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The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility

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THE COWBOY CODE MEETS THE SMASH MOUTH TRUTH: MEDITATIONS ON WORKER INCIVILITY

*Michael C. Duff**

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I. INTRODUCTION

To answer oppression with appropriate resistance requires knowledge of two kinds: in the first place, self-knowledge by the victim, which means awareness that oppression exists, an awareness that the victim has fallen from a great height of glory or promise into the present depths; secondly, the victim must know who the enemy is.¹

When I was a young man I went to work. I mopped floors. I cooked burgers. I inventoried freight. I loaded airplanes. I worked hard and wanted to be treated fairly. But somewhere along the line I began to feel that I was not being treated fairly. Then, for years, I *continued* to feel that I was not being treated fairly. So I began to resist. I knew— sort of— that the employer for which I worked owned the land on which I toiled and the machines which made my work possible. My bosses claimed that nothing in the great chain of being that is production could be carried out without their control. I heard the argument that under these circumstances it would be best for me, and others like me, to shut up or move on. But I did not like those choices and, as it turned out, I did not have

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¹ CHINUA ACHEBE, *THE EDUCATION OF A BRITISH PROTECTED CHILD: ESSAYS* 57 (2009).

to accept them. After all, I realized, nothing that is made or done could be made or done without *someone* like me engaged in the making or doing. So I continued to resist.

When I now teach labor law² in Wyoming, a few decades removed from my prior work reality,³ I have a little introductory talk with my students. I tell them about my past as a blue-collar worker and I confess to possessing a world view that is likely starkly different from theirs. Then I make them a promise to teach the *doctrine* of labor law in as evenhanded a way as possible. I use a traditional labor law textbook,⁴ and we discuss the major labor law cases that would be discussed in any law school in the United States offering the course. I tell my students that I suspect they, as students from a western state, may be under the emotional influence of something akin to Gene Autry's "Cowboy Code." That elegant and simple code reads as follows:

The Cowboy must never shoot first, hit a smaller man, or take unfair advantage.
He must never go back on his word, or a trust confided in him.
He must always tell the truth.
He must be gentle with children, the elderly, and animals.
He must not advocate or possess racially or religiously intolerant ideas.
He must help people in distress.
He must be a good worker.
He must keep himself clean in thought, speech, action, and personal habits.
He must respect women, parents, and his nation's laws.
The Cowboy is a patriot.⁵

The message I then bring to them is that such a code would not be significantly helpful in any workplace I have ever encountered in real life. I acknowledge I would prefer to live in a world in which I could simply approach the boss and ask for a raise; where I would not be taken advantage of; where I could rely on the boss's word; where I could be open about what I really thought about my job without fear of retaliation; where I could expect gentleness and tolerant treatment; where I could help people in distress and expect to be helped in return; where I could simply be a good worker, a good man, and a good patriot.

² My labor law course covers the National Labor Relations Act, 29 U.S.C. §§ 151–159 (2012), a statute I will describe somewhat simplistically, but sufficiently for my present purposes, as regulating labor-management relations of private sector, non-transportation employers.

³ I worked as a blue collar worker from 1977–1992, for seven of those years as a Teamsters Union shop-steward.

⁴ Presently I teach from PAUL M. SECUNDA & JEFFREY M. HIRSCH, *LABOR LAW: A PROBLEM BASED APPROACH* (2012).

⁵ JIM ARNDT, *HOW TO BE A COWBOY* 96 (Gibbs Smith 2009).

Nothing could be further from what I have experienced, however. In my experience the boss has almost never complied with anything remotely resembling the Cowboy Code. I have been lied to, underpaid, and duped in any number of ways by my various bosses. I do not feel bitter; I feel enlightened. As a result of my experiences, I simply cannot read labor law cases in the way most of my students read them. As a former semi-skilled worker actively participating in the precariat,⁶ I read the cases as fictive chains of reasoning meant to persuade certain select audiences that the law of the jungle does not reign supreme in the workplace.⁷ As I have written elsewhere,⁸ I do not believe that labor law was ever meant to “succeed,” if what is meant by success is the actual effectuation of democratically-based rights on the workplace floor.⁹ But I take things further, for I believe not only that the boss wants the upper hand with workers. I believe that the boss means to utterly dominate the worker for malicious reasons centering on nothing more complicated than a hegemonic thirst for total power.

All of this is to say that I have learned to evaluate the world through the lens of what I term “the smash mouth truth.”¹⁰ It is really a very simple idea.¹¹ The boss is *not* your friend. The boss wants to smash you in the mouth. And until you, the worker, understand that stark truth, you cannot act or function as a mature, informed actor in the labor market or indeed in the world.¹² Without

⁶ See GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011); see also David Brooks, *The American Precariat*, N.Y. TIMES, Feb. 10, 2014, http://www.nytimes.com/2014/02/11/opinion/brooks-the-american-precariat.html?_r=0 (“[T]he Precariat is the growing class of people living with short-term and part-time work with precarious living standards and ‘without a narrative of occupational development.’”)

⁷ In the late 1980s former AFL-CIO president Lane Kirkland once famously opined that he would prefer the law of the jungle to American labor laws. Martin Tolchin, *AFL-CIO Chief Laments State of Labor Laws*, N.Y. TIMES Aug. 30, 1989, <http://www.nytimes.com/1989/08/30/us/afl-cio-chief-laments-state-of-labor-laws.html>. In my opinion, however, that comment missed Kirkland’s brave point even when made. For those who have had to work for a living in non-union skilled or semi-skilled jobs the law of the jungle has been in effect alongside *putative* American labor laws for decades.

⁸ Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth: A Union Side Apologia*, 15 EMP. RTS. & EMP. POL’Y J. 521 (2011).

⁹ *Id.* at 535.

¹⁰ *Id.* at 522.

¹¹ *Id.* at 522 n.6. I draw on the former football coach Mike Ditka’s elaboration of “smash mouth” football, a form of American football in which all pretense of what is actually happening in a game is stripped away and each side simply begins to impose its physical will on the other by delivering punishing blocks and tackles. The last man standing wins.

¹² See *supra* note 1.

To answer oppression with appropriate resistance requires knowledge of two kinds: in the first place, self-knowledge by the victim, which means awareness that oppression exists, an awareness that the victim has fallen from a great height of glory or promise into the present depths; secondly, the victim must know who the enemy is. He must know his oppressor’s real name, not an alias, a pseudonym, or a nom de plume.

realization of the truth you will never be able to negotiate effectively. You will be forever chasing the phantasm of the “good employer” and feel cut to the quick upon discovering that the good employer was not as good as you imagined. The Cowboy Code’s ideal of an essential human civility is, in the workplace, a goal to be pursued but not a reality to be presumed. In many ways the pursuit of a beautiful incivility is the very essence of the labor movement.

In short, this symposium essay seeks to trace a worker’s journey. A worker first awakens to a brutish workplace reality. A worker next considers how to function within a grand economic illusion animated and powered by symbolism that has been presented as the best of all possible worlds. Emerging from the symbolic morass a worker finds little that is firm to grasp beyond the immediate need to engage in systematic self-defense. However, accepting the necessity of self-defense immediately leads to questions respecting the virtue of defense, in ethical terms, and upon its legitimate scope. Of course, during purely reflexive defensive activity, a worker will, from time to time, ruminate on the ultimate ends of the struggle to survive. It is this struggle that will lead to considerations and exploration of transformation. I contend that having identified the way forward workers are capable of crafting a necessary incivility that is both beautiful and appropriately zealous.

Ultimately, to say that resistance and self-defense are necessary, when facing an implacable adversary, is to accept the ineluctability of the situation. However, the predicament remains full of possibilities. And many possibilities along the way are beautiful and ennobling. Workers need not lose their humanity, or their values, when confronting moral insouciance. In the end, I am convinced (in the context of my own life) that both my Wyoming law students and their former blue collar unionist law professor (and perhaps others) can learn to appreciate and even venerate the sometimes beautiful incivility of resistance.

II. CHANNELING THE PRINCE

Awakening to a brutish workplace reality is accepting the world for what it is, though this acceptance can be a drawn out process. I now realize that I have, in many respects, been channeling Machiavelli over the years.¹³ As one may recall, counsel afforded to the Prince is not all that different from what I have told my students about my worker motivations and have attempted to articulate about both my open and tacit assumptions. At the root of my beliefs is that attempting to operate in the world in an *ideally* ethical manner, while presuming

Id. at 57.

