Notes to Introduction

On the movement from unfree to free labour, see D. Hay, "Wage Labour," in *Oxford Handbook of Global Labour History*, eds. Sven Beckert and Marcel van der Linden (Oxford: Oxford University Press, forthcoming). He describes how work for returns was performed for about 3,000 years ere what is currently labelled free labour came to rule the roost. The piece sets out the many ugly, brutal legalized repressions, including slavery, which characterized the long period of transition from feudalism to early capitalist relations of production. I am deeply indebted to the work of my former colleague Doug Hay and to his advice, especially in respect to the early common law history of labour struggles. See D. Hay and P. Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (University of North Carolina Press, 2004); T. Brass and M. van der Linden, eds., *Free and Unfree Labour: The Debate Continues* (Peter Lang, 1997); Robert J. Steinfeld, *The Invention of Free Labour: The Employment Relation in English and American Law and Culture, 1350–1871* (University of North Carolina Press, 1991).

Henry Maine, *Ancient Laws: Its Connection with Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861); F. Fukuyama, *The End of History and the Last Man*, US 2 ed. (New York: Free Press, 2006).

On inequality, see David MacDonald, "Outrageous Fortune: Documenting Canada's Wealth Gap," Canadian Centre for Policy Alternatives, April 2014; Taylor Scollon, "The Economy Isn't Working for Most Canadians," *Toronto Star*, September 7, 2019, citing Statistics Canada, reports that, from 1982–2015, the share of income for the top 1% grew from 8% to 14.2%, an increase of 78% while that of the bottom 50% fell by 29%; Andrew Stanley, "Global Inequalities," *IMF*, March 2022, reported that 10% of the world's population owned 76% of all wealth, took 52% of all income (and accounted for 48% of all carbon emissions); see also Jeremy Lent, "Five Ways to Curb the Power of Corporations and Billionaires," *Resilience*, 2018; T. Piketty, *Capital in the Twenty-First Century (tr. Arthur Goldhammer)* (The Belknap Press, 2014); Anthony B. Atkinson, "Inequality: What Can Be Done?," (Harvard University Press, 2015); Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton & Coy, 2013); R. Wilkinson and K. Pickell, *The Spirit Level* (Bloomsbury Press, 2011).

Jean Fourastié, *Les trente glorieuses ou la Revolution Invisible de 1946 a 1975* (Paris: Fayard, 1979). In English writings, the period is sometimes referred-to as the Golden Years.

On the debates between some of the foremost scholars and policy-makers, see Joseph E. Stiglitz, Amartya Sen, and Jean Paul Fitoussi, *Report by the Commission on the Measurement of Economic Performance and Social Progress*, Government of France, 2008; Mark Carney, "Inclusive Capitalism: Creating a Sense of the Systemic," paper presented at *Conference on Inclusive Capitalism*, London, May 27, 2014; Christine Lagarde, "Economic Inclusion and Financial Integrity," paper presented at *Conference on Inclusive Capitalism*, London, May 27, 2014; Joseph E. Stiglitz, *The Price of Inequality*.

On what freedom to enter into binding contracts for work for wages signified, see Harry Braverman, *Labor and Monopoly Capitalism: The Degradation of Work in the Twentieth Century*, 25th anniversary ed., foreword by Paul M. Sweezy, new introduction by John Bellamy Foster (New York: Monthly Rev. Press, 1998).

On the persistence of feudal incidents of servitude continuing after feudalism had disappeared, see Gramsci's notion on how the old hangs on as a transition occurs. He observes that it is inevitable that there is a retention of the old and it is not necessarily an evil. It follows that some of the civil and political rights already won, such as freedom of speech, association, and belief, should be consciously retained as a transformation from capitalism to socialism evolves; Antonio Gramsci, *Selection from the Prison Notebooks* (London: Lawrence Wishart, 1971).

Ronald Coase, "The Nature of the Firm," *Economica* 4 (1937): 386, on how workers agree to curb the powers they normally exercise over themselves.

In respect of the argument that property and contract are structural institutions to the working of capitalist relations of production, it is to be noted that "property" and "contract" are being used in their conventionally accepted liberal/capitalist sense. Thus, property could be thought of in a non-capitalist context. It does not have to be thought of as a thing an individual possesses singularly; it could be posited to be a right over the use of things which would make it available to many persons; see C. B. McPherson, *Democratic Theory: Essays in Retrieval* (Oxford: Oxford University Press, 2012).

On the inherent alienating nature of capitalist relations of production, Marx observed that the freeing-up of the worker to sell his capacities and the accompanying alienation and the transformation of socially coordinated work done by others into capital, were the distinguishing characteristics of capitalist relations of production. The system, therefore, always has to fight for its legitimacy.

For the argument that law does more than provide the foundational institutions of property and contract, reliance is being placed on the argument by Alan Stone, "The Place of Law in the Marxian Structure—Superstructure Archetype," *Law & Society Review* (1985): 39, who argues that a particular view of property is seen as the base of the Marxian model and that it is not possible to talk about property without reference to law. Law therefore must be part of both the base and the superstructure. For a more sophisticated elaboration, see E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books 1975), 261; see also Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019); N. Hardern and E. Tucker, "Marxist Theories of Law Past and Present: A Meditation Occasioned by the 25th Anniversary of *Law, Labour and Ideology*," *Law & Social Inquiry*, 2020.

On the fears expressed by plutocrats, see Nick Hanauer, "The Pitchforks Are Coming … for Us Plutocrats: Memo from Nick Hanauer to My Fellow Zillionaires," *Politico*, January 27, 2015, and the discussion in H. Glasbeek, *Class Privilege: How Law Shelters Shareholders and Coddles Capitalism* (Toronto: Between the Lines, 2017).

On the myriad of situations that inflict horrendous harms on workers, both in the workplace and their living environments, see H. Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002); Russel Mokhiber, *Corporate Crime and Violence: Big Business Power and Abuse of the Public Trust* (San Francisco: Sierra Club Books, 1988); Laureen Snider, *Bad Business: Corporate Crime in Canada* (Scarborough, ON: Nelson Canada, 1993); Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* ☹Routledge, 2015); Steve Tombs and David Whyte, eds., *Unmasking Crimes of the Powerful: Scrutinizing States and Corporations* (New York: Peter Lang, 2003); Steve Tombs and David Whyte, eds., *State, Crime*

Power (London: Sage, 2009); Frank Pearce and Steve Tombs, *Toxic Capitalism: Corporate Crime in the Chemical Industry* (Aldershot: Ashgate, 1998).

Notes to Chapter 1 From status to contract: Toward new legal forms of worker subjugation

A letter by Edward III in Edward P. Cheyney, ed., "England in the time of Wycliffe," in *Translations and Reprints from the Original Sources of European History*, vol. 2, no. 5 (Philadelphia: University of Pennsylvania, 1898), 3–4, sets out the spirit and essential contents of the Black Plague legislation:

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

> That every man and woman of our realm of England, of what condition he be, free or bond, able in body, and within the age of sixty years, not living in merchandise, nor exercising any craft, nor having all his own whereof he may live, nor land of his own about whose tillage he may occupy himself, and not serving any other; if he'd be required to serve in suitable service, his state considered, he shall be bound to serve him which shall so require him; and take only the wages, livery, mead, or salary which were accustomed to be given in the places where he oweth to serve, the twentieth year of our reign of England, or five and six other common years next before.
>
> If any reaper, mower, or other workman or servants, of what estate or condition that he be, retained in any man's service, do depart from the said service without reasonable cause or licence, before the term agreed, he shall have pain of imprisonment; and no one, under the same penalty, shall presume to receive or retain such a one in his service. No one, moreover, shall pay or promise to pay any one more wages, liveries, mead, or salary than was accustomed, as is before said."

On the many Black Plague–like statutes and resistances to them see, Samuel Cohn, "After the Black Death: Labour Legislation and Attitudes Towards Labour in Late-Medieval Western Europe," *Economic History Review* 60, no. 3 (2007): 457; see also Rodney Hilton, *Bond Men*

Made Free: Medieval Peasant Movements and the English Rising of 1381 (New York/London: Routledge, 1977); Michel Mollat and PhilippeWolff, *The Popular Revolutions of the Late Middle Ages* (Milton Park: Routledge, 1973); Samuel K. Cohn Jr., ed. and trans., *Popular Protests in Late Medieval Europe: Italy, France and Flanders, Selected Sources Translated and Annotated* (Manchester University Press, 2004). A short list of uprisings includes: Flanders, 1323–1328; St. George's Night Uprising, 1343, Estonia; The Jacquerie, 1356–1358, northern France, during Hundred Years War; Imandino Revolts, Galicia, 1431, 1467; Budai Nagy Antal Revolt, 1437, Transylvania; Kent Rebellion 1450, Jack Cade; Rebellion of the Remences, Catalonia, 1462, 1485; Cornish Rebellion, 1497, Cornwall/London.

On the nature and erosion of the commons, see E. P. Thompson, *The Making of the English Working Class* (London: Penguin, 1963); Thompson, *Whigs and Hunters*; E. P. Thompson, *Customs in Common* (New York: The New Press, 1991); J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England 1700–1820* (Cambridge University Press, 1993). Pertinent here is that these histories tell us that the enclosures were not just developments that reflected changing wealth creating modes which involved the abrogation of multiple use rights over land, but that they also led to the collapse of the myriad of manorial customs that, over several centuries, had established a variety of localized master and servant practices and customs. Their disappearance did much to lead toward a common law in England, that is, to the common rules, ideology, and principles that established the legal relations discussed in this chapter.

On the initial perceptions of the emerging work-for-wages class see Christopher Hill, "Pottage for Freeborn Englishmen: Attitudes to Wage Labour in the Sixteenth and Seventeenth Century," in *Reformation to Industrial Revolution* (Penguin Books, 1969), 268; J. U. Nef, *War and Human Progress* (London: W.W. Norton, 1950). For elaboration on how progressive activists of the time saw work-for-wages, see C. B. McPherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962); G. Winstanley, *The True Levellers Standards Advanced*, in G. H. Sabine, ed., *The Works of Gerrard Winstanley* (New York: Russell and Russell, 1965).

On the role of the capitalist as an intermediary between producer and the market, see S. Margolin, "What Do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production," *Review of Radical Political Economy* 6, no. 2, (1974): 60–112.

For overviews of the *Statute of Apprentices*, see Donald Woodward, "The Background to the Statute of Artificers: The Genesis of Labour Policy 1558-63," *The Economic History Review* 33, no. 1 (1980): 32; Palgrave's *Dictionary of Political Economy*.

On the working class's efforts to rollback the impacts of individual bargaining, see G. Howells, *A Handy Book of the Labour Laws*, 3 ed. (London: Macmillan Press, 1895); A. H. Ruegg, *The Present and Future of Trade Unions* (London: William Clowes, 1906).

See Thomas Hobbes, *The Leviathan* (Cambridge University Press, 1991), for the point that, as capitalist relations were taking hold, there would be too many people not subject to the equivalent of feudal masters empowered to exercise control over their bodies and conduct. It is in this context that historians explain the emergence of controlling policies, the very word "policy" coming from "police," the administrative and regulatory body developed to deal with these kinds of problems; see also Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (New York: Viking Press, 1972).

For detailing of the legal restraints on the formation and operation of trade unions, see Norman Citrine, *Citrine's Trade Union Law*, 3 ed. (Stevens, 1967); A. W. R. Carrothers, *Collective Bargaining Law in Canada*, 2 ed. (Butterworths, 1986); E. I. Sykes, *Strike Law in Australia* (Law Book Company, 1960).

The capitalists' goal when acting extra-legally when seeking to gain electoral rights was made clear in the statute that embedded their success, the *Coronation Path Act*, 1688: "Monarchs solemnly promise and swear to govern the people of England according to the statutes in parliament agreed on, and laws and customs of the same." For an overview of the coming of electoral power for the emerging capitalist class, see K. D. Ewing and C. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914–1945* (Oxford: Oxford University Press, 2000); Conor Gearty, "Reflections on Civil Liberties in an Age of Counterterrorism," *Osgoode Hall Law Journal* 41, no. 2 (2003): 185. On the pursuit of civil and political rights by workers seeking voting rights, see Thompson, *Making of the English Working Class*. Rights were won after many fierce battles as capitalists, having got what they wanted,

feared losing the gains they had made. B. Cooke and J. R. Vincent, *The Governing Passion* (Harvester Press, 1974), recorded that, by the mid-1800s, politicians of all major parties "believed politics was ultimately about the organization and presentation of the parliamentary community, in such a way that the working class could be contained. . . . The politicians of 1885/86 were dealing seriously and adequately with the main problem confronting them, namely that of *presenting themselves and the world of parliamentary activity generally in a sufficiently attractive, necessary and interesting way to maintain a general consent to their hegemony*, and so maintain the political system they had been used to since 1868"emphasis added). According to the historian E. J. Hobsbawm, by the 1860s, the dominant class in England was amenable to representative government elected by popular majorities because its efforts to blunt the working class had convinced it that it was no longer revolutionary in nature. Of course, he also noted that not all capitalists were that sanguine, observing that the then leader of the lamestream media, *The Times*, did not regard majority representative government acceptable until 1914 when the working class's consent to fighting a war for the dominant class was needed; see Hobsbawm, *Industry and Empire*, revised edition, (London: Penguin Books, 1999).

These tensions explain why the universal franchise we enjoy today was established in fits and starts. For instance, in England in 1819, a mass demonstration demanding universal suffrage was met with violent repression at Peterloo. Hussars, on horses with swords drawn, rode into the crowds, killing fifteen and injuring many. No charges were laid against the zealous troops. In 1832, the male urban middle class was given the right to vote, whereas previously only landowners had this right. All skilled urban males were given the vote in 1867 and, in 1884, working class men in the countryside won voting rights. In 1918, all men over twenty-one and women over thirty obtained the vote and women over twenty-one won the same right in 1928. In Canada, until 1848, women were systematically excluded from pre-confederation and post-confederation electoral rights. A limited number of women were granted the vote in 1917. They had to be relatives of males serving in Canada's or British armed forces. In 1918, women were fully enfranchised. Asian peoples did not get the right to vote until 1898 but it remained the case that, should a province discriminate against a race, that would be honoured by the federal government and those people were not eligible to vote. British Columbia (Chinese and Japanese) and Saskatchewan (Chinese) had such racially discriminating laws. In 1949, this restriction was removed. First Nations' people had the right to vote as early as 1867, provided they gave up or

had lost their Indian status. It was not until 1950 that Inuit people were enfranchised. In Australia, the first voting rights, as in Canada, were developed in the British colonies that were to become States after Federation. Each developed franchise rights separately. In New South Wales, in 1843, some members of the Legislative Council were elected. The voters were men owning land valued at two hundred pounds or who paid annual rent of twenty pounds, hefty sums. All males over twenty-one who could claim British citizenship could vote in elections as first, South Australia, then Victoria, New South Wales, and Tasmania won limited self-government rights. When New South Wales established an upper chamber for its parliament in 1856, that upper chamber was appointed not elected, and it had governing powers. The lower chamber was voted for by all adult males. In 1895, South Australia and, in 1899, West Australia enfranchised women. Apart from Tasmania (which still had some property ownership requirements) all male British subjects over twenty-one had the vote. In 1902, the second year after federation, the Commonwealth enfranchised all British Subjects over twenty-one who had been in the country for six months, males and females. Australia was the second country to enfranchise women in this way, New Zealand having preceded it. But the Australian law disenfranchised Indigenous people from Australia, Asians, Africa, and the Pacific Islands (unless they were Maori). It was not until 1962 that these restrictions were overcome. Today, all Australian citizens over twenty-one (unless imprisoned for some offences) have the right to vote. In the US, too, the right to vote came in stages. Originally, each of the States had their own conditions. Most States only gave the vote to white males who owned property. By 1856, property was no longer a requirement, but voters had to be male whites. Eventually, the federal Constitution, step by step, instituted reforms. The 15th Amendment, eliminated discrimination in respect of voting on the basis of race, colour, or servitude; the 19th Amendment barred discrimination on the basis of sex (1920); inhabitants of the District of Columbia were declared eligible to vote for the president and vice-president by the 23rd Amendment in 1961; poll taxes were no longer to constitute a bar after 1964 (24th Amendment); no one over eighteen could be disqualified because of age as a result of the 1971 26th Amendment. The spirit of liberalism's de jure equality for all has been hard to implement.

On the Poor Law systems and the struggle around them, see William P. Quigley, "Five Hundred Years of English Poor Laws, 1349–1834: Regulating the Working and Nonworking Poor," *Akron Law Review* 40, no. 1 (1987); Katrina Honeyman, "The Poor Law, the Parish Apprentice, and the

Textile Industries in the North of England, 1780–1830," *Northern History* 44, no. 2 (2007) documents how parish administrators and factory owners combined to turn children into fake apprentices in order to get them off the books; Bryan Palmer, "The New Poor Law: A Chapter in the Current Class War Waged from Above," *Labour/Le Travail* (forthcoming); Sidney and Beatrice Webb, *English Poor Law History* (Hamden, Conn.: Archon Books, 1963); Frances Fox Piven and Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Vintage, 1972); Thompson, *Making of the English Working Class*; John Knott, *Popular Opposition to the 1834 Poor Law* (London/Sydney: Croom Helm, 1986); E. Hobsbawm, *Industry and Empire*.

The Disraeli quote is found in William Flavelle Monypenny and George Earle Buckle, *The Life of Benjamin Disraeli, Earl of Beaconsfield, vol. I, 1804–1859* (London: John Murray, 1929), 629. The reformed Poor Laws were so harsh, local authorities were forced to carve out a great number of exceptions enabling them to grant outdoor relief, that is, handing out benefits to people not committed to the workhouses.

While the decision in *Stewart* v. *Somerset*, 1772 Lofft 12, 98 E.R.506, ended slavery in England, the emancipation of slaves in the remainder of the British Empire had to wait until the enactment of *The Slavery Abolition Act* 1833, 3 & 4 Will. IV c. 73. While, by then, England was considered the leader when it came to the adoption of liberal philosophical ideas and ideals, this had not translated into the abandonment of antithetical practices; see Domenico Losurdo, trans. Gregory Elliott, *Liberalism: A Counter History* (London/New York: Verso, 2014). The Master and Servant Acts also reflected this apparent paradox. For a small sample of the extensive literature on the persistently coercive nature of these statutes, see Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth* Century (Cambridge University Press, 2010); D. Hay, "Property, Authority and the Criminal Law" in *Albion's Fatal Tree* (New York: Pantheon, 1975); D. Hay, "Working Time, Dinner Time, Serving Time: Labour and Law in Industrialization," *University of Oxford Discussion Papers in Economics and Social History*, no. 164 (2018), also in E. Tucker and J. Fudge, eds., *The Class Politics of Law: Essays Inspired by Harry Glasbeek* (Halifax/Winnipeg: Fernwood, 2019); S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005); Christopher Frank, *Master and Servant Law: Chartists, Trade Unions, Radical Lawyers and the Magistracy in England, 1840–1865* (Farnham: Ashgate, 2010). When slavery in

the British colonies was abolished, the English allowed their representatives in the widespread empire to use adaptations of the Master and Servant Acts to telling effect; see D. Hay and P. Craven, eds., *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955* (Chapel Hill, NC: University of North Carolina Press, 2004) (note the end-date of the study). Jay M. Feinman, "The Development of the Employment at Will Rule," *American Journal of Legal History* 20, no. 2 (1976): 118–35, writes about the way in which the US, until very recently, resisted the idea that workers were employed for indefinite periods and could not be dismissed without a proportionally calculated amount of notice. Note that, although this rule did not develop to help workers (it allowed employers to treat their workforce as just-in-time inventory), it did give them some assistance. As seen, leaving their employ without permission led to criminal sanctions in the English system; the United States' hiring at will rule meant that they were not necessarily acting criminally when engaging in a concerted withdrawal of labour.

K. Marx's observation about how long it took to forge labour markets compatible with capitalists' goals in *Capital, vol. I,* chapter 10, is echoed by Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times*, 1944 (Boston: Beacon Press, 2001).

On violence used against workers trying to organize, see Sally McManus, *On Fairness* (Melbourne University Press, 2019); "Violence, the police, mercenaries and the military have been used across time and the world to bust strikes, persecute union leaders and suppress worker protests" (13). Some examples included: UK trade unionists swore allegiance to unionism on pictures of skeletons because they knew the price of being caught was death; Tolpuddle Martyrs, in the 1830s, were deported to Australia; in 1903, Colorado passed martial law to put down silver/gold mine strikers; in 1929, in Rothbury, NSW, one man was killed and forty-five injured as police opened fire on marchers protesting a lock-out.

Notes to Chapter 2 Capital-labour struggles better described as wars

For the vicious employer reactions to the *Wagner Act*, see *Proposed Amendments to the National Labor Relations Act: Hearings Before the [La Follette] Subcomm. of the Senate Comm. On Education and Labor*, 76th Cong., 1st Sess. 29; see also Irving Bernstein, *Turbulent Years: A History of the American Worker 1933-1941* (Houghton Mifflin, 1970); Karl Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41," *Minnesota Law Review* 62 (1978): 265. Klare also documents the resistance of the judiciary to the promotion of unionization and collective bargaining. On the Mohawk Valley Formula, see the decision in *Remington Rand, Inc.* (1937), 2 *National Labor Relations Board*, 626, 664.

The New Deal policies were enshrined in the *National Industrial Recovery Act*, 48 Stat. 195 (1933), and was struck down as unconstitutional in 1935, leading to Roosevelt's threats to "pack the Court." 1935 saw the passing of the *Wagner Act*, formally entitled the *National Labor Relations Act*, 49 Stat. 449 (1935). Its earlier incarnations included the *Railroad Labor Act*, 44 Stat. 577 (1926), and its 1934 re-enacted version, 48 Stat. 1185. The dates tell the story of the continuity of the struggles. The *Norris-LaGuardia Act*, 49 Stat. 449, intended to help save the legislated remedies from employers' attacks in the courts, was enacted in 1932. The decision upholding the validity of the *Wagner Act* was handed down in 1937 in *National Labor Relations Board* v. *Jones & Loughlin Steel Corporation* 301 U.S. 1 (1937). This defeat did not stop employers from litigating to try to limit the powers of the National Labor Relations Board (NLRB), see *NLRB* v. *Pennsylvania Greyhound Lines Inc.* 303 U.S. 261 (1938); *NLRB* v. *The Falk Corporation* 308 U.S. 453 (1940); *American Federation of Labor* v. *NLRB* 308 U.S. 401, 1940. It should be noted that President Roosevelt was unenthusiastic about the enactment of the *Wagner Act*, and it was only the fierce strike actions during the period 1933–1936 that brought him onside. For overviews, see Chris Tomlins, *The State of the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (Cambridge University Press, 1985); Philip S. Foner, *History of the Labor Movement in the United States, Vol. 7: Labor and World War I, 1914–18* (International Publishing Co., 1987); Irving Bernstein, *A Caring Society: The New Deal, the Worker and the Great Depression—A History of the American Worker 1933-1941* (Houghton Mifflin, 1970).

Reports on the English working class have been chosen to illustrate the general points being made because the legal historical developments that still affect us evolved there in the first place and because England may fairly be said to have been at the forefront of what we now term the Industrial Revolution and of the emergence of liberal political philosophy whose ideas and ideals still have a hold on us. The contemporaneous drive to accumulate mercilessly and the political philosophy of individual sovereignty built in a set of contradictions which became all too visible. It spawned a host of formal inquiries as wealth creation and immiseration emerged as twin outcomes at a time when the sovereignty of individuals was being trumpeted as a major achievement of liberalism. For example, there were: Royal and Parliamentary Commissions of Inquiry dealing with the *Combinations Acts* of 1824 (to address the right of workers to collectivize); the report by Edwin Chadwick, discussed in the text; a number of commissions of inquiry into sewers, reflecting the continuing concerns with appalling living conditions in cities and the lack of clean water; as well as new, rather narrow, industrial safety rules. There also was much discourse on how to better educate, by policing, the working class to make it more useful to capital: *Report on the Sanitary Condition of the Labouring Population of Great Britain 1842* (from which the quotes in the text are taken); a Health and Town Commission in 1844 and seven Commissions on Sewers through the 1840s (to deal with the appalling living conditions in towns); a Commission on Mills and Factories in 1841; and a Factory Enquiry Commission in 1833 (examining workplace conditions); as well as variety of education, policing, life-style (eg., drunkenness) inquiries as people struggled with harsh conditions.

There are many formal academic and polemic accounts of the shocking conditions of the working class as capitalist relations of production exploded into maturity in England and elsewhere. My eclectic list includes Thompson, *Making of the English Working Class*; Jack London, *People of the Abyss* (Alan Rodgers Books LLC, 2006); Friedrich Engels, *The Condition of the Working Class in England*, reissued edition (Oxford Paperbacks, 2009); Benjamin Disraeli, *Sybil*; Charles Dickens, *Bleak House, Domby and Son, Nicholas Nickleby, Oliver Twist*; Elizabeth Gaskell, *Mary Barton*; Charles Kingsley, *Alton Locke*; Victor Hugo, *Les Misérables*; Emile Zola, *L'Assomoir*, *Germinal*; Styn Coninx, director, *Daens* (1992). In Australia, the nineteenth century brought misery in the cities that was said to exceed that which prevailed in the Midlands and workers and children suffered dreadful hardships; see Michael Cannon, *Life in the Cities: Australia in the Victorian Age* (Melbourne: Currey O'Neill, 1975); G. J. R. Linge,

Industrial Awakening: A Geography of Australian Manufacturing 1788 to 1890 (Canberra: ANU Press, 1979). The Canadian working class went through similar privations: Laurel Sefton McDowell and Ian Radfort, eds., *Canadian Working-Class History, Third Edition: Selected Readings* (Canadian Scholars Press, 2006); Eric Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario 1850–1914* (Toronto: University of Toronto Press, 1990); B. Palmer and G. Heroux, *Toronto's Poor: A Rebellious History* (Toronto: Between the Lines, 2016).

On the transformation of criminal law into regulatory law, see W. G. Carson, "The Conventionalization of Early Factory Crime," *International Journal for the Sociology of Law* 7, no. 37 (1979); W. G. Carson, "The Institutionalization of Ambiguity: Early British Factory Acts," in G. Geis and E. Stotland, eds., *White-Collar Crime: Theory and Research* (Beverly Hills: Sage, 1980); E. Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850-1914* (Toronto: University of Toronto Press, 1990).

On the Knights of Labor, see Steven Parfitt, "The First and-a-Half International: The Knights of Labor and the History of International Labour Organizations in the Nineteenth Century," *Labour History Review* 80, no. 2 (2015): 135; Gregory S. Kealey and Bryan D. Palmer, *Dreaming of What Might Be: The Knights of Labor in Canada, 1880–1900*, revised edition (Cambridge University Press, 2004). As the Knights of Labor's strength waned, one of the organizations that emerged was the Western Federation of Miners, especially in Western US and British Columbia. It was engaged in many violent struggles and helped found the Wobblies movement. Some of its locals persisted for a long time. One, a local of the Union of Mine, Mill and Smelter Workers in Sudbury, remained viable until 1993.

On the Haymarket Riots, see Philip S. Foner, *History of the Labor Movement in the United States* (International Publishing, 1974); James Green, *Death in the Haymarket: A Story of Chicago, the First Labor Movement and the Bombing that Divided Gilded Age America*, reprinted edition (Anchor, 2017); David Henry, *The History of the Haymarket Affair* (MacMillan Publishing Company, 2000); Paul Avrich, *The Haymarket Tragedy* (Princeton University Press, 1984).

On the Homestead and Pullman strikes, see David Brody, *The River Ran Red: Homestead 1892* (University of Pittsburgh Press, 1992); Paul Krause, *The Battle for Homestead 1880–1892: Politics, Culture, and Steel* (University of Pittsburgh Press, 1992); Jonathan Bassett, "The Pullman Strike of 1894," *OAH Magazine of History* 11, no. 2, *Labor History* (Winter 1997), 34; Richard Schneirov, Shelton Stromquist, and Nick Salvatore, *The Pullman Strike and Crisis of 1890s: Essays on Labor and Politics* (University of Illinois Press, 1999); Nick Salvatore, *Eugene Debs: Citizen and Socialist* (University of Illinois Press, 2007).

There has been a tendency to underplay the visceral and often violent nature of the Canadian capital-labour struggles; see Scott W. See, "Nineteenth-Century Collective Violence: Toward a North American Context," *Labour/Le Travail* 39 (1997): 13–38; for an account of the early Canadian struggles, see Gregory Kealey, *Toronto Workers Respond to Industrial Capitalism, 1867–1892* (Toronto: University of Toronto Press, 1980). For an account of the *Industrial Disputes Investigation Act* (IDIA), see Judy Fudge and Eric Tucker, eds., *Work on Trial: Canadian Labour Law Struggles* (Irwin Law, 2010); Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada* (Toronto: University of Toronto Press, 2015); Judy Fudge and Harry Glasbeek, "The Legacy of PC 1003," *Canadian Labour and Employment Law* 3 (1995): 357–400. The way in which class war is suffused by racial divides exploited by capital is reflected in the fact that the *IDIA* of 1907, engineered by MacKenzie King, was impelled in part by the 1907 race riots in Vancouver that arose from the large Chinese labour presence in the railway industry; see John Price, "MacKenzie King and the Aftermath of the 1907 Race Riots," *BC Studies* 156 (Winter 2007–8): 53.

On the Australian strike wave, see Stuart Svenssen, *Industrial Wars: The Great Strikes 1890–94* (Wool Ram Press, 1998); on the later Rothbury Riot, see Jim Comerford, *Lockout: The Northern New South Wales Coal Lockout 2nd 1929–3d June 1930; an Eyewitness Account of Australia's Most Violent Industrial Conflict* (Sydney: Construction, Forestry Mining & Energy Union, 2006); on the Great Strike in New Zealand, see, Melanie Nolan, ed., *Revolution: The 1913 Great Strike in New Zealand* (Christchurch: Canterbury University Press, 2005).

On the Everett Massacre, see Walker C. Smith, *The Everett Massacre: A History of the Class Struggle in the Lumber Industry* (IWW Publishing Bureau, 1916); John McClelland Jr., *Wobbly War: The Centralia Story* (Tacoma, Washington: Washington State Historical Society, 1987). On

the Industrial Workers of the World, their role in free speech fights and the assaults on them as World War I resistors, see a film by Travis Wilkerson, *An Injury to One*, 2003; Paul Buhle and Nicole Schulman, eds., *Wobblies!: A Graphic History of the IWW* (Verso, 2005); Melvyn Dubovsky, *We Shall Be All: A History of the IWW* (New York: Quadrangle/NYT Books, 1973); John Duda, ed., *Wanted! Men to Fill the Jails of Spokane: Fight for Free Speech with the Hobo Agitators of the IWW* (Chicago: Charles H. Kerr, 2009); Eric Thomas Chester, *The Wobblies in Their Heyday: The Rise and Destruction of the Industrial Workers of the World during World War I Era* (Praeger Publishers, 2014). In the US, 166 Wobblies were arrested and convicted under the new *Espionage Act 1917*; in Australia, the IWW was declared an illegal organization under a newly minted *Unlawful Associations Act*. More than 100 (out of a membership of 500 or so) were imprisoned. The IWW was considered a major influence leading to the defeat of two referenda which asked the population to support conscription in World War I. In Canada, the IWW was banned as a subversive organization, but it continued to flourish. Note here that, although the numbers and influence of the IWW were most impressive in the US and Canada, it had adherents in Australia, New Zealand, Germany, Luxembourg, Switzerland, Wales, Ireland, Scotland, and England.

On the Bread and Roses upheaval, see United States, Bureau of Labor, Charles Patrick Neill, *Report on the Strike of Textile Workers in Lawrence, Mass., in 1912*; Ruth Milkman, *Women, Work and Protest: A Century of Women's Labor History* (Routledge, 2013); Elizabeth Gurley Flynn, *I Speak My Own Piece: Autobiography of "The Rebel Girl"*(International Publishers, 1973); Upton Sinclair, *The Cry for Justice: An Anthology of the Literature for Social Protest* (Sinclair, 1915).

On the General Strike of 1926 in the UK, see Margaret Morris, *The General Strike* (Penguin Books, 1976); Charles Ferrall and Douglas McNeil, eds., *Writing the 1926 General Strike: Literature, Culture, Politics* (Cambridge University Press, 2015). See also the memoir of Duff Cooper (Lord Norwich) *Old Men Forget*, London, 1953.

On Canadian class conflicts, see generally, Stuart Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada 900–1960*, Task Force on Labour Relations, study no. 22, Institute of Industrial Relations, University of British Columbia, 1968; Craig Heron, ed., *The Workers' Revolt in Canada 1917–25* (Toronto: University of Toronto Press, 1998); on the

Winnipeg Strike 1919, see David Bercussen, *Confrontation at Winnipeg: Labour Industrial Relations, and the General Strike* (McGill-Queens University Press, 1990); Norman Penner, *Winnipeg 1919* (Toronto: James Lorimer Company, 1973); on the coal mine strikes in Cape Breton, see Ian MacKay and Suzanne Morton, "The Maritimes: Expanding the Circle of Resistance" in *The Workers' Revolt in Canada 1917–25*, ed. Craig Heron; David Frank, "Industrial Democracy and Industrial Legality: The United Mineworkers Association in Nova Scotia, 1908–1927," in *The United Mineworkers of America*, ed. John H. M. Laslett (Penn State University Press, 1996); on the later Estevan Riot, see Stanley Duane Hanson, *The Estevan Strike and Riot* (masters' thesis, University of Saskatchewan, 1971); Steven Hewitt, "September 1931: A Re-Interpretation of the Royal Canadian Mounted Police's Handling of the 1931 Estevan Strike and Riot," *Labour/Le Travail* 39 (1997): 159.

Some other stories of pitched class warfare include the Battle of Blair Mountain, the culmination of ceaseless conflict between West Virginia coal mine owners and unions. Its inglorious end, after many earlier killings, was a shoot-out between warring parties, ensconced in trenches, armed with machine guns and other deadly weapons, the use of planes and the deployment of 2100 troops by the president of the US; see *The Mine Wars*, on American Experience, PBS, aired September 3, 2019. See also Barbara Kopple's 1976 film, *Harlan County, USA.* The Flint sit-down strike at General Motors, a strategy employed by workers fighting for recognition of their union after the enactment of the *Wagner Act* had mandated this, saw GM cut-off the heating to the occupied plants, enlist the governor of Michigan who threatened the deployment of National Guards and who used 4,000 soldiers to cut-off the highway to Flint to stop supporters of the strikers. This was a fight won by the workers; see Bernstein, *Turbulent Years*; Julian Guerro, "The Flint Militants," *Jacobin*, October 13, 2017; Sidney Fine, *Sit-Down: The General Motors Strike of 1936-1937* (Ann Arbor: University of Michigan Press, 1969). In 1934, a truckers' strike led to a general strike in Minneapolis; the usual pitched battles involving the police, militia, scabs, and striking workers occurred, including one terrible day that became known, of course, as Bloody Friday; see Bryan Palmer, *Revolutionary Teamsters: The Minneapolis Truckers' Strike 1934* (Haymarket Books, 2014). The eighty-three day-long San Francisco strike of 1934 led to gun fights, beatings, and other such violence and boasted a Bloody Thursday.

