

Using History in Teaching Contracts: The Case of *Britton v. Turner*

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My job in this symposium is to illustrate the potential uses of history in teaching current contract law.

The principal case I'll use as the gateway into this demonstration is one that may be found in almost all the major casebooks: *Britton v. Turner*.¹ In this case a laborer under a one-year contract to work for an annual wage of \$120 quit his job in the tenth month, and sued his employer in *quantum meruit* for the reasonable value of the work he had performed up to that point. The employer's defense was that completing the contract was the condition precedent to the employee's right to payment, and that to allow him to recover anything at all would promote immorality by giving people incentives to break their contracts. This court held for the plaintiff: even a breaching party should be able to recover the value of his services, offset by defendant's damages, if any. Otherwise, an employee who had done most of the year's work would suffer a forfeiture: "[T]he party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract"; and "the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach" and thus more than he could recover in damages.²

In the casebooks, *Britton* is generally used to illustrate the current mainstream doctrine that even a plaintiff in default should be able to recover the value of part performance (less damages, up to the limit of the contract price or rate) in restitution, and also the more general remedial principles disfavoring forfeitures and penal or deterrent damages. It is also sometimes cited in sections of the casebooks dealing with implied or constructive conditions of exchange, for the purpose of showing that "work first, pay later" is the default rule if no time of payment is expressly specified in service or construction contracts. Putting the case back into historical context, I think, opens up a much wider and more interesting range of issues and questions for students to consider—and especially to get them to ask: what are the real stakes of these technical issues of doctrine? Why does it matter, and for whom, what view you take?

Here is a short digression on the stakes of legal rules. The very first case I read in law school was for Civil Procedure; the case was *Sibbach v. Wilson*,³

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¹ 6 N.H. 481 (1834).

² *Id.* at *5.

³ 312 U.S. 1 (1941).

a case brought in the federal diversity jurisdiction. The case was meant to introduce the class to the *Erie* Problem, and for the next few weeks we were kept busy analyzing whether state law or federal procedural rules should govern this case and others like it. The one question we never examined was why anyone—except the litigants who might find federal or state law better or worse for their side in a particular dispute—would care what the answer was. What was at stake? Not until many years later did I learn that the *Erie* Problem had a history, and the history was that of interstate corporations, especially railroads, fleeing state tort law *en masse* into pro-defendant federal jurisdiction with its “federal common law” and essentially using the federal courts to nullify state law protections for personal-injury plaintiffs. Cases like *Sibbach* were the dying embers of these once flaming economic and political wars.⁴ The rule in *Britton* is much the same. The particular fighting issues that made the case important in its time have faded. The case continues to shed light, however, on a whole range of social conflicts, involving parties with high stakes in the outcomes, which are very much alive.

The first thing a historically informed teacher of the case can point out (as do some, but not all, of the casebooks) is that *Britton* was very much a minority holding when it was decided. The standard rule in most American jurisdictions was the “entire contract” rule, that the worker who quits before the end of his term forfeits all claims to unpaid wages.⁵ The leading case is from Massachusetts, *Stark v. Parker*,⁶ which says that if the worker is hired for a year, the contract is presumed to be “entire” so that serving out the year is the condition precedent for his recovering any wages, and that this is a good rule because it discourages contract breach and rewards faithful service. Quite possibly one of the factors influencing this decision was that wage labor in this period of New England’s history had recently become very mobile. Farms and households were finding it hard to hold on to hired hands and servants tempted into the burgeoning higher-paying factory economy.⁷ The “entire contract” rule seems to aim to deter such defections by imposing a high penalty for quitting work.

The next point to make is that both cases supply implied (default) terms to the contractual relationship. The parties *could* expressly spell out their own

⁴ The (magnificent) history of these conflicts, and also of the depoliticizing of them in postwar academic writing and teaching of federal jurisdiction, is provided by EDWARD PURCELL, *LITIGATION AND INEQUALITY* (1992) and EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (2000).