¹³ Considered one of the originators of political theory, Niccolò Machiavelli was born in Florence in 1469 and died in 1527. His political writings were considered so shocking that no compendium of his works were even attempted until 1782. By profession he was a political advisor and international ambassador. See Cary Nederman, *Niccolò Machiavelli*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 13, 2005), <http://plato.stanford.edu/entries/machiavelli/>.

the “other actor” is inherently ethical, is a serious mistake. In the words of the counselor to the Prince:

Many have dreamed up republics and principalities which never have in truth been known to exist; the gulf between how one should live and how one does live is so wide that a man who neglects what is actually done for what should be done learns the way to self-destruction rather than self-preservation. The fact is that a man who wants to act virtuously in every way necessarily comes to grief among so many who are not virtuous. Therefore if a prince wants to maintain his rule he must learn how not to be virtuous, and to make use of this or not according to need.¹⁴

This ethic of self-defense, addressed to princes, is no less applicable to the sons and daughters of the working class. Do you, workers, want to negotiate sensibly and with strength? Then realize the nature of the contest in which you are engaged.

What does this mean as a practical matter? It means understanding that the obviously prevailing business model is nothing like the business model your grandfather knew, unless, perhaps, your grandfather worked in a coal mine in the 1920s. The relentless march of a global labor market steeped in principles of fungibility now dictates that virtually all labor must be cheap labor.¹⁵ In order for labor to be the cheapest it can be it must be utterly vulnerable.¹⁶ It must be outsourced whenever possible and where not possible it must be stripped of all power. Thus, for example, we can have no relatively privileged government employees performing even *relatively* expensive labor. All such labor must be

¹⁴ NICCOLÒ MACHIAVELLI, *THE PRINCE* 90–91 (George Bull trans., Penguin Books 1981) (1532).

¹⁵ ALAN TONELSON, *THE RACE TO THE BOTTOM: WHY A WORLDWIDE WORKER SURPLUS AND UNCONTROLLED FREE TRADE ARE SINKING AMERICAN LIVING STANDARDS* 6 (2002).

¹⁶ “Vulnerable employment” is becoming so common worldwide that the United Nations has formulated a definition for it. In essence it means self-employment and family members who are engaged in unpaid support of the self-employment.

Vulnerable employment is defined as the sum of the employment status groups of own-account workers and contributing family workers.

Own-account workers are those workers who, working on their own account or with one or more partners, hold the type of jobs defined as a self-employment jobs (i.e. remuneration is directly dependent upon the profits derived from the goods and services produced), and have not engaged on a continuous basis any employees to work for them during the reference period.

Contributing family workers, also known as unpaid family workers, are those workers who are self-employed, as own-account workers in a market-oriented establishment operated by a related person living in the same household.

Millennium Development Goals Indicators, UNITED NATIONS, <http://mdgs.un.org/unsd/mdg/Metadata.aspx?IndicatorId=0&SeriesId=772> (last visited Mar. 1, 2015).

privatized.¹⁷ Thus, for example, we can have no employment “rights,” and the move to privatize formerly public justice is already well underway in the guise of “voluntary” employment arbitration¹⁸—not that plaintiffs ever fared well in the court system. Even the mere possibility of legal accountability is too much for the boss to risk.

Thus, my advice to workers is to understand exactly where you are and to once and for all realize that the rights Mr. Blackstone¹⁹ described²⁰ are viewed as “quaint” by the boss. My advice to workers is to awaken from illusion.

III. WELCOME TO THE GRAND ILLUSION

If I have had an awakening from illusion to the brutish workplace reality that I have just described, how then can I teach in good faith an incremental labor law comprised of shadowy or non-existent sanctions?²¹ On what moral ground

¹⁷ See Steven Pearlstein, *The Federal Outsourcing Boom and Why It's Failing Americans*, WASH. POST, Jan. 31, 2014, http://www.washingtonpost.com/business/the-federal-outsourcing-boom-and-why-its-failing-americans/2014/01/31/21d03c40-8914-11e3-833c-33098f9e5267_story.html.

¹⁸ See Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 2 (2013).

¹⁹ To quote from an Encyclopedia Britannica entry,

Sir William Blackstone, (born July 10, 1723, London, England—died February 14, 1780, Wallingford, Oxfordshire), English jurist, whose *Commentaries on the Laws of England*, 4 vol. (1765–69), is the best-known description of the doctrines of English law. The work became the basis of university legal education in England and North America. He was knighted in 1770.

Sir William Blackstone, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/68589/Sir-William-Blackstone> (last visited Jan. 30, 2015).

²⁰ As Blackstone wrote,

The emphatical words of magna carta[s], spoken in the person of the king, who in judgment of law (says sir Edward Coke[t]) is ever present and repeating them in all his courts, are these; nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam: and therefore every subject,” continues the same learned author, “for injury done to him in bonis, in terris, vel persona, by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.”

¹ WILLIAM BLACKSTONE, COMMENTARIES *137–38, available at http://press-pubs.uchicago.edu/founders/documents/amendV_due_process8.html (last visited Apr. 3, 2014).

²¹ See generally Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579 (2005).

For many violations of labor law the sole “sanction” available to the victims of labor law violations is an administrative cease and desist order accompanied by the posting of a lovely, 8 ½ x 14” “Notice to Employees” in which employers who have just been found to have violated the law promise not to do it again. See generally NAT’L LABOR RELATIONS BD., CASEHANDLING MANUAL FOR UNFAIR LABOR PRACTICE PROCEEDINGS, 10124–10170 (2015), available at

can I justify heaping symbolic “remedy” atop symbolic remedy, with little or no hope that any sanction that might actually deter bad employers will ever be enforced?²² I believe I can justify teaching labor law because of what it symbolizes in its *essence*. The *idea* of labor law is that the economic power of producers must have limits in order to preserve a sustainable economy.²³ But power also fights against those limits,²⁴ and the individual worker is caught in the middle. The law in principle seeks to gird up societal combatants and to array them in logical, orderly, tidy ranks.²⁵ Despite this expressed policy preference

<http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM-1.pdf>. I have personally been involved in seemingly endless negotiations with employers over the precise version of unreadable language that will be included in the Notices. *Id.* at 10132. As a former, actual blue collar employee I knew from experience that almost no employee reads such notices. And they would not understand them if they did. Fired employees are entitled to “mitigated” backpay. Awards of \$3000 or less were common during my tenure as an NLRB field attorney. “The principle that legal rights must have remedies is fundamental to democratic government.” Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 665 (1987). This is a maxim sufficiently ancient to be familiarly recounted in Latin: *ubi jus ibi remedium*. See Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008).

²² Of course, in individual cases,

The acknowledgement of injustice, even when the law provides no legal remedy, is as critical to sustaining the integrity of the courts as their reliance upon precedent. Legal scholars refer to this kind of public acknowledgement of a past injustice as a “symbolic remedy.” A lack of compensatory money damages does not by itself render this remedy insignificant. For the victims of legally sanctioned injustice this acknowledgement carries deep psychological resonance. This is because the failure to acknowledge injustice is itself a form of further injury visited upon the victims of unjust laws. Such widespread social amnesia, that mode of forgetting by which a whole society separates itself from a discreditable past, erases not only collective guilt, but the very identities of past victims by denying the reality of their experience.

Foster Calhoun Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 U.S.F. L. REV. 883, 945 (2012).

²³ Section 1 of the National Labor Relations Act states, *inter alia*:

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

National Labor Relations Act § 1, 29 U.S.C. § 151 (2012).

²⁴ It has been known for a long time that employers respond to employees’ attempts to organize for their self-protection with massive unlawful conduct. See generally CHIRAG MEHTA & NIK THEODORE, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS (2005), available at <http://web.wm.edu/so/tlsc/orgmaterials/Busting.pdf>.