Notes to Chapter 3 World War II: Promises made, fulfilled, and then diluted

The famous Roosevelt declaration of the need for a Second Bill of Rights was made in a speech entitled *The Economic Bill of Rights*, delivered on January 11, 1944. While the Roosevelt speech is well-known to many, this was more because of who delivered it and the circumstances in which it was delivered than for the fact that its contents were unusual. The need to protect the vulnerable from unfettered capitalism's ravages had been addressed in many capitalist polities. Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (Basic Books, 2006), records that Mexico's 1917 constitution included a provision for social-welfare guarantees; in 1935, Spain's constitution provided for an assurance "to every worker the conditions for a fitting existence"; South Africa, Iraq, Finland, Portugal, Brazil, Poland, Uruguay, Ukraine, Romania, Bulgaria, Hungary, Russia, and Egypt all had constitutional promises of guarantees for a certain level of welfare and security. This, as in the US case, did not mean these promises were given full rein, but the common acknowledgment of the need to off-set capitalists' power is manifest. Note here that, in the US, in 1946, a bill was offered in the Senate, the Wagner-Murray-Dingell proposal to establish a national health insurance plan. This was defeated by fierce lobbying by the American Medical Association. This defeat for New Dealers was followed by the union-injuring *Taft-Hartley Act* in 1947. To promise radical reform does not lead to radical reform.

Roosevelt's declaration that "Necessitous men are not free men" was first used in an eighteenth century English judicial decision, *Vernon* v. *Bethell* (1762) 28 E.R. 838. There it was held that economic dependence led to coercion and, therefore, vitiated any contract made under such duress because it had to be understood that "to answer a present exigency" a person "will submit to any terms that the craft [here the dominant party] may impose." This book is pre-occupied with the problem that is created by law pretending away this insight when modern day contracts of employment are administered and enforced.

While the emphasis here is on the *Wagner Act* reforms engineered under the New Deal, it was part of a much larger plan to restart the capitalist engine. Michael Hitzik, *The New Deal: A Modern History* (Free Press, 2011), documents some of the Works Progress Administration's

achievements—more than 651,000 miles of highway, 124,000 bridges, 125,000 public buildings, including 41,300 schools, 469 airports, 800 parks, 18,000 playgrounds and recreational facilities and the Tennessee Valley Authority; see also Nick Taylor, *American-Made: The Enduring Legacy of the WPA: When FDR Put the Nation to Work* (Bantam, 2008).

The European Recovery Act, the formal name for the Marshall Plan, was approved by Congress in 1948.

The anti-red card was played with great fierceness, testimony to the influence Soviet success had on policymakers in the West. In one of the more blatant cases, in 1949, the Canadian government imported an American union, the Seafarers International Union, headed by Hal Banks, a man charged with having committed a homicide in the US. His task was to displace the Communist-led Canadian Seamen's Union. Only after the SEIU had succeeded was an inquiry into these dark practices instituted and Hal Banks had to flee the country; See Jim Green, *Against the Tide: The Story of the Canadian Seamen's Union* (Toronto Progressive Books, 1986); Craig Heron, "Communists, Gangsters, and Canadian Sailors," *Labour/Le Travail* 24 (1989): 231; William Kaplan, *Everything that Floats: Pat Sullivan, Hal Banks, and the Canadian Seamen's Union* (University of Toronto Press, 1987). The purges in the US were supplemented by allegations of, and major public inquiries into, union bullying and misfeasance to demonstrate to the population that unionism had to be cleansed before it was to be accepted. The cultural attacks took the form of films such as *On the Waterfront*, with its images of bullying and criminality. A little later, the McCarthy hearings made communism, socialism, or just leftism anathema, putting real pressure on the union movement. In Australia, the Communist party's opposition to the war effort had led to its being banned. Immediately after the war, a Labor Government felt it could not afford to show any softness in the face of allegations of communist influence in trade unions. In 1947, Evatt, who was to become the first chairman of the General Assembly of the United Nations, broke a strike on defence projects by having the military protect scabs. Anti-red sentiments justified the safeguarding of these defence undertakings. By 1949, the war-time Labor government having been succeeded by a Liberal one, legislation was introduced to declare the already banned Communist Party an illegal association. Eventually this legislation was held to be unconstitutional. By then, however, the die had been cast. Within the Labor Party, a Catholic Action party had been formed with the support of some deeply anti-communist unions. This caused a split, and the peculiarities of the preferential and proportional voting schemes, led to the

Labor Party being excluded from power for nearly twenty-three years even though it got the largest number of votes at nearly every election. It was not until it could be shown that both the Labor Party and the union movement had been purged of communist and fellow travelling influences that Labor became electable again.

On the idea that corporate wealth might make a mockery out of liberal democracy, taking power away from elected governments, an idea that had given life to the push for a new social entente, see R. A. Dahl, *Preface to Democratic Theory* (New Haven: Yale University Press, 1966); R. A. Dahl, *After the Revolution? Authority in a Good Society* (New Haven: Yale University Press, 1970). On the utility of countervailing power to off-set these democratic deficits, see John Kenneth Galbraith, *American Capitalism: The Concepts of Countervailing Power*, 1952 (Kessinger Publishing, 2010).

Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* (New York: Free Press, 1965); Peter Drucker, *The Unseen Revolution: How Pension Fund Socialism Came to America* (New York: Harper & Row, 1976). The titles say it all: "Eschew these foreign ideas and ideologies!" In this context it became fashionable to declare that, as there were no inherent class conflicts, it would make sense for the owners of the means of production to sacrifice some profits to ensure that workers, the environment, and consumers were not adversely affected by their chase for profits. Managers were urged to be conscious of their social obligations; see Edward S. Mason, ed., *The Corporation in Modern Society* (Harvard University Press, 1960); see also H. J. Glasbeek, "The Corporate Social Responsibility Movement—The Latest in Maginot Lines to Save Capitalism," *Dalhousie Law Journal* 11 (1988). Of course, intellectual defenders of capitalism objected; see M. Bruce Johnson, *The Attack on Corporate America*, Law and Economics Center, University of Miami School of Law, McGraw-Hill Book Company, 1978; Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits," *New York Times Magazine*, September 13, 1979. In due course, these ripostes provided a platform for the push-back by capitalism that ended Les Trente Glorieuses. (While thirty or so years may look like a long period, it is but a historical hiccup, a relatively brief segment of capitalism's long reign.); see C. Harman, *A People's History of the World from the Stone Age to the New Millennium* (Verso, 2008), 548. In the meanwhile, let us remind ourselves that the willingness of scholars to lend their heft to the status quo is a well-established phenomenon; see the introduction to this book where the eagerness to stabilize and promote freedom of contract was

noted; and, more recently, in a moment of triumphalism, Francis Fukuyama announced that there was no longer any need to talk about any other regime replacing liberal market capitalism as we had devised the best of all systems; see his *The End of History & the Last Man* (New York: Avon, 1993).

The post-war decolonization struggles became a focus of the Cold War conflict as the Western and Soviet blocs sought military, ideological, and economic advantage. The Bandung response, namely, to develop an alliance of non-aligned nation states to act as a third protagonist on the world stage, added fuel to an already fierce fire. The many claims of autonomy by sovereign states gave a spur to activists who were trying to establish more domestic respect for the different identities and cultures whose lot they wanted to improve.

For a broad overview of the improved social wage schemes, see Gosta Epsing-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton, NJ: Princeton University Press, 1990). He summed up the movement as one which went some way to the de-commodification of labour (unionization, unemployment insurance, public pensions, child benefits), and one in which services, such as health, education, culture, recreation, and housing, were increasingly provided as entitlements rather than let them be determined by the ability to pay. It is interesting that the gains in the social wage were the least generous in the US, despite the respect accorded the Roosevelt Bill of Rights speech.

On inclusive and industrial citizenship, see T. H. Marshall, *Class, Citizenship, and Social Development* (Garden City, NY: Anchor Books/Doubleday, 1965); H. W. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century," *Canadian Bar Review* 45, no. 4 (1967): 786–830; for an earlier and equally sanguine view of the taming of capitalism, see Anthony Crosland, *The Future of Socialism*, 50th review ed. (Constable & Robinson, 2006). The claim that things had been improved because workers had a better status now was a little discomfiting for those who thought that it was freedom of contract that had been the key to help the working class escape the hardships of the rigidly status-based social relations that characterized feudalism; see the scholarly exchange between O. Kahn-Freund, "A Note on Status and Contract in British Labour Law," *Modern Law Review* 30, no. 6 (1967): 635–44, and R. W. Rideout, "The Contract of Employment," *Current Legal Problems* 111 (1966).

The formal title of the *Taft-Hartley Act* was *The Labor Management Relations Act 1947*, 29 U.S.C. Labor. The formal title of the *Landrum-Griffin Act* was *The Labor-Management Reporting and Disclosure Act 1959*, 29 U.S.C.A., para. 401, et seq.

As workers pushed for gains in the UK as the war ended, employers took to the courts where their old friends found ways to bypass statutory protections. They were most imaginative, for instance, overcoming the need to establish knowledge by the defendant of the existence of a contract to found an inducing breach of contract action. It was ruled that the defendant merely needed constructive knowledge of the contract; subsequently, courts decided that a breach of contract was not essential, that an interference with commercial relations should suffice; and, even more radically, that, while inducing a breach of contract might, as a result of a statute, have become non-actionable during a trade dispute, a threat to cause such a breach was not protected. Devilish cleverness in the service of property and contract principles; see *Thomson & Co. Ltd.* v. *Deakin*, [152] Ch. 646, *Rookes* v. *Barnard*, [1964] A.C. 1129; *Stratford* v. *Lindley*, [1965] A.C. 269; *Emerald Construction Co. Ltd.* v. *Lowthian* [1966] 1 All E.R. 1013; *Daily Mirror* v. *Gardner* [1968] 2 Q.B. 762; *Morgan* v. *Fry* [1968] 2 Q.B. 710; *Torquay* v. *Cousins*, [1969] 2 Ch. 100. For an overview of this judicial politicking, see K. W. Wedderburn, *The Worker and the Law* (Macgibbon & Kee, 1966). Some of this will be examined a little more closely in a later chapter. Here it suffices to note that unions had to go back, again and again, to the legislature to get protections against the new legal impediments. Uncertainty and anger reigned. This was the context for the launching of the Donovan Commission and undergirded its recommendations.

For a good account of the taming and co-opting of unions to allow Les Trente Glorieuses to take off in the US, see Michael Yates, *Naming the System: Inequality and Work in the Global Economy* (New York: Monthly Review Press, 2003), 220 et seq.; see also W. Gould IV, *A Primer on American Labor Law*, 1963, 6 ed. (Cambridge: Cambridge University Press, 2019), who notes that having to submit disputes arising during an agreement to a grievance process was the employers' concession to win enforceable no strike provisions during the life of a collective agreement. Implicit in the various policymakers' and reporting commissions' reforms was the notion that workers' unions had to be tolerated but that they should be controlled. As one of the signatories of the Donovan report noted "there is nothing much wrong with British industrial relations which a few effective unions exercising more authority over their members could not

remedy"; per A. Shonfield, *The Times*, October 6, 1970. To this end, managers had to share some of their control with unions which could then be asked to rein in their members.

The emphasis of this chapter has been on the way the struggles over the scope collective actions by workers should be given shaped the institutional designs that came out of a series of incidents and economic changes. It is to be acknowledged, however, that there are many sociological theories that postulate that what is called the taming and co-optation of unions here are not due to particular social, economic, or political circumstances but are built into the very structure of unions as bureaucracies which has evolved within the parameters of a capitalist political economy. For an excellent overview of the strengths and weaknesses of these varied approaches to the nature of unions, see Richard Hyman, *Marxism and the Sociology of Trade Unionism* (London: Pluto Press, 1971).

On the Canadian Ford Motors strike, see William Kaplan, "How Justice Rand Devised His Famous Formula," in *Work on Trial: Canadian Labour Law Struggles*, eds. Judy Fudge and Eric Tucker (Toronto: Osgoode Society for Canadian Legal History, 2010); William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press, 2009). The principle that unions had a duty to ensure that the workers they represented honoured the prevailing restrictions on collective action was endorsed by a luminary among industrial pluralists and *Wagner Act* model cheerleader Bora Laskin; see his decision in *Re Polymer*, (1958) 10 L.A.C. 31, aff'd by the Supreme Court of Canada, [1962] S.C.R. 338 (sub nom *Imbeau v. Laskin*). Laskin was consistent; see his decision in *Re C.G.E.*, (1951) 21 L.A.C. 608.

For the evolution of plant-by-plant bargaining, see H. Pentland, *A Study of the Changing Social, Economic and Political Background of the Canadian System of Industrial Relations*; for the Woods Task Force, see below; see also Judy Fudge and Harry Glasbeek, "The Legacy of PC 1003," *Canadian Labour and Employment Law Journal* 3 (1995): 357–400.

The judgment writing in *Hersees of Woodstock* v. *Goldstein* (1963), 38 D.L.R. (2d) 449 (C.A. Ont.), was so poor that it would have got a failing grade in a second-year law school examination. In a perverse way, it was a bit of a bonus for the emerging industrial pluralists who wanted to argue that Canada had to ditch the anti-worker notions developed by the courts over two hundred years. To them it was proof that the judges should be kept out of industrial relations; see H. W. Arthurs, "Picketing, Public Policy and Per Se Illegality," *Canadian Bar*

Review 41 (1963): 580, buttressing his earlier "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship," *Canadian Bar Review* 38 (1960): 346. Yet, it was not until 1999, thirty-six years later, that the Supreme Court of Canada explicitly said that the *Hersees* decision no longer ruled; see *U.F.C. W, Local* 1518 v. *KMart Canada Ltd.* [1999] 2 S.C.R. 1083; *Allsco Building Products Ltd.* v. *U.F.C.W., Local 1288P* [1999] 2 S.C.R. 1136.

The two Ontario inquiries into labour injunctions were A. W. R. Carrothers and E. E. Palmer, *Report of a Study on the Labour Injunctions in Ontario* (Toronto: Ontario Deptartment of Labour, 1966); Ontario, *Report of the Royal Commission Inquiry into Labour Disputes* (Toronto: Queen's Printer, 1968), Chair I. C. Rand (yes, the same one). The federal inquiry was Canada, Canadian Industrial Relations, *The Report of the Task Force on Labour Relations* (Ottawa: Queen's Printer, 1969), Chair H. D. Woods.

Williams v. *Hursey* (1959) 130 C.L.R. 30 was a politically significant decision as it reflected an on-going dispute within union ranks about where to stand on the red scare. This dispute led to a splitting in both the union and political Labor Party movements which effectively kept the Australian Labor Party out of federal office for nearly twenty-three years.

The legal struggle about whether administrative agencies with expertise should be freed from judicial oversight and control has its equivalents everywhere. Many legislators are persuaded to leave polycentric issues to regulatory agencies with expertise and, therefore, put privative clauses in the governing legislation, that is, provisions that seek to sideline the courts; see Shaun Fluker, "Does a Privative Clause Completely Oust Judicial Review? Comment on *Green* v. *Alberta Teachers' Association*, [2015] A.B. Q.B.," ABlawg.ca, July 29, 2015: "Privative clauses are almost a given in statutes governing administrative tribunals these days, and the Supreme Court has repeatedly affirmed that a privative clause cannot completely oust judicial review. The authority on this point is *Crevier* v. *Quebec* [1981] 2 S.C.R, 220." In recent years, it has been a major legal and political controversy in Australia as more conservative governments have sought to make it easier for individuals (read: employers) to access the common law and the common law courts by widening the scope to apply to the administrative tribunal to permit a court action to be launched when a statutory provision is alleged to have been violated.

The South Australian court in *Woolley* v. *Dunford* [1972] 3 S.A.S.R. 243, accepted the existence of a tort now known as interference with contractual relations, an extension of the tort of

inducing a breach of contract; it also stated that mere interference with performance would suffice to ground the action and, while there should be knowledge of the contract or contractual relations, it did not need to be actual knowledge—constructive knowledge would do; this eagerness to give greater scope to union-impeding doctrines was endorsed a few years later in *Davies* v. *Nyland* [1975] 10 S.A.S.R. 76. As will be seen, this embrace of UK judicial anti-union decisions became ever warmer.

For a comprehensive overview of the changes in New Zealand, see Gordon Anderson, "Competing Visions and the Transformation of New Zealand Labour Law," in *Transforming Workplace Relations in New Zealand, 1976–2016,* eds. Gordon Anderson, Alan Geare, Erling Rasmussen and Margaret Wilson (Wellington: Victoria University Press, 2017).

When the Canadian government enacted the *Anti-Inflation Act*, S.C. 1975, c. 75, wages in 1974 had registered an increase of 12.1% and of 13.8% in 1975. These gains had come as workers had struck frequently (often illegally) in their desperate efforts to keep up with price rises. At the end of one year of the statute's operation, wage increases had moderated to 6%, to rise again to 9% when the statute's life came to an end. When it was all over, the brake on wages had been much more effective than that on prices. The *Act* was challenged constitutionally by trade unions; see *Reference Anti-Inflation Act* [1976] 2 S.C.R. 373. This challenge was defeated. The judges showed their pro-property, anti-collectivized workers' bias. They accepted the government's argument that the rate of inflation had created a national emergency which warranted the restrictive legislation. The government's evidence for this claim was a speech by the governor of the Bank of Canada at a lunch; the judges thought this was good enough even though seventeen of the most reputable economists in the country gave formal evidence that the inflation rate presented no emergency at all. The successful reining-in of workers provided a lesson. Soon all Canadian governments would impose restraints on their own employees. They did this to cut down costs of services and to show private employers that it was worthwhile to show some spine and reject workers' demands; see Leo Panitch and Donald Schwartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3 ed. (University of Toronto Press, 2003).

The luminaries of the Mont Pelerin Society included Frank Knight, Karl Popper, and Ludwig von Mieses. There are many studies of the intellectual history of neoliberalism, as well as many popular comments on its manifestations; see Quinn Slobodian, *Globalists: The End of Empire*

and the Birth of Neoliberalism (Harvard University Press, 2018); Stephen Metcalf, "Neoliberalism: The Idea that Swallowed the World," *The Guardian*, August 18, 2017; for my own account, see *Capitalism: A Crime Story* (Toronto: Between the Lines, 2018). Sometimes the title of a book tells us what the political thrust of this intellectual and public re-education was; see Michael J. Crozier, Samuel P. Huntington, and Joji Watanuki, *The Crisis of Democracy: Report of the Governability of Democracies to the Trilateral Commission* (New York University Press, 1975). The Trilateral Commission was a group of major capitalists from the US, Europe, and Japan and its mission was the renewed flourishing of untamed capitalism; see Stephen Gill, *American Hegemony and the Trilateral Commission*, revised edition, Cambridge Studies in International Relations, bk. 5 (Cambridge University Press, 1992).

On Rogernomics, see Brian Easton, *The Making of Rogernomics* (Auckland: Auckland University Press, 1989); on the war on New Zealand's labour institutions, see Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?* (Auckland: Auckland University Press, 1993); for Gordon Anderson's conclusion on the reversion to nineteenth century thinking in New Zealand, see work cited above.

Typical of their mordant humour, Australians came to call those who pushed for deregulatory reforms, and who presented themselves as economic rationalists, ecorats.

On the Accords, see K. Wilson, J. Bradford, and M. Fitzpatrick, eds., *Australia in Accord: An Evaluation of the Prices and Incomes Accord in the Hawke-Keating Years*, Workplace Studies Centre and School of Applied Economics, Victoria University, 2000; P. Ewer, I. Hampson, C. Lloyd, C. Rainford, S. Rix, and M. Smith, *Politics and the Accord* (Pluto Press, 1991); M. Pusey, *Economic Rationalism in Canberra: A Nation Building State Changes Its Mind* (Melbourne: Cambridge University Press, 1991); G. Singleton, *The Accord and the Australian Labour Movement* (Melbourne: Melbourne University Press, 1990).

As noted, the material plusses and minuses of the Accords are hard to assess, but it is notable that the share of national income going to labour in 1963 (under compulsory arbitration's reign) was 63%; after the Accords it was around 50%. While this is not conclusive, it does shed light on why it might be that the employing class waged a fierce war on the arbitral wage system.

On *Work Choices*, see J. Murray, "Work Choices and the Radical Revision of the Public Realm of Australian Labour Law," *Industrial Law Journal* 35 (2006): 343; *Special issue on the Work*

Choices Scheme, Australian Journal of Labour Law 19 (2006): 95 et seq.; J. Riley and K. Peterson, *Work Choices: A Guide to the 2005 Changes* (Sydney: Thomson, 2006); I. Ross, J. Threw and T. Sharard, *Bargaining under Work Choices* (Sydney: Butterworths, 2006); A. Stewart and K. Peterson, *The Work Choices Legislation: An Overview*, 2006, supplement to B. Creighton and A. Stewart, *Australian Labour Law*, 4 ed. (Sydney: Federation Press, 2004); C. Sappideen, P. O'Grady and G. Warburton, with K. Eastman, *Macken's Law of Employment*, 6 ed. (Sydney: Lawbook Co., 2009).

Some of the English-inspired court cases that helped the politicians, and perhaps the general public, to see merit in promoting individualism over collectivism, commercial profit-seeking over workers' self-interested pursuits, were *Latham* v. *Singleton* [1981] 2 NSWLR 843; *Dollar Sweets Pty. Ltd.* v. *The Federated Confectioners' Association of Australia* [1986] VR 383; *Mudginberri* v. *Australasian Meat Industry Employees' Union*, (1985) 9 Federal Ct. R. 425; *Ansett Transport Industries (Operations) Pty. Ltd.* v. *Australian Federation of Air Pilots* (1989) 95 ALR 211. The symbiosis between the legislative and judicial assault on unions was on full view in the post-Work Choices period in *Patrick Stevedores Operations No. 2 Pty. Ltd.* v. *Maritime Union of Australia* (1998) 195 CLR 1.

On the unions' successful anti-Work Choices struggle and the disappointing reforms by the Labor Party, see H. Glasbeek, "Rudderless in a Sea of Choices: The Defeat of the Your Rights at Work—Analysis and a Possible Response," *Dissent* 29 (Autumn/Winter, 2009): 33. While the right to strike was slightly better protected than it had been by the Work Choices legislation, it still forbade secondary boycotts and industry-wide actions, and the employers' right to use the old tort laws were only slightly more inhibited.

On the potential significance of making the for-profit corporation the pivot of the labour regulatory system, see Harry Glasbeek, "IR Reforms: Implications for Corporate Scholars and Activists," *Australian Journal of Corporate Law* 24 (2010): 110. Michael Quinlan's observation on the state of capital-labour relations law in Australia is to be found in "Australia 1788–1902: A Workingman's Paradise?" in *Masters. Servants and Magistrates in Britain and the Empire, 1562–1955*, eds. D. Hay and P. Craven (Uni. North Carolina Press, 2004), 249.

The conservative Australian governments, taking their cue from the post-war plots in the US, have amplified their assaults on unions by mounting commissions of inquiry to establish that

unions are not only anti-market and anti-freedom but also corrupt and criminal; see *Royal Commission into Building and Construction* (Chair: Cole), 2009, which led to the establishment of a fierce oversight body with powers that some equate to those of the Star Chamber (somewhat ameliorated by a subsequent Labor government, but not abolished by it until 2022 when it provided a less draconian version of this odious legislation); for a follow up on this draconian path, another public inquiry, which responded favourably to the implicit direction, was established: *Royal Commission into Trade Union Governance and Corruption* (Chair: Heydon), 2016.

On the PATCO strike, see Joseph A. McCartin, "Professional Air Traffic Controllers' Strike (1981)," *Encyclopedia of U. S. Labor and Working Class History*, ed. Eric Anderson (CRC Press, 2006); he pithily remarked that Reagan was "laying down a marker." Joseph A. McCartin, *Collision Course: Ronald Reagan, the Air Traffic Controllers and the Strike that Changed America* (New York: Oxford University Press, 2013); Alan Greenspan, "The Reagan Legacy: Remarks by Chairman Alan Greenspan at Ronald Reagan Library, California," April 9, 2003, agreed: "[M]ost importantly his action gave weight to the legal right of private employers, previously not fully exercised to use their own discretion to both hire and discharge workers." It successfully encouraged a meatpacking firm in Austin. Hormel P-9 demanded a 23% wage cut from its employees in 1985. Fifteen hundrend workers went on strike. Six months into the strike, the parent of the local union of the United Food & Commercial Workers asked the local to stop the strike. When this was disobeyed, the parent put the local into receivership. Ten months after the strike had begun, it collapsed. It had been violent and National Guards had been deployed to patrol the streets of the small city of Austin. The employer hired new workers at much lower wages and then sold the business which then hired a large number of Mexican workers; see Elizabeth Baier, MPR News, August 9, 2010. The attacks have continued. Fairly recently, Wisconsin's Governor Scott Walker sought to build a national reputation (he was briefly touted as a potential Republican Presidential candidate) by attacking the State's public employees. His *Act 10* barred public employees from bargaining over health coverage, pensions, workload, and hours of work. It was still possible to bargain over wages provided that no increase over the inflation rate was to be agreed to by the parties. More, unions that intended to bargain would be forced to have an annual vote to determine whether a majority of its members wanted to belong to the union; as well it was no longer legal to have dues checked off by the employer and

employees would have to pay 10% more by way of contributions to their pension and health plans. The political upheaval was intense but, in the end, unions lost a large number of their members; see Steve Greenhouse, "Wisconsin's Public-Sector Unions Fight Back as Supreme Court Case Looms," *The Guardian*, January 4, 2016.

On the impact of these persistent manoeuvres on the working of the Wagner Act model in the US, see Kate Andras, "The New Labor Law," *Yale Law Journal* 126 (2016): 5.

On the attack on Canada's post office workers' union, see Harry Glasbeek and Michael Mandel, "The Crime and Punishment of Jean-Claude Parrot," *Canadian Forum* (August 1979).

On the assault on public sector workers, see Panitch and Schwartz, *From Consent to Coercion*.

The literature on the struggles to have collective bargaining guaranteed as part of the *Charter*'s guarantee of freedom of association is voluminous. For my own views, see "A No-Frills Look at the Charter of Rights and Freedoms and How Politicians Hide Reality," *Access to Justice, Windsor Year Book* 9 (1989): 293; "Contempt for Workers," *Osgoode Hall Law Journal* 87 (1990): 805. After a slow start, the Supreme Court of Canada gradually, if somewhat reluctantly, began to see the social difficulties with its position. This movement started coming to the fore in *Dunsmuir* v. *Ontario (Attorney-General)* [2001] 3 S.C.R. 1016, followed by *Attorney-General of Ontario* v. *Fraser* [2011] S.C.R. 20. In a split decision, *Saskatchewan Federation of Labour* v. *Saskatchewan* [2015] 1 S.C.R. 1, the Court held that governments should not take away any right to strike it had given workers unless it was absolutely necessary and an adequate alternate dispute settling process had been put in its place. For this slow, tremulous evolution, see E. Tucker, "Farm Work Exceptionalism: Past, Present, and the Post Fraser Future," in *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, eds. F. Faraday, J. Fudge and E. Tucker (Irwin Law, 2012); Judy Fudge and Heather Jensen, "The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice," *King's Law Journal* 27, no. 1 (2016).

On the impact on Canada's versions of the Wagner Act model, see Eric Tucker, "Shall Wagnerianism Have No Dominium?," *Osgoode Legal Studies Research Papers* 49 (2014). Robert Hajaly, "How Canada Can Achieve Greater Equality and Shared Prosperity," *Toronto Star*, January 7, 2020, cites Statistics Canada to report that unionized workers' median wages are 37% higher than those of non-unionized workers. The sharp decline in unionization to 16% of

private sector workers is therefore closely tied to the growth in the numbers of the working poor. On the working poor in Canada, see Louise Montbraaten, "Visible Minorities More Likely to Be Working Poor," *Toronto Star*, November 26, 2019. On the downward spiral of unionization and its correlation to a downward pressure on wages, see Carlo Fanelli and Stephanie Luce, "Austerity without End," *The Bullet*, August 15, 2019.

On the coal miners' strike, see Martin Adeny and John Lloyd, *The Miners' Strike: Loss without Limit* (Routledge & Kegan Paul, 1986); Seamus Milne, *The Enemy Within*, updated ed. (Verso, April 2014); Geoffrey Goodman, *The Miners' Strike* (Palgrave MacMillan, 1985); Sunday Times Insight Team, *Strike: Thatcher, Scargill and the Miners* (Coronet Books, 1985); Raphael Samuel, *The Enemy Within—Pit Villages and the Miners' Strike 1984-85*, eds. Barbara Bloomfield and Guy Boana (Routledge, 1987); there has been a slew of documentary films and feature movies: see *The Miners' Strike and Me*, directed by Stuart Ramsay (March 12, 2014), TV movie; *Billy Elliot*, directed by Stephen Daldry (2000); *Brassed Off*, directed by Mark Herman (1996).

For the Thatcher quote, see Ronald Butt, "Interview with Margaret Thatcher," *Sunday Times*, May 1, 1981. Her belief that she had succeeded in changing the soul of the nation was evinced when she reportedly said that her legacy was Tony Blair.

Paul Smith, "Labour under the Law: A New Law of Combination, Master and Servant Acts in 21st-Century Britain?," *Industrial Relations Journal* 46, no. 5–6 (2015): 345–64.

For my take on thinking capitalists' concerns, see *Class Privilege: How the Law Shelters Shareholders and Coddles Capitalism* (Toronto: Between the Lines, 2017): ch. 13.

Warren Buffet interview, CNN, January 4, 2011.

The new trends in literature to find new solutions to overcome the failures of the existing mechanisms of capital-labour adjustment cover an enormous amount of ground. A short, non-exhaustive list, includes: R. Mitchell, ed., *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, CELRL (University of Melbourne, 1998); C. Arup, P. Graham, J. Howe, R. Johnstone, R. Mitchell, and A. O'Donnell, eds., *Labour Law and Labour Market Regulation* (Sydney: Federation Press, 2006); B. Langille, "Labour Policy in Canada: New Platform, New Paradigm," *Canadian Public Policy* 28 (2002):133; C. Barnard, S. Deakin,

G. S. Morris, eds., *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Oxford/Portland: Hart Publishing, 2004); Sally Wheeler, *Corporations and the Third Way* (Oxford/Portland: Hart Publishing, 2002); H. Collins, "Is There a Third Way in Labour Law?," in *Labour Law in an Era of Globalization*, eds. J. Conaghan et al. (New York: Oxford Uni. Press, 2002); G. Davidoff and B. Langille, eds., *Boundaries and Frontiers of Labour Law* (Portland/Oxford: International Institute of Labour Studies and Hart Publishing, 2006); Helen Anderson, ed., *Directors' Personal Liability for Corporate Fault—A Comparative Analysis* (The Netherlands: Kluwer Law International, 2008); A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001); G. Schmidt and B. Glazier, eds., *The Dynamics of Full Employment: Social Integration through Transitional Labour Markets*(Cheltenham: Edward Elgar, 2002); Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: Public Affairs, 2019); Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices*, UK Dept. for Business, Energy, and Industrial Strategy, 2017; Ursula Huws, Neil Spencer, and Simon Joyce, *Crowd Work in Europe: Preliminary Results from a Survey in the U.K., Sweden, Germany, Austria and The Netherlands*, Foundation for European Progressive Studies, 2016; David Graeber, *Bullshit Jobs* (New York: Simon & Schuster, 2018); Shelley Marshall, Richard Mitchell, and Ian Ramsay, eds., *Varieties of Capitalism, Corporate Governance and Employees* (Melbourne: Melbourne University Publishing, 2008); P. Hall and D. Soskice, eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); C. Crouch, *Capitalist Diversity and Change: Recombinant Governance and Institutional Entrepreneurs* (Oxford: Oxford University Press, 2005).

For the point on law being more than superstructural and ideological, see Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton/Oxford: Princeton University Press, 2019); Alan Stone, "Place of Law in the Marxian Structure."

Notes to Chapter 4 The common law's anti-collectivism and the impoverished right to strike

The song "Solidarity Forever" was written in 1915 by Ralph Chaplin, an active member of the Industrial Workers of the World, the Wobblies. For his own account of this, see his "Why I Wrote Solidarity Forever," *American West*, January 1968. By the time he wrote this article, the US union movement was disappointing him. He thought that the *Wagner Act* model had led to the kind of unionism and accommodation with capital which betrayed the goal of the Wobblies who had fought for the abolition of the work-for-wages regime. He thought this denied the spirit of "Solidarity Forever" which, in every verse, supported the Wobblies' goal.

On the working-class belief and assertion that, without workers, there is no production of wealth, see Bertold Brecht's "Questions from a Worker Who Reads." It contains stanzas such as "Great Rome is full of triumphal arches. Who erected them?" and "The young Alexander conquered India. Was he alone?"

The liberal law's starting position to the effect that it will enforce screamingly unequal contracts is so well-established that it has its own descriptor. It is said that, for a contract to be enforceable, there has to be real consideration, that is, the promissor and promissee must agree to give the other something in return for what they get. If a court is clear that there has been that kind of exchange, it does not matter whether an outsider might think that one of the parties is not getting enough in return for its promise. What matters is that there was some thing promised in return, even if it was only a peppercorn; see *Chappel* v. *Nestle*, [1959] UKHL 1, per Lord Somerwell of Harrow, 1971: "A contracting party can stimulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promise does not like pepper and will throw away the corn." This legal doctrine is, of course, deadly for workers who, in fierce competition with others just like them, are forced to accept terms and conditions which will leave them impoverished. More profoundly, the doctrine also throws light on a core problem with liberal political philosophy. Rawls, in his justly respected *A Theory of Justice* (Harvard University Press, 1971), looked for a way to ensure fairness. He settled for an allocation of resources and entitlements by a distribution which required the distributors to determine what the least well-off in society should get. The guiding star was to be that the

distributors had to think that, acting behind a veil of ignorance, they might be the least well-off. Ingenious as this is, it is also an acknowledgement that there is nothing in liberal political philosophy, and therefore in liberal law, which provides a scientific or moral basis for the allocation of resources and entitlements. The social good is to be determined by people thinking of their own interest first and last.

The sentence which states that the right to withhold their property gives property owners a right to strike may be thought to be ill-chosen because a strike is usually defined as requiring a collective withholding of resources. But the point is made in the way it is because an employer's property is often a collection of assets and, very often, held by a corporation which, in functional terms, is a collection of things and people. The "property" of individual workers, however, being the sum total of their talents, physical and intellectual capacities, is one "thing" and this is why, when they want to exercise economic power, the withholding is to be done in concert. This is why the strike is thought to require a collective and why the legal formalists think the term should not be applied to an individual capitalist. Also note that, in addition to recognize the reality that a capitalists' assets are a collectivized lump of properties, it is understood by statutes that an individual capitalist might be able to strike: just as there are rules governing strikes there are rules governing a lock-out.

The quote "Dare to struggle, dare to win. If you don't fight, you lose" is attributed to John Cummins, president of the Victorian Branch of the Construction, Forestry, Mining & Energy Union.

For the OECD report on types of bargaining regimes, see OECD, *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*, Organization for Economic Cooperation and Development, 2019; J. Stanford, F. Macdonald, and L. Raynes, *Collective Bargaining and Wage Growth in Australia*, The Centre for Future Work at the Australian Institute, November 2022; see also K. Ewing and J. Hendy, *Reconstruction After the Crisis: A Manifesto for Collective Bargaining*, The Institute of Employment Rights, 2013, for an earlier but similar set of findings and a description of different models of bargaining.

The assault on collectivized bargaining everywhere, including in some of the more worker-friendly jurisdictions in the EU, was coordinated; see S. Deakin, "Social Policy, Wage Determination and EMU: Towards an Egalitarian Solution to the Crisis," Paper Line 4 Europe,

2013; S. Clauwaert and I. Schomann, “The Crisis and National Labour Law Reforms: A Mapping Exercise,” ETUI Working Paper, 2012; T. Schulten, “The Troika and Multi-Employer Bargaining: How European Pressure is Destroying National Collective Bargaining Systems,” *Global Labour Column* 139 (2013). It is Schulten’s discussion of the European Commission report that is cited in the text; see European Commission, *Labour Market Developments in Europe*, 2012. It is acknowledged here that the OECD report and analyses only apply to one sector of nations among the world’s political entities. But its scope addresses conditions in the more mature capitalist political economies and, of direct interest to this work, includes the Anglo-American sphere.