⁵ See CHRISTOPHER TOMLINS, *LABOR, LABOR AND IDEOLOGY IN THE AMERICAN REPUBLIC* 273-78 (1993).

⁶ 19 Mass. 267 (1824).

⁷ See JONATHAN PRUDE, *THE COMING OF INDUSTRIAL ORDER: TOWN AND FACTORY LIFE IN RURAL MASSACHUSETTS, 1810-1860* 68-69 (1983).

times and terms of payment in exchange for performance. In fact, the *Britton* court points out that the parties could, if they wished, contract around its holding and specify the result of the majority doctrine then-prevailing in other states—that is, no payment until and unless a full year's work had been performed. A builder or contractor supplying materials and labor on a building contract, likely to be a business-savvy repeat-playing party, will of course usually insist on structuring the contract to get around any such rule, and provide for periodic payments to finance the work as it proceeds. (He will also get a mechanic's lien on the realty.) And, as in the 1830s, unlike the employee, he will usually get *quantum meruit* for work performed if he is held in breach, since the owner remains in possession of material benefits from the contractor's work. A farm laborer or factory worker is more likely to accept work on the terms offered, less likely to be aware of the invisible terms of the contract; and even if aware of them to be very unlikely, unless labor is scarce and his skills unusual, to be able to contract around them.

Make sure students understand the full implications of the "entire contract" rule. Since it is a default rule, the employer gets its benefit without having to say anything about the payment of wages at the onset of the contract. Unless a worker is willing to lose his wages, he is effectively indentured to his employer for the entire term, even if he gets a better offer elsewhere, and even if the boss is abusive. If the boss were abusive enough, of course, the boss would himself be in material breach of contract, which would entitle the worker both to quit work and to damages. But this is not much comfort to the worker; it leaves a farm laborer who has not yet been paid for his work with the burden of having to bring and finance a lawsuit. The default rule allows even the abusive employer to hold on to the money, to withhold back wages without going to court, and, as Judge Parker points out in his *Britton* opinion, gives the employer an incentive "to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment."⁸ Even the *Britton* rule, of course, requires the worker to sue to recover his wage, and as Robert Steinfeld has pointed out, "it was always possible for an unsympathetic judge. . . to find that the damage to the employer from the worker's breach

⁸ *Britton v. Turner*, 6 N.H. 481, 494 (1834). A teacher at this point could productively ask the class to compare this occasion for employers to fire opportunistically to avoid paying wages with the corresponding temptation to employees to threaten to quit work in mid-contract when their services are most urgently needed, and the employer has unrecoverable sunk costs, unless the employer agrees to a higher wage – as in another famous contracts case, *Alaska Packers Ass'n. v. Domenico*, 117 F. 99 (9th Cir. 1902). In such cases the courts use consideration (pre-existing-duty-rule) or duress doctrine to relieve the employer from having to pay the promised higher wage, or to get back the extorted surplus if he has already paid it.

fully equaled the value of any labor performed, leaving the worker to recover nothing.”⁹

Now bring in some more history to expand the frame. Robert Steinfeld and Christopher Tomlins have done the best historical work on this subject. The penalty/forfeiture for quitting work is particularly significant as one of the many doctrines that, in combination, constitute the implied terms of the employment relationship.

The central fact of that relationship was this: by the 1820s and 30s the United States had defined itself as a republic of “free labor.” This self-definition was especially important to the North, to distinguish its labor system from that of the slave South and also from that of England. Over half the immigrants to the American colonies had arrived as indentured servants, legally bound to their masters for a term of years. The master could inflict corporal discipline on his servant, and have him recaptured by the sheriff if he ran away. Indentured servitude had however almost completely disappeared by 1820. In American law, long terms of labor service, personal powers of discipline, and legal process to recapture defaulting servants were now thought incompatible with the worker’s freedom.¹⁰ In England through the 1860s, employers could still use criminal process against employees who quit work before their term, and in fact prosecuted over 10,000 workers for quitting. In the American North, the use of criminal process was denounced as anti-republican.¹¹