²⁵ See *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) (“The underlying purpose of this statute is industrial peace.”); see also *Vegehn v. Guntner*, 167 Mass. 92, 108 (1896) (Holmes, J., dissenting) (conceiving of labor strife in terms of “combinations” in eternal opposition).

for orderliness, the question is orderliness for whom, and the worker may be forgiven for taking a moment to think things over, to question the nature of the looming fight, and to consider whether it is worth having.²⁶ And the worker is right to ask questions. I cannot find fault with delaying conflict when one rationally fears its consequences, provided one is honest about what is happening.²⁷

Aside from the broader, historical nature of labor law symbolism I can also justify teaching labor law's retreating shadows because of the strange and fascinating nature of its *current* symbolic character. Employers seem to *need* the symbolic value of the National Labor Relations Board. In an instance of the highest irony the virtually powerless agency is converted through the words and perhaps in the minds of employers into the perennially menacing agent of socialism.²⁸ The menace is not, however, what this employer ideology explicitly makes it out to be. The agency has extremely limited power, but it does suggest the *possibility* of worker power. It puts workers in a power mindset. Once in that mindset, if workers subsequently became aware that there was no substance to the shell game of the NLRB, what would they think? If they knew that all the labor and employment "protections" concocted in the last eighty years were demonstrably ineffective when measured against the massive resources of the employing class, what would they do? Over time, a growing awareness of the scope of the impotence of the structures originally meant to provide some semblance of justice in the workplace might lead workers to imagine an *actual* labor law with *actual* remedies. A deep psychological gambit is in play.²⁹ The great fear of the employers is ultimately that workers might somehow (while enjoying the sparse protections of a weakly functioning labor and employment

²⁶ It seems self-evident that when human needs are satisfied the likelihood of resort to aggressive resistance would be significantly reduced. See generally CONFLICT: HUMAN NEEDS THEORY (John Wear Burton ed., 1990).

²⁷ This old debate was much in evidence in Thoreau's *Civil Disobedience* in which a well-known moral authority of the time was quoted as follows: "the justice of every particular case of resistance is reduced to a computation of the quantity of the danger and grievance on the one side, and of the probability and expense of redressing it on the other" HENRY DAVID THOREAU, CIVIL DISOBEDIENCE 12 (Applewood Books 2000) (1849) (internal quotations omitted). Thoreau joins the side of the debate holding that there are "cases to which the rule of expediency does not apply, in which a people, as well as an individual, must do justice, cost what it may. If I have unjustly wrested a plank from a drowning man, I must restore it to him though I drown myself." *Id.* at 5–6.

²⁸ See Heather, *Tom Coburn Compares NLRB Boeing Decision to 'Near Socialist, Marxist State'*, CROOKS AND LIARS (Sept. 14, 2011), <http://crooksandliars.com/heather/tom-coburn-compares-nlr-boeing-decision-n> (interview by Neal Cavuto with Tom Coburn, U.S. Senator). Coburn is not strictly speaking an "employer," but is obviously articulating many employers' position.

²⁹ See JENNIFER JIHYE CHUN, ORGANIZING AT THE MARGINS: THE SYMBOLIC POLITICS OF LABOR IN SOUTH KOREA AND THE UNITED STATES (2009) (discussing the symbolic nature of labor disputes as always about something larger than may first meet the eye).

law regime) stumble onto the truth of their latent power. They might begin to “[take] a notion”³⁰:

If the workers took a notion they could stop all speeding trains;
Every ship upon the ocean they can tie with mighty chains.
Every wheel in creation, every mine and every mill;
Fleets and armies of the nations, will at their command stand
still.³¹

Unions and liberals, on the other hand, make use of the NLRB as a symbol of an ancient time in which an authentic Democratic Party wielded real power on behalf of the working and middle classes.³² In its heyday the NLRA was imagined as a bulwark fortifying a burgeoning working class that could plausibly be conceived as a co-equal partner with business in the day-to-day operation of American society.³³ The NLRB and the NLRA symbolized meaningful, effective intervention by the *old* Democratic Party into the brutish, employer-dominated “at will” regime.³⁴ Perhaps most importantly, *the general public* perceived the NLRB as effecting such an intervention.³⁵ In turn, workers, believing themselves to possess actual power, became the all-too-willing instrumentality of the old Democratic Party in maintaining political power. Thus, the *new* Democrats’ election eve appeals to labor are often accompanied by the symbolic propping up of the NLRB that could only be credible to a voting bloc completely divorced from labor history. Only voters with an utter lack of historical knowledge could fail to see the distance between the democratic party-labor alliance of present times and that of decades past.³⁶ What can the NLRB possibly mean to organized labor when there has been virtually no meaningful

³⁰ JOSIAH BARTLETT LAMBERT, *IF THE WORKERS TOOK A NOTION*, at i (2005).

³¹ *Id.* Attributed to labor activist, Joe Hill.

³² Kevin Drum, *Why Screwing Unions Screws the Entire Middle Class*, MOTHER JONES (March/April 2011), <http://www.motherjones.com/politics/2011/02/income-inequality-labor-union-decline> (“In the past, after all, liberal politicians did make it their business to advocate for the working and middle classes, and they worked that advocacy through the Democratic Party.”).

³³ Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265, 285 (1978) (“[T]he Act by its terms apparently accorded a governmental blessing to powerful workers’ organizations that were to acquire equal bargaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy.”).

³⁴ See, e.g., *Democratic Party Platform of 1960*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29602> (last visited Mar. 1, 2015) (endorsing strong support for the principles of traditional collective bargaining).

³⁵ *Id.*

³⁶ Thomas B. Edsall, *Republicans Sure Love to Hate Unions*, N.Y. TIMES, Nov. 18, 2014, http://www.nytimes.com/2014/11/19/opinion/republicans-sure-love-to-hate-unions.html?_r=0 (“Democrats are happy to get labor’s votes and money, but they have done little to revitalize the besieged movement.”).

intervention in the employer-dominated labor “relations” regime for decades?³⁷ We live in an economy and society in which requiring employers merely to inform workers of their rights under federal law has been found, with a straight face, to constitute interference with employers’ “free speech” rights not to speak.³⁸ The medieval metaphysicians would have been proud, but “the law” is on life-support. Yet it is precisely this symbolic dance that I find interesting in the game that labor law has become. Both “conservatives” and “liberals” promote different but equally illusory memes of labor law and its administering agency to further narrow and cynical ends. The entire system has become a morality play of *some* kind. Workers must grasp the symbolic and illusory nature of this law.

IV. WHEN ALL THE DIME-DANCING³⁹ IS THROUGH

Let us then, teachers and workers alike, cut through this illusion. Suppose all the labor law that ever was suddenly disappeared and that we were presented with a blank slate. What would be the significance of this altered reality? This is another way of asking not simply what workers want,⁴⁰ or what (as some have argued) they have been told they want,⁴¹ but rather what they *should* want. That is, what would be virtuous, or moral, or appropriate, or sustainable for workers to want? Workers have been permitted to pose such “should” and “would” questions only for the briefest historical moments; for as soon as workers ask such questions the boss delivers a smash mouth punch.

As proof of the allegation that workers have not been permitted to ask the question of what *they* want, I offer no less an exhibit than all of American labor law. That law, at its essence, is a tale of how employers will fight to the bitter end to avoid even having to discuss terms of employment with individuals deemed inferior. “I will not,” says the master, “deign to *discuss* workplace issues with my servants.” Never mind that in American-style labor law the boss’s sole mandate is mere discussion of issues to the point of clear disagreement with a

³⁷ See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983).

³⁸ Nat’l Ass’n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013), *overruled by* Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18 (D.C. Cir. 2014) (“[T]he Board’s rule violates § 8(c) because it makes an employer’s failure to post the Board’s notice an unfair labor practice, and because it treats such a failure as evidence of anti-union animus in cases involving, for example, unlawfully motivated firings or refusals to hire—in other words, because it treats such a failure as evidence of an unfair labor practice.”).

³⁹ See STEELY DAN, *Aja, on AJA* (ABC Records 1977). Where one dance partner has paid the other a “dime” to dance. In other words, going through the motions without passion.

⁴⁰ See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999).

⁴¹ See Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?* 26 QUINNIPIAC L. REV. 799 (2008).

legally designated representative of his employees.⁴² Once disagreement is reached the boss may simply enforce his preferences.⁴³ If workers do not like those preferences they can, but will not, strike. For if they strike they will simply be permanently “replaced,”⁴⁴ which for most workers is the practical equivalent of being fired.⁴⁵ Given the rules of this obviously unequal contest, what reason could the boss have for *refusing* to discuss matters with the worker? Only this, the boss views the worker as being not even worthy of a *discussion*. In such a world, the worker has precious little opportunity to consider what she *should* want, for on some views the worker does not exist.