In the text, it is noted that Greece, categorized as a system which features some sectoral bargaining, had such a sharp reduction in workers covered by collective bargaining after the Troika re-moulded its social and economic relations that, to arrive at the average drop in coverage of 6.3% in this category, the OECD excluded the Greek catastrophic loss from its calculations. In Greece, there had been national agreements which set minimum conditions for all workers and industry-wide sectoral agreements allowed better conditions to be negotiated and special firm-level agreements could allow to improve those conditions. All this was thrown out after the Troika’s interventions which, among other things, allowed the enforcement of agreements which provided worse conditions than had prevailed under the old national agreements.

While it is to be expected that the more collectivized workers are the greater their ability to improve their working conditions and terms, a recent study puts actual figures on this; see J. Stanford, F. Macdonald, and L. Raynes, *Collective Bargaining and Wage Growth in Australia*, cited above, who calculate that each loss of 1% of bargaining coverage leads to an 0.16% loss in annual wage growth in Australia. Commenting on proposed reforms which might improve the coverage of workers by collectivized bargaining, they contend that a 10% of growth in coverage would yield 1.6% in annual wage or a boost of $1,473 per annum for the average full-time worker. The Australian Bureau of Statistics (ABS) reports the connection in a different way. In a study reporting on the downward trend in union membership, it recorded that union members’ wages median weekly earnings stood at $1,520 per week, compared to those of non-union workers who took home $1,208 weekly, a considerable gap; see Workplace Express, “Union Density Meets Pandemic Cliff: ABS,” December 14, 2022. Union membership is, of course,

correlated with collective bargaining coverage. It is easy to see why employers oppose improvements in workers' capacity to form unions and strengthen collectivized bargaining.

On the concept of Legal Origin as an explanatory force for the evolution of one kind of capital-labour regime rather than any other, see M. Jones and R. Mitchell, "Legal Origin, Legal Families and the Regulation of Labour in Australia," in *Varieties of Capitalism, Corporate Governance and Employees*, eds. S. Marshall, R. Mitchell, and I. Ramsay (MUP Academic, 2008).

The scholarship in the area of study called Varieties of Capitalism (VoC) has found it to be possible to assign different manifestations of capitalism to one of two major categories. While any one nation state slotted into one category may well have features generally attributed to the other category, VoC scholars are sanguine that they have the necessary indicia to characterise a nation state into one of the two overarching compartments rather than the other. This enables them to assess and predict the way in which disputes and conflicts will be dealt with by a nation; see S. Marshall, R. Mitchell, and I. Ramsay, eds. *Varieties of Capitalism*; Charles J. Whalen, ed., *New Directions in the Study of Work and Employment* (Edward Elgar Publishing, 2008); P. Hall and D. Soskice, eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001). Some of the scholars argue that this frame of analysis is useful to see how things are but does not provide any tools for imagining or initiating change; see N. Wailes, R. Lansbury, and J. Kitay, "Varieties of Capitalism and Employment Relations under Globalization: Evidence from the Auto Industry," in *New Directions in the Study of Work and Employment*, ed. Charles J. Whalen (Edward Elgar Publishing, 2008); Harry Glasbeek, "*Varieties of Capitalism, Corporate Governance and Employees*, edited by Shelley Marshall, Richard Mitchell and Ian Ramsay," *Australian Journal of Corporate Law* 22 (2008): 293.

The discussion on the judiciary's involvement in setting the table for the creation of the Anglo-American mechanisms of adjustment begins with references to two eighteenth-century decisions, *Keeble* v. *Hickeringill* (1706) 103 E.R. 1127 and *Tarleton* v. *M'Gawley* (1794) 170 E.R. 153 and then turns to nineteenth and twentieth centuries decisions. These include: *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] 435; *Mogul Steamship Co.* v. *McGregor Gow and Co.* [1892] A.C. 25; *Lumley* v. *Gye* (1853), 118 E.R. 749; *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426; *Quinn* v. *Leathem* [1901] A.C. 495; *Allen* v. *Flood* [1898]

A.C. 1; *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A.C. 700; *McKernan* v. *Fraser* (1931) C.L.R. 343; *Rookes* v. *Barnard* [1964] A.C. 1129. For other decisions which sprang out of these and refined them, see the cases listed in the notes to chapter 3 where the line of cases which relied on these English developments in Australia and Canada are also listed.

As the English courts were busy carving out the legal principles restricting collectivism which, they believed, should govern capital-labour relations, they were complementing and manipulating legislative efforts impelled by the same goal. When the nineteenth century opened, Parliament had enacted two statutes, the *Combination of Workmen Act 1799 & 1800*, 39 Geo'3, c. 81 and 39 & 40 Geo.3, c. 106. They made all combinations interfering with the right to trade criminal and were in part impelled by the fear that the English working class might be tempted to emulate the French Revolution. The courts were happy to impose sanctions whenever they deemed these statutes to be violated. This harshness was relieved by a repealing statute in 1824. But this largesse lasted only twelve months. In 1825 the *Combinations Laws Amendment Act Repeal Act* 6 Geo 4, c.129, provided that it remained non-criminal for workers to combine to negotiate wages or hours at their own place of work, but any other kind of collective action was re-criminalized if violence to the person or property by threats or intimidation were used to attain different contract terms. In 1859, the *Molestation of Workmen Act* 22 Vict., c.34, used similar language. The *Lumley* v. *Gye* decision was handed down in 1853 so it is clear that the legislative provisions, including the *Master* & *Servant Acts*, already achieved much of what the courts were eager to achieve. Maybe this is why the decision in *Lumley* v. Gye did not immediately draw attention to its potential to affect capital-labour relations. Note that the forbidden "intimidation," made criminal by both the 1825 and 1859 statutes was given new life in the bellwether decision *Rookes* v. *Barnard* which made intimidation a tort, a civil action which could skewer trade unions—a method, as seen in the text, regularly used by courts who purported not to be doing anything novel. Note also that the threat to break an individual contract for employment was held to be the equivalent of the "violent" conduct criminalized by the 1825 and 1859 legislation. Paul Smith, "*Rookes v. Barnard* and the Trade Union Question in British Politics," (2019) *Industrial Relations Journal* (2019), notes that, at trial, J. Sachs specifically told the trial jury that the threat of an unofficial strike was the same as an act of violence, intimidation at pistol point; in the House of Lords, Lords Hodson and Devlin used similar language. Smith's piece, which puts *Rookes* v. *Barnard* in both its legal and political historical context, suggests that these sentiments

may have impelled the courts to make their thunderclap decision without having much judicial precedent on which they could rely. They cited two Irish State cases, decided in 1938 and 1940, which had been cited without any evident disapproval in a 1957 English case. When the heart is convinced, the brain will follow.

To return: the next major piece of legislation was the *Trade Union Act 1871* 34 & 35 Vict., c. 31 which removed the legal disabilities imposed by the courts' treatment of unions as unlawful associations in restraint of trade. This statutory remedy had been provided as the working class's legal plight had forced the government of the day to hold an inquiry; see the *Eleventh & Final Report of the Royal Commission of 1867*. Reflexively, the judiciary hit back, as the text notes; this forced another inquiry to be established, *Report of the Royal Commission on Trade Disputes and Trade Combinations*, which decriminalized combining to obtain better conditions and terms. But the judiciary lay in waiting. In a series of cases handed down in the last years of the nineteenth and first six years of the twentieth century, the courts made life unlivable for unions. The workers sought parliamentary protection and got the *Trade Disputes Act 1906*, 6 Edw.7, c. 47. For the politics surrounding the enactment of the 1906 law, see Paul Smith, "The Trade Dispute Bills of 1903: Sir Charles Dilke and Charles Percy Sanger," *Historical Studies in Industrial Relations* 36 (2015): 159.

The statutory protections granted in England, unlike the judicial decisions, were—with a few exceptions—not replicated in other Anglo-American jurisdictions. See Canada's federal government's partial replication of the UK 1871 Act, its *Trade Unions Act 1872*, SC 1872, which required that, for a union to get the benefit of the statute, it had to be registered (very few unions ever took advantage of this); in British Columbia, after a court there had given a decision giving life to England's *Taff Vale* decision, a *Trade-Union Act* S.B.C. 1959, c. 90 was passed—it partially, but only partially, replicated the protective UK law, the *Trade Disputes Act 1906*; similar partial enactments followed, in 1944 in Saskatchewan and Ontario; see the *Trade Union Act*, S.S 1944 (2nd session) c. 69; *Rights of Labour Act* S.O. 1944, c. 54. Here it may be appropriate to note some Canadian differences from the UK developments.

The text discusses the picketing cases very briefly, in particular the conflicting readings in *Lyons* v. *Wilkins* and the *Ward Lock* cases. In a Canadian case called *Williams* v. *Aristocratic Restaurants Ltd.* [1951] S.C.R. 762, the *Ward Lock* reasoning was favoured. As noted in the text,

this has not done much to stop courts from enjoining picketing actions; see E. E. Palmer, "The Short Unhappy Life of the 'Aristocratic' Doctrine," *University of Toronto Law Journal* 13 (1960): 166; see also *U.F.C.W., Local 1518* v. *Kmart Canada Ltd.* [1999] 2 S.C.R. where the Supreme Court listed the many kinds of conduct which can turn an otherwise protected picket into an unlawful one. To foreshadow a note below: the willingness to enjoin picketing clashes with the pressure on the courts to give some rein to political protests. On another front: the requirement of an unlawful act to found an action in intimidation is easily found where workers' actions are in breach of a statutory procedural requirement. That is, just as a breach of contract was added to the list of unlawful acts—added that is to the commission of a tort or a crime—in polities such as Canada a breach of a collective bargaining law (and there are tight restrictions in the Wagner Act model) should do the trick; see *Gagnon* v. *Foundation Maritime Ltd.* [1960] S.C.R. 435; *Therien* v. *International Brotherhood of Teamsters* (1959) 16 D.L.R. 646. The category of things which make worker militance unlawful has been enriched.

The statute which followed the defeat of the English coal miners' strike in 1926 was the *Trade Disputes and Trade Unions Act 1927*. For a description of its draconian nature. See Paul Smith, "*Rookes* v. *Barnard* and the Trade Union Question in British Politics," *Industrial Relations Journal* 50, no. 5–6 (2019): 431–49. Smith throws a great deal of light on the history of the renewal of judicial intervention in the 1960s. He notes that, during the war, even the courts seemed to understand that different times required a different approach. In a case called *Crofter Handwoven Harris Tweed Co.* v. *Veitch* [1942] 435, the House of Lords held magnanimously—given its history—that, if workers combined primarily to serve their own interests, rather than hurt those of the employer, they should be immune from liability in civil conspiracy, just as the ship owners had been in 1892. They acknowledged that the right to strike is an essential element of the principle of collective bargaining. For Canadian readers, this should be arresting. When freedom to associate was included as a constitutionally protected right in Canada's Constitution, trade unions which had their strike rights abrogated by governments went to the courts to claim that their Charter-guarantee of freedom of association signified that their existing right to strike could not be taken away. The Supreme Court of Canada rejected their claim, arguing in part that Charter rights were fundamental rights and that the right to strike was not a fundamental right as it had been bestowed by statute, by means of an elected government, rather than found to exist by an unelected court; see *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1

S.C.R. 313; *PSAC* v. *Canada* [1987] 1 S.C.R. 424; *RWDSU* v. *Saskatchewan* [1987] 1 S.C.R. 460 (the Canadian labour trilogy). It was not until 2015, twenty-eight years later, that the Supreme Court of Canada conceded—after much criticism, after unions had become enfeebled, after the ILO had ruled that Canada was out of step with international norms—that the decision rendered in *Crofter* in 1944 (and in Australia in 1931 in *McKernan* v. *Fraser* (1931) 46 C.L.R. 343) to the effect that freedom to associate must allow workers a right to strike, should rule in Canada. This account should be sobering to trade unions and their allies when, feeling imperilled by the politicians, they tend to reach out to the courts for succour. For an example, note that Ontario unions, supported by many non-union and even anti-union groups, reached out to the judiciary when a right-wing government suspended their bargaining rights; for an analysis, see Harry Glasbeek, "Ford, CUPE, Class Struggle and the Charter: A Primer," *Canadian Dimension*, November 8, 2022.

The A. V. Dicey quotation is from *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 2 ed. (MacMillan, 1914), 199.

For non-lawyers, another judicial technique is noteworthy. The game changing *Taff Vale* decision came after the railways and their workforce had been locked in struggle for about three years. Unquestionably the judges would have known this. This context plays no part in their written reasons which focus on the interpretation of the 1871 statute: did the statute's wording permit expanding the scope of union legal responsibility, a decision to be made as a formal one, not as one affected by industrial and social upheaval. Part of the judicial methodology is to deny social and political context, in effect to deny history and class. This gives judges more manipulation room; simultaneously it makes some people suspicious of their methodology and motivation. The same thing was true of the *Glamorgan Coal* case where the desire of workers and many employers to control output had been a major public controversy which had raged over a long time before the judges made their decision; see Paul Smith, "Unions 'Naked and Unprotected at the Altar of the Common Law'. Inducement of Breach of Contract of Employment: *South Wales Miners' Federation and Others v. Glamorgan Coal Co. and Others* [1905]," *Historical Studies in Industrial Relations* 35 (2014): 33.

The *Glamorgan Coal* discussed in the text made it crystal clear that, when workers induce a breach of contract, the courts will refuse to allow them to claim that they should be immune from

civil liability on the basis that they were justified because they were pursuing their own interests. There are odd exceptions. One celebrated instance is *Brimelow* v. *Casson* [1924] 1 Ch.302. A manager of a theatre company paid chorus performers less than a scale set by an actors' union. The union asked theatre owners who had contracted to hire out their premisses to the offending theatre manager's company to breach those contracts in order to bring pressure on the theatre company manager. The union was found to have induced breaches of contract but had been justified in doing so because the court was outraged by the outcome of the below scale pay. One chorus "girl" had been forced to live in "immorality" with another member of the company who, even more scandalizing, was "a tiny, deformed creature, a dwarf …who was an abnormal man." There are very few other instances of courts accepting justification as a defence; see, however, *James* v. *The Commonwealth* (1939), 62 C.L.R. 339, where the inducer believed that its action had been mandated by the law, but it was eventually decided that that law was constitutionally invalid. To all intents and purposes, the courts have held that, even when workers are understood to be genuine when they claim that their primary goal is to pursue their own interests, this will not furnish them with the same kind of protection that traders/capitalists are given when they hurt others when pursuing their interests.

The common law cases discussed fall under a rubric known to lawyers as Economic Torts. This label signifies that the harm complained of is economic/financial damage inflicted by a violation of a common law duty and that, to succeed in a civil action to recover, it is not necessary for the injured parties to show that they suffered any physical or psychic injuries. Of course, where the complaint is one about a physical or psychic injury, the result sought is, just as it is in an economic tort case, an award of monetary compensation. The supposed distinction between economic and other torts is (what by now should be the familiar) part of the sophistry in which lawyers excel. The felt need to distinguish the two areas of civil liability is the fear that, should the principles of compensation for physical harms be applied to financial loss claims, the impact would be economically dangerous. Physical harms, by their very nature, are contained (although the recent rise in class actions is making this less true than it used to be). Financial/economic losses are not as limited in scope because they are not limited to identifiable persons in one vicinity. The interconnectedness of business activities means that harms flow on from violations in many directions. This might inhibit profit-seeking initiatives. There is a built-in, but rarely

acknowledged need, for courts to treat profit-seeking activities differently to other kinds of conduct which leads to financial/economic losses.

The passage from the House of Lords judgment in the *Mogul* case set out in the text acknowledges the fact that "trade" requires promotion and special treatment. The sentiment was caught even more vividly by Chief Justice Coleridge who presided over the trial phase of that case: "Very lofty minds, like Sir Philip Sidney with his cup of water will not stoop to take advantage, if they think another wants it more … but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business … I cannot see that these defendants [the ship owners and their association] have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice"; see (1888), 21 Q.B.D. 544, 553. Similarly, in *Lumley* v. *Gye*, one of the judges, J. Erle, wrote that "the procurement of the violation of the right is a cause of action." These sweeping pronouncements were proffered in cases involving actors engaged in profit-seeking at each others' expense.

This is not what workers and their unions do as they seek to inflict financial or economic costs on employers. They are not pursuing profits. This is why their actions are known as industrial torts. They are a species of economic torts. They are treated differently. There is a hidden class-based reason for differential treatment. As it would be destructive of the elaborately maintained façade that the judiciary approaches all individuals who come before the law apolitically, neutrally, to admit this, it is never explicitly admitted. The differential treatment of industrial torts which legally are pictured as being part of a larger category of torts, namely, economic torts, is disturbing to many status quo scholars; T. Weir, "An Analysis of the Economic Torts," *Law Quarterly Review* 118 (2002): 164, wrote that economic torts, largely because of the decision making in the industrial torts sphere, constitute an area of law "which is very widely considered a mess". J. D. Heydon, whose prominence helped him become a judge of the High Court of Australia, authoritatively noted that "there cannot be any account of the economic torts which is comprehensible without effort"; see his *Economic Torts*, 2 ed. (London: Sweet and Maxwell, 1978); see also R. Podolny, "The Tort of Intentional Interference with Economic Relations: Is Clarity Out of Reach?," *Canadian Business Law Journal* 52 (2011): 63. In relatively recent times, courts have had to revisit the area because their fiercely anti-union decisions might make entrepreneurs liable for ordinary, if vigorously competitive, conduct. As

seen in the text, the tort of intimidation may be made out if it threatens contractual rights of other. As well, courts had come to hold that it was fine to do away with the need to find that there had been a breach of a contract—interference with contractual relations would do; more: they no longer required that there be actual knowledge that a contract existed or any knowledge of such a contract's terms (leading cases include *D.C. Thomson & Co. Ltd.* v. *Deakin* [1952] Ch. 646, *J.T. Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269, *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] Ch. 106, *Woolley* v. *Dunford* (1972) 3 SASR 243, *Dollar Sweets Pty. Ltd.* v. *Federated Confectioners* [1986] V.R. 383, *Ansett Transport Industry (Operations) Pty. Ltd.* v. *Australian Federation of Air Pilots* (1989), 95 ALJR 211, *Emerald Construction* v. *Lowthian* [1965] AC 269). All this added up to a revival of a very old maxim which said that all these categories of economic torts were merely special applications of an overarching common law principle. This was that there was a general rule that to cause a loss by unlawful means was actionable. The nature of the unlawfulness and whether the harm was the result of the action of a third person (accessorial) or whether or not an identifiable right, such as a contract had been breached, ought not to matter. Add to this the fact that there are some established economic torts which support the line of reasoning that liability may exist whether or not there a separate unlawful act or whether or not a contract or contractual relations had been harmed, namely the torts of injurious falsehood and passing-off. The danger to business if there is a general rubric of liability for doing harm by unlawful conduct is great. The awkwardness of all this was seen by the UK Supreme Court (formerly the House of Lords) and it decided to consider the question of whether there was just one general rule or separate rules, that is, whether it made sense to separate some economic torts from others. It consolidated three economic loss cases with very different factual causes of the harms inflicted and explored the question of whether they should all be treated in the same way: *OBG Ltd.* v. *Allan*, *Douglas* v. *Hello! Ltd. (No.3)*, *Mainstream Properties Ltd.* v. *Young* [2007] UKHL 21. Its conclusion was that there were at least two torts, not just one, and that one most likely to affect dealings between businesses was limited to the finding of a separate unlawful act. This is vague enough to lead to further manipulative decision making, but it does illustrate the fact that the judiciary is aware that its inclination to restrict workers' power may have the potential to interfere with its zeal to help capitalists out; see *A.I. Enterprises Ltd.* v. *Bram Enterprises Ltd.* [2014] 1 S.C.R. where the Supreme Court of Canada which explicitly observed that the tort of holding people liable for interference with economic interests by

unlawful means "should be kept within narrow bounds" and "should remain a tort of narrow scope"; see generally, Justice Peter Dutney, "The Economic Torts Revisited," *Queensland Lawyer* 28, no. 1 (2007): 5; P. Sales and T. Stilitz, "Intentional Infliction of Harm by Unlawful Means," *Law Quarterly Review* (1999): 411; H. Carty, *An Analysis of the Economic Torts* (Oxford University Press, 2001); H. Carty, "OBG Ltd. v. Allan: The House of Lords Shapes the Economic Torts and Explores Commercial Xonfidences and Image Rights," *Torts Law Journal* 15, no. 3 (2007): 283–99; James Lee, "Restoring Confidence in Economic Torts," *Tort Law Review* 15, no. 3 (2007): 172–76. The titles of the last two articles highlight the anxiety about the need to treat profit-seeking conduct differently.

On the recent reforms in New Zealand and Australia, see the *Fair Pay Agreements Act*, passed in October 2022, and the *Secure Jobs Bill*, passed in November 2022. While both are large strides given the many setbacks the labour movement suffered in the previous three decades, objectively they are modest reforms. The promoters of the New Zealand legislation suggest that the reforms should help improve the quantum and coverage of minimum standards although there is some hope that, should it help unionism grow, it might lead to better conditions all around. In Australia, the Labor government which introduced the reforms, went out of its way to say that (a), while it wanted to increase multi-employer bargaining, it did not envisage sector-wide or industry-wide bargaining and (b) that its intent was to leave firm-by-firm enterprise bargaining (as it is called in Australia) as the default position. In addition, the Australian reforming legislation has explicitly excluded the nation's largest (and arguably its most militant) union from engaging in multi-employer bargaining—presumably because that union has been the object of much finger-pointing about alleged corruption. This union represents construction and mining workers among others, likely the union best placed to make multi-employer bargaining count. In the US much attention has been paid to a spate of union drives at franchises of Starbucks and Amazon. The workers have organized themselves by building community links, rather than relying on existing union structures. They have had quite a large number of successes and have been certified as bargaining agents at many franchises. The employers are fighting back and making it difficult for new unions to be certified and for the recently certified ones to do anything with their certification. It is a poster story of how limiting the firm-by-firm (artificially created separate ones in these cases) is and how employers fight back when workers show their determination to change their lives; S. Kolhatban, "Starbucks: Poster Child for Corporate

Abuse," Socialist Project, *The Bullet*, February 28, 2023, noting seventy-eight Starbucks franchises were unionized but this only represented 3% of all stores; Jenny Brown, "The US Labor Movement Notched Some Impressive Victories in 2022," *Jacobin*, December 29, 2022; Sebastian Herrera, "Unionization Stalls at Amazon as Turnover, Company Efforts Stymie Activism," *Wall Street Journal*, December 28, 2022; Jonah Furman, "A New Report Shows the Labor Movement Hasn't Yet Reversed Its Decline," *Jacobin*, January 2023. At the time of writing none of these newly certified unions had won a first collective agreement (except for workers at an independent delivery firm which works exclusively for Amazon).

Some of the writings consulted in writing this chapter include: K. W. Wedderburn, *The Worker and the Law* (Penguin, 1965); K. W. Wedderburn, "Strike Law and the British Experience: The Labour Injunction 1850–1966," Wedderburn Papers, Warwick University; E. I. Sykes, *Strike Law in Australia* (Law Book Co., 1960); E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia* (Butterworths, 1972); F. B. Sayre, "Inducing Breach of Contract," *Harvard Law Review* 36 (1923): 663; F. B. Sayre, "Criminal Conspiracy, " *Harvard Law Review* 55 (1921–22): 393; K. Ewing, ed., *The Right to Strike* (Institute of Employment Rights, 2006); O. Kahn-Freund, "Labour Law," in *Selected Writings* (Stevens, 1978); Paul Smith, "Labour Under the Law"; J. A. G. Griffith, *The Politics of the Judiciary*, 5 ed. (HarperCollins, 1997); I. M. Christie, *The Liability of Strikers in the Law of Tort*, Industrial Relations Centre, Queen's University, 1967; A. W. R. Carrothers, "Recent Developments in the Tort Law of Picketing," *Canadian Bar Review* 35 (1957): 1005; A. W. R. Carrothers, *Collective Bargaining Law in Canada* (Butterworths, 1961); H. J. Glasbeek, "*Lumley v. Gye*: The Aftermath: An Inducement to Judicial Reform?," *Monash Law Review* 1 (1975): 187; Peter G. Heffey, "The Survival of Civil Conspiracy: A Question of Magic or Logic," *Monash Law Review* 1 (1974–75): 136; C. Grunfeld, "Inducing or Procuring Breach of Contract," *Modern Law Review* 16 (1953): 86; L. Hoffman, "*Rookes v. Barnard*," *Law Quarterly Review* 81 (1965): 116; B. Laskin, "Picketing: A Comparison of Certain Canadian and American Doctrines," *Canadian Bar Review* 15 (1937): 10; H. W. Arthurs, "Labour Law—Secondary Picketing—Per se Illegality—Public Policy," *Canadian Bar Review* 41 (1963): 573; J. G. Fleming, *The Law of Torts*, eds. Carolynn Sappideen and Prue Vines, 10 ed. (Law Book Co., 2011); J. Hendy and G. Gail, "British Trade Union Rights Today and the Trade Union Freedom Bill," in *The Right to Strike from the Trade Disputes Act 1906 to a Trade Union Freedom Bill*, ed. K. Ewing (Institute of Employment Rights, 2006).

Notes to Chapter 5 How judges are programmed to define and interpret contracts of employment

The incidence of primitive forms of exploitation are too well known to require documentation. To take but a few instances: the Bhopal explosion leading to the deaths and injuries of tens of thousands of Indian people attributable to systemic omission to provide the kind of operational safeguards used by the same corporation in the "first world"; the Rana Plaza disaster; the use of child labour to mine cooltan, relied upon by "first world" corporations like Apple, Samsung, Dell, Hewitt-Packard; the egregious exploitation of children in Uzbekistan to pick the cotton from which respectable retailers like H&M profit; the killing of Indigenous people who stand in the way of advanced economies' investors and miners; the killing of environmental activists, as in the case of Berta Caceres whose assassination was ordered by the executives of an internationally funded firm; the horrendous conditions of work that lead to spectacular rates of suicide at outfits like Foxconn which serve corporations like Apple. The ravages are well-known and provide much fodder for news outlets and for many demands for more ethical behaviour. Recently, a *New York Times* investigation by Hannah Drieir ("Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S." , February 25, 2023), revealed that, in the US, 835 corporations, many of them giant ones, employed children contrary the laws of the land, many of them children of undocumented families. For my own documentation of these and many like illustrations of our capitalists' determined drive to maximize profits regardless of the human and ecological costs, see *Class Privilege: How Law Shelters Shareholders and Coddles Capitalism* (Toronto: Between the Lines, 2017); *Capitalism:k A Crime Story* (Toronto: Between the Lines, 2018). The conditions and terms of workers in the developing and undeveloped world reflect how hapless workers are in the face of relatively unregulated capital. To be sure, there are some scholars and opinion moulders who argue that, with all its flaws, capitalism has brought greater prosperity to more people than any other system ever managed; see Bill Gates at the World Economic Forum, Davos, 2019; Steven Prinker, "Is the World Getting Better or Worse?," TED, 2018; Nick Kristof, "Why 2017 was the Best Year in Human History," *New York Times*, January 6, 2018. But Jason Hickel, "Bill Gates Says Poverty Is Decreasing. He Couldn't Be More Wrong," *The Guardian*, January 29, 2019, observes that these claims are based on flawed reasoning and inadequate data and are politically loaded. They ignore the amazing impact on all

data of the unique explosive growth in China; they do not acknowledge that the only valid comparative data on poverty measures was not being compiled until 1981; that the historical record shows that the kind of poverty the defenders of capitalism see as being alleviated only began as capitalism began its reign; that the poverty rates they assume are artificially low. On the last point, the argument is that the cheerleaders for capitalism take an income of $2 a day as the poverty cut-off line. This, as Lant Pritchett has shown, in "Some Reflections: The Politics of Penurious Poverty Lines, Part II," *Centre for Global Department*, September 11, 2014, is a rate chosen to enable developed countries minimize the development aid they disburse. He argues that the daily consumption poverty line in the US is $30 per day, in India $1.38 per day. The gap being enormous, setting the poverty rate at $2 per day ignores the huge number of people who are above the very bottom line and the lowest upper poverty line. If this was taken into account, a world-wide figure of $7.40 per day might be a more realistic cut-off between poverty and non-poverty. In 2019, this would leave 4.2 billion people living in miserable poverty.

On wage theft, see Annette Bernhardt, Ruth Milkman, and Nik Theodore, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, National Employment Law Project, September 21, 2019; Michael Felsen and M. Patricia Smith, "Wage Theft Is a Real National Emergency," *American Prospect*, March 5, 2019; for overviews of the Australian situation, see Killiam Plastow and Euan Black, "Employers Are Underpaying Workers 1.8 Billion a Year," *New Daily*, September 27, 2019; Samantha Dick, "Bar, Restaurant and Café Workers Are Still Being Ripped Off," *New Daily*, January 31, 2020. Another common means for employers to underpay workers is by having them work extra time, by not paying for time spent on shift change-overs, for time spent on dealing with evening inquiries by e-mail, by playing on their goodwill and have them do "extras" to assist the employing firm in its branding, and so on. The theft of time is a sophisticated business; see Laureen Snider, "Crimes against Capital: Discovering Theft of Time," *Social Justice* 28, no. 3 (Fall 2001); Laureen Snider, "Theft of Time: Disciplining through Science and Law," *Osgoode Hall Law Journal* 40 (2002): 89; Steven Bittle and Laureen Snider, "How Employers Steal from Employees: The Untold Story," *Social Justice* 45, no. 2 (Fall 2019).

The asymmetry between investor and worker rights when it comes to participation in vital corporate decision making is justified by the ruling mantra which holds that it is a corporation's duty to maximize profits for shareholders. This is often referred to as the primacy of shareholders

doctrine. Many progressive scholars and activists clamour for a different approach. Demands for a showing of more social corporate responsibility or, more strongly, requirements that boards of directors should be charged with a duty to take interests of stakeholders other than shareholders into account when serving the corporation, abound. The former is really a request; the latter approach envisages the imposition of a legal requirement on corporate decision-makers. Unsurprisingly, little headway is made on the latter. In the UK, company law now allows directors to take the interests of employees into account, although they do not have to do so. This underlines the point in the text: investors/capitalists are required to be served, others not so much. The very fact that the UK legislation was proffered as a positive reform points to the awkward legal position that obtained and was now sought to be remedied. Up to then, it had been a positive wrong for directors to put workers' interests over those of shareholders; see *Parke* v. *Daily News* [1962] Ch. 927. In the US, a number of States have enabled corporations to set themselves a goal to benefit interests other than those of shareholders. If the provision of a corporation's bylaws provides that its directors should be, say, environmentally pro-active, and they do so at the expense of the shareholders, the directors will not have committed a wrong on which the shareholders or their corporation can act. Of course, if the directors fail to act positively for the environment, they will have committed a wrong but it will be a wrong to the corporation, not to the environment. Only the corporation will be allowed to hold them responsible. Again, a clear indication of the special place investors occupy in law is being given by the narrowness of this reform. For an elaboration, see my *Class Privilege: How Law Shelters Shareholders and Coddles Capitalism* (Toronto: Between the Lines, 2017), and also "Controlling Corporations: The Miner, the Bus operators and Sharia law, " *Dissent* 39 (Spring 2012): 15–21.

On the definition of security, see *Securities and Exchange Commission* v. *W.J. Howey Company and Howey-in-The-Hills Service Inc.*, 328 U.S. 203; *Hawaii (State) by its Commissioner of Securities* v. *Hawaii Market Center, Inc.*, 485 P.2d (Sup. Ct. Hawaii); *Pacific Coast Coin Exchange of Canada* v. *Ontario (Securities Commission)* [1978] 2 Sup. Ct. Rep. 112. To raise an issue that will be revisited, note that the notion that investors entitled to profit from the labour of others is one that does not sit well with the defenders of liberal philosophy such as John Locke, who argued that the ownership of private property can be justified provided it is the fruit of an individual's personal efforts; John Locke, *Second Treatise on Civil Government: An Essay Concerning the True Original, Extent and End of Civil Government,* in *Social Contract,*

introduction by Sir Earnest Barker (London: Oxford University Press, 1960). The only effort put in by a security holder in a corporation is the depositing of money and the foregoing of enjoying that money immediately. This equating of the investment of inorganic capital with labour power is an elision that troubles the logic of capitalism.

In the text, it is noted that employers like to misuse the word partners when it suits them. Note a recent battle that took place at a Buffalo Starbucks. Workers wanted to unionize, complaining, among other things, about discriminatory behaviour. Starbucks put out a response: "Our 200,000 partners across the US are the best people in the business, and their experiences are key to helping us make Starbucks a meaningful and inspiring place to work. We offer a world-class benefits program for all part-and full-time partners and continued support for partners during COVID-19 to care for themselves and their families, and we continue to have an industry-leading retention rate." The workers were unconvinced and had a rare success, winning certification. They issued a statement: "We believe that there can be no true partnership without power-sharing and accountability"; see Sonali Kolhatkar, "Starbucks Workers Victorious in Their Fight for a Union," Socialist Project, *The Bullet*, December 20, 2021.

On the stevedoring case, see H. Glasbeek, "The MUA Affair: The Role of Law vs. The Rule of Law," *Economics and Labour Relations Review* 9 (1998): 188–221. Aided by the very conservative government of the day, the Patrick group of companies embarked on a union-busting campaign. It secretly trained scabs in Dubai in preparation. Its legal tactics included emptying two of the seventeen companies in the group of their material assets by requiring them to repay debts to their siblings and the parent of the group. That is, the financial assets of the whole of the group were unchanged but two of their members were now asset-less. Those two companies had been responsible to do the actual stevedoring, the loading and unloading of ships, when the group got a contract to do so. To this end, they had retained a labour force, a unionized labour force. Now, after the restructuring, their only task was to supply labour when the group called on them. If they could not do so, the parent and sibling companies could employ their own workers, non-unionized labour. None of this was known to the workers; they had no intimation that their employer was no longer their employer but merely a seller of their services. The trained foreign workers landed as scab labour protected by security guards and attack dogs. The unionized workers set up picket lines. The labour supply companies could not supply their former workers' labour; the supply companies' parent and siblings were free to hire their own.

All hell broke loose. The strike that followed had enormous popular support and threatened the government. In the end, when the issues were taken to court, the union and its many allies lost impetus. This struggle played a major role in swinging the pendulum in Australia away from compulsory arbitration and toward plant-by-plant and individual bargaining. It involved the demonization of unionism, the use of corporate law pyrotechnics, and some determined ideologically driven people. As noted in the article cited, the chief executive of the Patrick Group was celebrated as a hero by the financial media.

As well as the attacks on the contract of employment to avoid legislative obligations by using the techniques discussed in the next chapter, the employing class has been systematically waging war on the social wage, on the ability of the public sector to provide services, on the regulatory schemes that impose costs on profit-seekers, on the right to strike, on barriers to the free flow of finance and the accompanying power to seek out cheap resources and labour around the globe, and more.