The South was another country. Even after emancipation, legislative prescription of criminal penalties for contract-breaching was revived in the South to try to keep freed slaves bound to their former masters. If freedmen under contract quit, they could be arrested, convicted, and leased back to their masters by the state.¹² In the 1911 case of *Bailey v. Alabama*,¹³ criminal penalties for contract-breaching were held to violate the Thirteenth Amendment and the anti-peonage statutes, though this holding had no actual effect on the practice of Southern planters who were still finding ways to send tenant farmers to jail for quitting through the 1940s.

Thus, first in the North then later in the South as well, another crucial (though again implied, invisible) term of free contract labor in the United States has come to be that specific performance and the criminal process are unavailable against the defaulting employee. Those remedies define the

⁹ ROBERT J. STEINFELD, *COERCION, CONTRACT AND FREE LABOR IN THE NINETEENTH CENTURY* 300 (2001).

¹⁰ See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR* (1991).

¹¹ See STEINFELD, *supra* note 9, at 290-308.

¹² See WILLIAM COHEN, *AT FREEDOM’S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915* (1991).

¹³ 219 U.S. 219 (1911).

condition of “involuntary servitude”; their unavailability defines “free labor” contracts, the remedies for breach of which are supposedly limited to damages (or negative injunctions, in a proper case).

But as we’ve seen under the majority rule in *Stark v. Parker*, even Northern employers had the additional remedy of withholding back pay for work already done, the wage-forfeiture penalty of the “entire contract” default rule. Gradually, over a very long period, workers got the default rule changed by legislation—statutes (in effect in most states by the 1930s) requiring that workers must be paid periodically (weekly or bi-weekly) and prohibiting the parties from contracting out.¹⁴ These are striking examples of the use of prohibitions on free contract to promote, as the reformers saw it, the real freedom of employees. Other examples would be the Constitutional (Thirteenth Amendment) and statutory prohibitions of peonage and involuntary servitude; statutes prohibiting the parties from contracting for payment in scrip, redeemable at the company store, instead of cash (some famous cases initially held these statutes to be unconstitutional intrusions upon freedom of contract); statutes limiting the terms of personal-service contracts; statutes prohibiting yellow-dog contracts (contracts requiring workers as a condition of employment to promise not to join a union); and the statutes prescribing minimum wages, maximum hours, and mandatory overtime pay.

“Free labor” as it is understood in modern America turns out to be a surprisingly complex and intricate legal construct. Far from a simple absence of legal coercion of the laborer or employer, it involves and, indeed, seems to require an extensive set of legal regulations in the form of both implied default and state-mandated compulsory and prohibited terms.

This brief history of the defining elements of the “free labor” contract opens up a window into what I think are the most interesting—and very much still current—issues raised by *Britton v. Turner*: what are the invisible (implied, default) terms of contracts? Specifically, what are the terms of the labor contract, and how like or unlike are they to terms of other types of contract relations such as supply (especially requirements or output) contracts, construction contracts, and so forth?

Again, understanding some of the historical background helps out here. By the late nineteenth century, “contract” relations came to be strongly contrasted to “status” relations. Status relations had a content (mandatory terms) prescribed by law and usually unequal or asymmetric rights and duties. Marriage was the prime example of a status: the state’s terms could not be varied by the parties; rights of exit from the contract, even by mutual consent, were heavily restricted by divorce law; in the contract relation the wife was subordinated to the husband’s orders, control of their joint property, choice of dwelling place,

¹⁴ See STEINFELD, *supra* note 9, at 311-14.

and even citizenship; the wife owed the husband domestic and sexual services, but the husband was also obliged to support the wife. Thus, it was clear to late nineteenth century lawyers and treatise writers that marriage was not a contract. Contract relations were supposedly between formal equals, on terms mutually agreed to by both, and alterable and terminable by mutual consent. Which was employment? Constitutional law (e.g., *Lochner v. New York*¹⁵) said it was the paradigmatic “free contract” relation. But was it?