The denial of workers’ legitimacy by “the boss” could be as easily effectuated simply by refusing to agree with representatives of his workers on anything of value.⁴⁶ Eventually workers will learn that their union certification means little and will give up on the representation. Indeed, this is a strategy that employers use to good effect by “withdrawing recognition” from unions representing workers who have given up.⁴⁷ However, even that easy tactic is not enough, for if the worker attempts to organize a union with whom the boss will refuse to negotiate the boss will *still* fire the worker.⁴⁸ The boss will *still* cause the worker to lose her house. He will *still* take food out of her children’s mouths. He will *still*, in other words, smash the worker in the mouth. If the boss is implacably set on smashing the worker in the mouth whenever she shows the slightest inclination of trying to improve her lot, should the worker nevertheless submit to the boss’s authority and do nothing, either out of fear of annihilation for openly resisting, or from a sense of religious or moral obligation to submit to

⁴² ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 375 (14th ed. 2006).

⁴³ See Peter Guyon Earle, *The Impasse Doctrine*, 64 CHI.-KENT L. REV. 407 (1988).

⁴⁴ See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

⁴⁵ See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 28 (1983); CHRIS RHOMBERG, *THE BROKEN TABLE: THE DETROIT NEWSPAPER STRIKE AND THE STATE OF AMERICAN LABOR* 180 (2012).

⁴⁶ See, e.g., *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981) (“[A] party . . . is entitled to stand firm on a position if he reasonably believes . . . that he has sufficient bargaining strength to force agreement by the other party.” (quoting *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973)). Because employer are now always stronger than unions it follows that employers will always be lawfully entitled to “stand firm” on “a position.”

⁴⁷ *Levitz Furniture Co. of the Pacific, Inc.*, 333 N.L.R.B. 717, 718 (2001). *Levitz* insisted that employers be required to prove that a union has actually lost the support of employees and not merely that they possess a good faith doubt of continued employee support of the union. *Id.* at 720. But the truth is that employees will actually cease to support the union if it is unable to secure a collective bargaining agreement with the employer. Employers know this and it is simply child’s play to run out the clock in all but the most uniquely militant of work groups.

⁴⁸ MEHTA & THEODORE, *supra* note 24.

authority?⁴⁹ Should the worker continue to try to enter into a “civil” discussion of her needs and complaints in the hope that the boss will eventually listen?⁵⁰ Or is it so obvious that the boss is attempting to injure the worker that she should have no concern for “civility” while engaging in zealous advocacy to improve her lot?⁵¹

I suggest that the worker’s immediate goal should be to protect her mouth from being smashed. Thus, the fundamental threshold of survival and self-defense cuts through the abstract rhetoric respecting the goods and evils of collective representation from the perspective of “the Government” or “Society.” And once upon a time, late in the 19th century, self-defense, or the common self-interest of workers, was precisely the rubric through which common law courts began to see concerted labor activity.⁵² Workers struck and picketed to raise their wages because they had no other choice.⁵³ Built into much thinking of that era was the idea that it was only natural that employers and employees would be embroiled in a struggle over the fruits of production. That is the way it had always been and would always be.⁵⁴ In fact, so clearly did the common law courts understand the perpetual reality of this struggle that they became unreliable from the perspective of employers, who in response were forced to construct different legal theories centered in antitrust law that were more effectively deployable, especially in the federal courts.⁵⁵

In sum, self-defense is a rational response to one’s existence being threatened. However, to say that a response is rational is not necessarily to say that it is moral. Furthermore, any conception of a right to self-defense will always

⁴⁹ See generally 1 Peter 2:18–20 (setting forth one biblical doctrine of submission). *But see* JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE* 17 (1990) (observing that resistance may be subtle or even hidden from view altogether).

⁵⁰ According to John Rawls civility is the moral duty to,

[B]e able to explain to one another on . . . fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fair-mindedness in deciding when accommodations to their view should reasonably be made.

JOHN RAWLS, *POLITICAL LIBERALISM* 217 (1993).

⁵¹ Cris Mayo, *The Binds that Tie: Civility and Social Distance*, 52 *EDUC. THEORY* 184–86 (2002), available at <http://commontheme.iupui.edu/resources/Mayo.pdf>.

⁵² See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 480–81 (1921) (Brandeis, J., dissenting) (discussing increasing acceptance by common law courts of labor organization self-defense justifications), *superseded by statute*, Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), (codified as amended at 29 U.S.C. §§ 101–115 (2013)), *as recognized in* *United States v. Hutcheson*, 312 U.S. 219, 231 (1941).

⁵³ *Id.*

⁵⁴ *Vegehlahn v. Guntner*, 44 N.E.1077, 1081–82 (Mass. 1896) (Holmes, J., dissenting).

⁵⁵ *Loewe v. Lawlor*, 208 U.S. 274 (1908).

have to come to terms with its allowable scope. It is to these questions the essay will now turn.

V. A MORAL TURN

In order to have a discussion about the *morality* of self-defense, I must freely acknowledge a first principle. I do not subscribe to a form of ethical emotivism in which it is assumed that it is impossible to work out rationally or in an articulable manner any moral values other than certain “feelings” or intuitions about what is morally right.⁵⁶ I believe that threats to one’s survival trigger an *actual and clear* right—in the moral sense—of self-defense, a right to resist.⁵⁷ The right seems clear though its *scope* can be obscure.⁵⁸ What form of attack is sufficient to trigger the right, and what am I, as a worker, authorized to do when defending myself?

Is encroaching pauperization sufficient in moral terms to trigger a right to self-defense? A line of casual thought in common social discourse is that no one has a “right” to earn such and such an amount of money. Who do those restaurant workers think they are with their demand of \$15 per hour for flipping burgers?⁵⁹ Once upon a time a former boss of mine told a group of us assembled workers: “[y]our problem is that you see this job as an end in itself and not as a means to an end.” In other words, we, the workers, should have stopped complaining about our meager wages and poor working conditions because our crappy jobs were merely temporary. Problematically, we had no way to know whether our jobs, with their accompanying poor working conditions, *were* temporary. As it turned out, for many of us who were marginally employed in the early 1980s low wages and poor working conditions became permanent job features. While the jobs were ephemeral, for many of us the absence of decent pay and working conditions proved enduring. Furthermore, even if we were corporate-executives-in-waiting, this did not detract from the reality that we had to earn enough to survive *today*.

⁵⁶ ALASDAIR MACINTYRE, *AFTER VIRTUE* 13–14 (2d ed., 1985).

⁵⁷ THOMAS AQUINAS, *SUMMA THEOLOGICA, OF SEDITION* (Fathers of the English Dominican Province trans., Benziger Bros. 1947), *available at* <http://www.ccel.org/ccel/aquinas/summa/SS/SS042.html#SSQ42OUTP1>.

⁵⁸ I do not pretend that this is an uncontroversial position in itself. Philosophers have great difficulty explaining the moral basis for a right to self-defense. *See, e.g.,* Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 384 (2005). This is not the place to plumb the depths of those discussions. I merely wish to be clear that I believe that such a right exists and that it can be articulated.

⁵⁹ In the *Fast Food Forward* Campaign workers seek \$15 per hour and a union. *See Strike! Fast Food Workers Strike in 190 Cities, #STRIKEFASTFOOD*, <http://strikefastfood.org/featured/believe-we-deserve-15-and-a-union-spread-the-word-now/> (last visited Mar. 11, 2015).

I assume for purposes of this kind of discussion that many, many workers are not earning enough today and have to change that reality in order to survive today.⁶⁰ Furthermore, the boss has demonstrated, as I have discussed above, that he is not interested in negotiating with the worker about changing that reality. The boss has explained that the property where work takes place is *his* property and that the worker has contracted with him to work according to whatever terms of employment he decides to unilaterally provide. His message, in its harshest version, may even deny workers the possibility of improving their lot as his business *improves*.⁶¹ Under the classical business narrative the boss is not required to give the worker anything beyond what is necessary to maintain his business.⁶² The persistent liberal economics question is whether the boss will *necessarily* deny the worker any coherent and substantial future: wherever possible paying just enough to keep the worker alive, condemning the worker in practical effect to perpetual insecurity. Some, in the tradition of Malthus or Ricardo, say yes. Others have said that conditions for workers will necessarily improve as capital increases.⁶³ The law holds in essence that the fact of deteriorating working conditions is no occasion for resistance so long as a worker is at liberty to refuse employment.⁶⁴ I reject and have always rejected the notion of such a specious liberty. I appeal to no tidy set of empirical data but to the collective experience of workers. How has “liberty” worked out for us as we proceed into the 21st century? I do not require the freedom to starve to death and

⁶⁰ The labor participating rate is steadily falling, job growth is extraordinarily weak, and wages have been in free fall for years. See Michael Madowitz & Danielle Corley, *The State of the U.S. Labor Market: Pre-January 2015 Jobs Release*, CTR. FOR AM. PROGRESS (January 8, 2015), <https://www.americanprogress.org/issues/economy/news/2015/01/08/104030/the-state-of-the-u-s-labor-market-pre-january-2015-jobs-release/>; see also Derek Thompson, *The Incredible Shrinking Incomes of Young Americans*, THE ATLANTIC (Dec. 3, 2014), <http://www.theatlantic.com/business/archive/2014/12/millennials-arent-saving-money-because-theyre-not-making-money/383338/>.