The serious literature on the meanings and implications of class is voluminous and complex. Some of the readings relied on to pen these few observations include: Erik Olin Wright, *Class, Crisis and the State* (New Left Books, 1978); Eril Olin Wright, *Classes* (Verso, 1985); Erik Olin Wright, *Understanding Class* (London: Verso, 2015); Erik Olin Wright, *How to Be Anti-Capitalist in the 21st Century* (Verso, 2019); Johanna Brenner, "Work Relations and the Formation of Class Consciousness," in *The Debate on Classes*, ed. Erik Olin Wright et al. (Verso, 1989); Peter Meiskins, "A Critique of Wright's Theory of Contradictory Class Locations," in *The Debate on Classes*; Joseph Choonara, *Unravelling Capitalism: A Guide to Marxist Political Economy,* 2 ed. (Bookmarks, 2017); Val Burris, "New Directions in Class Analysis," in *The Debate on Classes*; Val Burris, "The Discovery of the New Middle Classes," in *The New Middle Classes: Lifestyles, Status Claims and Political Orientations*, ed. Arthur Vidich (New York Uni. Press, 1986); Barbara Ehrenreich and John Ehrenreich, "The Professional-Manager Class," in *Between Labour and Capital*, ed. Pat Walker (Harvester Press, 1979); John Urry, "Toward a Structural Theory of the Middle Class," *Acta Sociologica* 16, no. 1 (1973); Gugliemo Carchedi, *On the Economic Identification of Social Classes* (Routledge, 1977); Gugliemo Carchedi, "Classes and Class Analysis," in *The Debate on Classes*; Anton Pannekoek, "The New Middle Classes," *International Socialist Review* 10 (July–June 1910); Harry Braverman, *Labor and Monopoly Capital* (Monthly Review Press, 1968) ; David Harvey,

The Limits to Capital (Verso, 2006). To place the establishment of a Ministry for Prosperity of the Middle Class in Canada in context, see Michael Parenti, who observes that, in political discourse, everything is done to avoid the mention of class relations or class conflict. He notes that, instead of "working class" we hear "working families" or "blue collar" and "white collar" employees, or instead of "lower class" we talk of "inner city poor," of "low income security elderly"; instead of "owners of the means of production," we refer to "the more affluent" or the "upper quintile." Some clever politicians avoid the whole trouble spot by referring to everyone as "folk," a favourite President Obama term. Parenti argues that class is only to be used when associated with the word middle: this suggests that, but for a few exceptions, there can be no class conflict. Joe Roberts, "The Myth of the Middle Class," *Toronto Star,* April 14, 2021, observes how strange it is to talk about a middle class when the data show that, in Canada, more than half of us live paycheque to paycheque and one in four Canadians find that monthly bills amount to more than their income: "Half of our friends and neighbours aren't middle class at all … If everyone is middle class, can anyone be?" Unsurprisingly, the Canadian attempt to deceive the public did not work. The first and last Minister of Middle Class Prosperity was appointed in 2019 and held the non-job until 2021. It had been met with ridicule, even in mainstream media; see Bill Curry, "New Minister of Middle Class Prosperity Declines to Provide Clear Definition of Middle Class," *Globe and Mail,* November 22, 2019; Jennifer Wells, "Is the New Federal Minister for Middle Class Prosperity for Real?," *Toronto Star*, November 23, 2019.

Notes to Chapter 6 How employers avoid the employment contract's strictures and profit from its principles and ideology

The two scenarios are, in fact, the actual events that gave rise to two English judicial decisions: *Dacas* [2004] ICR 1437; *Tilson* [2011] IRLR 169. The idea to begin this chapter with them and to use the approach taken in it came from the very good article on these and like cases by Pauline Bomball, "The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis," *Australian Journal of Labour Law* 29 (2016): 305.

On the reluctance of judges and tribunals to read these kind of complex contractual networks as creating employer–employee relationships, Bomball quotes J. Elias, a judge in the *Tilson* case. He agreed that, even though to all the world it must look as if Tilson was an employee of Alstom, it would be an "error [to assert] that because someone looks and acts like an employee, it follows that in law he must be an employee." Elias had earlier noted that workers were often vulnerable and needed protections from abuse, yet could not bring himself to look through the complicated web of contracts and make a finding that the core of the arrangements should be treated as the creation of a contract of employment. Bomball argues courts should overcome this reluctance, this adherence to contract puritanism, and cites a couple of examples where courts have done so. But, she acknowledges, this kind of interpretation has not won much adherence in the courts as yet, persuasive as its logic is; for bold and unusual piercings of contractual webs, see *Muscat* [2006] ICR 975; *Quest* (2015) 228 FCR 346—in which somewhat more adventurous courts stressed that implying a contract of employment where it was necessary to do so to make sense of the contractual arrangements actually made was an appropriate judicial function. Law, however, being law, finds it hard to define necessity and even harder to be persuaded that self-standing contracts cannot be understood without more.

In a previous chapter, it was noted that the claim that the precariat is truly a new class is controversial. But that there is an increasing segment of the working population that has fallen on truly hard times is unquestionable; see Leah Vosko and the Employment Standards Research Group, *Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs*, 2018, a report prepared for the government of Ontario; Wayne Lewchuk, "Precarious Jobs: Where Are They, and How Do They Affect Well-Being?," *Economics and*

Labour Relations Review 28, no. 3 (2017): 402; D. Coates, *Models of Capitalism* (Camb.: Polity Press, 2000).

On the growing irrelevance of the institutions carved out during the Golden Years or Les Trente Glorieuses (as I have been labelling the period), see Christopher Arup, "Labour Law as Regulation: Promises and Pitfalls," *Australian Journal of Labour Law* 14 (2001): 230; H. W, Arthurs, "Labour Law without the State," *University of Toronto Law Journal* 46 (1996): 8; Paddy Ireland, "From Amelioration to Transformation: Capitalism, the Market and Corporate Reform," in *Labour Law in an Era of Globalization*, eds. J. Conaghan, R. Fischl, and K. Klare (Oxford: Oxford University Press, 2004); B. Hepple, "New Approaches to International Labour Regulation," *Industrial Law Journal* 26 (1997): 353.

On the standard contract of employment, see Judy Fudge, "The New Workplace: Surveying the Landscape," *Manitoba Law Journal* (2009); Judy Fudge, "The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory," *Journal of Industrial Relations* 59 (2017): 374; on the exclusion of workers from the standard contract of employment, see J. Conaghan, "The Invisibility of Women in Labour Law: Gender Neutrality and Model Building," *International Journal of Sociology of Law* 14 (1986): 377.

The development and policy goals of vicarious liability has attracted an enormous amount of scholarly attention, precisely because the doctrine appears to demand an abandonment of the cherished position that each of us should only be held responsible for our own conduct, not for anyone else's. A non-exhaustive list includes: A. M. Linden, B. Feldhusen, M. Isabel Hall, E. Knutsen, and H. Young, *Canadian Tort Law*, 11 ed. (Lexis-Nexis, 2018); Robert Flannigan, "Enterprise Control: The Servant-Independent Contractor Distinction," *University of Toronto Law Journal* 37 (1987): 25; P. S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967); G. Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts," *Yale Law Journal* 70 (1960–61): 499; John Fleming, *The Law of Torts*, 10 ed. (Law Book Co. Australia, 1998); E. I. Sykes, "The Economics of Vicarious Liability," *Yale Law Journal* 93 (1984): 1231; J. H. Wigmore, "Responsibility for Tortious Acts: Its History," *Harvard Law Review* 7 (1894): 315, 383, 441; O. W. Holmes, "Agency," *Harvard Law Review* 4 (1890–91): 345.

On the divide between the master tort theory (note the feudal language) and vicarious liability, see my analysis in *Class Privilege: How Law Shelters Shareholders and Coddles Capitalism* (Toronto: Between the Lines, 2017). The argument there is that the divide is artificial at best and that the need to hold masters and employers liable for the acts of those they employed arises from the need to off-set the harsher workings of unfettered capitalism. A sense of fairness, and thereby acceptability of capitalist relations of production, is generated by holding those who control productive activities and benefit from the way they are carried out somewhat responsible. This line of argument underlines much of the developments in vicarious liability and in the ways contracts of employment come to be defined by law. On the one hand, there is an internalized understanding that responsibility for the conduct of others should be minimized. On the other, to maintain the legitimacy of capitalist activities in which the imbalance in economic power produces disturbing outcomes, there is a recurring need to compromise the principle. The argument in this text is that it is this tension which causes there to be so much uncertainty when the existence of contracts of employment needs to be established. It will be argued that basing decisions on economic reality will lead to more satisfactory results, even though this vague notion has no legal standing and, consequently, cannot be used by reference to known criteria. It does, however, provide a bridge between those situations where there are, more or less, direct relationships and very indirect ones, that is, between situations where, functionally, the outcomes for capitalists are the same even as the legal relationships they have with task performers are different.

The 1880 decision in which control over how a task was to be carried out, said to be the defining characteristic of employment contracts, was that of Bramwell, B., in *Yewens* v. *Noakes* (1880), 6 Q.B.D. 530. Bramwell was a wealth owners' supporter. He endorsed limited liability for shareholders at a time when this was still a controversial notion, limiting the risks to the investing class. He also supported the defence of common employment which barred workers from suing their employers for damages if their injury could be attributed to the conduct of another worker. The injured person, he argued, should be held to have assumed the risk when he agreed to work with that other servant. No limitation of risk there. It is fair to surmise, then, that Bramwell's formulation in *Yewens* v. *Noakes* was not intended to widen the net of employer responsibilities too much.

On the reaction to the control over how tasks are to be done, see Simon Deakin, "The Contract of Employment: A Study in Legal Evolution," *ESCR Centre for Business of Cambridge*, WP #203, June 2001. Deakin also notes that piece workers were usually treated as independent contractors, that is, people who could not bind the persons to whom they rendered services and who could not claim protections under, say, health and safety or workers' compensation legislation. In addition, he notes that some of those who might be paid a share of the profits, for example, inshore fishermen, were not covered by social insurance legislation. See also S. Pollard, *The Genesis of Modern Management* (Harmondsworth: Penguin, 1965); C. Littler, *The Development of the Labour Process in Capitalist Societies* (Aldershot: Gower, 1956); P. Biernacki, *The Fabrication of Labour: Germany and Britain, 1640–1914* (University of California Press, 1995). To be paid by profits does not make one a partner; see chapter 5, where it was noted that cases in which two or more people pursue a business in tandem and in which remuneration is calculated as being a share of the profits made, does not necessarily make their relationship one of partnership. But, apparently, it also does not necessarily create an employment relationship. It is easy to see how law is bent and twisted to reach different outcomes in analogous situations and that it does so by reference to unarticulated and/or imprecise criteria. A focus on the verbal formulations found in the decisions or the legislation will leave the interpreter confused. There is an underlying agenda, one that is unconsciously based on retaining class relations but one that cannot be acknowledged.

The trapeze performer's case is *Zuijs* v. *Wirth Bros. Pty. Ltd.* (1955), 93 C.L.R. 561. The case used to illustrate the definition problems is the *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions* [1968] 1 All E. R. 433. The date of the decision is important, as is its title. By 1968, the many legislative interventions with terms and conditions of employment had become an integral part of the scene and the question as to whether these provisions applied to a dispute became ever more crucial. *Ready-Mix* was a case involving the Minister of Pensions, that is, a case involving a claim about who was responsible for payments into a social wage scheme. The question as to what kind of legislative policy is involved affects the way in which the definition of employment is approached. For instance, the same arrangement might be viewed differently, depending on whether the issue is one related to a tax debt or to a disability pension benefit. The vagueness of definitions gives decision-makers ample room to pursue the goals of the legislation in issue as they prefer. This, of course, makes the exercise less than scientific.

On the uncertainty left by the *Ready Mixed Concrete* decision, see the very vigorous debate: C. P. Mills, "Defining the Contract of Employment," *Australian Business Law Review* 7 (1979): 229; A. Merritt, "'Control' v. 'Economic Reality': Defining the Contract of Employment," *Australian Business Law Review* 10 (1082): 229; C. P. Mills, "The Contract of Employment Is Economic Reality," *Australian Business Law Review* 10 (1982): 270.

The notion that the test should be whether a person is an integral component of an organization was proffered by Denning, L. J., in *Stevenson Jordan & Harrison, Ltd.* v. *Madonald & Evans* [1952] 1 *Times Law Rep.* 101, to overcome the vagueness and inutility of a test based on distinguishing a contract of service from a contract for services. It was not long before Denning realized that his formulation was not all that helpful and he tried a variant, focussing on being part and parcel of the organization, rather than integral to it; *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford* [1952] 2 *All. Eng. Rep.* 956; see Robert Flannigan, "Enterprise Control: The Servant-Independent Contractor Distinction," *University of Toronto Law Journal* 37 (1987): 25, for an effective critique of the vagueness of these formulae.

While it is difficult to say that the "organization" formula developed to determine whether a contract of employment existed was intended to undermine class consciousness as is suggested in the text, this was the impact of the use of that neutral word when deployed by legislators who enacted novel corporate crime provisions in Canada, Australia, and the United Kingdom; see Harry Glasbeek, "Missing the Targets—Bill C-45; Reforming the Status Quo to Maintain the Status Quo," *Policy and Practice in Health and Safety* 11 (2013): 9; see also chapter 12 .

For an interesting example of how some workers are exempted from entitlements by the legislation itself, see the decision by the Quebec Superior Court which held that major junior hockey league players could make claims for monies owed as a result of violation of employment standard laws. They were treated as employees but not so a whole number of major junior hockey players who had played at a time when the same laws excluded them from coverage; see *Lancaster House*, "Headlines," August 14 , 2019.

Notes to Chapter 7 A paradox: Workers' need to expand the scope of contracts of employment

On the adoption of the Scandinavian notion of dependent contractors, see H. W. Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power," *University of Toronto Law Journal* 16 (1964): 89. Although the language is new, the idea that some apparently independent contractors should win labour rights is rather old. In Australia, in 1891, there was a massive strike in a major industry, sheep shearing. Each shearer had a separate contract with a variety of sheep owners. They struck because the employers refused to accept their union. Eventually they won. To this day, individual shearers contract as businesses (most have an Australian Business Number) but are allowed to bargain collectively and are entitled to minimum standard protections and workers' compensation as they are "deemed employees."

The Ontario Labour Relations Board decision setting out the many criteria to determine whether task performers are dependent contractors was *Algonquin Tavern*. v. *Canada Labour Congress* (1981), 3 Can. LRBR. 337. For an overview of the difficulties Canadian decision makers have confronted, see B. A. Langille and G. Davidov, "Between Employees and Independent Contractors: A View from Canada," *Comparative Labour Law and Policy Journal* 21 (1999): 26. Italy had a fairly short-lived equivalent set of provisions to deal with what it termed "quasi-subordinate" workers. The label points to the problems created by formal and restrictive readings of the label "employee." In 2015, the legislation was replaced by a more encompassing concept, coverage being proffered to service renderers if the purchaser of these services organizes the method of the work to be done. It is not yet certain that this addresses the problems all that well; see M. Del Conte and E. Gramano, "Looking to the Other Side of the Bench: The New Legal Status of Independent Contractor under the Italian Legal System," *Comparative Labour Law and Policy Journal* 39 (2018): 590. Spain has also introduced legislation motivated by the need to overcome the shortcomings of the legal definition of employment, but its effort has been seen as a rank failure; see M. A. Cherry and A. Aloisi, "Dependent Contractors," in the collection "Gig Economy: A Comparative Approach," *American University Law Review* 66 (2017): 635, 660. The United Kingdom's version was more encompassing. Its *Employment Rights Act 1996 (UK)*, eschews the use of the word "employee." Instead, it uses "worker" and it covers those engaged

under a contract of employment as traditionally understood and those who have entered into any other contract to do work or services for another where that other is not by virtue of the contract a client or customer of any profession or business undertaking carried on only by the individual. While the goal, once again, is to allow workers who might be dependent contractors to claim the protection of entitlements granted to employees, this definition is not limited to specific entitlements such as the right to bargain collectively. But it still requires adjudicators to make a determination as to whether the individual seeking classification as a worker is more like a person who is a traditional employee, rather than an independent business owner or professional.

On the new Amazon delivery business model, see Jake Alimahomed-Wilson, "Building Its Own Delivery Network, Amazon Puts the Squeeze on Drivers," *Labor Notes*, December 17, 2020. The Amazon business model is much discussed; the sheer size and heft of this huge enterprise and the stories about worker exploitation and attempts to ameliorate things have made Amazon into a poster case for the challenges posed by the new modes of production. For a good overview, see Jake Alimahomed-Wilson and Ellen Reese, *The Cost of Free Shipping: Amazon in the Global Economy* (Pluto Press, 2020). For the report on the Canadian truck industry, see Sara Mojtehedzaden, "Wage Theft. Deportation Threats. Defamation Suits," *Toronto Star*, December 12, 2021. Note here that part of the heading is "Wage Theft." There is a tendency to see the avoidance of payments that might be due if protective legislation applied to amount to theft. But this is legally fraught: the employers say they are not employers, but rather purchasers of goods and services from equally sovereign businesses. It may turn out that it was a misclassification in which case they may have to compensate the mis-classified party but that is not the same as saying they have committed a crime for which they should be punished criminally.

For good overviews of the difficulties and attempted resolutions, see J. Fudge, E. Tucker, and L. Vosko, "Employee or Independent Contractor—Charting the Legal Significance of the Definition in Canada," *Canadian Labour Law and Employment Law Journal* 10 (2003); A. Stewart and S. McCrystal, "Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?," *Australian Journal of Labour Law* 32 (2019): 4.

For my efforts to explain how corporations serve capitalism and capitalists, see Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* Toronto: (Between the Lines, 2002); *Class Privilege: How Law Shelters Shareholders and Coddles*

Capitalism (Toronto: Between the Lines, 2017); *Capitalism: A Crime Story* (Toronto: Between the Lines, 2018).

For a fuller discussion of the legal manoeuvring and context of the Brambles case, see Harry Glasbeek, "The Legal Pulverization of Social Issues: *Andar Transport Pty. Ltd.* V. *Brambles Ltd.*," *Torts Law Journal* 13 (2005): 217. For the legal precedent which permits the use of the ridiculous attribution of legal personhood to a corporation which has only one living owner, operator and beneficiary, see *Lee* v. *Lee's Air Farming Ltd.* [1961], A.C. 12. This attribution of distinct personhood is the legal key to all the avoidance devices discussed in the text that follows.

On common employment at common law, see *Sinclair* v. *Dover Engineering Services Ltd.* (1988), 49 D.L.R. (4th) 297; *Gray* v. *Standard Trustco Ltd.* (1994), 8 C.C. E. L. (2d) 46; *Downtown Eatery (1993*) *Ltd.* v. *Ontario* (2001), 54 O.R. (3d) 161; *Dumbrell* v. *The Regional Group of Companies Inc.* (2007), 85 O.R. (3d) 616; *O'Reilly* v. *ClearMRI Solutions Ltd* (2021), ONCA 385 (CanLII). For an extraordinary use of the corporate vehicle, narrow reading of statutory protections, and the inability of unpaid workers to find a remedy, even though no one doubted their entitlement, see *550551 Ontario Limited* v. *Framingham* (1991), 4 O.R. (3d) 571, discussed in Glasbeek, *Wealth by Stealth*. It involved a set of functionally integrated, but legally discrete, firms which rendered the lead operators legally immune. It was a small-time version of the global supply chains model to be discussed below.

There was a short-lived attempt in Ontario to make it easier for claimants to establish responsibility for a violation of the statutory minima on related or associated entities. The Wynne government enacted an amendment to the *Employment Standards Act* on January 1, 2018, which did away with the requirement that the claimant prove that the entity sought to be made liable had had an intent to defeat the purpose of the Act. Mere association or close-knit relationship would be enough. The next government did away with this reform. Similar, but always limited, efforts have been made elsewhere to establish what is often labelled "accessorial liability." In the US, the *Fair Labor Standards Act 1938*, defines the word "employ" as including "suffer or permit to work." This has allowed adjudicators to find joint employers and impose liability on any of them when workers claim entitlements. They have been aided by guidelines developed by David Weil who is the guiding mind in the United States Department of Labor, Wages and

Hours Division. The reach of the statute is limited but the impetus, closing the lacuna created by restricting remedies to situations where there is one identifiable employer, is manifest. A similar impulse moved Israel to make the host who obtained its workers from a temporary workers' agency liable for the entitlements workers might have. Hosts can avoid responsibility if they made diligent efforts to ensure that the workers' statutory entitlements would be bestowed by the temporary workers' agency; see G. Davidoff, "Indirect Employment: Should Lead Companies Be Liable?, " *Comparative Labour Law and Policy Journal* 37 (2015): 125; G. Davidoff, "Special Protection for Cleaners: A Case for Justified Selectivity," *Comparative Labour Law and Policy Journal* 36 (2015): 219. Cleaning contracts often present the problem in a trenchant way. Cleaners, the workers, are hired out to a cleaning firm which has won a contract to clean and maintain a building. The management and owners of that building may enter into an arrangement with a new cleaning firm. The workers will lose their jobs and any entitlements they had are put in jeopardy; see Sara Mojtedhedzaden and Alex McKeen, "Workers Win Fight against Real Estate Giant," *Toronto Star*, September 14, 2018. Australia has seen an epidemic of cases in which temporary employment agencies, or a bottom actor at the nether end of a supply chain, or construction trade employers, do not pay workers monies owed to them. A variety of limited remedies have been spawned. Australia's *Fair Work Act 2009*, under which many of the minimum standards for workers are governed, has been amended to allow for accessorial liability of employers in the networks if they have consciously or knowingly abetted the contravention of the statute. One practice at which the amendments aim is that of an employer who incorporates to perform a set of tasks, then dissolves and the same people then incorporate a different entity. Should the owners/managers of the new corporation be held responsible for the debts of their previous *legally* distinct firm? The amendment goes some way toward stopping firms incorporated for a particular contractual task from dissolving before payments are paid, and the owners reforming themselves for another set of contracts by means of a newly incorporated firm, a practice so widely engaged-in in Australia that it has earned its own label, the creation of "phoenix" corporations. In some areas, the opportunities to successfully game the spirit of the protective laws is so great that, in Australia, wholesale changes have been enacted. In the textile, clothing, and footwear industry, outworkers, the people who will not have any contractual arrangements with a host of firms in a complicated network of production, will be deemed employees of any or all of them if they need to make a claim in respect of minimum rates of

overtime payments due under the *Fair Work Act*. The onus of proof is on a firm to prove that it did not have any right to supervise or otherwise control production prior to the delivery of goods. Another unusual Australian remedy, fashioned because the harms inflicted go beyond the confines of the contract, is to be found in its *Work Health and Safety Acts*. The responsibility for injuries and harms inflicted as a result of productive activity is to be attributed to a person conducting a business or undertaking (a PCBU as the regulation describes them) as far as it is deemed reasonably practical to ensure the safety of workers (who are under contract) and others (who are not).

To return to franchises for a moment, it is useful here to note that law provides franchisors with an incentive to exert control over franchisees. The brand, the way of doing things which set the franchisor apart, is protected by intellectual property rights law. That law provides that franchisors must continuously ensure that its brand is alive and well by maintaining control over the way in which franchisees are operating. If they cannot do so, they may lose their intellectual property, their real asset. This puts an onus on franchisors when contracting with their franchisees to make it clear that they are not desirous of having anything to do with the daily work done at the franchisees' place of business.

On the significance of law's view of labour relations as relations between isolated individuals, see Zoe Adams, "Labour Law, Capitalism and the Juridical Form: A Critical Approach to Questions of Labour Law Reform," *Industrial Law Journal* 50 (2021): 434. In a recent High Court of Australia decision, the way in which the abstracted individual remains a core platform for interpretation was on full view. In *WorkPac Pty. Ltd.* v. *Rossato* [2021}, HCA 23, it was held that the supposed reality of relationships should not be guessed at, that the way in which the legal sovereign parties constructed the contract should prevail. The judgement read: "It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from disparity in bargaining power between the parties so as to adjust their bargain." This common understanding creates high hurdles to clear by those who demand that adjudicators take economic reality into account when asked to be just and fair. Understandably, such reforms as are won are limited in scope.

On early work on the criminogenic nature of the franchise model, see William N. Leonard and Martin Glenn Weber, "Automakers and Dealers—A Study of Criminogenic Market Forces,"

Law and Society Review 4, no. 3 (1970): 407; Harvey A. Faberman, "A Criminogenic Market Structure: The Automobile Industry," *The Sociological Quarterly* 16 (Autumn 1975): 438. These studies showed how, empirically, if car dealerships were to survive, they had to cheat. Car dealers, who have a reputation for sleaziness, deserve more sympathy than they usually get. The squeeze felt by franchisees often causes them to cheat their workers.

Until 2017, the National Labor Relations Board in the US had held that two or more employers would only be adjudged joint employers if they exercised direct and immediate control over the workers' essential terms and conditions. Then, in a decision named *Browning-Ferris* 362 NLRB, No. 186, 2015, the Board held that such joint responsibility could exist if there was indirect or limited control over essential terms and conditions. In one high-profile case, it was held that the McDonalds Corporation, which operates both non-franchised and franchised outlets, could be held to be a joint employer of workers engaged by franchisees. A spate of decisions were handed down following this development and it appears that there has been a retrenchment; at the time of writing the much narrower pre-*Browning-Ferris* decision has been re-established. Thus, even though a franchisor provides human resource guidance to its franchisees, conducts some pre-opening training programmes, and has monthly reviews of franchisees to measure compliance with the franchisor's system's standards, the franchisor will not be liable for obligations owed to franchisees' employees if it makes it clear from the outset in its franchise agreement that its standards do not include personnel policies and procedures; see the NLRB Office of the General Counsel, responding to the decision in the *Freshii* case, on April 2015. The plight of both franchisees and their employees remains dire and, in 2022, there was a legislative move to overcome the many disadvantages experienced by workers in the heavily franchised fast-food industries. The *FAST Recovery Act* would support sectoral bargaining and joint liability of franchisors and franchisees. At the time of writing, the legislative proposal is still being contested; Rachel M. Cohen, "California Could Transform How Fast Food Workers Are Treated," *Vox*, August 17, 2022. In Canada, it has been reported that delivery drivers for Pizza Hut have initiated a class action suit, claiming that, by classifying them as independent contractors, Pizza Hut has denied them entitlements, such as minimum wages and overtime pay, as well as forcing them to pay for delivery-related expenses. Pizza Hut has responded by saying that the drivers are hired by its franchisees and thus no legal responsibility is to be attributed to it; see Sara Mojtehedzadeh, "Pizza Hut Sued for $150 M," *Toronto Star*, January 26, 2022.

Without any other evidence about the details of the agreements and arrangements between the franchisor and its franchisees, it is useless to speculate about the likely outcome.

On wage theft legislation in Australia, Ben Schneiders and Nick Bonyhady, "Wage Theft to Become a Crime as Victoria Parliament Passes New Laws," *WAtoday*, June 17, 2020; Lydia Lynch, "Qld Bosses Who Underpay Staff Face 14 Years' Jail Under Proposed Laws," *Brisbane Times*, March 6, 2020. For Australian exposes of major corporations associated with franchisees and contractors which denied workers their entitlements, see Dominic Powell and Paul Sakkai, "Woolworths Executive Bonusses Cut after Workers Underpaid up to $300 Million,: *WAtoday*, October 30, 2019; Ben Butler, "They're Madly Checking Their Payrolls: The Ugly Truth of Australia's Underpayment Epidemic," *The Guardian*, November 2, 2019; Adele Ferguson and Mario Christodoulo, "How Australia's Biggest Pizza Chain Has Squeezed Franchisees While Its Franchisees Have Underpaid Workers and Exploited Migrant Labour and Its Investors Have Made Millions," *WAtoday*, February 10, 2017; Cara Waters and Adele Ferguson, "Franchise Cowboys Slammed," *The Age*, March 15, 2019 (famous franchisors exposed: Michels Patisserie, Brumby's, Gloria Jeans, Donut King); Mario Christodoulo and Adele Ferguson, "Domino's Pizza Workers Kept in the Dark about Underpayment for Two Years," *WAtoday*, February 14, 2017; Catie Law, "Domino's Reveals Soaring Profits amid Concerns over Worker Underpayment," *WAtoday*, February 15, 2017. The statutory amendment which arose out of these exposes (and there was a slew of them) is *The Fair Work Amendment (protecting Vulnerable Workers) Act*, 2017. There is a Fair Work Ombudsman guide to help franchisors understand what they must avoid doing if they do not wish to be made responsible for franchisees' failures.

The World Trade Development Report 2020 (WDR) observed that global value chains grew from 45% of world trade in the mid-1990s to 55% in 2008 and currently sits at about 50%. That major corporations scour the world for cheap resources and labour is old hat. Cecil Rhodes, one of the more arrogant and rapacious of colonizers is said to have observed that "We must find new lands from which we can easily obtain raw materials and at the same time exploit the cheap slave labour that is available from the natives of the colonies. The colonies would also provide a dumping ground for the surplus goods produced in our factories." Today it would be politically and socially unacceptable to speak this candidly. Indeed, the opposite is required. As giant corporations set up competing supply operations across the globe, intellectual gatekeepers argue

that, in the end, this benefits the poorer nations as their workers are given a chance to earn wages and local entrepreneurs, by concentrating on one facet of production as required by lead firms, do not have to invest so much capital, enabling them to get off the ground and to integrate themselves into increasingly high technology production; see *WDR 2020*, "Trading for Development in the Age of Global Value Chains." This glass is half-full conclusion is not shared by those who work in Export Processing Zones, zones which provide special incentives to attract capital and in which materials undergo some degree of processing before being re-exported. Those incentives may include suspension of normal rates of export and import duties, tax exemptions and waiving of labour rights, and health and safety regulation; see ILO, 2003. One count reported 5,000 such sites, employing some 43 million people; see David Whyte, "Naked Labour: Putting Agamben to Work," *Australian Feminist Law Journal* 31 (2009): 52; S. Tombs and D. Whyte, "The Shifting Imagineries of Corporate Crime," *Journal of White Collar and Corporate Crime*, January 7, 2020. For Susan Rosenthal's comments, see "One World or No World. Choose!," *The Bullet*, January 5, 2022.

The Bangladesh Accords were the consequence of the horrendous Rana Plaza factory collapse in Bangladesh in 2013. One thousand and one hundred died and 2,500 were injured. Something had to be done to save the use of global supply chains. For an argument that lead firms in this kind of network must be made responsible, see Alain Supiot and Mirelle Delmas-Marty, *Prendre la responsibilite au serieux* (Paris: Presses Universitaires de France, 2015). On the gap between promises to do better and performance on the ground, see Know The Chain, *2020 ICT Benchmark Overview*, June 8, 2020; D. Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington: Brookings Institution, 2005); Beryl ter Haar and Maarten Keune, "One Step Forward or More Window Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh," *International Journal of Comparative Labour Law and Industrial Relations* 30, no.1 (2014): 5–26; Elizabeth Winkler, "How Fair Labour Buzzwords Can Obscure the Truth," *Toronto Star*, August 26, 2017. For a more optimistic view on the possibilities, see M. Anner, J. Bair, and J. Blasi, "Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks," *Comparative Labor Law and Policy Journal* 35 (2013): 1. On the Foxconn/Apple saga, see Debby Wu and Ganesh Nagarajan, "Apple Puts Foxconn on Probation," *Bloomberg*, December 30, 2021.

On the debates to use international human rights as a means to trump the shortcomings of traditional contract law, see Lance Compa, "Labor's New Opening to International Human Rights Standards," *Working USA: The Journal of Labor and Society*, March 1, 2009; Jay Youndahl and Lance Compa, "Should Labor Defend Worker Rights as Human Rights? A Debate," *New Labour Forum* 18, no. 1 (Winter 2009): 30–37; Nelson Lichtenstein, "The Rights Revolution," *New Labour Forum* 12, no. 1 (2003): 68; T. Campbell and K. Ewing, eds., *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011); Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26 (2004): 63. In addition to human rights laws, the dispossessed often use tort law. They seek to bring an action against a lead firm in a rich nation for exploitation somewhere in their far-flung empire. For my discussion of this tactic and its general lack of success, see Harry Glasbeek, *Class Privilege*. It should be noted that the oppressions complained about frequently are much worse than some wage theft, bad food, or accommodation of hostile mangers. All too often these actions are concerned with killings, rape, razing of lands, evictions of Indigenous peoples, in short, complaints by the vulnerable of the world which reach beyond the work-for-wages sphere.

For Alain Supiot's views on the new modes of production, see his "A Labour Code for the 21st Century/" *Le Monde Diplomatique*, May 2018. His notion that employment contracts required an on-going relationship, rather than contracts which were but one in a series of discrete contracts, was a dominant strain in the debates about the nature of contracts; see Ian Macneil, "Whither Contracts?," *Journal of Legal Education* 21 (1969): 403; "The Many Futures of Contract," *Southern California Law Review* 47 (1974): 691; "Reflections on Relational Contract Theory after a Neoclassical Seminar," in *Implicit Dimensions of Contract*, eds. H. Collins, D. Campbell, and J. Wigmore (Hart Publishing, 2003). For a dissenting view by a scholar of the conservative law and economics group, see M. Eisenberg, "Why There Is No Law of Relational Contracts," *Northwestern University Law Review* 94 (2000): 805.

The literature on Platform Mediated Work is voluminous. The interest arises because of its potential to transform relations of production (see below), the fascination so many have with the many new innovations, and the evident parlous circumstances of many who find themselves doing this kind of work. For the remarks made in the text, I have consulted Ursula Huws, *Labour in Contemporary Capitalism: What Next (Dynamics of Virtual Work)* (Palgrave MacMillan,

2019); Ursula Huws, *Labour in the Digital Economy: The Cybertariat Comes of Age* (Monthly Review Press, 2014); Ursula Huws, "Logged Labour: A New Paradigm of Work Organization?," *Work Organization, Labour and Globalization* 10, no. 1 (2016): 7; Tom Slee, *What's Yours Is Mine: Against the Sharing Economy* (Between the Lines, 2016); Soshanna Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Public Affairs, 2020); E. Tucker, "Toward a Political Economy of Platform-Mediated Work: This Is Still Capitalism and It Is Something Worse," 101 (13) *Studies in Political Economy* 101, no. 3 (2020): 185–207; E. Tucker, "Uber and the Unmaking and Remaking of Taxi Capitalism," in *Law and the 'Sharing' Economy: Regulating Online Platforms*, eds. D. McKee, F. Makeh, and T. Scassa (Ottawa University Press, 2018); Arun Sundarajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (MIT Press, 2017); Nick Srnricek, *Platform Capitalism (Theory Redux)* (Polity, 2016); C. Vercellone, "The Becoming Rent of Profit? The Articulation of Wage, Rent, and Profit," *Knowledge Cultures* 1 (2013): 264; J. Woodcock, *The Fight against Platform Capitalism: An Inquiry into the Global Struggles of the Gig Economy* (University of Westminster Press, 2021); James Muldoon, *Platform Socialism: How to Reclaim Our Digital Future from Big Tech* (Pluto Press, 2022); Michael Hyatt, *Platform: Get Noticed in a Noisy World* (Thomas Nelson, 2012).

For Alain Supiot's view of the changing modes of production, see his "A Labour Code for the 21st Century," *Le Monde Diplomatique*, May 2018; for a piece that supports Supiot's thesis about the profound change in the nature of work as a result of the innovative technologies, see Laurent Lesnard, *La famille desarticulee. Les nouvelles constraintes de l'emploi du temps* (Paris: Presses Universitaires de France, 2009.