A century earlier, around 1800, employment was theorized legally as a contract relation very much like marriage. “Contract” in 1800, generally referred to relations that the parties agreed to enter voluntarily, but that once entered bound them to prescribed terms.¹⁶ English law, in fact, prescribed detailed mandatory terms—wage rates, job tasks, craft rules—for most trades and occupations. In 1799-1800, the English Parliament repealed these detailed rates and rules, allowing the terms of work to be set free of state regulation. It did not, however, contemplate that the parties would set these terms by mutual bargaining. Work was an authoritarian relation, controlled by masters, just as husbands controlled marriage.

The same English statutes that freed the work bargain from state control enacted a strong criminal prohibition on another form of free contracting—contracts among laborers to form unions.¹⁷ The state’s rules regarding labor associations, how they may organize, the tactics (strikes, pickets, boycotts, etc.) they may legitimately use, and the subjects over which they can pressure employers to bargain underwent a long and complex history of changes. I won’t dwell on these here, except to say that these rules are critical to understanding the employment contract, because, along with market conditions, they ultimately determine the relative bargaining power of the parties. Our present interest remains in the implied terms of the employment relation itself.

One key point here is that in legal contemplation throughout the nineteenth century and, to a very large extent to this day, this relationship remains in law as well as in fact, an authoritarian relationship. American courts in the early republic invented the new field of “employment law” to govern work relations in industrial society. The template they used for the common law governance of the employment relation was lifted, however, from the pre-industrial household—from the law of Master and Servant. Nineteenth century treatises commonly treated industrial and domestic employment under the same master-servant categories. In this relation, masters (employers) are superiors with the right of command, servants (employees) inferiors with the duty of obedience.¹⁸

¹⁵ 198 U.S. 45 (1905).

¹⁶ John V. Orth, *Contract and the Common Law*, in *THE STATE AND FREEDOM OF CONTRACT* 52-53 (Harry N. Scheiber ed., 1998).

¹⁷ See *id.* at 56-63.

¹⁸ See TOMLINS, *supra* note 5, at 278-92.

Servants, like wives, were a form of masters' property; masters might bring an action for enticement against competitors who tried to lure their servants away. Servants owed their masters an unqualified duty of loyalty to their interests and this remains an employee's duty today, though it is not reciprocated; employers have no corresponding duty to look after their employee's interest.¹⁹ Masters also owed their servants duties of care akin to the husband's duty of support, to take care of them in sickness, disability and age, but these duties were eroded away by the mid-nineteenth century, leaving—as Southern slaveholders gleefully emphasized—masters of “free labor” free to throw injured or elderly workers out into the snow. Much of this law evolved in ways that granted masters even greater rights vis-à-vis their workers. For example, workers who invented something on the job had the rights to control those inventions until the late nineteenth century, when the law changed the rules to make such inventions “works-for-hire” and the property of the employer.²⁰

By the 1880s, the most important implied term of employment is that it is at-will.²¹ At-will employment helps to set some outer limits on the employer's power to abuse. If the employee just can't take it any more, she can always quit. But of course quitting is hugely costly to most workers, unless they are lucky enough to have something better lined up. The practical consequence of the at-will rule, especially in sagging labor markets, is that, unless employers run afoul of some specific and *enforceable* statutory prohibition,²² they can treat their workers pretty much any way they please.

An historian of early twentieth century labor called her study *Belated Feudalism* to emphasize the prescriptive, authoritarian content of the employment relation.²³ Ironically, while marriage has shed many of its incidents of

¹⁹ This remains true even in Wagner Act (unionized) workplaces. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN LABOR LAW 95-96 (1983).

²⁰ See Catherine L. Fisk, *Removing the “Fuel of Interest” from the “Fire of Genius”: Law and the Employee Inventor, 1830-1930*, 65 U. CHI. L. REV. 1127 (1998); Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441 (2001).