⁶¹ See John Miller, *Employers Go on Strike—Because They Can*, DOLLARS & SENSE: REAL WORLD ECON. (last visited Feb. 27, 2015), <http://www.dollarsandsense.org/archives/2010/0710miller.html> (last visited Feb. 27, 2015).

⁶² This provides moral justification for what is known as David Ricardo’s “iron law of wages.” See *infra* note 63 and accompanying text; see generally W.J. Ashley, *The Rehabilitation of Ricardo*, in DAVID RICARDO: CRITICAL ASSESSMENTS 13 (John Cunningham Wood ed., 1985). Ultimately on this view the sole social responsibility of business is to maximize profits, see Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES MAG., September 13, 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>, which are obviously raised as wages are lowered.

⁶³ Ricardo ultimately held that wage levels would rise naturally over time with increases in capital. Ashley, *supra* note 62, at 16.

⁶⁴ See generally RICHARD A. EPSTEIN, *LIBERATING LABOUR: THE CASE FOR FREEDOM OF CONTRACT IN LABOUR RELATIONS* (1991); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

I deem the possibility of starvation a threat sufficient to trigger workers' rights to self-defense.

It is precisely the threat of insecurity and permanent pauperism that sets the groundwork for the desire for a collective bargaining agreement, a contract assuring predictable and regular working conditions. The collective bargaining agreement is the workplace-specific manifestation of a collective fear of falling into a precariat. But that type of agreement is, as a practical matter, long gone. Unions today are "busted" and fast.⁶⁵ When I was a new NLRB attorney, I was impressed by how fast the employer anti-union "labor consultants" arrived on the scene of a union representation campaign, often within a couple of days of an NLRB representation petition being filed.⁶⁶ Not so mysteriously, the union "went away." One need only look at widely available statistics to confirm that the percentage of workers represented by a union continues to fall, as it has now for decades.⁶⁷ If the decline reflected a reasoned choice by workers not to be represented by unions, one could shake one's head and be on one's way. Thirty years of immersion in the world of labor relations has suggested to me, however, that workers reject unions because they are afraid of being fired. It is really that simple.

The business model is based on cheap vulnerable labor.⁶⁸ Where facially protective employment statutes exist—quaint vestiges of an earlier era—claims arising under them are shunted off into the black hole of employment

⁶⁵ Even when winning representation elections unions are able to achieve a collective bargaining agreement about half the time. See Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47 (2009). Presumably in all other instances unions are eventually decertified.

⁶⁶ Under the standard NLRB procedures unions are permitted to file representation petitions in which they seek certification as the employees' exclusive representative once they have obtained signed authorization cards from 30% of the involved work group, known as the "appropriate unit." National Labor Relations Act, 29 U.S.C. § 9(a) (2012). The filing sets off a furious campaign in which unions are frequently overmatched by slick consultants who, unlike the union, have almost unlimited access to employees in the workplace. MEHTA & THEODORE, *supra* note 25, at 14.

⁶⁷ Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the CPS*, UNIONSTATS.COM, <http://www.unionstats.com/> (last updated Jan. 24, 2015). According to Hirsch and Macpherson union membership fell from 24% in 1973 to 11% in 2014. *Id.*

⁶⁸ See, e.g., Patrick Thibodeau, *Southern California Edison IT Workers 'Beyond Furious' over H-1B Replacements*, COMPUTERWORLD (Feb. 4, 2015), <http://www.computerworld.com/article/2879083/southern-california-edison-it-workers-beyond-furious-over-h-1b-replacements.html> (discussing replacement by utility of "permanent employees with H-1B visa workers).

arbitration.⁶⁹ There those claims are left to die a most undignified death.⁷⁰ Indeed, as I write this essay I am also actively engaged in research on the looming evisceration of workers' compensation statutes,⁷¹ a dismantling that, if successful, may recast historical figures like Otto von Bismarck as social progressives, or even radicals.⁷² This development lies at the interstices of "employment" law and the fundamental rights to personal security that we have come to know as tort law.⁷³ The project of worker vulnerability has become openly hostile to even Mr. Blackstone and Lord Coke. The project now appears to embrace no less than the "privatization of law,"⁷⁴ a concept difficult to wrap one's mind around. Thus, while I respect the legacy of the labor laws passed down to us in the last eighty years or so, I fear workers are embarked on a far more fundamental and primordial struggle for their very survival.

VI. THE ENDS OF RESISTANCE AS VIEWED BY WORKERS

Workers see, feel, and experience this intensification of the struggle for survival and some, at least, now understand that the ends of resistance have taken on a new character. I saw and felt the intensification when I was a manual laborer in the 1980s. Let me tell you what I felt: despair. I felt that no one cared. I felt that I had to do something dramatic to exit the encroaching gloom. Once upon a time, I was sitting on an airline belt loader parked on an airport tarmac. The word came down from above that 11,000 air traffic controllers had been fired for striking illegally and then refusing an order from President Reagan to return to

⁶⁹ According to some figures, as of 2010, 27% of U.S. employers employing 36 million employees, or one-third of the non-union American workforce, reported that they forced arbitration of employment disputes—thereby depriving employees of access to courts—as a condition of employment. EMPLOYEE RIGHTS ADVOCACY INST. FOR LAW & POLICY, 2013 ANNUAL REPORT 11 (2013), *available at* <http://www.employeerightsadvocacy.org/fmd/files/2013%20Institute%20Annual%20Report.pdf>

⁷⁰ See Imre S. Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. LAW 31 (2014) (describing various limitations).

⁷¹ Oklahoma's new "workers' compensation" statute is a glaring example. See OKLA. STAT. tit. 86A (2014).

⁷² Otto Von Bismarck, *Practical Christianity*, in 20 THE GERMAN CLASSICS 221 (Kuno Franke ed. 1913), *available at* <http://www.unz.org/Pub/FranckeKuno-1913v10-00221> (arguing that the establishment of workers' compensation systems was the duty of civilized Christian nations).

⁷³ Kenneth J. Vandeveld, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 456–57 (1990).

⁷⁴ Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685 (2004) (arguing that the effect of contract provisions requiring arbitration has been to privatize justice).

work.⁷⁵ Some said they deserved to be fired. Some said they did not. For my part, I was making about five dollars an hour at the time and distinctly remember thinking that if “these guys” could be fired, anyone could. During the next eleven years, as my airline career was drawing to a close, I felt at all times like I was on a sinking ship and that it was a very dangerous thing to be a “regular” worker. I was lucky enough to get on what I think may have been one of the last buses out of town.

I believe that workers have been disheartened and in despair for at least three decades, and PATCO is as good a debacle upon which to fix an originating point as any. Many discussions and explorations of reasons for the decline in union density, but even more importantly for the decline in worker disruption,⁷⁶ have focused on various policy prescriptions on how to right the ship.⁷⁷ But I think the answer to this riddle is located in the hearts, minds, and souls of workers. For workers know on a visceral level that the only road out of the morass is the road proceeding from their marrow and sinews. The road out of despair *is* resistance and workers have, not irrationally, been considering whether the risk of resistance is worth the candle. When historian Steve Fraser aptly describes present times as an age of acquiescence I am inclined to agree.⁷⁸ But perhaps there has never been a working class possessing so much information with which to conduct a wide ranging cost-benefit analysis about the many costs of resistance. Resistance hurts. Resistance is uncomfortable and inconvenient and complex.⁷⁹ Perhaps it *is* enough just to get by — in peace. However, as wages and working conditions worsen the nature of the question is transformed from one of acceptance of hopelessness to whether one will acquiesce to or resist becoming a wage slave.⁸⁰ The times appear to be dictating, once again, the inevitability of resistance. But it has been so long since workers have fought

⁷⁵ See generally Joseph A. McCartin, *The Strike that Busted Unions*, N.Y. TIMES, Aug. 2, 2011, http://www.nytimes.com/2011/08/03/opinion/reagan-vs-patco-the-strike-that-busted-unions.html?_r=0 (providing summary of facts of PATCO strike).