Relative to the total workforce, platform mediated workers are not yet a major force; see E. Tucker, "Toward a Political Economy"; L. Mishel, *Uber and the Labour Market* (Economic Policy Institute, 2018). The potential for the growth of the sector envisaged by Supiot and Huws above is, however, important because working conditions are, on the whole, so bad. If we view all insecure work as precarious, then much work done outside the platform mediated sphere qualifies. But the classification of the platform workers as non-employees deprives them of any of the protections available to other insecure workers. Add this to the fierce competition for these precarious contracts to perform tasks and a parlous set of circumstances are generated.; see T. Slee, *What's Yours Is Mine*; U. Huws; J. Healy, D. Nicholson, and A. Pekarek, "Should We Take

the Gig Economy Seriously?," *Labour & Industry* 27, no. 3 (2017): 232; C. Hendrickson, "The Gig Economy's Great Delusion," *Class & Inequality*, January 12, 2018, reports that, far from platform mediated work being a way to earn some extra income by using free time to perform a task, the people who do it often use it as their primary means to earn a living and their pay is so low that they need to get at least thirty hours of this supposedly freely chosen opt-in time to make anything close to a wage which allows them to survive. More, this kind of work is also having profound social impacts. Barna Athreya, "Bringing Precarity Home: Digitalized Piece Work and the Fiction of Flexibility," *The Bullet*, Socialist Project, January 3, 2022, notes that, as work can be done at home, many women looking for an income while doing unpaid house and care work, compete for these kinds of jobs. A 2021 report, *The Role of Digital Platforms in Transforming the World of Work*, draws attention to the fact that this kind of work has the potential to disrupt the dominant relations of production and, as a corollary, has the potential to impact social relations. The ILO Report noted that 23% of women who do platform work have children under the age of six; in middle- and low-income countries, this number rises to 50%. And the idea that this work is sought to indulge people's desire to be independent or to be a good neighbour is belied by V. Dubal's findings in her "The Time Politics of Home-Based Digital Piecework," *Center for Ethics: Perspectives on Ethics* 2020, symposium issue (2020): 50. She cites an interviewee situated in a rich nation, the US: "If I work 12 to 16 hours a day, I'll make maybe $5 an hour. But that's when there is work, but when you're sitting between jobs and you consider that time, when you're just looking for work, then the hourly wage falls dramatically. There are so many of us now, and fewer quality jobs. Sometimes I wake up in the middle of the night just to see if I can grab some good requests." This is elaborated in the works of U. Huws.

On the Foodora developments in Ontario, see *Canadian Union of Postal Workers* v. *Foodora Inc.*, March 2020 *CanLii* 16750 (OLRB); on the Foodora saga in Australia, see D. Chau, "Foodora to Cease Operations in Australia This Month, but Have Suits Ongoing," *ABC News*, August 2, 2021; on the Foodora determination in France, see David James, "Three Years after Leaving France, Foodora Sentenced for Concealed Work," *Blaze Trends*, January 21, 2022; on the California ruling declaring Uber and Lyft drivers should be treated as employees, see *People* v. *Uber Technologies Inc*, 20 Aug., 2020, Cal. Court of Appeal; Preetika Ram, "Uber, Lyft Drivers Are Employees, Court Rules," *The Wall Street Journal*, October 23, 2020; on the New York remedies, see Andrew Krok, "New York City Council Votes to Limit Number of Uber,

Lyft Vehicles," *CNET*, August 8, 2018; Shirun Ghaffary, "New York City Has Set the Nation's First Minimum Pay Rate for Uber and Lyft Drivers," *Vox*, December 4, 2018; on the invalidation of the compulsory arbitration clause which had been invoked by Uber to avert a class action by the Supreme Court of Canada, see Tara Deschamps, "Ontario Court Certifies Class-Action Lawsuit against Uber Over Wages, Vacation Pay," *Toronto Star,* August 12, 2021. On the Australian legal curbing and the economic reality quotations by judges, see Nick Bonyhady, "Staring Down the Barrel of a Landmark Judgment on Its Workers' Status, Uber Folds," *Sydney Morning Herald*, December 30, 2020; for the UK's Supreme Court decision holding Uber's drivers to be entitled to protections bestowed on employees, see *Uber BV and others* v. *Aslam and others* [2021] UKSC, 71—note that the court relied on the inclusion of the word "worker" rather than "employee" in the governing statute, although Gordon Anderson, "Rethinking the Legislative Architecture," *CLEW 50th Anniversary Seminar: Is It Time to Reset Our Employment Relations System?* April 14, 2021, suggests that the same reasoning and outcome would have been used and reached if the word "employee" rather than "worker" had been the focus of the analysis. See also Ruth Dukes and Wolfgang Streeck, "Putting the Brakes on the Spread of Indecent Work," *Social Europe,* March 10, 2021. On restraints put on elsewhere, see AP, "Dutch court rules Uber must pay drivers benefits," *Toronto Star,* September 14, 2021; AP, "Spain makes delivery riders employees," *Toronto Star*, March 12, 2021; Bloomberg, "EU plan will classify gig workers as employees," *Toronto Star*, December 3, 2021.

On the fight-back by platform operators, see generally, J. Woodcock, *The Fight against Platform Capitalism: An Inquiry into the Global Struggles of the Gig Economy* (University of Westminster Press, 2021); James Muldoon, *Platform Socialism: How to Reclaim Our Digital Future from Big Tech* (Pluto Press, 2022); on New York's guerilla warfare strategies and Australia's logging-off ones, see Greg Bensinger, "Uber Drivers Take Riders the Long Way," *Toronto Star*, August 14, 2018; on the California legislation to overturn the adverse judicial result, see Kate Conger, "Uber and Lyft Drivers in California Will Remain Contractors," *New York Times,* November 4, 2020—the article notes that Uber's share price went up by 3% and Lyft's by 7%; the platform operators had spent circa $200 million on the campaign, money well-spent; on Uber's reaction to adverse decision on its arbitration in The Netherlands clauses, see Tara Deschamps, "Uber Canada Uproots from Netherlands," *Toronto Star,* June 25, 2021; "Uber contract threatens class action, lawyer says," *Toronto Star*, September 2, 2021 (Uber was asking

new drivers to agree to a clause which will stop them from joining a class action and accepting an arbitration—not in The Netherlands); on fighting back against Australian pushes to classify drivers as employees, see Nick Bonyhady, "Uber Eats Overhauls Business Model amid Pressure Over Workers' Status," *WAtoday*, January 29, 2021 (demanding that drivers register a business number, ABN, to indicate that they were self-employed for tax purposes); on buying goodwill to avert regulation by providing some health and safety protection, see Nick Bonyhady, "Uber Lifts Safety Game for Australian Streets in World First," *WAtoday*, February 28, 2021; on trying to avert unionization drives, see Tara Deschamps, "Uber Canada, Union Reach Deal," *Toronto Star*, January 28, 2022 (not recognizing the union as a certified bargaining agent but rather an association which individual drivers might ask to help them if in dispute with Uber); as the Ontario government has come under pressure to provide safeguards for platform workers, the platform operators are offering some benefits but not all the benefits which employee status would bring, see Sara Motjtehedzadeh, "App Companies Scramble to Fight Minimum Wage 'Cap,'" *Toronto Star*, October 4, 2021; a government preparing for an election is proposing that, while Uber drivers and their like should still be treated as independent contractors, they should be entitled to minimum wage rates when delivering and to some access to the reasons why their accounts have been deactivated, per Sara Mojtehedzadeh, "Province, to table new gig work laws" *Toronto Star*, 238 February 2022.

On the struggle between licensed taxi-cab operators and the Uber and Lyft outfits, see Tucker, "Uber and the Unmaking and Remaking of Taxi Capitalisms"; Tucker, "Toward a Political Economy of Platform-Mediated Work"; T. Slee, *What's Yours Is Mine*; M. Rozworski, "Uber and the Luddites," and D. Bush, "UberXploited: Behind the Toronto Taxi Wars," in Two Essays on the Uber-Taxi Wars in Socialist Project, *The Bullet*, December 17, 2015. At the time of these discussions, there were 10,000 licensed taxi drivers in Toronto; UberX taxi operations in Toronto began in 2014 and by 2015, they boasted of having 16,000 drivers on their books. It is easy to understand why the writers began to talk of taxi-wars, although it was not the first time this expression was used; see D. Davis, "The Canadian Taxi Wars, 1925-1950," *Urban History Review* 27 (1998): 7. Licensing and regulation were introduced to stop the fierce, violent competition in a profit-seeking sphere in which entry was easy. The same kind of outright warfare in the dump truck industry led to the regulation in Ontario now known as the dependent contractor provisions; see H. Arthurs, "The Dependent Contractor." These are neat illustrations

that, quite often, capitalists need to be regulated for their own good. The new apps threaten to disrupt stabilized profit-making activities. The reluctance to regulate comes, in part, from the regulatory State's desire to promote capitalist initiatives and to respect the decisions of the owners of the means of production as to how they deploy their assets. Disruptions are to be welcomed as well as feared.

The difficulty created for regulators by platform-mediated work is not that it is a new source of worker exploitation as much as it does so in a way that undermines existing compromises and social expectations directly; at the same time it is presaging the advent of a radically different kind of capitalism. This issue is well beyond my understandings and outside the scope of a legal discussion of how workers should be categorized in order to get the benefit of protecting regulations. To address it briefly, note that the discussion in the text identifies a shift in profit-seeking arrangements. The platform providers are not obviously employers in the way that the two centuries of precedents discussed in the previous chapter saw them. Stephen A. Margolin, "What Do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production," *Review of Radical Political Economics* 6 (1974): 60, 112, argues that, as capitalism evolved, the drive to accumulate meant that owners saved, while the actual producers of goods and services did not. The owners put in inorganic capital and the workers organic capital, namely their labour power. To warrant taking their cut from the productive activities, capitalists inserted themselves as managers of the firms' productive activities. A hierarchical, top-down control system of operations evolved. This goes some way toward explaining why the contract of employment is established as a contract of subordination. Margolin documents how this need to control and manage goes a long way toward explaining why the steam engine came to replace the water wheel. It was not because it was more efficient in terms of production but because it was more effective in moving control from producers to managing capitalists; see also Andreas Malm, *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming* (Verso, 2016); see also Aaron Benavan, *Automation and the Future of Work* (Verso, 2020), who asserts baldly that "technologies developed in capitalist societies are not neutral: they are designed to embody capitalist control, not to free humanity from drudgery." In a parallel way, it is likely that digitalized intermediaries are using technology not because it is more economically efficient but because it gives capitalists a new way to make profits without working. But the capitalists are not inserted as managers/controllers in anything like the way in which more traditional capitalist

undertakings make that happen. They are more like rentiers. From this perspective, it is easier to see why the categorization of platform operators as employers is so difficult. Indeed, they may be heralding a different set of relations of production altogether. On this, see U. Huws, *Labour in Contemporary Capitalism* and *Labour in the Digital Economy*; E. Tucker, "Towards a Political Economy"; C. Vercellone, "The Becoming Rent of Profit?"; S. Bohm and C. Land, "The New 'Hidden Abode': Reflections on Value and Labour in the New Economy," *The Sociological Review* 60 (2012): 217.

For overviews of the disparagement of the Uber business model, see Evgeny Morozov, "Cheap Cab Ride? You Must Have Missed Uber's True Cost," *The Guardian*, January 31, 2016; David Olive, "What's Wrong with Uber? Everything," *Toronto Star*, July 3, 2021.

Notes to Chapter 8 Helping employers out: A private sphere of criminal justice

The opening quotation comes from Lord Ellenborough's decision in *Spain* v. *Arnott* (1817), 171 E.R. 638. The impact on the losing servant, and all other servants, was dramatic. Lord Ellenborough was committed to the welfare of employers. In an earlier decision he had expanded a doctrine that pertained to the feudal Master and Servant laws to supposedly freely entered-into contracts of employment and, at the same time, had extended the categories of workers to which those old master-favouring laws should be applied. After this decision, the adapted Master and Servant–type laws were to apply to all those who provided labour; see *Lowther* v. *Earl Radnor & Another* (1806), 103 E.R.287. For a thorough accounting and analysis of these developments, see D. Hay, "Working Time, Dinner Time, Serving Time: Labour and Law in Industrialization," in *The Class Politics of Law: Essays Inspired by Harry Glasbeek*, eds. E. Tucker and J. Fudge (Fernwood, 2019).

On the reasons why the employing class dislike full employment, see the work of Michal Kalecki, "Political Aspects of Full Employment." The salient point is reproduced in *Jacobin*, January 18, 2022, where Kalecki is quoted as writing that full employment "would cause social and political changes which would give a new impetus to the opposition of the business leaders. The "sack" would cease to play its role as a disciplinary measure. The social position of the boss would be undermined and the self-assurance and class-consciousness of the working class would grow…' Discipline in the factories' and 'political stability' are more appreciated than profits by the business leaders. Their class instinct tells them that lasting full employment is unsound from their point of view and that unemployment is an integral part of the "normal" capitalist system."

The 2002 bonking budget in Australia was the brainchild of the then treasurer, Peter Costello. It is difficult to know whether this kind of incentive works, underscoring the point made in the text that reproduction is not easily subject to manipulation by social engineers; see Misa Han, "Peter Costello's 'Baby Bonus' Generation Grows Up," *Australian Financial Review*, September 1, 2017. Han reports that there has been a 20% increase in the number of people who will be eighteen years' old by 2030 but that it may not be attributable to the baby bonus, at least not as much as to a stable economy which has encouraged parents to have more children.

Immigration is a major tool used by governments to try to provide a workforce which leads to sufficient competition for jobs and brings an appropriate mix of needed skills and values. To say that this is a fraught exercise is to state the obvious; but this does not diminish the use by policymakers of immigration flows as a tap to turn on and off. In a previous chapter, mention was made of the deployment of special visas to help employers out, leaving visa and migrant workers vulnerable to abuses. A variant is the notorious so-called flood of "illegal" migrants from Central America into the US. They face walls, brutality by border patrols, and harsh detentions. At the same time, it is common knowledge that many employers in the US survive by the availability of undocumented (and therefore poorly paid) immigrants. Most recently, McDonald's was fined for employing children under ten who came from such alien families; *Toronto Star,* May 5, 2023. The tension between those who insist on regulated and secure borders and those who profit from having people squeezing their way through the closed borders is a daily staple of US politics. More recently, as the pandemic is winding down, there is said to be a shortage of labour in some sectors of the economy. Governments are expected to help employers out. In Canada, employers have been loudly urging the government to welcome Ukrainian refugees/immigrants. Brazenly they point out that these migrants/refugees share "our" values and will make good workers. The federal government appears to be responsive to these pleas (justified, of course, by claims that it also suits its humanitarian agenda). It has announced that it will tap migrants for "a quick fix to labour shortages"; see Randy Thanthong-Knight and Teophilos Argitis, *Toronto Star,* April 30, 2022. Other ways to counter the lack of surplus workers, whose existence helps employers, are on offer. Heather Scofield, an opinion writer, is suggesting that older people should be encouraged to re-enter the workforce, saying that new technological aids make this possible; see Heather Scofield, "Flexibility, Economy Go Hand in Hand," *Toronto Star,* April 28, 2022. The provision of the kind of labour force employers need is a central pre-occupation of government. On governments' sympathy for the plight of employers facing labour shortages, see Megan Leonhardt, "The Secret to Getting Workers Off the Sidelines," *Fortune,* March 24, 2022; Canada, Employment and Social Development, "Government of Canada Takes further Action to Address Labour Shortages in Quebec," April 1, 2022; Business Development Bank of Canada, "The Challenge of the Decade: How to Navigate Canada's Labour Shortages," *Situation,* 2021; the Canadian government is to propose to fast-track regularizing the status of 1.4 million undocumented workers whose employment potential

is untapped, see Sara Mojtehedzadeh and Nicholas Keung, "A Path to Permanent Residency," *Toronto Star*, September 3, 2022; in Australia, an announcement was made to extend the school year by twelve months by enrolling four-year-olds. Not only would this be good for their education, said one of the ministers, it would help parents, especially mothers, get back to work; *The New Daily*, June 16, 2022; the Retail Council of Australia has advocated dropping the age at which children can work in shops to thirteen and the government is considering changing the pension rules to allow more elderly people to enter the work force; Nick Pearson, "Pension Changes Allow Older Australians to Work Longer Hours," *9NEWS*, September 2, 2022; Erin Brightwell, "The Fight to Defend Abortion Rights," Socialist Project, *The Bullet*, May 9, 2022, writes that this engineering of an appropriate workforce has led the ruling class to control women's reproductive rights, something which undergirds the herculean burdens imposed on women as they seek to gain, and then to retain, the right to determine whether they will have children. She notes that, as Iran and China are confronting long-term trends toward a declining population, it may be no coincidence that, recently, they have been strengthening penalties for abortions and restricting women's access to abortions.

This last point serves to highlight the fact that the construction of labour and consumer markets affects many other socially and politically contested spheres. It has an impact on the struggles around patriarchy, on policing as physical boundaries and racial antagonisms are put in play, on the nature of education (should it be aimed at providing skills and discipline useful to capitalist relations of production, should it be more liberal, more focussed on teaching how people should pursue leisure as that idea is described in chapter 12?), etc. In short, a very obvious point emerges: capitalism is a holistic system and its gyrations pervade all aspects of society.

On the conceptual justification for the private ownership of property, see John Locke, *Two Treatises of Government*: "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once

joined to, at least where there is enough, and as good, left in common for others." The notion has had, and continues to have, a great deal of resonance; see Abraham Lincoln, as quoted in J. G. Nichols and J. Hay, *Abraham Lincoln: Complete Works, vol. 1* (NY: Century Co., 1984), 92: "No good thing has been or can be enjoyed by us without having first cost labor. And inasmuch as most good things are produced by labor, it follows that all such things of right belong to those whose labor has produced them. But it has happened in all ages of the world that some have labored and others have without labor enjoyed large proportion of the fruits. This is wrong and should not continue. To secure to each laborer the whole product of his labor, or as nearly as possible, is a worthy object of any good government."

On the assumption that the workers' product belongs to their employers, see R. L. Fischl, "Some Realism about Critical Legal Studies," *University of Miami Law Review* 41 (1987): 505.

The argument made by Marx after his exhaustive historical research and careful analysis is crucial to his conceptualization of capital-labour relations. It is most easily read in K. Marx, *Wages, Price and Profit*, first edition 1898 (Foreign Languages Press, 4th rep., 1973); for an accessible and persuasive account, see Michael A. Lebowitz, *Build It Now: Socialism for the Twenty-First Century* (NY: MPR, 2006). He argues that one of the reasons that the true nature of capitalism is not confronted directly is that it appears natural precisely because capital is given a separate role from labour in production organized under capitalist relations of production; at p. 27, he writes that there is an elision: the transposition of "the social productivity of labour into the material attributes of capital is so firmly entrenched in people's minds that the advantages of machinery, the use of science, invention, etc., are necessarily conceived in this alienated form, so that all these things are deemed to be attributes of capital."

One of the implications of the assumption that workers are fully paid for their work and that, therefore, the net value of their product rightfully belongs to the other contributor, capital, is that—as workers internalize the verity of the assumption—it makes sense for workers to think that all they can ask for is a better wage. After all, they are not entitled to the product. This gives rise to the oft-made claim by workers that they should get a fair day's wage for a fair day's work. They no longer fight about the right to own the product of their labour. This is frustrating to those who want to reject capitalist relations of production. As early as 1881, Friederich Engels urged that, instead, workers should demand possession of the means of work, raw materials,

factories, machinery, as they were produced by them; see his "A Fair Day's Wages for a Fair Day's Work," *The Labour Standard*, 1881, https://www.marxists.org/archive/marx/works/1881/05/07.htm. The Wobblies were conscious of the conservative path workers had taken by internalizing the claim that capital constituted a discrete contribution to the production of goods and services. The preamble to their Constitution provided: "Instead of the conservative motto, 'A fair day's wage for a fair day's work', we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'"

On the fact that there is plenty of evidence that workers have a reason to be concerned about not being paid and, therefore, arguably have a case that they should be paid in advance, note the discussion of wage theft in chapter 7.

The normalization of the idea that workers should work before employers pay them is an intuitive response to the conventional understanding of economic power and of the need to accommodate the wealthy rather than others. It is mirrored in the tax systems: taxes are deducted from wages before the workers can spend them; employers pay their taxes after they have had a chance to make profits and use them. The payment in arrears system and the payment upfront system in respect of taxes have a similar impact on workers: both leave people reliant on their pay cheque (it is often noted that a majority of workers would only be able to meet their obligations for about a month should they not have their normal remuneration coming in) in a position where they are loath to confront their employers. This is not the place to extend this argument, but it is clear that the burden of debt that workers bear in contemporary society enhances their employers' power. One revelatory aspect is the plight in which workers find themselves when employers become bankrupt. Because they are paid in arrears, it is likely that they will be owed money at such a moment. But, being mere workers, they are treated as unsecured creditors, fighting for the scraps left over after secured creditors (lenders, banks, and lawyers) have collected what is owed to them. Downturns in the economy bring out this problem and various jurisdictions have taken remedial stances to help out otherwise hapless workers by setting monies aside for workers (so-called wages funds, paid-for by employers, employees, governments, or a combination of these sources) or moving workers up a few rungs on the ladder of those queuing-up to divide the carcass. In Canada, workers remain unsecured creditors but are now ranked ahead of other unsecured creditors.

The Truck practices, briefly adumbrated in the text, were a means to keep workers indebted. On the history of the legislative remedies, see E. Lipson, *The Economic History of England*, vol. 1 (1937), 480–82, which reports the first remedial legislation being enacted in 1462 (it is to be noted that similar legislation came to be enacted as the Industrial Revolution swung into action in Belgium, Russia, and France, indicating that capitalist employers give in to the same competitive drives no matter who they are, where they are); see G. W. Hilton, "The Truck Act 1831," *The Economic History Review* 10 (1958): 470; for an account of the contest between the reforming legislatures and the employer-favouring courts, see *The Law of Truck*, House of Commons, February 27, 1906, vol. 152, cc-1076–1109; for a more modern overview, see R. W. Rideout, *Principles of Labour Law* (London: Sweet & Maxwell, 1972). There were not very well-documented reports in the 1950s/60s that, in England, large firms had to send trucks to collect cash to pay all their workers on the same day, leading to robberies; eventually, the right to pay wages by way of cheques, if consent was given by the workers, was permitted.

On the nomenclature for these statutory reforms, Truck Acts, it is hard to pinpoint where it came from; some say it was an adaptation of the word truc used in French to describe a means, a trick, to get things done; others that it had something to do with the origin of the word truck as meaning dealing or bartering.

The passage from Kahn-Freund which points to the very special nature of the employment contract is one that informs this book in general and this chapter in particular. Kahn-Freund wrote: "In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment.'" See Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law*, 3 ed. (Stevens, 1983), 18. See also G. A. Cohen, "The Structure of Proletarian Unfreedom," in *History, Labour, and Freedom*, ed. G. A. Cohen (Oxford University Press, 1989). It is the fact that those without any disposable wealth must find a place to sell their labour capacity which makes the contract one of submission and the fact that this has given rise to a legal position of inferiority by the imposition of duties in the resulting contracts which creates the subordination or, as Cohen would have it, the unfreedom.

On the nature and scope of the implied terms:

The duty to pay wages is easy to enforce. Still, on occasions, there may be no explicit term setting out that wages are to be paid or how much is to be paid. Here custom and/or legislative minima will come into play. Infrequently, but often enough, work will be done by workers but, for some reason, the contract fails to meet a requirement to make it enforceable or there has been a fundamental mistake by the parties of what the bargain they struck truly was. In those odd circumstances, courts may order remuneration to be paid on what they call a quantum merit basis or on restitutionary principles which will not allow one party to be unjustly rewarded.

Some of the early case law, which allowed sick persons who remained willing to discharge their tasks under the contract as soon as possible to be paid, included one decision by the Supreme Court of Canada, *Dartmouth Ferry Commissioners* v. *Marks* (1903–4), 34 S.C.R. 366. The leading English decision came in *Cuckson* v. *Stones* (1851), 120 E.R. 902. It held sway for quite a while (see *Marrison* v. *Bell* [1939], 2 K.B. 187, and *Orman* v. *Saville Sportwear Ltd.* [1960], 3 All E.R. 105), but today the courts' approach is to hold that, unless there is something in the contract, either explicitly stated or clear from the nature of the contract, the dominant presumption ought to be that the right to wages is not to exist independent of the doing of the work. Mere willingness is no longer enough. Again, then, we see a regression from earlier law. Sometimes this is said to be warranted because there are now many income replacement schemes (both private insurance schemes and social wage provisions such as workers' compensation or disability pensions) but this is a little cavalier. During the pandemic, many jurisdictions' failure to provide adequate replacement income for those who were infected or at risk of becoming infected led to huge political controversies as some people were forced to endanger themselves because they could not afford not to go to work.

The case in which it was said that the employer had a duty to pay a willing worker but not provide her with work was *Collier* v. *Sunday Referee Publishing Company Limited* [1940], 2K.B 647. The example chosen to make the point was telling. The case had nothing to do with a servant hired to cook. It harked back to a different, a more status-conscious time. It exemplifies the spirit which imbues the judiciary, the primary legal institution when it comes to the imposition of terms into voluntarily, entered-into contracts of employment. They are influenced by the authorities laid down when employees were servants and employers were masters; they

are influenced by feudal incidents, rather than contemporary contractual ones. While it is clear that, despite the suggestion in *Devonald* v. *Rosser & Sons* [1906], 2 K.B. 728, there is no implied term that employers have to provide their employees with work, there are some exceptions. Thus, when a performer is not given a chance to perform or commission agents are prevented from earning by not being allowed to do what they normally do, they may be able to argue that this failure to provide them with work is a violation of the most essential term in their contract of employment. This puts them in the position of arguing that the employer has repudiated the contract and that they have been dismissed unlawfully: the employer had no cause to dismiss them (see below) or had not given them the notice due to terminate the contract. These special instances underline the fact that employers do not have a duty to provide work (despite Lord Denning's sweeping suggestions in *Langston*, see chapter 12).

The judicially implied duty to provide a safe system of work was finally nailed down by the courts in *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57. By then many statutory minimum standards had been imposed by legislators. And more were to come. The slowness of the judges to imply a duty to provide a safe workplace is attributable to the fact that such a duty would be a real intervention with the employers' right to run their enterprises as they sought fit. For an elaboration, see chapter 12.

The English Employment Appeals Tribunal (EAT) was established under what is now known as the *Employment Rights Act (UK)*, 1996, c. 18. On the original position taken by courts that all that employees could recover was what they would have earned if a reasonable period of notice had been given, note that there were some exceptions. In the early days, the period of notice thought to be reasonable, more often than not, was related to the kind of hiring the contract appeared to be, a weekly, a monthly, or a yearly one. It was also part of the jurisprudence that courts could award money for a lost opportunity in the job market or for lost opportunities to enhance reputation, as a performer or commission agent might suffer. While specific performance was not ordered by courts because this would impose a positive burden on one of the parties to a contract for personal services, judges would finesse the issue if they could posit that their order was a negative one, even if it meant that one of the parties had to perform under the contract s/he wanted to avoid. This issue arises from time to time when a term of the contract provides that the other party may not enter into a competing business on behalf of a person not her employer or herself for a certain amount of time in a given geographic area; much depends

on whether this is seen as interfering with free competition, with market freedoms; see *Warner Bros. Pictures Inc.* v. *Nelson* [1937] 1 K.B. 209. On the judiciary's original reluctance to impose punitive damages for a breach of contract, see *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488. More recent decisions have allowed claims for aggravated damages, that is, damages beyond the actual monetary loss caused by the breach, which compensate the plaintiff for the way in which a wrongful dismissal (a breach of the contract) was engineered by the employer; see *Quach* v. *Mitrux Services Ltd.* [2020] BCCA 25; *Wallace* v. *United Grain Growers Ltd.* [1997] 3 S.C.R. 701. Early on, the damages awarded tended to be added to the notice period but, gradually, aggravated damages have come to be seen as a head of damages in its own right; see *Honda Canada Inc.* v. *Keays* [2008] S.C.R. 39. Alongside this approach, an associated one developed: the idea that there might be a separate award to punish the defendant (for the same conduct that attracts aggravated damages sometimes) took hold and punitive damages became an acceptable head of damage awards; see *Whiten* v. *Pilot Insurance Co.* [2002] 1 S.C.R. 595.

The decision in *Malik* v. *Bank of Credit and Commerce International SA (in liq)* [1998] A.C. 20, excited academics, especially in the UK; see D. Brodie, "The Heart of the Matter: Mutual Trust and Confidence," *Industrial Law Journal* 23 (1996): 121; "Beyond Exchange: The New Contract of Employment," *Industrial Law Journal* 27 (1998): 79; "Wrongful Dismissal and Mutual Trust," *Industrial Law Journal* 28 (1999): 260; "Mutual Trust and the Value of the Employment Contract," *Industrial Law Journal* 30 (2001): 84; "Mutual Trust and Confidence: Catalysts, Constraints and Commonality," *Industrial Law Journal* 37 (2008): 329; "Fair Dealing and the World of Work," *Industrial Law Journal* 43 (2014): 29; A. Stewart, "Good Faith: A Necessary Element in Australian Labour Law?," *Comparative Labour Law and Policy Journal*, 32 (2011): 521; Hugh Collins, "Claim for Unfair Dismissal," *Industrial Law Journal* (2001): 305. The view that the EAT approach was merely a replication of old common law views in a changed social setting was echoed by some leading academics and by judges; see the early pronouncement to that effect in *Hepple and O'Higgins Employment Law*, 3 ed. (London: Sweet Maxwell, 1979), 120. For judicial pronouncements to this effect, see the early reaction by Lord Denning in *Western Excavating (ECC) Ltd.* v. *Shay* [1978] I.C.R. 221; for a later echo of this approach, see Lord Nicholls in *Eastwood & another* v. *Magnox Electric PLC* [2004] UKHL5.

On the narrowness of the decision in *Bashin* v. *Hrynew* (2014) SCC 71, see C. Mumme, "Bashin v. Hrynew: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the

Margins," *International Journal of Comparative Labour Law and Industrial Relations* (2006): 117; for an overview of the developments which led to an enrichment of fairness principles and the restrictions they have left in place, see D. Doorey, "Employer Bullying: Implied Duties of Fair Dealing in Canadian Employment Contracts," *Queen's Law Journal* 30 (2005): 500; see also K. Van Buskirk, "Damages for Imprudent Employer Behaviour: Two Judicial Approaches." *Canadian Bar Review* 83 (2004): 756; Kevin Banks, "Progress and Paradox: The Remarkable Yet Limited Advance of Employer Good Faith Duties in Canadian Common Law," *Comparative Labour Law and Policy Journal* 32 (2011): 547. On the distinction made by the High Court of Australia which pointed to the special nature of the need for litigants to bring themselves under the administrative/non-judicial umbrella, the arguments were arcane. In the end, it suffices to note that the Australian jurisprudence came to the view that, unless it was *necessary* to make a contract work, there should be no new duties and obligations implied. The finessing by the Australian High Court was given some support by a decision of the UK's House of Lords in *Johnson* v. *Unisys* [2003] 1 A.C. 518, which acknowledged that, since the UK's unfair dismissal statutory scheme had been revised, the implied duty of mutual trust and confidence had to be restricted as well: it should no longer apply to anything which happened after the termination of employment (as had been the case in *Malik*). This bolstered the link between the legislation and the UK's 1997 holding which the High Court of Australia emphasised. On the need to fetter the heralded new term of trust and confidence in *Malik* itself, see Lord Steyn at *Malik* v. *Bank of Credit and Commerce International SA (in liq)* [1998] A.C. 20, 46. For the Supreme Court of Canada's views on good faith in *Bashin* v. *Hrynew* (2014) S.C.C. 71, see paras. 63–66; see also E. Kay, "Good Faith and Fair Dealing in Canadian Employment Law," *HR blog*, DickinsonWright, April 26, 2021. For a an even more direct pronouncement to the same effect, see the Ontario Court of Appeal's judgement in *Piresferreira* v. *Ayotte* [2010] ONCA 384. There it was held that a duty of care in negligence could not exist if there was another important legal policy which needed to be preserved. Here an employee's right to sue in tort, including for the infliction of mental suffering as a result of bad behaviour by her supervisor, was negated by the fact that, should she be allowed to bring the action, it would upset the policy of what the scope of the implied term of good faith should be.

On the duty of good faith and loyalty, many of the litigated cases arise because workers set up their own businesses which rely in some way on what they learned or experienced at their last

place of employment. They are engaged in enterprises (sometimes by joining other would-be competing firms), just as their former employers are. This is something to be encouraged in competitive capitalism. But, for once, the source of these entrepreneurs' ownership of the means of production is challengeable—by their former employers who have a claim on those very means. Once again, the tender care for capitalists exhibited by law is on display. As a result, the cases are about whether the competition is to be adjudged fair to existing capitalists. Often, they are cases about whether employers—who feared losing their workers with valuable knowledge to others or to the lure of becoming self-standing businesses—seek to avert the problem by inserting a restraint clause in their contract with such workers and the issue of good faith and loyalty is fought on the more precise ground of the enforceability of such a clause. The geographic scope, the duration, of any specified restraint, and the like, are criteria that determine whether the restraint clause offends the public policy to promote competition. They are also the criteria that determine whether the restraint clause is justified because it gives appropriate support to the employer's right to enforce the duties of good faith and loyalty he has bought when entering into a contract of employment. A very old decision still reflects the nature of these kinds of balancing acts which are capable of justifying any one of several outcomes on one set of facts: *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition* [1894] A.C. 535.

For cases on the protection of confidential information and trade secrets, see consumer list cases, *Robb* v. *Green* [1895] 2 Q.B. 315; *Wessex Dairies* v. *Smith* [1935] 2 K.B. 80; for the limits on constraints on working with and for competitors while on their own time, see *Hivac* v. *Park Royal Scientific Instruments* [1946] 2 All E.R. 350. For the difficulties posed by having to determine whether the circumstances, in the absence of an express clause, indicate that a worker's invention should be turned over to the employer, see the eight criteria a court listed as determinative in *Comstock Canada* v. *Electec Ltd.* (1991), 38 C.P.R. (3d) 29; see also *Spiroll Corp.* v. *Putti* (1976) 88 D.L.R. (3d) 761.

On the tensions created by, on the one hand, the structured alienation of the work-for-wages regime and, on the other, the desire for self-respect of the alienated workers, see R. Edwards, *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (Basic Books, 1980); H. Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (Monthly Review Press, 1998); J. Rhinehart, *The Tyranny of Work: Alienation and the Work Process*, 5 ed. (Pearson/Prentice Hall, 2005). As Alan Fox, *Beyond*

Contract: *Work, Power and Trust Relations* (Faber & Faber, 1974), 188, wrote: "When, into this picture of attitudes towards the employment relationship, we introduce yet another strand, the ethic of work as a redemptive activity—complexity and ambivalence become compounded. Labour emerges as a highly peculiar entity—at once a commodity, an obligation to social superiors, and a source of spiritual or secular entitlement for the self."

On the initial visceral and accepted justification for employers who wanted to dismiss workers because they did not show what the employer thought to be an appropriate level of skill, see *Harmer* v. *Cornelius* (1858), 5 C.B. (N.S.) 236. The notion was that, even though the worker was no longer bound by feudal ideas, s/he was bound by the principles of pure contract. Having voluntarily entered into a contract, it could be implied that workers had promised to have and to deliver an appropriate level of skill and care. As the elements of the duty were softened, the concept undergirding the duty persisted. It will be recalled that, in chapter 6, there was a discussion about the doctrine of vicarious liability. It was noted that, when employees make an employer legally liable for wrongs committed while the employees were discharging their duties, it was legally permissible for employers to re-coup their losses by bringing an action against their harm-inflicting employees. The basis for such action is the employees' failure to exercise appropriate skill and care; see *Lister* v. *Romford Ice and Cold Storage* [1957] A.C. 555. While this employer power is rarely exercised, its persistence speaks to the scope of the implied duty.

On the initial approach to the implied duty to obey, see *Turner* v. *Mason* (1845) 153 E.R. 411; on the development of the refinement that the disobedience must have been wilful, be an act that demonstrated a desire by workers to derogate from their duty, see *Clouston* v. *Corry* [1906] A.C. 122; *Laws* v. *London Chronicle (Indicator Newspaper) Ltd.* [1959] 1 W.L.R. 698; on lines drawn between orders which are within the scope of the contract and those which are not, see *York University and YUSA* (arbitration, August 10, 1979, the coffee case in the text); between acceptable disobedience because obedience would expose the worker to real danger and when it would not, see *Bouzourou* v. *The Ottoman Bank* [1930] A.C. 271, and *The Ottoman Bank* v. *Chakarian* [1930] A.C. 277. Here note that the duties are imposed on individuals, and it is only individuals who may refuse to obey orders if they feel they are not lawful or reasonable. Sympathetic workers may not support a fellow worker who takes a stance. This persists, as will be discussed in the chapter on occupational health and safety, if workers want to exercise their right to refuse work under occupational health and safety legislation: they must do so as

individuals. The rationale is plain: the fear held by employers that this statutory right might be abused by workers to engage in otherwise prohibited strike actions is to be allayed.