²¹ Jay M. Fineman, *The Development of the Employment At Will Rule*, 20 AM. J. LEG. HIST. 118 (1976).

²² I stress this because, of course, many statutes protecting workers are good on paper only, because the penalties for violating them are too low and long delayed to deter employers or attract lawyers. The influence on courts of the common-law baseline presumption that employers have an arbitrary power to fire at will reaches even into settings where employers seem to be using the power for a specifically illegal purpose, such as firing union organizers. See Richard Michael Fischl, *A Domain Into Which The King's Writ Does Not Seek To Run: Workplace Justice in the Shadow of Employment-at-Will*, in LABOUR LAW IN AN ERA OF GLOBALIZATION (Joanne Conaghan, et. al. eds., 2002).

²³ KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991).

unequal status and been transformed into a much more egalitarian form of contract relationship (though still heavily influenced by the customary gendered division of labor and the assumption that whoever brings in the wage or salary income from outside calls the shots), employment remains a domain of top-down and often arbitrary command. The feature of the work contract that distinguishes it from virtually all other contract relations is the vast discretionary authority that the law delegates to one party to exercise near-absolute control over the time and actions of the other.²⁴

Over time many different successive rationales have been used to explain the asymmetrical authority relations of the workplace: that the masters were gentlemen and servants low-born; the masters were superior in education and attainments; the masters had emerged on top in the Darwinian struggle for survival, while the servant-drones had been left behind; and even, rather incredibly, that the masters had a preference for being bosses and workers for being bossed around, etc.²⁵ The current dominant rationales are that hierarchy and "flexibility" are efficient, and that the acquiescence workers give—evidenced by their staying on the job—to their employers' regime under fear of being fired, exhibits their consent to the regime.²⁶ Again, I venture to say that in no other set of contract relations, would the legal system tolerate such a readily abused discretion to dictate and to alter the constitutive contract terms at one party's unqualified discretion.

Implications for teaching

The purposes of an exercise like this, an exercise in sketching the historical evolution of social institutions such as implied contract relations, are several. First, one purpose is simply to make the legal-realist's/institutional-economist's point that one cannot understand most contract relations simply as the products of mutually agreed-upon terms. Important terms and aspects of the relation are set by customary arrangements and understandings, often reflected in implied terms or default rules, and sometimes just mutely present as

²⁴ Another nice topic to explore with students is what are the implied limits of the employer's implied authority? May he require employees to pick up his dry cleaning? Come over on the weekend and wash his car? Contribute to a lobbying effort that benefits the employer, such as a reduction in OSHA's budget and authority? Wear tight T-shirts on the job? Engage in dangerous work? Execute a waiver of employer's liability for injury on the job? Undergo sterilization as a condition of continuing employment in jobs with radiation or chemical hazards? In an at-will world, is the question meaningful?

²⁵ See generally REINHARD BENDIX, *WORK AND AUTHORITY IN INDUSTRY: MANAGERIAL IDEOLOGIES IN THE COURSE OF INDUSTRIALIZATION* 13-116, 198-340 (1956).

²⁶ Some nice test cases of the borderlands of duress are in modern peonage cases involving abusive treatment of illegal-immigrant workers, who are easily exploited because they risk deportation by complaining. See, e.g., *U.S. v. Kozminski*, 487 U.S. 931 (1988).

background conventions (for example, the gendered division of household labor: he works outside the house; she cooks, cleans and takes care of the kids even if she works outside as well). Other important terms are determined by the law's or convention's delegation of effective decisional power to one of the parties such as the party who drafts and supplies the form, or in employment contracts, the party who makes the rules and gives the orders. Since these are default terms only, they can be altered by express agreement, but of course for most workers (other than executives or professionals) they rarely are. The employers set the terms in contracts that employees rarely see and often run strikingly counter to their expectations. Empirical studies of worker expectations of job security, for example, suggest that the vast majority of workers have no idea that their employer may legally fire them for bad reasons or no reasons.²⁷

Second, for teaching purposes the *Britton* and *Stark* cases also furnish a nice pair of contrasts in judicial technique—how judges go about creating implied default terms. In each case the judge argues from custom or convention, from policy, and from basic principle. Judge Parker in *Britton* argues from convention that: “[W]e have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary.”²⁸ And as we’ve seen he adds the policy argument that the contrary rule would tempt the employer to drive out the employee near the end of the term by “ill treatment” to escape payment. *Britton*’s benchmark principle is fair compensation to both parties, neither forfeitures nor windfalls.