⁷⁶ See U.S. BUREAU OF LABOR STATISTICS, MAJOR WORK STOPPAGES IN 2014 (Feb. 11, 2015), available at <http://www.bls.gov/news.release/pdf/wkstp.pdf>. There were only 15 major strikes in the United States during all of 2013. *Id.* at 3.

⁷⁷ See, e.g., Seth D. Harris, *Don't Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. SCH. L. REV. 303, 311 (2005) (discussing tactics to work around cramped employee statutory definitions excluding workers from legal protections, evolving tactics of labor organizers, and the linkage of traditional labor campaigns to broader racial and ethnic struggles).

⁷⁸ STEVE FRASER, *THE AGE OF ACQUIESCENCE* (2015).

⁷⁹ JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 2* (1992) (discussing the elaborate construction of “public transcripts” by those who are dominated out of fear of open confrontations with those who dominate).

⁸⁰ MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 181–82* (1996). Abraham Lincoln saw wage slavery as a worker's reliance on wages in circumstances that could never culminate in autonomous self-employment. *Id.*

back—*really* fought back—that there may be a learning curve in play while workers retrieve what was once known: workers have the ability and, indeed, an entire history of resisting and fighting back.⁸¹

I suppose workers must first internally, psychologically and spiritually, give themselves permission to resist. They must acknowledge that resistance is dangerous and become resolved over time to reacquiring courage. Courage is the *sine qua non* of resistance, especially non-violent resistance.⁸² Workers must also accept that resistance is, when all is said and done, a kind of coercion in itself. Domestic tranquility will quite possibly be disturbed, and the morality of that development must be reflected upon.⁸³ To what extent are such disturbances ethically warranted? The dilemma is reminiscent of a distinction made by Mahatma Gandhi between the different ends of non-violent civil resistance. *Satyagraha* means holding on to the truth, a truth writ large that is ultimately beneficial for my opponent, for me, and for all of society.⁸⁴ *Duragraha*, on the other hand, though non-violent, aims for the short term resolution of a narrower conflict in one's favor, irrespective of whether the resolution is in accord with some larger truth or broader social benefit.⁸⁵ On some level, I think workers worry about whether their struggles are *duragraha*, and thus illegitimate.⁸⁶ In a very real way this is the narrative that has been allowed to prevail in critiques of workers, and especially of organized labor. At some point along the line, the story goes, workers became too greedy and narrowly self-interested.⁸⁷

⁸¹ See AMERICAN LABOR STRUGGLES AND LAW HISTORIES (Kenneth Casebeer ed., 2011) (discussing exhaustively a long history of labor conflicts of the 18th, 19th, and 20th centuries).

⁸² ROBERT L. HELVEY, ON STRATEGIC NONVIOLENT CONFLICT: THINKING ABOUT THE FUNDAMENTALS 27 (2004) available at http://www.mk gandhi.org/ebks/nonviolent_conflict.pdf.

Public acts of courage against oppression dispel the stereotype that sees nonviolent protestors as cowards. Courage is universally respected whether that courage is displayed by soldiers on a battlefield or by nonviolent warriors confronting an oppressive regime. In some cases, the suffering endured by members of an opposition group can greatly influence the attitudes of both the oppressor and the oppressed. Courage is not always measured in the blood shed by individuals on behalf of a cause. The willingness to brave the consequences of an act is a true measure of courage.

Id.

⁸³ See Hugo Bedau, *On Civil Disobedience*, in MORALITY AND THE LAW 69, 72–74 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

⁸⁴ Dennis Dalton, *Satyagraha versus Duragraha*, in GANDHIAN ALTERNATIVE 169 (R.P. Misra and K.D. Gangrade eds., 2005).

⁸⁵ *Id.*

⁸⁶ See Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2086 (2007) (quoting JOHN RAWLS, A THEORY OF JUSTICE, 319 n.2 (rev. ed. 1999)). The idea of civil disobedience is intelligible only in the context of a “nearly just” society in which it is understood that respect for the interests of others is to be maintained at all times. *Id.*

⁸⁷ George Wass, *Union Greed in Modern America*, REDSTATE, (Oct. 4, 2011, 10:07 PM), <http://www.redstate.com/diary/georgewass/2011/10/04/union-greed-in-modern-america/>.

I wish that workers would simply credit themselves on an existential level for resisting the received wisdom that poverty and want is endemic to the human condition unless their “betters” are provided free reign to exercise unfettered dominion in the workplace. But whether or not workers will give themselves this credit, I cannot accept they will simply sleep through the arrival of a new gilded age.⁸⁸ In the end, the boss’s voracious appetite⁸⁹ may have done workers a favor beyond measure: it may no longer be possible to credibly paint *satyagraha* as *duragraha*.⁹⁰ The boss’s overreaching may be on the verge of resolving all ambiguity within the hearts and minds of workers respecting the righteousness of the ends of resistance (i.e., survival and self-defense), and set them on their first steps this century towards honest reflection on the scope and *means* of resistance. In eras of excessive aggression against workers all *duragraha* may be inseparable from *satyagraha*. The ends of resistance now seem much more clearly rooted in a broad program of self-defense aimed at survival.⁹¹

VII. TRANSFORMING AN ANTI-LABOR ENVIRONMENT

The question of how to transform an anti-labor environment in the interests of worker self-defense and survival is at bottom a question of means. However, the question in some respects presupposes that it is within the power of workers or their advocates to somehow dictate through negotiation the terms of the transformation. Because of the weakening of labor law overall and the

However, the law has funneled organized labor into a narrow economic consciousness by virtually insisting that only self-interested actions are subject to labor law protection as “legitimate.” See Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CALIF. L. REV. 1767, 1795–96 (2001).

⁸⁸ During the Gilded Age, circa 1870–1895, “While the rich wore diamonds, many wore rags. In 1890, 11 million of the nation’s 12 million families earned less than \$1200 per year; of this group, the average annual income was \$380, well below the poverty line.” *American Experience*, Andrew Carnegie, *The Gilded Age*, PBS.ORG, <http://www.pbs.org/wgbh/amex/carnegie/gildedage.html>; see also Paul Krugman, *Why We’re in a New Gilded Age*, N. Y. REV. BOOKS, May 8, 2014, <http://www.nybooks.com/articles/archives/2014/may/08/thomas-piketty-new-gilded-age/>.

⁸⁹ See, e.g., Suresh Naidu, *Capital Eats the World*, JACOBIN, May 30, 2014, <https://www.jacobinmag.com/2014/05/capital-eats-the-world/> (discussing that in the context of neoclassical economics it has been a challenge to explain why the rate of capital accumulation remains unusually high in modern times and attributes one possibility to psychological fantasies of future empires, or other structural imperatives).

⁹⁰ See Dalton, *Satyagraha Versus Duragraha*, *supra* note 84 and accompanying text.

⁹¹ As evidence of workers’ contemporary survival environment see for example Martha C. White, *New Normal: Many Gen Xers See Future in Rubble*, NBC NEWS, (Mar. 23, 2014, 6:18 AM) <http://www.nbcnews.com/feature/in-plain-sight/new-normal-many-gen-xers-see-future-rubble-n46136> (“After moving from Silicon Valley in 2009, [the subject of the piece] said her husband—whose high-tech skills had always been in demand before—struggled to find work. The family relied on [the subject]’s income as a professional clown and, at one point, food stamps to make ends meet.”).

ideological unwillingness of the boss to bargain,⁹² I doubt that this is possible. Rather, I think that the boss often ironically catalyzes the dynamic brought about by worker self-defense. When the worker tries to stop the boss from punching her in the mouth the boss becomes even more determined to demonstrate his power to do so. In turn the worker must react to these redoubled efforts. From this dyadic interchange new circumstances emerge. It is not my intent here to attempt to describe precisely the emergence.⁹³ My point is that talking the boss—or a society in which the boss is in substantial control of the major organs of opinion and information—out of being anti-labor seems a tall and dubious order. Organized workers are unlikely to pierce the veil of corporate media in order to accurately present their positions in the course of labor disputes. To ask why this is so is to ignore the obvious point that business interests are not likely to advertise views that do not inure to their long term commercial benefit. The time expended on that fool's errand would be better spent on developing means and methods of resistance based on the presupposition that the boss will not willingly provide workers with *any* defined sliver of the societal pie.