One of the many issues which has given rise to disobedience by workers is the refusal to work longer hours than those to which they had thought they had committed themselves. Lengthening the workday is, of course, a very effective way for employers to get more value out of each worker. If it is a lawful command to lengthen the day in some way, employers benefit enormously from the imposed duty to obey. This is what made the nine- and eight-hour day struggles so vital, why they led to mass uprisings and mass repressions; see chapter 3.

For the schemes established by other legislatures to deal with what the North American systems call grievance procedures, see the overviews: H. Collins, K. Ewing, and A. McColgan, *Labour Law: Text & Materials*, 2 ed. (Hart Publishing, 2005); B. Creighton and A. Stewart, *Australian Labour Law*, 4 ed. (Federation Press, 2004); C. Sappideen, P. O'Grady, and G. Warburton, with K. Eastman, *Macken's Law of Employment*, 6 ed. (Lawbook Co., 2009); G. Anderson, A. Geare, E. Rasmussen, and M. Wilson, eds., *Transforming Workplace Relations in New Zealand, 1976-2016* (Victoria University Press, 2017).

On the emphasis that North American collective bargaining law puts on stability after a certain amount of economic warfare is permitted, see P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Carswell, 1980), 94: "While collective agreements are in place, we must provide workers with a satisfactory source of relief for such grievances against their employer which might otherwise spark a work stoppage . . . as the *quid pro quo* for the prohibition on strike action during the term of a collective agreement, our statutes typically mandate a system of binding arbitration as the mechanism for settling contract grievances without any stoppage of work." For the famed passage on the industrial plant not being a debating society, see *Ford Motors*, 3 L.A. 779 (Shulman).

My own views on how North American grievance arbitration presents both more lenient treatment for some workers and adheres to, and perfects, the disciplinary system which helps employers extract surplus value and turns trade unions into disciplining partners are to be found in: "The Utility of Model Building—Collins' Capitalist Discipline and Corporatist Law," *Industrial Law Journal* (1984): 133; "Law, Real and Ideological Constraints on the Working Class," in *Law in a Cynical Society: Opinion and Law in the 1980s*, eds. D. Gibson and J. K.

Baldwin (Carswell, 1985), 252; "Voluntarism, Liberalism and Fairness—Dream, Romance and Real Life" in *Essays in Labour Law*, ed. G. England (CCH, 1976); "Labour Relations Policy & Law as Mechanism of Adjustment," *Osgoode Hall Law Journal* 25 (1987): 179; "Coerced and Unfree in the Private Sector," *Critical Criminology* 26 (2018): 279; for a contextualizing of these evolving ideas, see my *Capitalism: A Crime Story* (Between the Lines, 2018).

On the authorities for the arguments on the way in which North American grievance arbitrators expand and refine the common law implied duties to obey, exercise reasonable skill and care, good faith and loyalty, and then create an intricate disciplinary and corrective "justice" system, see D. Brown and D. Beatty, *Canadian Labour Arbitration*, 2 ed. (Canada Law Book Company, 1984); M. Mitchnick and B. Etherington, *Labour Arbitration in Canada* (Cutom, 2006); D. Drache and H. Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System* (Lorimer, 1992); G. Adams, *Grievance Arbitration of Discharge Cases*, Queen's Industrial Relations Centre: Research & Careers Issues Series, no. 38, 1978. The *Ford Motors* case is *Ford Motors, Arbitrator Shulman* (1948).

The notion that capital-labour relations system is closely associated with criminalization of the people who need to be disciplined in order to maintain and perpetuate the extant system is far from novel. D. Hay, "Wage Labour," cited in Notes to Introduction, reports how the Master and Servant Acts always made it a crime for servants to violate the duties they owed their masters, whereas breaches of their duties only made masters liable civilly; In D. Hay and P. Craven, *Masters, Servants, and Magistrates*, Hay goes on to show that, in the late eighteenth century, penalties were increased as in the roaring days of capitalist development, masters were eager to dampen wages and to give masters greater powers and the capacity to quash what they deemed to be unreasonable worker demands. Three months imprisonment with or without correction (by which was meant whipping) of duty-violating workers came into fashion. *Spain* v. *Arnott*, the decision from which the quotation that opens this chapter was taken, reflected the judicial approval of these high-handed methods. Obedience was being nailed down with a heavy hammer. Hay goes on to show how thoughtful masters were conscious of the need to get workers to buy into the new modes of production. He gives examples of how traditional conduct, such as bull-running—large scale town events where bulls with their horns and tails cut-off, rubbed with soap and having pepper sprayed into their noses, were run around town; see E. Griffin, *England's Revelry: A History of Popular Sports and Pastimes 1660-1830* (Oxford Uiversity

Press, 2005)—and setting dogs onto tied-down beasts, were popular and perceived to be acts of rebellions as the wealthy tried to cultivate a more "civilized" population. Police and criminalization were invoked to create a more malleable workforce which led to the need to build prisons; see P. Linebough, *The London Hanged: Crime and Civil Society in the 18th Century* (Verso, 1991); D. Melossi and M. Pavarini, *The Prison and the Factory System*, 40th anniversary edition (Palgrave-MacMillan, 2018); for accounts linking these developments to current circumstances, see M. Neocleous, *Administering Civil Society: Toward a Theory of State Power*, 1996 (Verso, 2021); T. Gordon, *Cops, Crime and Capitalism: The Law and Order Agenda in Canada* (Fernwood, 2006); L. Wood, *Crisis and Control: The Militarization of Protest and Policing* (Pluto/Between the Lines, 2014). Master and Servant crime-based thinking set the tone for the supposedly agreed-upon duties to obey, to exercise skill and care, to be of good faith and loyalty; see S. Pollard, "Factory Discipline in the Industrial Revolution," *Economic History Review* 14 (1963): 254; S. Pollard, *The Genesis of Modern Management: A Study of the Industrial Revolution in Great Britain* (Edward Arnold, 1965).

The research and report on Canadian (and to a lesser extent US) capital-labour relations was *The Report of the Task Force on Labour Relations*, Woods Task Force, 1968, *Canadian Industrial Relations*, Ottawa: Privy Council Office. In Hugh Collins's piece "Is the Contract of Employment Illiberal?," in *Philosophical Foundations of Labour Law*, eds. H. Collins, G. Lester, and V. Mantouvalou (Oxford: Oxford University Press, 2018), Collins's unseen adversaries were those who propounded what is referred to as a threadbare argument in the Summation section of the chapter. Scholars such as R. Coase, in his very famous and influential "The Nature of the Firm," *Economica* 14 no. 16 (1937), argued that there is no submission or subordination by workers because they have made an autonomous decision to submit and subordinate parts of themselves for a limited period. It has always been a difficult argument to swallow. As early as 1887 it was realized that workers might very well give up so much of themselves that it would be difficult to enforce a contract as if it were a voluntary one between legally and politically equals; see *Davies* v. *Davies* (1887) 36 Ch. D., where the court wrote that, if there were elements of servitude, rather than service, attached to such a contract, it would have to be set aside. The vagueness of the distinction underlines the frailty of any argument that any terms and conditions should be enforced as the outcome of free bargaining. Given the fact that workers are pushed and shoved into fierce competition for scarce jobs with people all over the world these days, it is

unsurprising that many feel that the so-called freedom to enter into contracts is not liberating at all; see S. Deetz, *Democracy in an Age of Corporate Colonization* (SUNY Press, 1992). More colloquially, see I. Solty, "We Should Be Free to Say 'Fuck You' to the Boss," Socialist Project, *The Bullet*, January 10, 2020, and see L. Susan Brown, *Does Work Really Work?*, The Anarchist Library, retrieved from spunk.org, February 2, 2011, who wrote: "If the truth behind the employment contract were widely known, workers in our society would refuse to work, because they would see that it is impossible for human individuals to truly separate labour power from themselves. … A dancer has to be totally present in order to dance, just like a machinist must be totally present in order to work; neither can just send their discrete skills to do the work for them. Whether machinist, dancer, teacher, secretary, or pharmacist, it is not one's skills that are being sold to an employer, it is also one's very being. When employees contract out their labour power as property in their person to employers, what is really happening is that employees are selling their own self determination, their own wills, their own freedom. In short, they are, during their hours of employment, slaves."

Notes to Chapter 9 Essential workers

The quoted John Galsworthy passage comes from *The Forsythe Saga*, 1922 (London: Heinemann Ltd., 1973), 731. He was writing about the Victorian epoch to which he referred as manifesting a "gilded individual liberty."

The phrase Hobson's Choice is commonly attributed to the practice of a man called Hobson who kept horses hired by students to travel between Cambridge and Oxford. As many wanted the best horses, he frequently would have to disappoint some clients. He solved the problem by offering each client a horse he, Hobson, had chosen and told them they could have that one or none at all.

The Ontario regulation which listed the businesses to open and sector specific public health and workplace safety measures can be found at *O.Reg.82/20*, https://www.ontario.ca/laws/regulation/20082.

For the question posed by David Harvey, see his "Capitalism Is Not the Solution to Urban America's Problems—Capitalism Itself Is the Problem." *Jacobin*, June 2, 2020; for the differential impact on Canadian Indigenous and racialized workers, see Angele Alook, Sheila Block, and Grace-Edward Galabuzzi, "A Disproportionate Burden: COVID-19 Labour Market Impacts on Indigenous and Racialized Workers in Canada," CCPA, December 7, 2021; for the farm workers' infection rates elaborated in chapter 8, see Sara Mojtehedzadeh, "Farm Convicted in Migrant Worker Death," *Toronto Star*, June 7, 2022; on the US disparities, see Arianna McNeill, "Study: If People of Color Had the COVID Death Rates of College Graduate Whites, 89% Fewer Would Have Died in 2020," Boston.com, December 17, 2021; on the Poor People Campaign's findings, see Shailly Gupta Barnes and Jim Pugh, "During the Pandemic, Poor Areas Have Had Twice the Death Rates of Rich Ones," *In These Times*, May 24, 2022. The ghettoization of jobs is no accident in a class-divided society. The dominant class benefits from having a large, disunited pool of workers; M. Lebowitz, *Know Your Enemy: How to Defeat Capitalism*, Socialist Project, February 6, 2022, www.socialistproject.ca; see also his *Between Capitalism and Community*, (New York: Monthly Review Press, 2020). It is to be noted that elderly people were allowed to die in frighteningly large numbers. While, when housed in private retirement homes, they constitute profit-centres, from a productive point of view, they are of no

direct use to capitalists—they do not even add to the pool of available workers, a pool which intensifies competition among workers, diluting their bargaining powers.

There is a mountain of literature on the way in which the coronavirus pandemic has been tackled by various societies. For my own contributions, see "The Two Viruses: COVID-19 and Capitalism," *Canadian Dimension*, March 31, 2020 (also in *Progressive Economics Forum*, https://www.progressive-economics.ca/2020/04/01/guest -blog-harry-glasbeek-on-coronavirus-and-capitalism/); with Eric Tucker, "The Anti-Union Virus inside the Emergency Powers: Lessons for Workers," *The Bullet*, April 26, 2020; "COVID-19 and Toxic Capitalism," *Sick of the System: Why the COVID-19 Recovery Must Be Revolutionary*, ed. Between the Lines (2020); "The Pandemic from a Lawyer's Perspective: On Heroes and Compulsion," *Canadian Dimension*, May 19, 2020; "'Open the Economy'? The Pandemic, Costs, Benefits, Capitalism," *The Bullet*, June 11, 2020; "Divided Health and the Crisis of Capitalism," *Canadian Dimension*, January 6, 2021; "The Pandemic and Capitalism's Essential Workers: A Glimpse into the Belly of the Beast," *Canadian Dimension*, March 9, 2021.

This chapter presents a sketch of the way in which nation states such as Australia, Canada, New Zealand, the UK, and the US (and most of the EU) have (after hesitation by some) dealt with the pandemic. The stress has been on keeping the economy going until the capacities of the health system cannot deal with impacts of the infection and death rates. Other jurisdictions, notably China, have aimed at what has come to be labelled "zero tolerance." This emphasises shutting down the economy whenever there are any reports of infections in a region, contacting, testing, and isolating all who might have been exposed. This leads to large shutdowns of parts of the economy, but it sharply reduces infection and death rates. Rather peculiarly, but in line with the story told in this chapter, the shutting down of productive enterprises to attain these goals is derisorily referred to as authoritarian in western capitalist polities. They find the Chinese approach abhorrent and inefficient; see Bingqin Li, "China Clings to COVID-19 Zero," *Eastasiaforum: Economics, Politics and Public Policy in East Asia and the Pacific*, February 27, 2022, who makes the contrary argument that China was not only recording much lower impacts on ICU and health care facilities but was making relatively quick economic recoveries after the many lockdowns which it imposes. This debate raises the question squarely: is economic "authoritarianism" undesirable if it manifestly saves lives? The noted anthropologist Margaret Mead is reported as having replied to a student question about what she considered to be the first

sign of civilization in ancient culture. She said it was the finding of a human thighbone that had been broken and then healed. If the thighbone had belonged to an animal, it would have died; there would have been no one to heal it. “Healing someone else through difficulty is where civilization starts,” Mead said, as cited in Ira Byock, *The Best Care Possible: A Physician’s Quest to Transform Care through the End of Life* (Avery, 2012).

I have made some of the argument in this chapter about restrictions on the right to strike, especially in the public and quasi-public sectors, elsewhere: with M. Mandel, “The Crime and Punishment of Jean-Claude Parrot,” *Canadian Forum* (1979); “Public Sector Strikes and Democracy: Learning from the City of Toronto Workers’ Strike,” *Relay: A Socialist Project Review* 27 (July–September 2009); “Compulsory Arbitration in Canada,” in *Compulsory Arbitration*, by J. Loewenberg, W. Gershenfeld, H. Glasbeek, B. Hepple, and K. Walker, (Mass.: Lexington, 1976); “Coerced and Unfree in the Private Sector,” *Critical Criminology* 26, no. 4 (2018): 579. The last publication used the same two scenarios produced in the text of chapter 9 to indicate the differential treatment of essential capitalists and essential workers. On this issue, note the many occasions on which medical and pharmaceutical capitalists are willing to let people die if they cannot meet the price set by them in order to maximize their profits; see the infamous CEO Marin Shkreli of Valeant who increased the price of a drug by 5000%: Jennifer Yang, “Turing CEO to Roll Back 5,000% Price Hike for Daraprim Pills,” *Toronto Star*, September 23, 2015; for the infamous EpiPen episode, where the price of an instrument essential to people prone to anaphylaxis attacks was raised by 600%, see Ben Popken, “Mylan Executives Gave Themselves Raises as They Hiked EpiPen Prices,” *NBC News*, August 24, 2016; similarly, see Deena Beasley, “Pfizer Hikes U.S. Prices of Over 100 Drugs on January 1,” *Reuters*, January 10, 2016. Of course, this was before Pfizer made out like a bandit when it produced its BioNTech vaccine to fight COVID-19. Given its right to exclude others from its use unless they paid the price, it and Moderna, aided by the wealthy countries which place private property above all other interests, including life, fought desperate nations’ demands that they drop their monopoly rights; see Prabir Purkayastha, “The WTO and Vaccinations: Greed and Profits Win,” *The Bullet*, July 31, 2022, who reported that Pfizer’s profits doubled in 2021 from those recorded in 2020, totalling $81 billion, leaving huge swathes of people in poorer parts of the world unvaccinated. No one ordered Pfizer to make its life-saving vaccine available. It was allowed to withhold its asset, unlike essential workers. It all contrasts rather sharply with Jonas Salk’s

attitude. He was one of the developers of the crucially needed polio vaccine. In response to the famous journalist Edward R. Murrow who, in a 1955 broadcast, had asked him who owned the vaccine, Salk said: "I suppose the people . . . can you patent the sun?" Other models than the one by which we live are easily imaginable.

On the role of advertising, see David Olive, *White Knights and Poison Pills: A Cynic's Dictionary of Business Jargon* (Key Porter Books, 1990); Michael Lebowitz, *Know Your Enemy: How to Defeat Capitalism*, Socialist Project, February 2022, www.socialistproject.ca; see also his *Between Capitalism and Community* (New York: Monthly Review Press, 2020). In addition to the remarks made in the text about how capitalists need to expand their markets, Lebowitz also points to the way this pressure leads them to find markets in places where there are none. This undergirds the drive toward globalization, predicted by Marx (as quoted by Lebowitz) when he wrote that capital strives "to tear down every spatial barrier" to exchange and "to conquer the whole earth for its market."

This ceaseless effort to grow has been naturalized by propagating the idea that any kind of undertaking which promotes the drive for private riches serves the public need, whatever is being produced. Of course, some ways of making profit are prohibited, for instance where they involve physical coercion (as in murder for money or breaking into property to steal) or fraud which negates any notion that a voluntary exchange took place. Those kinds of extremes aside, law finds it very hard to differentiate between money-seeking endeavours which it feels it must criminalize and analogous conduct which retain its blessings; for an elaboration, see my *Capitalism: A Crime Story* (Toronto: Between the Lines, 2018).

On the pressure for growth at any cost, see Joseph Schumpeter's dictum in *Capitalism, Socialism and Democracy* (Unwin University Books, 1943): "Capitalism without growth is a contradiction in terms"; on the way in which growth is measured, quantitatively rather than qualitatively, see Robert F. Kennedy's insight in 1968: "Our gross national product now is over eight hundred billion dollars a year, but that gross national product—if we should judge the United States of America by that—that gross national product counts air pollution and cigarette advertising and ambulances to clear our highways of carnage. It counts special locks for our doors and the jails for the people who break them. It counts the destruction of the redwoods and the loss of our natural wonder in chaotic sprawl. It counts napalm, and it counts nuclear warheads, and armored

cars for the police to fight the riots in our cities. It counts the television programs which glorify violence in order to sell toys to our children. Yet the gross national product does not allow for the health of our children, the quality of their education, or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage; neither our wisdom or our learning; neither our compassion nor our devotion to our country; it measures everything, in short, except that which makes life worthwhile, and it can tell us everything about America except why we are proud that we are Americans." In Norman MacAfee, ed., *The Gospel According to RFK: Why It Matters Now* (Basic Books, 2008), 45.

The quoted passage by Mick Lynch comes from a speech he gave at a rally at King's Cross Station in London on June 25, 2022. It can be found at RMT@RMTunion. The rally was part of a campaign preparing workers for a possible strike. It attracted attention because it was publicized under the heading "We Refuse to Be Poor."

In this chapter on essential workers, the discussion involves setting out the outlines of how trade unionism, collective bargaining, and strikes are regulated. The chapters lump some Anglo-American jurisdictions together because of their common legal origins. They all start off with a regulatory approach which rests on jurisprudence developed in common law courts. The judicial approach—as already noted in chapters 2, 3, and 4—was that, as defenders of private property owners' rights and the elevation of the autonomy of all individuals, judges were happy to employ criminal law and develop civil anti-union causes of action against workers who collectivized in order to erode the rights of property owners. The fights for enlargement of the franchise and the right to form unions arose in this context. In this sense, the right to strike has always remained partial and challengeable. This is true in all the jurisdictions considered in this work. But all these nation states have different histories, and the actual regulation differs from jurisdiction to jurisdiction. Writing, as I am, from within Canada, I focus on the Canadian setting and, occasionally, the United States.

On the way in which trade unions are to be formed and the scope of their bargaining and strike rights for the UK, New Zealand, and Australian approaches, see H. Collins, K. Ewing, and A. McColgan, *Labour Law* (Cambridge University Press, 2012); G. Anderson, *Labour Law in New Zealand*, 3 ed. (Kluwer Law International, 2019); A. Stewart, A. Forsyth, M. Irving, R. Johnston,

and S. McCrystal, *Creighton & Stewarts' Labour Law*, 6 ed. (Federation Press, 2016); C. Sappideen, P. O'Grady, and J. Reilly, *Macken's Law of Employment*, 8 ed. (Lawbook Co., 2016). All these schemes are framed by the fundamentals of the common law judges: all regulatory schemes are bound to a greater or lesser degree—which varies from time to time—by the need to protect private property owners' rights at the expense of other rights and by the creed of individualism which forces those who advance the cause of collective actions to politically justify, and continue to justify, their goal.

The quotation from Roosevelt is from "Letter to Mr. Luther Seward, President of the National Federation of Federal Employees, Aug. 16, 1937." Roosevelt's ideas were embedded in the Taft-Hartley Act, *Labour-Management Relations Act, 29 U.S.C.A. P.L.101—80th Cong. Sect. 305*. For a comment on recent attempts to ban similar legislation banning public employees to bargain and/or strike, see Matt Murphy, "Public Employees Press Right-To-Strike Legislation," *State House News Service*, July 14, 2021.

For the numerous repressions of collective bargaining rights in Canada, see L. Panitch and D. Schwartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3 ed. (Garamond Press, 2003); see also, in addition to my own writings cited above, D. Drache and H. Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial relations System* (Lorimer, 1988).

The way in which the courts' approach continues to infuse contemporary thinking with the idea that the owners of the means of production should be protected from workers driven to reduce competition among themselves by collectivizing, as well as the way in which these same courts are pleased to split the economic sphere off from the political one, came together as soon as Canada's judiciary was asked whether the embedded *Charter of Rights and Freedoms* enlarged the right to associate to give an unalloyed right to bargain collectively and to strike. The answer was a resounding "no." The cases arose when governments had suspended bargaining and strike rights in the public sectors; for an insightful discussion, see M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing Inc., 1994). Thirty years later, the Supreme Court of Canada changed its stance. It has seemingly come to terms with the principle that collective bargaining rights include strike rights but the conceptual frame its predecessors provided still appears to have its hold; see E. Tucker, "Freedom to Strike?

What Freedom to Strike? Back-to-Work Legislation and the Freedom to Strike in Historical and Legal Perspective," *Labour/Le Travail* 86 (2020): 107.

Notes to Chapter 10 Executives: In a class of their own?

For the baseball story, see "10 Unvaccinated Kansas City Royals Can't Play in Series vs. Toronto Blue Jays Due to Canadian COVID Rules," *CBS NEWS*, July 14, 2022, https://www.cbsnews.com/news/10-unvaccinated-kansas-city-royals-series-toronto-blue-jays-canadian-covid-rules/. The highest player stated that he thought the loss was worth it as he did not think the risks associated with vaccination were worth taking. It is worth noting that, even though athletes (and other performers) are well-treated in monetary terms, they are dependent on their employers who often have the capacity to treat them as "owned" commodities who can be prevented from leaving their employ or be subjected to being traded, forcing these well-off people to unionize and to win contracts which, after an agreed-upon period of time, allow them to put themselves on the "market" again. Even well-paid employees may be characterized as commodities. In the US, in some cases, professional team owners are allowed to deduct the cost of employing an athlete from their income and then to take deductions comparable to the depreciation allowance a factory owner may claim in respect of the notional reduction in value of a piece of equipment; see Paul Kiel, "Ten Ways Billionaires Avoid Taxes on an Epic Scale," *ProPublica*, June 26, 2022.

The Canadian Centre for Policy Alternatives (CCPA) is a labour-side research and advocacy group. Each and every year, it produces a report which documents the earnings of CEOs in major Canadian corporations and then compares them with the earnings of workers. In large part, this is a riposte in the never-ending contest between capital and labour for the hearts and minds of the general public. A right-wing think-tank, the Fraser Institute, also presents an annual report. It documents its calculation as to when the average worker will have earned enough to pay all the taxes that s/he will be paying that year. That date, cleverly, is called "Tax Freedom Day." In 2022, June 15 was pronounced to be that day. The message is that everyone would be better off if governments taxed less. The CCPA is telling the workers that CEOs are getting rich at the expense of workers and that this exploitation should be stopped, maybe by governments using their taxing powers more effectively.

The phraseology about the general duty of executives and senior managers to the corporation varies from jurisdiction to jurisdiction. The sense of what is intended, however, is widely shared. It is caught well by s. 122 of the *Canada Business Corporations Act*, which decrees that "Every

director and officer of a corporation in exercising his powers and discharging his duties shall (a) act honestly and in good faith with a view to the best interests of the corporation." Note that the expressions, "CEO," "executives," and "senior managers" are not used. The text of this chapter does employ those descriptors. In various Anglo-American jurisdictions, different language is deployed. For instance, in Australia, New Zealand, and the UK, the term "director" includes members of the board of directors who have no other function than to be board members and a CEO may be described as a "managing director" and the persons described in this chapter as "senior managers" may often be labelled "officers." It may be the case that the CEO or managing director may be a director serving on the board of directors, that is, as both a "director" and a "managing director or CEO." The language I have chosen in the text is used to discuss the methods of payment (and the way in which they might be understood) of those actors within the corporation who have responsibility for implementing the policies identified by the governing board of directors.

For the Welling quote on the expectations law and society may have of executives and senior managers, see B. Welling, *Corporate Law in Canada: The Governing Principles*, 2 ed, (Butterworths, 1901), 381. On the issue that directors, executives, and senior managers are not truly trustees in legal terms because they do not own the property which they administer, see R. Flannigan, "The Fiduciary Duty of Departing Employees," *Canadian Labour and Employment Law Journal* 14 (2009): 355. Flannigan has written a series of doctrinal essays showing that the fiduciary duties, properly so-named, overlap with the duties of fidelity imposed on a variety of actors, including employees who are not seen as trustees. His analysis in "The Employee Status of Directors," *King's Law Journal* 25 (2014): 370, re-enforces the point made in the text to the effect that executives and senior managers are, in legal terms, employees. Flannigan's careful analysis of English jurisprudence which, on occasion, refers to directors as non-employees, shows that even directors are, in legal terms, employees. As noted, the term "directors" is used in the UK, Australia, and New Zealand to include managing directors, personnel more often called CEOs in North America. The term "directors" also includes those members of the board of corporations whose only task is to set the policy of the corporation. Their duties, albeit very well remunerated, are light in terms of time spent. A few half- or one-day meetings each year are the norm. They are not responsible for daily operations of the corporation and often have other jobs, including being executives at other corporations or even directors at a number of corporations.

The description of the "highest paid casual labour in Australia" was given to these non-executive directors; see Mathew Dunckley, "Two-Strike Rule 'Should Be Struck Out,'" *The Age*, April 22, 2019. This kind of hands-off, episodic work might make some think of non-executive directors as independent contractors, rather than employees, but Flannigan's analysis rejects this stance. In this chapter, these arcane issues are not all that pertinent. The concern here is the way in which law treats officers who actually do the work the boards of directors require to be executed.

The formula provided by the Supreme Court of Canada which holds that, where a person has discretionary power over assets and the exercise of that power may adversely affect a beneficiary's interest or the interest of a peculiarly vulnerable person, there is an obligation to act in good faith and selflessly is found in *International Corona Resources Ltd* v. *LAC Minerals Ltd.* (1989), 61 D.L.R. (4th) 14. For an overview, see P. D. Finn, *Fiduciary Obligations* (Lawbook Co., 1977). The difficulty in the literature on fiduciary relationships exists because there is an unarticulated starting point. While workers owe obligations which are very similar to executives and senior managers in spirit, non-Marxist scholars have internalized a basic truth, namely that what this chapter calls "ordinary," "lesser" employees never have sufficient control over anything to be saddled with an accountability which, historically, was imposed on persons with true discretionary powers. This was unwittingly revealed by J. Laskin in a Supreme Court of Canada case, *Canadian Aero Service Ltd.* v. *O' Malley* [1974] S.C.R. 592. At p. 606 the highly respected judge wrote that the two men who had claimed not to have owed a fiduciary duty to their former corporation because they were mere employees were wrong because it was clear to him that they were not mere servants. The language is revelatory. (This is not the place to argue—as I would—that J. Laskin was wrong. Even if they had been classified as mere employees or servants, these men had allegedly taken advantage of an opportunity they had denied their employer. If that allegation had been proved—and the facts as found were that they had not been proved—they would have been in breach of their duty of good faith and loyalty.)

Sarah Anderson was the author of a report done for the Institute for Policy Studies in 2016, *Off the Deep End: The Wall Street Bonus Pool and Low-Wage Workers*; for the Bernie Sanders numbers, see Bernie Sanders, "The Real Truth About America," *Reader Supported News*, January 21, 2019; for the Robert Reich piece, see his "Work and Worth," *Robert Reich's Blog*, August 3, 2014. These populist responses were chosen randomly; they cover a few years, indicating the problem is not a momentary one.

The storied story of Al (Chainsaw) Dunlap is summarized in Gideon Haigh, "Bad Company: The Cult of the CEO," *Quarterly Essays* 10 (2003): 14 et seq. The article "Corporate Killers: Wall Street Loves Lay Offs but the Public Is Scared as Hell: Is There a Better Way?" by Allan Sloan appears in *Newsweek*, February 1996; the story about the RJR Nabisco Air Force is mocked by J. K. Galbraith in *The Culture of Contentment* (Broughton Mifflin Company, 1992). The citation for the RJR Nabisco book is Bryan Burrough and John Helyar, *Barbarians at the Gate: The Fall of RJR Nabisco* (New York: Harper & Row, 1990). The vanity, selfishness, and self-importance of so many CEOs was on full display during the rise and fall of Dennis Kozlowski who was the head honcho at a corporation called Tyco during the volatile 1980s and 1990s. He became infamous for having bought a $6,000 shower curtain, a $15,000 dog-shaped umbrella stand, and a $2,900 gilded waste-basket, holding a birthday party for his wife in Sardinia where an ice sculpture of Michelangelo's David dispensed Stoli thorough its appendage, costing a mere $2.1 million claimed as a business expense, as well as being paid a salary of around $100 million plus some unspecified amounts as a bonus (Kozlowski actually observing that his remuneration package was confusing). It all came to light as the corporation failed and Kozlowski and his chief financial officer, Swartz, were charged with criminal offences, including receiving $81 million in unauthorized bonusses, the use of corporate monies to purchase $14.725 million worth of art, and paying an unwarranted fee to a friend and associate. They were convicted of twenty-two counts of grand larceny and forced to make substantial restitution. They served long jail sentences. Later Tyco also brought a civil action to recover the $500 million in salary and benefits it had paid Kozlowski during a five-year period. Note the amount! Tyco won. Intriguingly, it had brought its action under a New York statute, *The Faithless Servant Liability Act.* This statute with its telling name points to the fact that, elevated or not, whether a fiduciary or not, whether endowed with discretionary powers or not, in the end, even CEOs may be seen as servants by capitalists.

One of the justifications for treating executives and senior managers in special ways—in terms of remuneration and legal obligations—is that while, legally, corporations are cast as persons with all the capacities of human beings (indeed, with more capacities, as they are born as adults, may reproduce instantly, and notionally need never die) and can therefore participate as individuals and own property, deploy it, and sell and buy it, they are just legal creations with no mind or muscles of their own. They must think and act through human beings who represent them.

Corporations are also the principal vehicles by which capitalists pursue profits. They are often in an adversarial position vis-à-vis workers and owners of resources they covet. To pursue their interests, the so-called best interests of the corporation, they must have some one they can trust to do their bidding, not anyone else's. The executives and senior managers are, as Marx called them "the personification of capital." This is why there is so much discussion of their roles and duties as, being individuals in their own right, they may stray from the central function which the logic of corporate capitalism accords them. In legal terms—as law does not acknowledge the political economic thinking of Marxism—those acting on behalf of the corporation are known as the guiding mind and will of the corporation. As such they may create civil liability or criminal responsibility for the corporation. There being no reason for identifying them other than to find a way to determine whether technically a corporation has engaged in some legally binding way, there is much uncertainty in law as to how far judges and administrators ought to go down the hierarchy when deciding whether the persons who did the thinking and acting were part of the guiding mind and will of the corporation. A morass is fertilized by the mountainous volume of litigation. For my own elaborations see *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (Between the Lines, 2002/3); "Missing the Targets—Bill C-45: Reforming the Status Quo to Maintain the Status Quo," *Policy and Practice in Health and Safety* 11, no. 2 (2014): 9; "More Direct Director Responsibility: Much Ado About ...What?," *Canadian Business Law Journal* 25 (1995): 416. From the perspective of this chapter, it can be said—as I contend—that the reason executives and senior managers are enabled to extract these huge wages from their labours is because, as *the personification of capital*, they are, in part, rewarded as if they are members of the capitalist class. Defenders of the liberal view of law believe that it is necessary to pretend that there is something special about the executives' and managers' ordinary employee-type duties to be of good faith and loyal to the employer, something so different about the same genus of duties that it is understandable that they will be paid on a different basis. This, of course, is a shaky basis which gives a rationale both for the expressions of envy at the apparent privileging of executives and senior managers and for the many attempts to look for solutions to uneven treatment that betrays the liberal principles which undergird the legitimacy of the corporation. The Marxist approach is not at all perplexed by what others see as the egregious excesses of the executive and managerial class.

For the Adam Smith quote on the general inutility of companies, see *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 3, ed. Edwin Cannan (Modern Library, 1994), ch. 1. By 1904, Thorstein Veblen, *The Theory of the Business Enterprise* (Scribner's, 1904), was bemoaning the fact that the discretionary powers of executives and senior managers were often exercised to satisfy their personal aims. Adam Smith's anxieties were given a boost as corporate capitalism appeared to be in crisis during the late 1920s, through to 1940, by the empirical work of A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (Commerce Clearing House, 1932). It had become clear that executives and senior managers had served themselves well and neither the corporations nor the general public well at all. It led to a cry for reforms, the major proposition being that executives and senior managers really should hold corporate property in trust to serve the general public; see E. M. Dodd, "For Whom Are Corporate Managers Trustees?," *Harvard Law Review* 45 (1932): 1145. Berle was to acknowledge that Dodd was on the right track as, in the postwar period, there was a desire and hope that the bad old days of corporate single-minded focus on the bottom line had been banished; see A. A. Berle, "Modern Functions of the Corporate System," *Columbia Law Review* 62 (1962): 433. During those golden years, when prosperity seemed assured and corporate growth appeared unstoppable, there were more and more pleas to executives and senior managers, fortuitously blessed by having control over massive assets, to put them to use for the benefit of society as a whole. The text notes the writings of John Kenneth Galbraith who believed that the time had come for such a change of role. During this golden period, the cries for corporate social responsibility were loud and persuasive; see Edward S. Mason, *The Corporation in Modern Society* (Harvard University Press, 1960); as Les Trente Glorieuses were coming to an end, vigorous counter-attacks were mounted; see Law and Economics Center, *The Attack on Corporate America*, ed. Bruce Johnson (McGraw-Hill Book Company, 1978). For my own take on these struggles for the heart and mind of the corporation, see H. Glasbeek, "The Corporate Social Responsibility Movement—The Latest in Maginot Lines to Save Capitalism," *Dalhousie Law Journal* 11 (1988): 363; *Capitalism: A Crime Story* (Between the Lines, 2018). The movement, while still part of the discourse, lost its potential as shareholder primacy became the virtually unchallenged objective of corporate pursuits.

For the change in academic direction which pushed corporate management to make shareholder primacy the centre of its concerns, see M. Jensen and W. Meckling, "Theory of the Firm:

Managerial Behavior, Agency Costs and Ownership Structures," *Journal of Financial Economics* 3, no. 3 (1976): 305. When the raiding which followed did not work out all that well, a new tack was taken. This time Jensen found a new collaborator; see M. Jensen and K. Murphy, "CEO Incentives—It's Not How Much You Pay, but How," *Harvard Business Review* (1990): 138; M. Jensen and K. Murphy, "Performance Pay and Top-Management Incentives," *Journal of Political Economy* 98, no. 2 (1990): 225.

