is held onto in contract forms, *and* in the nonexistent and therefore empty images of the contemporary public/private distinction of a statism known only by reference to civil society.

Two moves have been made. First, the social consequences of a labor market supported by the private/public unity of *Coppage's* legal consciousness were deflected into the state's arena by the creation of public policy exceptions to discharge and public insurance programs. Second, the state, as a form for organizing society's division of labor,

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[93] See supra text accompanying notes 23–24.

[94] 1 J. Habermas, The Theory of Communicative Action: Reason and the Rationalization of Society 13 (1984).

was kept purely formal and derivative to simultaneously hide the continued generation of social consequences of exchange relations, and yet still allow mediation of those consequences as conflict and alienation in a manner which permitted the stable reproduction of those social relations. Under these circumstances, attributing a causal direction to the order of ideas in relation to events represents an unclear meaning and intent. The goal is to uncover that which is taken as natural and which need not be caused, but which limits our possibilities.

The public, political power's primacy in creating contingent bargainable entitlements is false and apparent so long as the conceptualized phenomenon of the public domain remains a universalized abstraction of a particular, historical, and concrete image of civil society. Paradoxically, the celebration of legal contingency in private relations, which are subject to public control in the name of general welfare, misses the point. Such contingency is manufactured by virtue of the primary assumption of naturalness in which the exercise of public power is always about the coherence of departure from what is already known, already fact, already constructed.

Katherine Stone has argued that the ideology of collective bargaining as private government similarly freezes inequalities of property entitlements and bargaining power into the interpretation of thereby weakened public intervention in labor relations under the National Labor Relations Act.[95]

James Atleson[96] and Karl Klare[97] have linked the public/private distinction and mobility of capital to judicial retrenchment of the National Labor Relations Act. Karl Klare particularly sees the retrenchment as the result of an incoherent manipulation of the modern public/private distinction. However, these issues are far more intractable than these commentators suggest because they are linked to much of the deep structure of American law.[98] This historically older structure gains its most explicit form in the forgotten case law of un-

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95 Stone, The Post-War Paradigm in American Labor Law, 90 Yale L.J. 1509 (1981).

96 Atleson, supra note 50.

97 Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 Minn. L. Rev. 265, 310–18 (1978); Klare, supra note 5.

98 In principle, and in fact, issues of equal pay and comparable worth, speech and protest in the workplace, tort and safety obligations, permanent employment contracts, and much of collective-bargaining law serve as easily as at-will discharge and unemployment compensation law to manifest the conceptual structure of work law. Tracing the structure of legal consciousness of work is the subject of my work in progress, to which this Article is an introduction. The immediate project concerns the false consciousness constituted in employment compensation law and the shared relationship of employment and unemployment to the conceptualization of the labor market and the role of the state.

organized workers—by far the most numerous group in our society. Labor law as an arena for the imagining of the possible organization of social production need not, indeed cannot, learn new tricks until it has forgotten the old ones.