It is not in the workers' best interests to attempt to transform the boss or to transform those under the boss's influence rhetorically.⁹⁴ Workers are better served by transforming themselves internally.⁹⁵ Workers should internalize a rediscovered ethic of resistance and should accept the smash mouth truth of the necessity of self-defense. Moreover, workers should be extremely skeptical of a collective bargaining mysticism appearing to hold that once workers successfully seat an employer at a bargaining table good things will inevitably happen.⁹⁶ This idea is ahistorical and unhelpful.⁹⁷ As the pioneers of American labor law fully

⁹² See generally John Miller, *Employers Go on Strike—Because They Can*, *supra* note 61.

⁹³ See, e.g., FRANCESCO ALBERONI, *MOVEMENT AND INSTITUTION* 20 (1984). One might reference Alberoni's description of the "nascent state," a social construct that simultaneously exists independently and in opposition to established institutions and is in part defined by those institutions. *Id.* It is a proposal for an alternative solidarity. *Id.*

⁹⁴ See Charles R. DiSalvo, *Abortion and Consensus: The Futility of Speech, the Power of Disobedience*, 48 WASH. & LEE L. REV. 219, 219 (1991) ("When words fail to resolve fundamental, no-compromise issues, an open society has two choices: political violence or civil disobedience.").

⁹⁵ BIDYUT CHAKRABARTY, *SOCIAL AND POLITICAL THOUGHT OF MAHATMA GANDHI* 75 (2006). Gandhi insisted that eliminating bad rulers was insufficient to effectuate change because removal of one bad ruler would simply result in the replacement of another. *Id.*

⁹⁶ William D. Turner, *Restoring Balance to Collective Bargaining: Prohibiting Discrimination against Economic Strikers*, 96 W. VA. L. REV. 685, 690 (1994). I embrace the term used by opponents of measures that inevitably weaken workers' right to strike. *Id.* Collective bargaining unmoored from the right to strike and protest is not collective "bargaining," it is collective "begging." *Id.*

⁹⁷ See B. Glenn George, *Visions of a Labor Lawyer: The Legacy of Justice Brennan*, 33 WM. & MARY L. REV. 1123, 1128 (1992). Justice Brennan, for example, as the son of a blue collar worker and labor union official, understood perfectly well that labor-management conflict was inevitably a kind of economic cold war. *Id.*

understood, negotiations without the possibility of worker resistance hanging in the wings is unlikely to achieve much that is durable.⁹⁸

VIII. A BEAUTIFUL INCIVILITY

Having concluded that workers are justified, by principles of self-defense, in resisting a deteriorating economic and societal state of affairs, how should they resist? The word “should” carries with it two different connotations. How should they proceed in a moral sense? How should they proceed to maximize the chances of success? The second question seems easier to answer than the first. In my opinion a praxis of non-violence maximizes the chances for ultimate success, but a full discussion of the claim is beyond the scope of my present discussion.⁹⁹

To take up the first question, a very natural reaction to a perceived injustice is to protest and to demand dialogue. Dialogue in such contexts can be strained. The labor relations regime embodied primarily by the National Labor Relations Act has generally, until recent times,¹⁰⁰ recognized and accepted the

⁹⁸ “[T]he design of the federal scheme [is one] in which ‘the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining.’” Int’l Ass’n of Machinists & Aero. Workers v. Wis. Emp’t Relations Comm’n, 427 U.S. 132, 144 (1976) (quoting NLRB v. Ins. Agents’ Int’l Union, 361 U.S. 477, 495 (1960)).

⁹⁹ Of course, even Gandhi said that “where there is only a choice between cowardice and violence, I would advise violence.” Chakrabarty, *supra* note 95, at 75. However, Gandhi believed that far more courage was required to engage in non-violence than violence. But as a cold-blooded matter of tactics there is empirical support for the proposition that non-violent civil disobedience is more successful than resistance premised on violence. See ERICA CHENOWETH & MARIA J. STEPHAN, WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT (2011) (finding that for more than a century, from 1900 to 2006, campaigns of nonviolent resistance were more than twice as effective as violent campaigns in obtaining movement objectives.).

¹⁰⁰ The D.C. Circuit Court of Appeals, a little more than a decade ago, upheld an employer’s efforts, as expressed in an employee handbook, to maintain “a decorous and peaceful workplace.” *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001). The court in *Adtranz* stated, “the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here.” *Id.* at 27. In fact, what the NLRB had decades of experience encountering arguments that union organizing was, in effect, uncivil. See, e.g., *NLRB v. Thor Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965); *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 815-16 (7th Cir. 1946). The rule in *Adtranz* had in my opinion, given its timing, been promulgated in the wake of a new union organizing campaign, see *Adtranz*, 331 NLRB 291, 292 (2000), and employees would in context know that it was aimed at union organizing. *Adtranz ABB Daimler-Benz Transp., N.A., Inc.*, 331 N.L.R.B. 291, 293 (2000) *vacated in part*, 253 F.3d 19 (D.C. Cir. 2001). In order to placate business interests over the decades, the NLRB declined to flatly reject these kinds of civility arguments in all but the most extreme cases. *Id.* Instead, it has employed a flexible standard (omitted in the interests of brevity) that in essence places “uncivil” employee conduct in “context.” *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979). See Lauren P. McDermott, *Unprotected Profanity: The Erosion of an Employee’s Right to Convey Grievances*, 4 AM. U. LABOR & EMP. L.F. 1 (2014) (“Following the decision in *Atlantic Steel*, the implementation of a balancing test has resulted in an inconsistent application of

rough and tumble of discussion and dialogue in the midst of labor disputes. The notion of civility in such contexts has been deemed unrealistic. Workers are angry about pay, working conditions, and the like, and cannot be expected, the thinking has gone, to comply with social niceties.¹⁰¹ As the Supreme Court once recognized, the most repulsive speech should enjoy immunity from government censure if we really want authentic debate on labor relations matters.¹⁰² Aside from the impracticality of demanding polite behavior of those protesting social injustice, a hidden message is implicit in the demand: be quiet or there will be consequences.

Because of my personal background,¹⁰³ I am predisposed to thinking about issues of civility and resistance through racial and religious frames. In a recent essay in the Huffington Post Baptist pastor, theologian, and activist Jeff Hood laid the civility matter bare in writing about calls for civility in connection with racial justice protests after the shooting of Michael Brown in Ferguson, Missouri. Reverend Hood noticed that a number of the clergy, present in the terrible hours just after the shooting, seemed to be focused on calming protesters, when people had every right to “exercise their birthright to civil disobedience.”¹⁰⁴

the law, yielding little predictive value. More importantly, the courts seem increasingly less apt to protect speech, perceived as offensive by the employer, even in the privacy of an office, away from the production floor, or when provoked by an employer’s own unfair labor practice.” (Internal citation omitted).

¹⁰¹ See *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 586–87 (7th Cir. 1965). The standard that has been lost was announced clearly in *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815–16 (7th Cir. 1946):

We believe . . . that courts have recognized that a distinction is to be drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in ‘a moment of animal exuberance’ . . . or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service . . . and that *it is only in the latter type of cases that the courts find that the protection of the right of employees to full freedom in self-organizational activities should be subordinated to the vindication of the interests of society as a whole.*

(Emphasis supplied). This has been whittled down to the much more employer-friendly *Atlantic Steel* standard which itself was a retreat in the interests of employer-defined (and convenient) “civility.” *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

¹⁰² *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63 (1966). The Court went on to say that a “grown up” labor movement would have to assume greater responsibilities for controlling “libelous” speech, and by implication to my mind other forms of speech on the borderline of receiving protection. *Id.* It would be interesting to know how the *Linn* Court would have assessed these issues in the context of today’s utterly smashed labor movement.

¹⁰³ See, e.g., *supra* note 3 and accompanying text.; *infra* page 123.