The hostile raider period which led to the poison pills, shareholder rights' agreements as they were politely known during this era of shareholder primacy, brought forth an army of professionals eager to use their fertile imaginations. They created defensive plans which, not so coincidentally, helped out apprehensive executives and senior managers, as well shareholders. It was said that the poison pill was invented by Martin Lipton of Watchtell, Lipton, Rosen & Katz in 1982, as a response to tender-based hostile take-overs. Some of the more notorious raiders of the time are mentioned in the text. They provided the foundations for anti-heroes portrayed in popular culture; see Oliver Stone's 1987 *Wall Street* and Norman Jewison's 1991 film *Other People's Money*. The compensation consultant Graef Crystal, whose book, *In Search of Excess: The Overcompensation of American Executives* (Norton, 1991), exposed the ways in which he and his fellow compensation consultants had contributed to what he claimed to be compensation not linked to performance and effort, referred to golden parachutes and golden handshakes as "golden condoms." Crystal saw no let-up of unacceptable excesses as the raiding period was replaced by the drive to align executive and senior managerial incentives with the interests of the shareholders. He knew that compensation consultants were bound to teach their clients how to take advantage of this new state of play. He told John Cassidy, in "The Greed Cycle: How the Financial System Encouraged Corporations to Go Crazy," *The New Yorker*, September 23, 2002, that, if it was allowed to combine a volatile stock with a willingness to reprice the stock option, "then you have created a money machine, an anti-gravity device, which guarantees that the senior executives will get super-rich." David Yermack had shown that the repricing of options was a common practice; see "Good Timing: CEO Stock Option Awards and Company News Announcements," *Journal of Finance* 52 (1997): 449; with D. Olek, "Taking Stock—Equity-Based Compensation and the Evolution of Managerial Ownership," *Journal of Finance* 55 (2000): 1367. For the Woolard quote which underscored Crystal's contempt for his fellow compensation consultants, see G. Morgenson, "How to Slow Runaway Executive Pay," *New*

York Times, October 23, 2005. The idea that some of the pay increases shocked the conventional writers was, in large part, due to the fact that there was a lot of evidence that the high pay rates had little to nothing to do with the performance of the corporations which paid so handsomely. On this, see James Collins and Jerry Porras, *Built to Last: Successful Habits of Visionary Companies* (HarperBusiness, 2005); James Collins, *Good to Great: Why Some Companies Make the Leap…and Others Don't* (HarperBusiness, 2001; Alfred Rappaport, "New Thinking about How to Link Executive Pay with Performance," *Harvard Business Review* (March/April 1999), from *The Magazine*; John Byrne, "How High Can CEO Pay Go?," *Business Week,* April 22, 1996, quoting Crystal: "There is no relationship between pay-package sensitivity and longer-term shareholder return; … there is no relationship whatsoever between the size of stock option grants and future performance of the company; … there is no reason why they need to be paid this sort of money. They could use that money to lower the cost of products, give workers raises, or give shareholder more profits." This last point endorses the argument made in this chapter that executive and senior manager pay, in part, comes out of the surplus value extracted by the corporation. It gives an edge to the title of Michel Albert's book title, *Capitalism against Capitalism* (Basic Books, 1992).

The series of changes from the managerialist period through to the emphasis on shareholder primacy took place in a context of changing political economic circumstances. The movement to neoliberalism had marked impacts on the way in which globalizing firms began to operate, creating many different divisions, each with management teams required to make profits on behalf of the centralized parent corporation. At the same time, there was an explosive growth of what is now labelled financial capital. It heralded a different set of priorities for, and pressures on, what used to be called industrial capital. One manifestation pertinent to this chapter is the fact that when the US established its new securities regime, it also forbade corporations from purchasing back their own shares. The prohibition was lifted during the Reagan presidency, creating a new avenue for executives and senior managers to enrich themselves while pretending to look after shareholders' interests. For some of the background to other legal changes that occurred as a result of these new forces, see John Cassidy, "The Greed Cycle"—among other things, Cassidy pointed to the way in which the professionals advising the executives and senior managers helped them get favourable tax treatment for the way in which options were to be viewed; for a more academic analysis of these sweeping movements, see Stephen Maher,

"Shareholder Capitalism, Corporate Organization, and Class Power," in *The Contradictions of Pension Fund Capitalism*, eds. K. Skerrett, J. Weststar, S. Archer, and R. Chris (Labor & Employment Research Association, University of Illinois, 2017).

While the data compiled by Coffee Jr, *Legal Options*, November/December 2003, and Lawrence Mishel and Julia Wolfe, "CEO Compensation Has Grown 94% since 1978," *Economic Policy Institute*, August 14, 2019, show that the executive and senior manager pay packages are still being packaged in much the same way, it is not to be thought that regulators are not trying to slow things down. In the UK, legislation has been passed which requires corporations to disclose the formulae they are using to pay their executives and senior managers and shareholders get a right to vote their approval or disapproval. If 25% or more of the shareholder votes disapprove of the compensation formulae two years in a row, the board of directors may be forced to stand down; there is a diluted version in Australia where such a repeated dissident shareholder demand is not binding on the corporation. But so far, this has had, as the numbers show, little impact. This is so because the schemes, as are most of the reform suggestions made by commentators and academics, persist in seeking a better alignment of the interests of the executives and senior managers and shareholders; see Graef Crystal's own prescriptions in his *What Are You Worth?: The New World of Executive Pay* (Chief Executive Press, 1992), or the lively discussion in E. Iacobucci, with M. Trebilcock, *Value for Money: Executive Compensation in the 1990s* (C. D. Howe Institute, 1986). Even though many see the need for some regulation to "revert to the old-fashioned model—one less focused on the ideology of incentives and more rooted in creating sustainable value (and values)," as former Chair of Ontario's Securities Commission Ed Waitzer wrote in "Executive Compensation—'A System So Perfect that No One Needs to Be Good,'" *Globe and Mail*, December 11, 2015, there is little resonance for such changes. Thus, when the EU pushed to cap bankers' bonusses to be only twice their base salaries, it drew contempt from the Anglo-American sphere. The then mayor of London, Boris Johnson, mindful of the importance of the city, said: "This is possibly the most deluded measure to come from Europe since Diocletan tried to fix the price of groceries across the Roman empire." As long as shareholder primacy provides the executives and senior managers with their goals, they will be allowed to pursue their own enrichment by partaking in shareholder welfare, even though as Waitzer (above) noted "the extreme pursuit of managerial/shareholder wealth maximization often goes in hand with dubious legal behaviour." My own elaboration of this point is to be

found in Glasbeek, “Enron and Its Aftermath: Can Reforms Restore Confidence?,” in *Crime in the Corporation*, eds. A. Anand, J. Connidis, and W. Flanagan (Queen’s Annual Business Symposium, 2004); Glasbeek, *Wealth by Stealth*.

Suresh Naidu’s argument that executives and senior managers are paid in part by income derived from capital, rather than personal labour, was made in “A Political Economic Take on W/Y,” in, *After Piketty: The Agenda for Economics and Inequality*, eds. H. Boushey, J. Bradford DeLong and M. Steinborn (Harvard University Press, 2018). It is an examination as to why Piketty’s historical study and the formula he drew from it needed special adaptation for the (especially Anglo-American) spurt in inequality which did not fit all that well with the formula. Piketty noted the significance of the explosion in executive and senior management pay and Naidu sought to explain how it affected the Piketty argument.

Notes to Chapter 11 A legal right to maim and kill workers

For a more detailed discussion of the context of the Great Lakes Power case, see Harry Glasbeek, "More Criminalization in Canada: More of the Same?," *The Flinders Journal of Law Reform* 8, special edition, Industrial Manslaughter (2005); Mary Beth Currie, "Workers: Last Line of Defence," *OHS Canada* (2004): 56. One of the features of the story is that a corporation pled guilty to a regulatory (contrast criminal) offence once its senior officers were left off the hook. As senior managers are in a position to force the corporation, they notionally serve to plead guilty, they can offer this kind of a "victory" to prosecutors who want a result but who would find it difficult to get one without senior managers' co-operation. The senior managers can use this as a bargaining chip when trying to avert criminal responsibility for the conduct which inflicted harm. I have discussed this at more length in "More Direct Director Responsibility: Much Ado About…What?," *Canadian Business Law Journal* 25 (1995): 416; "Missing the Targets—Bill C-45: Reforming the Status Quo to Maintain the Status Quo," *Policy and Practice in Health and Safety* 14, no. 2 (2014): 9; *Capitalism: A Crime Story* (Between the Lines, 2018).

Kevin Purse, "The Evolution of Worker Compensation Policy in Australia," *Health Sociology Review* 14 (2005): 8, noted that more than 2,000 workers died every year and 477,800 claimed compensation for injuries suffered at work in Australia. On the ILO and other figures in the text, see D. Whyte, "Naked Labour: Putting Agamben to Work," *Australian Feminist Law Journal* 21 (2009): 57; Harry Glasbeek, "Missing the Targets." The toll of injuries and deaths in Canada led to a campaign to have one day of the year designated, a day on which there was to be a roll-call of the dead and wounding. It has become established as The Day of Mourning and has been replicated in many other countries.

On the privileging of the capitalism-favouring ideology of competitive individualism over health and safety of workers, see E. Tucker, "The Law of Employers' Liability in Ontario, 1861-1900," *Osgoode Hall Law Journal* 22 (1984): 213; E. Tucker, *Administering Danger in the Workplace* (University of Toronto Press, 1990); N. Holdren, *Injury Impoverished: Workplace Accidents, Capitalism and Law in the Progressive Era* (Cambridge University Press, 2021). On the reason why some thinking employers and their allies saw the necessity to lessen the slaughter in nineteenth-century workplaces, see K. Marx, *Capital, vol. I, A Critical Analysis of Capitalist Production* (International Publishers, 1967), 265: "The capitalist mode of production …

produces thus, with the extension of the working-day, not only the deterioration of human labour power by robbing it of its normal, moral and physical conditions of development and function. It produces also the premature exhaustion and death of this labour power itself. It extends the labourer's time of production during a given period by shortening his actual lifetime." This echoes Engels' findings. It dovetails with the notion that the so-called unintentional assault on bodies in the workplace might be equated with murder. For a contemporary Marxist analysis of this notion, see P. Govender, S. Medvedyuk, and D. Raphael, "Mainstream Mews Media's Engagement with Friederich Engels' Concept of Social Murder," *tripleC* 20, no. 1 (2022): 62. It explains why the length of the working day and the number of days on which they were to be worked became central to class struggle.

The common employment doctrine was enunciated (somewhat unclearly, it must be said) in *Priestly* v. *Fowler* (1837) 150 E.R. 1030; it was applied in the US in *Farwell* v. *Boston and Worcester Railroad* (1842) 45 Mass (4 Met.) 49, where the judge, acknowledging the difficulty, insisted that the volenti principle meant that workers must be assumed to have taken the risk of negligent fellow workers into account; see C. Tomlins, "A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850," *Law and History Review* 6 (1988): 375. For the Johnny-come-lately acceptance by the judiciary that the doctrine of volenti should be abandoned, see *Wilsons and Clyde Co. Ltd.* v. *English* [1939] A.C. 57 (House of Lords); *Marshment* v. *Borgstrom* [1942] S.C.R. 374 (Sup. Ct. Canada).

On the role contemporaries wanted the nineteenth-century Factory Acts government inspectors to fulfill, see this quoted passage from the Deputy Minister of Agriculture, Toronto, 1908, cited by E. Tucker, "Occupational Health and Safety Regulation in Ontario": "The Factory Inspector must not be like the policeman with his baton in performing his work; he must be imbued with a large amount of that important ingredient which I have before characterized as common sense … bring together these two classes, which otherwise would be kept apart." On the scholarship which characterized the early British Factory Acts as exercises in institutionalized ambiguity, see W. G. Carson, "The Institutionalization of Ambiguity: The Case of the Early British Factory Acts," in *White Collar Crime: Theory and Research*, G. Geis and E. Stotland (Sage, 1980); see also V. Aubert, "White Collar Crime and Social Justice," *American Journal of Sociology* 58 (1952): 263. The concept of the institutionalization of ambiguity was found to be applicable to

today's circumstances by the same scholars who first identified the phenomenon; see W. G. Carson and R. Johnstone, "The Dupes of Hazard: Occupational Health and Safety and the Victorian Sanctions Debate," *Australian and New Zealand Journal of Sociology*, 26, no. 1 (1990); W. G. Carson and C. Henenberg, "Social Justice in the Workplace: The Political Economy of Occupational Health and Safety Laws," *Social Justice* 16 (1989): 124. Contemporary commentators and policymakers identify very similar approaches. They advocate leaving it to the parties to settle safety issues by government-facilitated internal dispute settlement mechanisms and that intervention by an externally appointed inspector should be thought of as a means to encourage the parties to pursue the reaching of a consensual resolution and that this encouragement might be helped by the knowledge that the inspectors might impose penalties on intransigent violators. This is seen as a more efficient scheme of regulation than the punish to persuade systems advocated by some; this softly, softly approach is commonly referred to as the pyramid system or responsive regulation; see I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); J. Braithwaite and J. Makkai, "Trust and Compliance," *Policing and Society* (1994): 1; B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); C. Dellitt and B. Fisse, "Civil and Criminal Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement," in *Securities Regulation in Australia and New Zealand*, eds. G. Walker & D. Fisse (Oxford University Press, 1994); F. Haines, "The Use and Effectiveness of Prosecution in the Industrial Context: Interrogating the Punish/Persuade Debate," in *Occupational Health and Safety Prosecutions in Australia: Overviews and Issues*, ed. R. Johnstone (Centre for Employment and Labour Relations Law, University of Melbourne, 1994); F. Haines and A. Sutton, "The Engineer's Dilemma: A Sociological Perspective on Juridification and Regulation," *Crime, Law and Social Change* 39 (2003): 1. All this pyramid/ responsive regulation theorizing appear to make the assumptions identified by those who characterized the system as being one of institutionalized ambiguity, namely that the safety of workers (or the environment or customers, such as investors) should be encouraged as long as it also serves to undergird the structural and ideological bases needed for the maintenance of capitalist relations of production.

For the earliest commentaries on the development of income replacement schemes, see A. Ruegg, *A Treatise Upon the Employers' Liability Acy, 1880* (Butterworths, 1882). That statute

was enacted in 1880; see 43 & 44 Vic.c.42. It was followed by the first Workmen Compensation Act in 1987. For the decision which showed the continued judicial antagonism to a no-fault system, see *Simpson* v. *EBBW Vale Steel, Iron & Coal Co.* [1905] 1 K.B. 453; for the Boris Johnson quote, see Boris Johnson, "Health and Safety Are Making Britain a Safe Place for Extremely Stupid People," *The Telegraph*, July 6, 2009; for the David Cameron quote, see Andrew Woodcock, Dan Bentley, and Ben Glaze, "David Cameron: I Will Kill Off Safety Culture," *Independent*, January 5, 2012.

The early versions of these no-fault compensation income replacement schemes struggled because the idea of having a socialized fund (that is, one in which the parties in some combination contributed to a general fund for all firms covered) had not yet evolved. In the meanwhile, some of the better-placed workers bargained for a fund out of which payments could be made. In Britain—as once again a war had made workers' lives more important to governments—the 1942 Beveridge Report, *Social Insurance and Allied Services Report*, recommended a social insurance fund to establish a national insurance and publicly funded health services scheme. This set the pattern and, from then on, the denial of access to the judiciary by injured workers could be justified. A premium system was in place which guaranteed workers that there would be funds available to provide income replacement awards if they could show their injury/disability had arisen in or out of the course of their employment.

For some of the history of the development of workers compensation in Canada, see the Meredith Report, *Interim Report on Laws Relating to Liability of Employers to Make Compensation to their Employees for Injuries Received in the Course of Their Employment*, 1913, which led to the enactment of the Ontario first *Workers Compensation Act* in 1914. Its essential elements remain in place. For early Australian developments, see Kevin Purse, "Evolution of Worker Compensation Policy in Australia," and Paula Cowan, "From Exploitation to Innovation: The Development of Worker Compensation Legislation—Queensland," *Labour History* 73 (1997): 93; for the New Zealand story, see H. Armstrong, *Blood on the Coal: The Origins and Future of New Zealand's Accident Compensation Scheme* (Wellington: The History Project, 2008). The contemporary New Zealand scheme is one that has merged all physical injuries under one no-fault regime, that is, it has extended the logic of the workers' compensation legislation to allow for income replacement no matter how or where a physical injury (but not diseases) which gave rise to the loss occurred. It was borne out of a desire to eliminate the

capricious judiciary from the field. In other jurisdictions this ousting of the judges is often found when losses are incurred as a result of automobile accidents. In short, there is a tendency to take note of the fact that the judicial system and the common law are out of step with social, political, and economic realities. Less so in the US. There the first worker compensation scheme was initiated in Wisconsin in 1911 and, by 1920, there were fourty-seven similar regimes; Mississippi was the last State to join the movement in 1948. But, in the US the amounts recoverable are typically less generous, less connected to the losses suffered by workers than in the other jurisdictions covered here. This has left room for the courts to insert themselves into the system as workers seek better remedies than workers' compensation schemes offer. They are allowed to bring actions against the manufacturers of products or substances which they believe were implicated in the harms they suffered. They bring products' liability cases to willing courts. The amounts awarded are often large, encouraging further litigation. This has given rise to a fervent politics waged on behalf of product manufacturers, that is, capitalists, demanding that tort liability be limited. The irony is plain: employers who benefitted from the judicial emphasis on individual risk-taking now want the judges out of the way; workers, who have always suffered from judicial meanness, now ally themselves with civil libertarians who believe in the importance of an independent judiciary. Strange bedfellows, brought together by the on-going carnage in workplaces.

The list of very well-known incidents whose horrendous nature force policymakers to mend fences is not exhaustive by any means. There is a mass of writing on these and like events; see, for instance, R. Mokhibar, *Crime and Violence: Big Business Power and the Abuse of Public Trust* (Sierra Club Books, 1988); J. Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press, 1993); C. Wells, *Corporations, Crime and Accountability*, 2 ed. (Oxford University Press, 2001); K. O'Brien, *Paradise Falls: The True Story of an Environmental Disaster* (Pantheon, 2022); Rebecca McFie, *Tragedy at Pike River Mine: How and Why 29 Men Died*, updated ed. (AWA Press, 2021); H. Szoke, "Brazil's Mine Disaster Exposes BHP's Failures," *Sydney Morning Herald*, November 19, 2015; H. Glasbeek and E. Tucker, "Death by Consensus: The Westray Mine Story," *New Solutions* (1993): 14; Angus Thompson, "What Is Silicosis? Is It the 'New Asbestosis'?," *Sydney Morning Herald*, February 19, 2023; G. Haigh, *Asbestos House: The Secret History of James Hardie Industries* (Scribe Publications, 2006); J. McCulloch and G.Tweedale, *Defending the Indefensible: The Global*

Asbestos Industry and Its Fight for Survival (Oxford University Press, 2008); P. Brodeur, *Outrageous Misconduct* (Pantheon, 1985). The asbestos story is perhaps the most written about mass poisoning of workers recorded; see J. Peto, A. Decarli, C. La Vecchia, F. Levi, and E. Negri, "The European Mesothelioma Epidemic," *British Journal of Cancer* 79 (1999): 662, estimate that, in the UK alone, asbestos will have killed 250,000 people between 1995 and 2029. While the text notes that it is rare that criminal proceedings are initiated, this did happen in two cases. *United States* v. *WR Grace*,401 F. Supp. 2d, 1093 (Mont. 2005) was a prosecution of a corporation and senior managers for having spread asbestos-contaminated material to cover a high school's running track and for the foundation of a skating rink. The prosecutions were not for injuring workers but for environmental offences. In Australia, James Hardie had provided asbestos-contaminated material for roads in a township with a predominantly Aboriginal population. No charges were brought in that case. By the time Grace was being prosecuted, it had declared bankruptcy and, by using an analogous avoidance strategy, James Hardie had left few assets behind before fleeing the jurisdiction. In Italy, a major asbestos corporation, Eternit, had contaminated a town and many workers. Its major shareholder and significant director was prosecuted and convicted of a serious criminal offence. It took sixteen years and, at the time of writing, a decision of an appeal of this conviction is awaited; see "Eternit, Justice for the Dead, Salvation for the Living," http://www.inaltreparole.net/en/news/eternit180509html; see also R. F. Ruers and N. Schouten, *The Tragedy of Asbestos: Eternit and the Consequences of a Hundred Years of Asbestos Cement*, trans. S. P. McGiffen, 2 ed. (Netherlands: Socialistische Partij, 2005).

While asbestos is the poster child of these long latency cases during which employers knew or should have known of the hazards they were asking workers to face, there are many of them. In 2018, it was reported that, at General Electric in Peterborough, Ontario, workers had been exposed for decades to 3,000 chemicals, at least fourty of which were suspected carcinogens.; see Sara Motjehedzadeh and Laurie Monsebraaten, "GE Workers Paying Price for Decades of Exposure to Toxic Chemicals: Report," *Toronto Star*, May 18, 2017, updated April 18, 2018. The presence of chemicals in workplaces is so great that it is impossible for regulators to know about them all. As long as investing employers are thought of as innocent and all their substances as innocent by virtue of this, workers will continue to be imposed to great risks; R. Chernomas and I. Hudson, "Labour in the Time of Cholera and Cancer." *The Bullet*, July 1, 2013, reported that the US environmental agency, charged with the task of vetting the impacts of chemicals, had

only vetted one per cent of all commercially available chemicals. The consequences are dire. The Chernomas and Hudson article reports the finding of a Mt. Sinai School of Medicine study which documented that a worker had ninety-five toxic elements in her body, fourty-nine of which were known carcinogens; see also the empirical work of J. Brophy, M. Firth, and M. Keith, *Workplace Roulette: Gambling with Cancer* (Between the Lines, 1997); see, more generally, S. Tombs and D. Whyte, *Ecocide: Kill the Corporation before It Kills Us* (Manchester University Press, 2020). Note how difficult it is to believe that anyone could even think of making an argument that workers voluntarily assume the risks of the workplace, given that they and the regulators are kept in the dark. Note also that, when workers' compensation regimes are forced to face the possibility that more diseases are connected to workplace exposures than acknowledged (as was the case, for instance, in the GE case and, of course, in the case of asbestos for decades), the occupational health and safety regulators must take the evidence of these debilitated canaries seriously and show their willingness to recognize more causal links between employer decisions and harms. But the complexity and cost of research is high, government resources are always stretched, and the new exposure levels will be discussed with the employers and their researchers; see C. Tuohy, "Decision Trees and Political Thickets: An Approach to Analyzing the Regulatory Decision-Making in the Occupational health Area," Law & Economics Workshop, University of Toronto, 1984. All this goes toward the caution raised in the text to the effect that workers' compensation regimes are far from giving total coverage for injuries and diseases. Just as causal links between exposures to chemicals and diseases are not acknowledged, it is also the case that workers' compensation tribunals, just as the common law courts always have been, are less than receptive to claims that emotional and psychic debilitations should be treated as injuries arising out of work. Stress, if recognized as a compensable injury at all, usually needs to accompany a traumatic injury and even where this rule has been abrogated, the tribunals are reluctant to compensate for stress; see Sara Mojtehedzadeh, "A Hole in the Safety Net," *Toronto Star*, May 6, 2023, who reports that only ten per cent of all such claims were successful in Ontario.

On the argument that ordinary criminal law could easily be applied to health and safety incidents if there was a political will to do so, see H. Glasbeek and S. Rowland, "Are Injuring and Killing at Work Crimes?," *Osgoode Hall Law Journal* 17 (1979): 506.

On the explosion of new criminal laws to deal with corporate health and safety violations (and sometimes other wrongdoings), see special issues of two journals: *The Flinders Journal of Law Reform* 8 (2005) and *Policy and Practice in Health and Safety* 11 (2013). In addition to the statutes covered there, note the following Australian jurisdictions (where the idea has been very popular) which have enacted industrial manslaughter kind of laws: Australian Capital Territory in 2004, New South Wales in 2022, the Northern Territory in 2020, Queensland in 2017, and Western Australia in 2020.

On the paucity of prosecutions under the new criminal laws, see S. Tombs, "Still Killing with Impunity: The Reform of Corporate Criminal Liability in the UK," *Policy and Practice in Health and Safety* 11 (2013): 63; Norm Keith, "After 10 Years, Bill C-45 Yields Few Prosecutions," *Canadian Occupational Safety*, April 23, 2016. More generally, see Steven Bittle, *Still Dying for a Living: Corporate Criminal Liability after the Westray Mine Disaster* (UBC Press, 2012); E. Tucker, "And Defeat Goes On: An Assessment of Third-Wave Health and Safety Regulation," in *Corporate Crime: Contemporary Debates*, eds. F. Pearce and L. Snider (University of Toronto Press, 1995); Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (Routledge, 2015); Harry Glasbeek, "Missing the Targets"; S. Bittle and L. Snider, "Moral Panics Deflected: The Failed Legislative Response to Canada's Safety Crimes and Market Fraud Legislation," *Crime, Law and Social Change* 56 (2011): 373.

The arguments made about the design of a special set of laws which facilitate and promote capitalist enterprises and which, as part and parcel of that exercise, reduce the externalization of the risks created by these capitalists as much as is acceptable to profit-maximizers, also applies in other spheres of harm-causing entrepreneurialism, such as the impacts on consumers and physical environments. In these other areas it is to be expected that monitoring and enforcement will be a little more vigorous because the victims do not all belong to the working class. This is especially true when it comes to the protection of shareholders in corporations and lenders to corporations. Here the rules are more stringent and more vigorously enforced as the struggles are seen as intra-class ones, albeit they are contests between large and small capitalists. On the whole, however, the reluctance to hold the owners of the means of production responsible when the risks they create for their own benefit materialize holds true in all spheres of capitalist activities. Laureen Snider has made a major contribution to this analysis; see "Towards a Political Economy of Reform, Regulation and Corporate Crime," *Law and Policy* (1987): 37;

"The Regulatory Dance: Understanding Reform Processes in Corporate Crime," *International Journal of the Sociology of Law* 19 (1991): 209; "'But They Are Not Really Criminals': Downsizing Corporate Crime," in *Marginality and Condemnation: An Introduction to Critical Criminology*, eds. B. Schissel and C. Brooks, 3 ed. (Fernwood Books, 2001); "The Sociology of Corporate Crime: An Obituary," in *Unmasking Crimes of the Powerful: Scrutinizing States and Corporations*, S. Tombs and D. Whyte (Peter Lang Publishers, 2004). For the adjudicating tribunal's views, see *United Steel Workers of America* v. *Cominco* 80 CLLC 16,045.

On the argument that it is workers who, by foregoing wages, pay for the funds needed to protect the security of workers with schemes such as workers' compensation and pensions, see J. E. Pesando and S. A. Roe, *Public and Private Pensions in Canada: An Economic Analysis* (University Of Toronto Press, 1977); *Gray* v. *Kerslake* [1968] 3 Sup. Ct. Rep. 3; *Parry* v. *Cleaver* [1970] 1 A.C. 1 (House of Lords). This raises the question why it is that the investment of these worker security funds is not controlled by the workers whose monies are being invested. It is a democratic argument and it is a political argument: workers might well want their monies to be invested in undertakings which are not anti-worker or anti-social, such as private prisons, for-profit long term care, plastic industries, armaments, pipelines, and highways. The owners of the means of production would mount considerable opposition to such a democratic and logical movement. Paradoxically, they frequently use their logic, a logic based on a misunderstanding, namely that they make contributions to these funds, as a way to attack the coverage of these security regimes. They claim that, as presently funded, if all contributions were to stop at some arbitrary date (there is no reason why this would ever happen, but that does not trouble these clever people!) then, given all the people who have qualified to collect benefits, the fund will just run out of money. This argument, which makes no social or political sense, is given a name to make it sound scientific. It is that there is an unfunded liability which cannot be tolerated. The answer they provide: cut the scope and benefits of the scheme. Make the workers pay.

Notes to Chapter 12 The dignity of work versus the degradation of work under capitalism

The quotes on the beauty of work are taken from *Langston* v. *Amalgamated Union of Engineering Workers & Chrysler United Kingdom Limited* [1973] EWCA Civ 7 (C.A.); *Re Public Service Employees Relations Act (Alberta)* (1987) 38 D.L.R. (4th), 161 (Sup. Ct. Canada); *Johnson Unysis* [2003], 1 A.C. 518 (H.L.). In the last decision, Lord Millett described employment as one of the "defining features of people's lives"; the Supreme Court of Canada restated its positive endorsement of work in *Machtinger* v. *HOJ Industries Ltd.* [1992] 1 S.C.R. 986.

Lord Denning, who relied on poetry and gut instinct about how people live to bolster his finding in *Langston*, was a much-admired judge. Law students loved (and possibly still love) him because of his felicity of expression and his unusual candid admissions that he was taking social conditions into account. Candour is a good quality but not so charming when it exposes the unappetizing views it promotes. As the *Langston* case passage shows, Lord Denning was a misogynist, and his many other judgments and writings speak to his visceral anti-unionism.

To foreshadow the contention that recurs throughout this text, the elegant C. J. Dickson pronouncement about his regard for workers' well-being was offered in a decision which went against a worker-protecting union—as it did in the *Langston* case and in the Supreme Court of Canada decision called *Machtinger* v. *HOJ Industries Ltd.* Lords Hoffman's and Millet's vigorous defence of the claimed benefits work brings in the *Unysis* case was mouthed while writing a decision which did not favour unions. Is there a pattern here?

What all these statements about the value of enhancing the quality of human beings' lives signal is that there is more to life than just surviving. Thus, *The Declaration of Philadelphia 1944*, cited in the text (and which became an annex in the Constitution of the ILO and thus binding as customary international law) says this specifically by declaring that "labour is not a commodity." For the origin of this much-used phrase, see Paul O'Higgins, "'Labour Is Not a Commodity'—an Irish Contribution to International Labour," *Industrial Law Journal* 26 (1997): 225. See also S. Evyuy, "Labour Is Not a Commodity: Reappraising the Origins of the Maxim," (2013), 4 *European Journal of Labour Law* 4 (2013): 222; J. Fudge, "Labour Is Not a Commodity: The

SCC and the Freedom of Association," *Saskatchewan Law Review* 67 (2004): 425. This declaration that human beings are not just economic beings or things, while often sincerely uttered, contrasts with another expression much in use when capital-labour issues are discussed. This is that there is a labour market, that is a market in which human beings' capacities are sold and bought; see K. Ewing and J. Handy, "The Myth of the Labour Market," *International Union Rights* 28 (2021): 24.

The lottery example is but one way of illustrating how governments and popular culture gurus signal that working for a living is not such a great idea. Thus, it is seen as perfectly normal for people to inherit wealth. In Canada, there are no inheritance taxes.

The film *For Richer, for Poorer* was made for television by Jay Sandrich in 1992.

An expression such as a right to work has different meanings in different settings. The declaration that it was a worker's right that ought not to be violated in the *Langston* decision did not mean that the court was saying that there is a right to get work. In the US there are States known as "right to work" law States. This denotes that people are freed from having to be subject to the collective and union protecting federal laws, a right that many see as a profoundly anti-worker right, certainly when contrasted with the right to a job which provided adequate income which Roosevelt advocated in his 1944 *State of the Union* address (see chapter 3).

For the ILO numbers on people in the work-for-wages spheres, see International Labour Office, *World Employment and Social Outlook Trends 2020*, ILO, 2020; International Labour Organization, "ILO Modelled Estimates: Employment by Sector: Annual," November 2019: International Labour Office, *Global Wage Report 2008/9*, ILO, 2008. For Kim Moody's analysis and commentary, see his "Workers of the World: Growth, Change, and Rebellion," *New Politics* 18, no. 2, whole number 70 (Winter 2021). Moody emphasises that the total work force has increased, that despite the claims that we are in a post-industrial phase of capitalism, the growth in industrial, manufacturing, construction, and transportation has increased mightily and, most pertinently to this chapter, that global value chains (discussed in chapter 7) have dragged people out of the informal economy into the integrated networks of the capitalist economy. This has brought women to the workplace, adding a vast number of relatively more easily exploitable workers into the competition for income-earning work. The growth in the world's workforces is much greater than the increase in population, making the intensification of competition real.

Some of Robert Hale's many influential writings include, "Bargaining, Duress, and Economic Liberty," *Columbia Law Review* (1943): 603 (from which the quoted passage is taken); see also his "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38 (1923): 470. The point of departure of the realist scholars was that they did not accept the then (and still?) dominant economic view that market capitalism was based on freedom—that workers were engaged in exercises of freedom when they offered their labour power, that contracts so concluded were freely made. They took notice of the fact that property rights affected the nature of conduct and affected distributional outcomes; see also B. Mensch, "Freedom of Contract as Ideology," *Stanford Law Review* 33 (1981): 753. For an overview of this important literature, see Joseph Singer, "Legal Realism Now," *California Law Review* (1988): 465; for an overview of Hale's work, see Warren Samuels, "The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale," *University of Miami Law Review* (1973): 261.

Even to capitalism-favouring theorists, it is clear that, for it to be said that workers have entered into a contract voluntarily and freely, the workers must have had other choices. In a scathing analysis, C. B. McPherson, "Elegant Tombstones: A Note on Friedman's Freedom," *Canadian Journal of Political Science* 1 (1968): 8, notes that, when Friedman defends the efficiency and liberating values of markets and concludes that the terms of employment contracts are to be enforced as the parties wrote them, he acknowledges that the workers should belong to a group (a household, or the like) which can support itself, giving the workers a choice as to whether or not to enter the labour market. This conveniently ignores the fact that this is rarely the on-the-ground situation. Centuries of enclosures, conquest, and colonization led (and continue to lead) to systematic dispossession, ensuring that many, many people, households, or groups cannot provide for their own subsistence. For my own elaboration on these issues, see Harry Glasbeek, *Capitalism: A Crime Story* (Between the Lines, 2018).

For a compelling overview of the persistence of the Poor Law approach, see the Minutes of Evidence (Scotland) of the 1910 Royal Commission on the Poor Laws: "If Parochial boards desire to discourage indolence, to detect imposture, and to reform or to control vice, they must make work, confinement and discipline the conditions upon which paupers of this class are relieved"; for the unwavering adherence to this approach, right up to the current moment, see

Bryan Palmer, "The *New* New Poor Law: A Chapter in the Current Class War Waged from Above," *Labour/Le Travail* 84 (2019): 53.

The passage from J. Higgins is to be found in *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Propriety Co. Ltd.* (1911) 5 C.A.R. 12, (HCA). Higgins was a principal engineer of the compulsory arbitration system that governed Australian capital-labour relations for nearly a century. Similar understandings to Higgins's ideas about the hapless position of workers could be found in early UK judicial decisions. In *Devonald* v. *Rosser & Sons* [1906] 2 KB 728 (CA), the court was faced with a claim by workers that their employer had suspended them without pay because there was little demand for the employer's product. The workers claimed that they should have been allowed to remain at work and be paid or given notice by the employer to terminate their contracts. The Court of Appeal agreed with them. Lord Justice Farwell thought that the very creation of a contract imposed obligations of mutuality. The mere misfortune of one party could not be passed on to be borne by the other unless there was an agreement to that effect. That would be unfair to the weaker party (in this case the suspended workers). "Workers," he wrote, "live *de diem in die*" because wages do not leave any scope for saving for a future day when no employment is available, whereas employers are in a position to plan their living over the long haul because profits are "ascertained, as an ordinary rule, *de anno in annum*." In effect, the judge was emphasising why the owners of the means of production have the advantage in bargaining and holding that it behoved the stronger party to respect the parlous negotiation position of the other. Note here that this acknowledgment of the conditions of the working class revealed that Abraham Lincoln's hope that workers would be able to save and establish businesses on their own account had not worked out as Lincoln had hoped. See discussion below. To return: the judgments in *Devonald* were, in their own way, a suggestion that, once a job exists, there is something like a right to work, as held in the *Langston* case. But those days of concern about the original bargaining inequality and the need for mutuality have not survived. Today it is permissible for employers, confronted by a market problem, to suspend workers for a period, not pay them during that period, and then recall them. That way the employer retains the specialized skills of workers it has trained. And the cost is passed on to the workers or the taxpayers. It is telling that many pro-worker activists see this development—suspension without pay—as a positive one as workers' jobs are preserved and because, in many

jurisdictions, the suspended workers may become entitled to collect some unemployment benefits (mostly paid for by the State).