¹⁰⁴ Jeff Hood, *The Violence of Demanding Peaceful Protest: The Missteps of Clergy in Ferguson*, HUFFINGTON POST (Aug. 24, 2014, 9:47 PM), http://www.huffingtonpost.com/rev-jeff-hood/the-violence-of-demanding-peaceful-protest_b_5703569.html.

Reverend Hood went on to powerfully explain his rationale for *not* espousing “calm”:

I am not sure that these clergy in Ferguson would have let Jesus demonstrate in the temple. The false promise that “peace will get what you want” is absurd. Sometimes you have to shut things down in order to bring about justice. The work that I do is to ensure that acts of civil disobedience remain nonviolent, not that they remain nonexistent. We must not forget that civil disobedience is an unpeaceful act. Civil disobedience is not intended to create situations of calm. Civil disobedience escalates situations to a point where people have to pay attention to injustice. To try to squash civil disobedience in Ferguson is to try and squash a movement for racial justice in our nation that is long overdue. Anger must not be extinguished for the sake of maintaining calm. Anger should be utilized to create a racial revolution that brings all people in this nation and perhaps even around the world to the table for an honest conversation and a subsequent reformation.¹⁰⁵

It seems natural that a stark moral assessment of the silencing of civil disobedience and incivility would be required in the context of racial conflict. In such conflict the core of the issue is obviously one of self-defense. The context is one in which people are being gunned down and the crux of the situation is precisely self-defense. In those high stakes situations it seems almost ludicrous to a *bona fide* moral observer that silence, calm, or civility could be expected. After all, they are coming to kill me, at least eventually. My contention is that whether workers know it or not the same necessity of self-defense is at hand.

The utility of the racial lens for understanding the unreasonableness of demands for civility was beautifully exemplified in a recent short piece in *Salon* magazine.¹⁰⁶ The article discussed issues surrounding the decision by the University of Illinois to rescind an offer of employment to Steven Salaita, a fierce and controversial critic of certain Israeli governmental policies aimed at the Palestinian people.¹⁰⁷ The article critiqued university officials’ defense of the rescission centered on maintaining campus civility.¹⁰⁸ What struck me most about the piece was one of its quotes, attributed to the late poet and African-American civil rights activist, June Jordan:

¹⁰⁵ *Id.*

¹⁰⁶ See generally David Palumbo-Liu, *Civility is for Suckers: Campus Hypocrisy and the “Polite Behavior” Lie*, SALON (Sept. 10, 2014, 4:39 PM), http://www.salon.com/2014/09/10/civility_is_for_suckers_campus_hypocrisy_and_the_polite_behavior_lie/.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

The purpose of polite behavior is never virtuous. Deceit, surrender, and concealment: these are not virtues. The goal of the mannerly is comfort, per se . . . Most often, the people who can least afford to further efface and deny the truth of what they experience, *the people whose very existence is most endangered and, therefore, most in need of vigilantly truthful affirmation*, these are the people—the poor and the children—who are punished most severely for departures from the civilities that grease oppression. If you make and keep my life horrible then, when I can tell the truth, it will be a horrible truth; it will not sound good or look good or, God willing, feel good for you either.¹⁰⁹

To people of color the relationship between resistance and self-defense is hardly theoretical; it is primordially existential.

I (who am of color) never had a chance to discuss worker self-defense with my white, Baptist-preacher, coal miner grandfather. While I did get to know him, and have some memory of him, he passed away from the ravages of black lung disease when I was a child. He was a Harlan County miner and a member of the United Mine Workers during the raging 1930s period of CIO membership expansion and militancy.¹¹⁰ I would like to have discussed with him precisely the issue that is at the heart of this essay: once I, as a worker, know that they are trying to kill me, what should I do? That sounds very dramatic, but I deeply and sincerely believe that workers are now *in loco Yossarian*:

“They’re trying to kill me,” Yossarian told him calmly.
 “No one’s trying to kill you,” Clevinger cried.
 “Then why are they shooting at me?” Yossarian asked.
 “They’re shooting at everyone,” Clevinger answered.
 “They’re trying to kill everyone.”
 “And what difference does that make?”¹¹¹

What would my grandfather say? He might say that I do not have sufficient evidence of the boss’s murderous intent and that I have become a bit unhinged, but suppose he accepted my smash mouth truth. Suppose he even smiled at my naïveté. I can imagine him saying, “When has this ever *not* been so? When has power been still?” My Baptist-preacher-grandfather might point me to the theological writings of Walter Wink and explain that there is a certain “inner essence” or “spirit” produced by the concrete reality of any institution, including a workplace.¹¹² The boss is no more than an agent of an invisible

¹⁰⁹ *Id.* (emphasis added)

¹¹⁰ MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS: A BIOGRAPHY 248–279 (1977).

¹¹¹ JOSEPH HELLER, CATCH 22 19 (Simon & Schuster 2011) (1961).

¹¹² WALTER WINK, COLLECTED READINGS 40 (Henry French ed., 2013).

mercantile mechanism that has become “the arbiter of human destiny, producing results in apparent independence of the human beings who comprise the system it governs.”¹¹³ My grandfather might warn me that in avoiding such fetishism, through establishment of an ethic of self-defense, I must be ever mindful of cooption by the very power I seek to oppose.¹¹⁴ In short, he might counsel a beautiful incivility.

IX. CONCLUSION: THE PURSUIT OF ZEALOUS ADVOCACY

Perhaps a lawyer, the stereotypically zealous advocate, would not be expected to speak in an emotional language of beauty, especially when discussing serious matters of worker self-defense. And perhaps a lawyer, a trafficker in rules, would not be expected to be discussing civil disobedience, a technique for resisting rules. A lawyer may indeed have difficulty even thinking of worker resistance to the policies of employers as civil disobedience. Civil disobedience, after all, is commonly conceived as directed against the State. Worker resistance, while it may be directed against the State, is often directed against employers that are, at least on the surface, private actors. Gandhi and Martin Luther King utilized forms of civil disobedience during industrial disputes, though in hindsight it can be unclear as to who, exactly, was being disobeyed. But outside of these constricting analytical boxes I can conceive civil disobedience as activity directed against the entire “official” social order. And, as a lawyer whose life has been focused on justice for the working class, I believe that lawyers, too, can see paths to light. Acts of peaceful resistance like the ones engaged in during an intermission of a performance of Brahms’s *Requiem* by the St. Louis Symphony in October 2004 are inspiring.¹¹⁵ During the intermission, protesters, singing beautifully, asked in lyric, “Which side are you on?” and concluded by chanting “black lives matter.” For me, it was the perfect venue, the perfect selection, and the perfect message. Some among those sitting in the audience no doubt subscribed to the business notion of “disruption.”¹¹⁶ While

¹¹³ *Id.* at 41.

¹¹⁴ THICH NHAT HANH, *THE ART OF POWER* 165 (2007) (“Protesting is a kind of help, but it should be done skillfully, so people see it as an act of love and not an attack.”).

¹¹⁵ Robert Samuels, *Protesters Interrupt St. Louis Symphony with ‘Requiem for Mike Brown’*, WASH. POST, Oct. 5, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/10/05/protesters-interrupt-st-louis-symphony-with-requiem-for-mike-brown/>.

¹¹⁶ CLAYTON CHRISTENSEN, *THE INNOVATOR’S DILEMMA* xv (1997) (explaining disruptive innovation as a process by which a product or service takes root initially in simple applications at the bottom of a market and then relentlessly moves up market, eventually displacing established competitors). *But see* Jill LePore, *The Disruption Machine: What the Gospel of Innovation Gets Wrong*, NEW YORKER, June 23, 2014, <http://www.newyorker.com/magazine/2014/06/23/the-disruption-machine?currentPage=all> (challenging the concept of disruption as an extremely imperfect model for explaining why businesses fail and strongly implying that its costs may exceed its benefits).

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having one's intermission during a classical music outing disrupted by unscheduled singing does not strike me as especially disruptive, I suspect that some "disruptors" felt disrupted. That racial justice activists selected a labor song through which to make their point suggests a modern unification of movements as attacks upon workers of all races intensify. The song suggests that a "side" is to be selected.¹¹⁷ The election is a deeply moral one. Both a Philadelphia Teamster and admirers of the Cowboy Code may appreciate the beautiful incivility of insisting, zealously, that all, including workers, realize a choice must now, in the interests of self-defense, be pursued.

¹¹⁷ See *supra* note 106 and accompanying text.