The ILO numbers on occupational health and safety deaths, injuries, and diseases were compiled by *World Statistic*, 2013.

For the drug rehabilitation story, see Julia Harris and Soshana Walters, "They Worked in Sweltering Heat for Exxon, Shell and Walmart; They Didn't Get Paid a Dime," *Grist*, April 30, 2019. For the ubiquity of prisoners' work, see Chris Hedges, "The Slaves Rebel," *Common Dream*, September 3, 2018. This use of forced labour is given Constitutional protection in the US. The 13th Amendment provides that neither slavery nor involuntary servitude is to be permitted, unless it is a punishment for a crime which had led to a conviction. Note that, when slavery was finally abolished, this left a great number of people without the labour, the slave labour, they had enjoyed. In many States, there was rash of prosecutions and convictions for all sorts of crimes related to poverty, pushing people, mainly Black people, into jails where their labour power became available to property owners; see also Michelle Alexander, *The New Jim Crow: Massive Incarceration in the Age of Colorblindness* (The New Press, 2012). As many prisoners fall under State jurisdiction, there has been pressure on States to give up the legal right to force prisoners to work and quite a few States have given in to these pushes, but obviously not all. For the references to the California and Arizona developments, see Murjani Rawls, "California Senate Elects to Not Change 'Involuntary Servitude Amendment,'" *The Root*, July 4, 2022; Charles Pierce, "Forced Labor Is the Life-Blood of Arizona, According to the Prison Guy," *Esquire*, July 18, 2022. For a historian's account, see Jaime Lowe in *Breathing Fire*: *Female Inmate Firefighters on the Front Lines of California's Wild Fires*, MCD, 2021. He reports that, in 1850, a law was passed that allowed white people to show that Indigenous people were unemployed, have them arrested and sold at public auction into slavery for a period of four months. These short-term slaves, according to Lowe, built much of California's infrastructure, including the Pacific Coast Highway and carving out the twenty-two-mile stretch of land that created Sunset Boulevard. Using jailed people as for-wages-workers leads them to react as workers. Everywhere jailed people riot and complain about their conditions, including the forced labour for very low wages in which they are made to engage. Inasmuch as they also do necessary work in the jails, such as cooking, gardening, and laundering, concerted activities might well give them some bargaining clout. There are many attempts to form prisoner unions; see Jordan

House, “Why Canadian Prisoners Are Participating in the US Prison Strike,” *Jacobin*, September 2018. In 1977, Guelph prisoners, who were farmed out to work for private firms, formed a local of the Canadian Food and Allied Workers Union; earlier, in 1975, other attempts to unionize in British Columbia had failed as did an attempt in 2011. One outcome of these struggles was the creation of a Prisoners’ Justice Day which, when celebrated, may be accompanied by refusals to work or to eat. In 2013, federal prisoners went on strike to protest a cut in wages for work done in manufacturing, textiles, construction, and other services. They were protesting a cut in wages. They lost the strike. It is plain to see that prisoners are seen as part of the labour pool. They compete with other workers as profit-makers look for the cheapest way to produce goods and services. As the radical unionist Greg Shotwell wrote, “When it comes to labor costs, the bottom line doesn’t have a floor—it has trap door”; “Collective Bargaining or Criminal Conspiracy,” Socialist Worker, July 11, 2011.

On slavery as a property-owning phenomenon, see Kathryn Boodry, “August Belmont and the World the Slaves Made,” in *Slavery’s Capitalism: A New History of American Economic Development*, eds. Sven Beckert and Seth Rockman (Philadelphia: Penn State University Press, 2016). Slaves were often bundled as property to raise capital on the bond markets, much as real estate came to be bundled during the subprime mortgage schemes of our times; see Sven Beckert, *Empire of Cotton: A Global History* (NY: Vintage Books, 2014).

In the text above, it is noted that the word slavery is used to good political effect but that it is not slavery as the law historically has defined that relationship. This imprecision may have unintended and undesirable consequences. For a thoughtful analysis and warning, see Judy Fudge, “Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization,” *Labour/Le Travail* 82 (2018): 227. In this chapter, the task I have taken on is to identify that work within capitalism’s parameters is dehumanizing, much as chattel slavery was. I do not feel I have to enter into the debate on how dangerous it is to characterize a relationship as one of slavery although I do believe that Fudge’s concern is fully warranted, both on academic and political grounds.

The study on work in the fishing industry is D. Tickler, J. Meeuwig, K. Bryant, F. David, J. A. H. Forrest, E. Gordon, J. J. Larsen, B. Oh, and D. Pauly, “Modern Slavery and the Race to Fish,” (2018), *Natural Communications* 9, no. 1 (2018): 4643. The work was done for the Sea Around

Us, a Global Fisheries Cluster, University of British Columbia. For a summary of some of the findings, see Melanie Green, "'Slave Labour' Catches Fish Canadians Buy, Study Says," *Toronto Star,* November 8, 2018. On the ILO/Walk Free Reports see, Kate Hodal, "How Many Slaves Are There Today, and Who Are They?," *The Guardian*, February 25, 2019. The number of forced labourers includes tens of thousands of children made to work in artisanal gold mines in Peru. Poor ventilation, malaria, exposure to mercury and cancer-inducing silica, all contribute to horrendous outcomes; see David Whyte, *Ecocide: Kill the Corporation before It Kills Us* (Manchester University Press, 2020); Verite, *Risk Analysis of Indicators of Forced Labor and Human Trafficking in Illegal Gold Mines in Peru*, Amherst, Mass., 2013. There manifestly is a lot of murkiness about these kinds of data because it is not easy to differentiate between formal and informal parts of the economies or to be sanguine about whether that distinction matters. The number of slaves said to exist in the Kate Hodal article is 40.3 million, rather than the 24.9 million cited in the text. The extra 15.4 million belonged to the category labelled "forced marriages." While this group might well fit the definition used by the researchers, they have been omitted here because it is not clear how they are linked to the formal economies. This, in no way, is to trivialize their oppression and repression. Not so tangentially, it is apposite to note that sex workers are often kept captive by profiteers who, to sell sex, had people abducted or deceived (their passports withheld, control over their daily lives extreme). For a prosecution in which such a set of circumstances led to convictions of a brothel keeper and her associates under one of the modern slavery statutes noted in the text, see *The Queen* v. *Wei Tang* (2008), 37 CLR 1 (High Ct. Aust.).

On Export Free Zones, etc., see David Whyte, "Naked Labour: Putting Agamben to Work," *Australian Feminist Journal* 31 (2009): 52. On the temporary labour programmes in Australia, see Joanna Howe, "Labouring under a Perilous Policy," *The Age*, March 13, 2019, a commentary on Australia's *Migrant Workers Taskforce Report*; Alan Kohler "Farmers and Business Demand Morrison Give Them Back Their 'Slaves,'" *News Daily*, November 18, 2021; Thomas Walkom, "Canada Exploits Temporary Foreign Workers—No Surprise," *Toronto Star*, 1June 19, 2020, makes the point that employers argue for the programme on the basis that no Canadian would do this kind of essential work. He wryly observes that Canadians would be prepared to do this work if decent wages were offered, something which is being denied to foreign farm workers; see also Sara Mojtehedzadeh, "Bunkhouse Living Conditions 'Cost Lives,' Survey Finds," *Toronto Star,*

June 10, 2021. The mass emigration from Ukraine is seen as an opportunity by some manufacturers who, after the pandemic, are suffering from labour shortages, a problem which has led Canada's government to ease its restrictions on temporary workers who might want to become citizens; Jordan Press, "Amid Labour Shortages, Feds Loosen Rules on Foreign Workers," *Toronto Star*, April 5, 2022. In the US, where much to-do is made about the flow of refugees, often called illegal immigrants, across its southern borders, it is widely acknowledged that, at any one time, there are more than 10 million undocumented aliens in the country (some have been there for so long that there is a political debate about whether their off-spring born in the US should be entitled to citizenship) who work for a living. They form a very low wage and insecure workforce which benefits specific employers, as well as all employers by dragging down the costs of almost everything; see Julie Keller, *Milking in the Shadows: Migrants and Mobility in America's Dairyland* (Rutgers University Press, 2019); see also Arvind Dilawar and Julie Keller, "The US Immigration System Treats Workers as Disposable," *Jacobin* February 27, 2021.

On food banks and food insecurity, see Daily Bread, "*Who's Hungry 2012: From Crisis to Resilience—A City's Call to Action*" (annual report). On the US large corporations' business model which exploits taxpayers, see Sylvia Allegretto, Marc Doussard, Dave Graham-Squire, Ken Jacobs, Dan Thompson, and Jeremy Thompson, "Fast Food, Poverty Wages: The Public Cost of Low-Wage Jobs in the Fast Food Industry," Center for Labor Research Education, University of California, and the University of Illinois at Urbana-Champagne of Urban and Regional Planning, October 2013; see also Jeff Schuhrke, "Millions of US Workers for Walmart, McDonald's and Other Corporate Giants Rely on Food Stamps and Medicaid," *In These Times* November 20, 2020; Alexander Abad-Santos, "Instead of Raises, McDonald's Tells Workers to Sign Up for Food Stamps," *The Atlantic*, October 24, 2013.

Given the thesis of this book, namely that capitalism is a system that thrives on coercion and oppression, it is to be noted that the McDonalds and Walmarts of today are not doing anything novel. When she worked as an undercover journalist, Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (Metropolitan Books, 2010), found her momentary co-workers—waiters, nursing home workers, cleaning workers, maids, etc.—were so poorly paid that they often were homeless, forced to sleep in their cars, miss lunches, and so on; see also Michael Yates, *Cheap Motels and a Hot Plate* (Monthly Review Press, 2006).

On the indignity of having to beg for washroom facilities, see Robert Benzie, "Ontario Bill Spells Relief for Delivery Workers," *Toronto Star,* October 20, 2021; Reuters, "Amazon Confirms Drivers Urinating in Bottles, Claims Is 'Industry-Wide,'" *Global* News, April 3, 2021; Shannon Liao, "Amazon Warehouse Workers Skip Bathroom Breaks to Keep Their Jobs, Says Report," *The Verge,* April 16, 2018; Will Evans, "Ruthless Quotas at Amazon Are Maiming Employees," *The Atlantic*, November 25, 2019; James Bloodworth, *Hired—Six Months Undercover in Low-Wage Britain* (Atlantic Books, 2019).

On the high levels of injuries in the trucking industry, see M. Quinlan, R. Johnstone, and C. Mayhew, "Trucking Tragedies: The Hidden Disaster of Mass Death in the Long-Haul Road Transport Industry," in *Working Disasters,* ed. E. Tucker (NY: Baywood, 2006); A. Williamson, P. Bohle, M. Quinlan, and D. Kennedy, "Short Trips—Long Days: Health and Safety in Short Haul Trucking," *Industry and Labour Relations Review* 62 (2009): 415; M. Quinlan and C. Mayhew, "Occupational Violence in the Long Distance Transport Industry: A Case Study of 300 Truck Drivers," *Current Issues in Criminal Justice* (2001): 36.

On Karoshi, see T. Kato, "The Political Economy of Japanese 'Karoshi' (Death from Overwork)," *Hitotsubashi Journal of Social Studies* 26 (1994): 41; A. Kanai, "Karoshi (Work to Death) in Japan," *Journal of Business Ethics* 84 (2009): 209; Internaltional Labour Organization, "Case Study: Karoshi: Death from Overwork," Work Day: Safety and Health at Work, April 23, 2013; J. McCurry, "Premium Fridays: Japan Gives Its Workers a Break—to Go Shopping," *The Guardian,* February 24, 2017; "There Will Be Little Privacy in the Workplace of the Future," *The Economist*, March 28, 2018, reported that Hitachi, worried about the phenomenon of overwork, had developed an algorithm which it calls a "happiness meter." It purports to be able to gauge mood levels which will identify problem spots. On the attempt to make Foxconn look ordinary (and therefore "reasonable") see "A Trip to the iFactory: 'Nightline' Gets an Unprecedented Glimpse into Apple's Chinese Core," *ABC News,* February 20, 2012; "Light and Death: A Series of Deaths Expose a Big Computer-Maker to Unaccustomed Scrutiny," *The Economist*, May 27, 2010. On France Telecom and the convictions, see "Former France Télécom Bosses Given Jail Terms over Workplace Bullying," *The Guardian*, December 20, 2019; K. Lippel, "Regulating to Prevent Work Place Violence Starting with its Roots," in *The Class Politics of Law: Essays Inspired by Harry Glasbeek*, eds. E. Tucker and J. Fudge (Fernwood, 2019), 96; E. Cazi, "Suicides at France Telecom: Executives Threatened with Legal Action for Moral Harassment,"

Le Monde, June 19, 2018; Francois Normandin, "France Telecom/Orange: Who Benefits from the Crime?," Gestion, Montreal HEC, Management Web Site.

Many would argue that the increasing incidence of drug overdose deaths may, in part, be attributable to the stresses caused by work under capitalism. While causal connections are hard to establish, there is a lot of research which shows it is not such a long bow to draw. After the great deindustrialization of the 1980s, Susan Faludi, *The Betrayal of the American Man* (HarperCollins, 2000), concluded that the increasing inability for men to provide for their households, something which years of patriarchal messaging had told them it was their noble duty to do, led to emotional depressions. The Brookings Institute research paper, "Growing Life-Expectancy Gap between Rich and Poor," 2016, recorded that there was an increasing life expectancy gap between high- and low-income earners. After allowing for possible reasons, such as smoking which was more common in lower paid sectors of the workforce, the researchers concluded that the excess deaths in the lower-wage strata were most likely attributable to alcoholism, drug overdoses, and suicide (often by gunshot, as this was a US study), which the literature labels "diseases of despair"; see Anne Case and Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton University Press, 2020); Alexander Brown, "If the Factory's Being Handed to Creditors, We'll Blow It Up First," *Jacobin*, July 2021, argues that insecurity leads workers to look for coping mechanisms, often involving, "Self-medicating, overeating, or gentle sobbing." For the connection between the extent of inequality in a society and bad health for the people at the short end of the stick, see Vicente Navarro, "Inequalities Are Unhealthy," *Monthly Review*, June 1, 2004.

Stress arising out of constant supervision and hassling has a long history. The need to keep workers working has always led to sometimes crude, sometimes more arms' length close monitoring of workers by employers. It was made easier by the law which did not allow workers to resist any commands given by their employers; see D. Hay, "Working Time, Dinner Time, Serving Time: Labour and Law in Industrialization," in *The Class Politics of Law*, eds. Tucker and Fudge. In later periods, workers were reminded that they were not trusted by the employers' frequent use of spies and security personnel; see, e.g., R. Weiss, "Private Detective Agencies and Labour Discipline in the United States, 1885–1946," *The Historical Journal* 29 (1986): 87.

There has been an explosion of writings on the uses being made of new technologies and how they affect workers and the modes of production initiated by employers. Some marvel at the possibilities for the liberation of workers (dealt with in the second part of this chapter), many on the augmented control it gives employers at the expense of workers, while others focus on ways in which employers are fissuring their production processes. Here are a few of the sources relied on for the short remarks made in the text: M. J. Masooi, N. Abdelaal, S. Tran, Y. Stevens, S. Andrey, and K. Bardeesy, *Workplace Surveillance and Remote Work*, Ryerson University Cyberspace Policy Exchange, September 24, 2021; S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs, 2020); Mark C. Perna, "Does Your Employer Trust You? Why Surveillance Is the Dark Underbelly of Remote Work," *Forbes*, September 14, 2021; I. Ajunwa, K. Crawford, and J. Schultz, "Limitless Worker Surveillance," *California Law Review* 105 (2017): 735; B. Rogers, "The Law & Political Economy of Workplace Technological Change," *Harvard Civil Rights—Civil Liberties Law Review* 55 (2020): 532; Rachel Sandler, "Microsoft's New 'Productivity Score' Lets Your Boss Monitor How Often You Use Email and Attend Video Meetings," *Forbes*, November 25, 2020; Darrell M. West, "How Employers Use Technology to Surveil Employees," The Brookings Institute, 2021; Joseph Parish, "Employee Monitoring Services on the Rise: Keystrokes, Mouse Movements, and Screenshots," *The Verge*, December 5, 2011; A. Nguyen, *The Constant Boss*, Data & Society, 2021; E. Saner, "Employers Are Monitoring Computers, Toilet Breaks—Even Emotions. Is Your Boss Watching You?," *The Guardian*, May 16, 2018.

Nurses have been included in the list of workers who might well feel satisfied that their jobs bring them self-respect and dignity as they see themselves, and are widely seen by others, as making important contributions to meeting social needs. Yet, during the pandemic, some of those perceptions were shaken as nurses were not very well-protected and they were grossly overworked. There are suggestions that many are seeking to leave the profession, hardly an indicator of job satisfaction. And there is a growing body of evidence that nurses and other health care workers have to put up with an alarming rate of largely ignored violence as they discharge their tasks, again not a circumstance leading to a sense that the work is worth doing because it is satisfying and bestows dignity; see M. Keith and J. Brophy, *Code White: Sounding the Alarm on Violence against Health Care Workers* (Between the Lines, 2021).

On the day the passage in the text on the pandemic and low-status workers was being written, the Liberal party of Ontario, in opposition and preparing for an election, made a statement that promised that, if elected, the new government would increase the minimum wage by a considerable amount, do away with underpaid gig and contract work, provide portable savings plans, and begin to think about a four-day week. This is mentioned because of how this set of promises (unlikely to be met any time soon) was characterized. The heading to the newspaper story was "Ontario Liberals Offer 'Dignity' Pledge" and, in the article, the leader of the Liberal party was quoted: "These days economic dignity is in short supply"; see R. Benzie, *Toronto Star*, March 26, 2022. This acknowledgment that dignity, self-respect, and job satisfaction are in short supply when workers are severely exploited supports the argument in this chapter.

On the issue as to whether some/much profit-seeking activities contribute little to nothing of social value, note that, in addition to the list provided in the text, some entrepreneurs have seen value in making toasters that burn an image of the toast maker onto the bread, in producing beer for canine consumption, wine for feline consumption, toilet rolls that send a message to a telephone when the paper is about to run out, and a hairbrush that tells users whether they are brushing their hair correctly.

D. Graeber's *Bullshit Jobs: A Theory* (Simon & Shuster, 2018), was an elaboration of an article he wrote, "On the Phenomenon of Bullshit Jobs: A Work Rant," *Strike*, August 2013. He tells how his article attracted attention from graffiti artists, with some of his illustrations about bullshit jobs in the article being featured on city walls. In turn, this led to some of the cited surveys being conducted. In due course this led him to elaborate the ideas in the book. The original Graeber article also led to another book, J. Brygo and O. Cyran, *Boulots de Merde!: Enquete sur l'utilite et la nuisance sociales des metiers* (La Decouverte, 2016).

On the frequently peddled idea that workers should love their job, see Mika Tokumitsu, "In the Name of Love," *Jacobin* January 12, 2014 (arguing how the idea emphasises individualism and selfishness). It suits capitalism's cheerleaders to argue that human beings want consumer goods and services and are eager to work hard for them. This suggests that there is nothing morally offensive about workers renting/selling some of their talents for a while: it is a deal they willingly make. This argument was used to give the nineteenth century Industrial Revolution a good name. Doug Hay, in his many writings on how law has been used to coerce people into the

work-for-wages sphere, has pointed out that there is very little empirical evidence that it is the craving for consumer goods and services that led workers to rush into the factories and mines. In particular, he relies on the critiques mounted by Hans Joachim Voth, "The Longest Years: New Estimates of Labour Input in England 1760-1830," *Journal of Economic History* (2001): 61; *Time and Work in England 1750-1830* (Oxford University Press, 2000); and on the work of Jan De Vries, "The Industrial Revolution and the Industrious Revolution," *Journal of Economic History* (1994): 54; *The Industrious Revolution: Consumer Behaviour and the Household Economy, 1650 to the Present* (Camb University Press, 2008). For Hay's arguments that law played a critical part, see "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, eds. Hay et al., 1975, 2 ed. (Verso, 2011); with Paul Craven, *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955* (Chapel Hill: University of North Carolina Press, 2004); "Working Time, Dinner Time, Serving Time: Labour and Law in Industrialization," in *The Class Politics of Law: Essays Inspired by Harry Glasbeek*, eds. E. Tucker and J. Fudge (Fernwood, 2019). The argument that non-property owners' desire for consumer and household goods is a natural driver of their behaviour which underlies the claims made by defenders of capitalism is demolished by Ellen Meiskins Wood, *The Origin of Capitalism: A Longer View* (London: Verso, 2002). She points out that it is part of the fallacy pushed by these defenders of capitalism who have a stake in arguing that capitalism is merely a scheme that is built on what was already there, rather than a sharp break with all that came before it. She notes that there is an assumption that human beings were always commercial beings, focussed on trade and material gain, that is, were always primarily economic beings. Her historical study exposes this to be an erroneous assumption.

For the Paul Sweezy quotation, see *The Theory of Capitalist Development: Principles of Marxian Political Economy* (Monthly Review Press, 1942); for the C. B. MacPherson quotation, see *Democratic Theory: Essays in Retrieval*, introduction by F. Cunningham (Oxford University Press, 2012).

On the Greek distinction between leisure and business, see A. R. C. Duncan, *The Concept of Leisure* (Industrial Relations Centre, Queen's University, 1963). He also noted that the Latin word, used by the Romans, for the word "leisure" was "otium" and that the word for business was the negative, "negotium" (the root of our word negotiation). Again, the same juxtaposition: leisure was equated with the full development of man's potential and this leisure time, this space

allowing for study and development, was essential for a society to flourish. Duncan's claim is that time in which we neither work nor just play games (recreate) is central to the creation of a rich democracy. He praises the wonders of a liberal, non-professional skill, education. This kind of thinking is found in many ancient and modern tracts, religious and secular. For more contemporary evocations for leisure giving meaning to life by doing other than doing necessary work, see Walter Abell, "Labor Arts Guild: What It Is, What It Does, What It Plans," Vancouver, 1945: "The time will come when Labor and Art will be united in fully organized agencies for the promotion of their joint aims and democratic social ideals, in a manner that will impress the public and win its understanding. I doubt whether any force in the world can exert more influence, or contribute more to human progress, than Art and Labor working hand in hand"; Fredy Perlman, *Against His-tory, Against Leviathan* (Red & Black, 1983), bemoaned the separation of mind, spirit, and work which capitalism envisages as a norm: "A time-and-motion engineer watching a bear near a berry patch would not know when to punch his clock. Does the bear start working when he walks to the berry patch, when he picks the berry, when he opens his jaws? If the engineer has half a brain he might say the bear makes no distinction between work and play. If the engineer has an imagination he might say that the bear experiences joy from the moment the berries turn a deep red, and that none of the bear's motions are work"; see also Jeremy Corbyn who, in 2017, said that "In every child there is a poem, in every child there is a painting, in every child there's music … I want all children to be inspired, to have the right to play music, to write poetry, to learn in the way they want."

The references in the text to possessive individualism as conceptualized by C. B. MacPherson come from *The Political Theory of Possessive Individualism: Hobbes to Locke*, 1962 (Oxford University Press, 2010); *Democratic Theory: Essays in Retrieval*, 1973 (Oxford University Press, 2012; see also F. Cunningham, *The Political Thought of C.B. MacPherson: Contemporary Challenges* (Routledge, 2019); see as well A. MacIntyre, "On 'Democratic Theory: Essays in Retrieval' by C.B. MacPherson," *Canadian Journal of Philosophy* 6, no. 2 (1976): 177. For a useful account of the difference between recreation and leisure, between relaxing and necessary downtime and educational, artistic, and intellectual pursuits, see N. Postman, *Amusing Ourselves to Death* (London: Heinemann, 1985).

For Smith's and Lincoln's perspectives on an idealized market capitalism see A. Smith, *The Wealth of Nations* (Oxford: Clarendon Press, 1976); A. Lincoln, "Address before the Wisconsin

State Agricultural Society in Milwaukee, Wisconsin, Sept. 20, 1859," National Agricultural Library. The central ideas are powerful to this day: Smith-ian notions of brewers, butchers, and bakers and Lincoln's of free hired labour saving to operate a businesses on their own account are platforms for the adoration of small independent business to this day. The only danger to true freedom becomes a State which tries to put fetters on independent economic actors. This view was also embraced by anti-government actors such as Thomas Paine and the Levellers. In more contemporary times, these ideas were used by fierce anti-socialist thinkers, such as those gathered in the Mont Pelerin Society, including Chicago' Frank Knight, George Stigler, Ludwig Von Mieses, Karl Popper, Friedrich Hayek, and Milton Friedman, to legitimate market capitalism. Pertinent to this chapter, their project was not just to boast about the economic efficiency of the system but also—perhaps more so—about its capability to increase the autonomy and liberty of individuals; for accounts of this intellectual history, see Quinn Slobodian, *Globalists and the End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018); S. Metcalf, "Neoliberalism: The Idea that Swallowed the World," *The Guardian*, August 18, 2017. In order to make their argument stick these true Mont Pelerin Society believers had to make some anti-empirical assumptions. The way in which C. B. MacPherson dealt with Friedman's sleight of hand, which allowed him to pretend that workers freely entered into contracts of employment, was set out in these notes above. The fraught nature of Friedman's reasoning more generally was pointed out by E. Herman, "Economics: The Politicized 'Science,'" *Z Magazine*, February 1993. He noted that Friedman's renown rested on his endorsement of capitalism and on his monetary theories. His world views and theories had been put to work by many policymakers. Yet, the trust they had in him may have been misplaced. A study revealed that of eleven forecasts of price, interest rates, and output changes made by Friedman during the 1980s, only one was accurate. In baseball terms, Herman reports, his batting average was 0.092, not enough to get into the Baseball Hall of Fame but more than enough to enter the pantheon of outstanding political economic thinkers.

This visionary Thomas More differs from the one portrayed in plays about his life and martyrdom; see *Sir Thomas More* (Munday & Chettle, and a revised version by Shakespeare), and Alan Bolt's *A Man for All Seasons*. In those, he is shown to be a doctrinaire follower of strict Papist directions on how life should be lived. Those Rome directives did not speak to the abolition of property rights, substantive equality, and freedoms of religion, the meat and potatoes

of his Utopia. Perhaps what this illustrates is that it is possible for a person to adhere to conventional truth and rules, even when they are convinced they are wrong. Radical as his *Utopia* was, More was a man of his time. He made an effort to overcome patriarchy but fell short of modern notions on this front; his Utopia also left room for slaves to do some of the more odious and necessary work. These slaves were to be culled from the ranks of strangers and local criminals.

The quoted passage from Marx comes from *Capital: A Critique of Political Economy, vol. I* (NY: Vintage, 1977, 1981). As seen in earlier chapters, the Industrial Revolution brought horrendous miseries for the working class; see the earlier citations and Friedrich Engels's *The Condition of the Working Class in England*, revised edition (Penguin, 1987). For the John Maynard Keynes comments, see "Economic Possibilities for our Grandchildren," in *Essays in Persuasion* (W.W. Norton & Co., 1963). Keynes noted that the game-changing technologies and inventions began to appear in the sixteenth century, accelerated during the eighteenth century, and reached a fevered pitch in the nineteeth. His list of production-augmenting things included coal, steam, electricity, petrol, steel, rubber, cotton, chemical industries, automatic machinery, techniques for mass production, wireless, printing, "and thousands of other things and men too famous and familiar to catalogue." (A modern reader might reflect a little on how many of these wealth generating innovations now threaten the viability of the human species.) Keynes thought that it was just a matter of time before human beings would have freedom to find themselves; they just had to put up with the soul-destroying, but wealth-creating, conditions for a while longer, "for at least another one hundred years we must pretend to ourselves and to every one that fair is foul and foul is fair; for foul is useful and fair is not" (my emphasis in the longer quote used in the text). Keynes's concern about how difficult it would be for human beings emancipated from the long reign of capitalism's demands was founded on his vinegary observation that, until now (1930), the only examples of people with free time were those with wealth and the wealthy appeared to have abused and wasted this luxurious freedom. In the words of the ancient philosophers, they spent a lot of time frivolously, at recreation, little at anything worthy of human beings' potential, they did not use their free time as leisure time. And this is still a real concern: the mere fact that work is so unrewarding means that workers believe they will have made a real advance if they are not working and can do anything they like, mow the lawn, drink, play—in this setting, fed by consumerism, recreation, rather than leisure becomes a

desired goal. Thus, in the State of Victoria there is a monument to the winning of the eight-hour day (which came in 1856 there). The monument is emblazoned with the winning slogan: "Eight Hours Labor, Eight Hours Recreation, Eight Hours Sleep." This is not to say that play, if it is not engaged in as a mere distraction, cannot play a major part in the development of human beings; see J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (Angelico Press, 2016).

William Morris's critique of Bellamy's work came in his essay "Looking Backward," *Commonweal* 5, no. 180, June 22, 1989. He subsequently wrote his famed *News from Nowhere or an Epoch of Rest*, ed. James Redmond (London: Routledge & Kegan Paul, 1970). Morris is known for his determination to elevate lives by treating work as intrinsically artistic. He favoured self-government of a decentralized nature, with a heavy emphasis on agriculture as a core activity. His vision stands in stark contrast to that of Keynes (or any of those of the many contemporary opinion writers who, on a weekly basis, produce pieces heralding the coming of armies of robots who will relieve workers of their income-yielding, boring work). Morris was more in line with the ancient Greeks and Thomas More.

Graeber's work, backed-up by Moody's (referred-to above), demonstrates the notion that the number of workers trapped in unrewarding jobs shows no sign of diminishing any time soon. In the meanwhile, the number of novel-technology driven jobs which produce needless goods and services are on the increase. Graeber adds an interesting twist. He poses the question as to why this is happening, why are not the current resources and new technologies used to provide necessary goods and services and allow people more free time? He speculates: "It's as if someone were out there making up pointless jobs just for the sake of keeping us all working … The answer clearly isn't economic: it's moral and political. The ruling class has figured out that a happy and productive population with free time on their hands is a mortal danger (think of what started to happen when this even began to be approximated in the 1960s). And, on the other hand, the feeling that work is a moral value in itself, and that anyone not willing to submit themselves to some kind of intense work discipline for most of their waking hours deserves nothing, is extremely convenient for them"; from "On the Phenomenon of Bullshit Jobs: A Work Rant," *Strike!*, August 2013. Graeber's point seems to find some support in a rather weird (minor) development, reported by Dene Moore, "Why More Companies Should Encourage Their Workers to Pursue a Side Hustle," *Globe and Mail*, February 14, 2022. It tells how, during the pandemic, some people had time and were not too tired to allow their unused creative urges to

flow. Some turned their innovations into businesses. Employers were told that this might give unhappy people some contentment and, thereby, make them more productive at their "real" jobs as they would no longer resent their mind-numbing aspects as much. Another newspaper item with a similar message was one that said that employers would do well to please workers returning to the office after the pandemic to let them bring their favourite pets along; see Clarrie Feinstein, "Workers Head Back to the Office, with Fido in Tow," *Toronto Star*, April 22, 2022.

The fostering of consumerism as a social value helps capitalism close the loop between the drive to accumulate by competitive production and the maintenance of markets for the ensuing goods and services. It also fits with the need to have people think of themselves as individuals, of the normality of possessive individualism. It supports the notion that human beings are economic beings, interested in commerce. This, in turn, allows an argument to be made that capitalist relations of production, with its emphasis on individualism, on economism, is a very human and natural development, a perfection of social relations. As noted, this averment is necessary because the historical evidence, so thoroughly documented by Ellen Meiskins Wood in *The Origin of Capitalism*, does not support this capitalism-favouring characterization of human beings in the many societies which anteceded capitalism. This nurturing of consumerism, its elevation to a way of life, embeds capitalist relations of production. A false, but powerful, legitimation process is at work. Yet, as Karl Polanyi noted, capitalism is novel. In *The Great Transformation* (Boston: Beacon Press, 1957), he concluded that only in modern market society is there a distinct economic motive, one separated from other social relationships such as the achievement of status and prestige, communal solidarity, reciprocal obligations based on kinship, or an authoritative redistribution mechanism from the centre of society.

In the market, society becomes a market society in which human beings are expected to behave as economic/market actors. Ernest Mandel, "The Debate on Workers' Control," *International Socialist Review* 30, no. 3 (May–June 1969), drew out the implications: "But where does this 'growing selfishness' come from, if not from the sacrosanct 'free enterprise' system which has elevated to the level of a religious dogma the principle of 'every man for himself'? Can private ownership of the means of production, the market economy, lead to anything but competition? Can competition, in a money economy, lead to anything but a desire to obtain the maximum income? The whole social climate, the whole educational system, all the mass media, the entire

economic life, don't they inculcate in everyone, day and night, that what matters most, above all else, is to climb the 'ladder of success'—if you have to step on the necks of others to do it?"

Aaron Bananav, *Automation and the Future of Work* (Verso, 2020), in the chapter "Necessity and Freedom," provides a very readable account of some of the utopian debates. He stresses that the major point of distinction between the many contributors is whether, on the one hand, they see a post-scarcity society to evolve from technology and that this then will pose the question as to what people will do, and those who, on the other hand, start from the perspective that the best way for people to live should be envisioned and then technology could be adapted to meet those goals. Thomas More is the exemplar of the latter and he probably drew on the early Christians who decreed that they would live by the principle that everything should be held in common (*omni sunt communia*). Bananav notes that it was one of More's followers, E. Cabet, *Travels in Icaria (Utopianism and Communitarianism)*, trans. Leslie Roberts, 1840 (Syracuse University Press, 2003), who coined the phrase which Marx rewrote and which today appears on so many banners at so many demonstrations: "From each according to his abilities, to each according to his needs." Today, during these rather dark times, the slogan has been adapted by some to read more bitterly: "From each according to their vulnerabilities, to each according to their greed."

Ernest Mandel in his *Introduction to Marxist Economic Theory*, 2nd revised ed. (Pathfinder Press, 1973), argues that what defines human beings is action (praxis). He observes that labour/work has "come to be practised … by mankind condemned to earn their bread in the sweat of their brows … the most wretched, the most 'inhuman', the most 'animal' form of human praxis." The goal must be to develop a society in which work/labour is no longer aimed at producing things but at developing personalities. The vision is one in which those who work not only produce something but that, in the act of producing it, they, like the material they transformed, also change. There is to be an integration of the workers and the outcomes their efforts produce. This is hard to imagine in our contemporary setting, but it was imagined by Che Guevara during a time of actual revolutionary experience; see his *Socialism and Man in Cuba*, 3 ed. (Pathfinder Press, 2009).

Michael Lebowitz suggests how we might get from where we are to approximate the visions of Mandel, Guevera, and a host of other socialists. In his *Build It Now: Socialism for the 21st Century* (Polity, 2020), he posits the necessary steps: social ownership of the means of

production; social production organization by workers; setting the goals of production to be the satisfaction of communal needs and purposes. He believes that conditions already exist which make the taking of these steps possible. Workers already know about the value of collaborative work as, after all, capitalism deploys them in this way; they already understand that the parlous conditions under which they work and live stem from their lack of control over the processes of production, leaving them subjugated and alienated; the hardest step to take, then, will be to act on this built-in knowledge and sense of alienation. What is sorely needed is to raise workers' awareness that it is their obligation to provide for each others' and society's essential needs, that their purpose is not simply to create more monetary wealth.