In contrast, Judge Lincoln in *Stark* emphatically declares that the “general understanding of the nature of such engagements” and the “usages of the country and common opinion upon subjects of this description” support a “work first, payment later” default regime,²⁹ and finds “any apprehension that this rule may be abused to the purposes of oppression, by holding out an inducement to the employer, by unkind treatment near the close of a term of service, to drive the laborer from his engagement, to the sacrifice of his wages, is wholly groundless” because if the employer is in fact in breach, the law gives the employee a remedy.³⁰ This court’s basic principle is the sanctity of

²⁷ See, e.g., Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105; RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 118-22 (1999).

²⁸ *Britton v. Turner*, 6 N.H. 481, 493 (1834).

²⁹ This might be so, but doesn’t speak to whether people commonly think workers should forfeit all their wages if they quit near the end of the term.

³⁰ *Stark v. Parker*, 19 Mass. 267, 271-74 (1824).

contractual promises: "Nothing can be more unreasonable than that a man, who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act."³¹

Third, the cases in historical context also dramatize how the law constructs the boundaries between "free contract" and "free labor"—relations that are "consented to"—on the one hand, and relations that are "coerced" on the other. Until the late nineteenth century the legal regimes of most societies did not see how people could be induced to work at unpleasant tasks without direct legal compulsion: specific performance to defaulting workers, the threat of imprisonment, whipping or heavy fines for leaving work, and criminal punishment for vagrancy and confinement to the workhouse for refusing work. Southern planters after emancipation had much the same view: the freed slaves would not stay on the plantation without the threat of the convict-lease system and the chain gang for leaving work, and vagrancy prosecution for refusing work. The great discovery of political economists such as Adam Smith was that the state could remove all these compulsions and let the invisible hand of the market, the force of brute necessity, do the work of pressing workers into lifetimes of hard and disabling labor and submission to employers' authority. The extra attraction of using the "free" market as the force of compulsion was that no visible human agents seemed to be doing the compelling. Laborers entering into the wage bargain to avoid starvation were freely *choosing* work over idleness (just as, it was and by many still is believed, the unemployed were *choosing* idleness) and were freely consenting to all the imposed and silently implied terms of the bargain. The force of necessity was by definition not coercion, and giving into it was thus an exercise of free choice.

The fragile and arbitrary quality of these distinctions is famously made manifest in the law of duress. Threats to use physical force, and even threats simply to breach existing contracts, to induce vulnerable parties to agree to onerous contract terms may constitute such duress as to invalidate the agreements. But the threat to fire or not to hire unless the worker agrees to the onerous terms—even if the consequences of refusing the deal for the vulnerable party may actually be much more severe than a fine or short jail term (e.g., unemployment, humiliation before family and friends, loss of health insurance for a sick child, etc.)—is not duress. There may be valid reasons for distinguishing the different kinds of threats, but as Hale and Dawson memorably pointed out, the reasons cannot be that the parties under threats of force or breach of pre-existing contracts are coerced and the workers under

³¹ *Id.* at 273.

threat of firing/not hiring are free.³² All are making a rational choice of the less disagreeable alternative. The reasons some threats are held improper and others permitted must be moral, economic and political reasons independent of the degree of coercion.

A fourth purpose is to drive home the related points that legal Progressives such as Hale liked to emphasize—that the degree and type of freedom that people have in contracting is always in part a resultant of how the legal system constructs markets through the distribution of the right to use state force. The deals people are able to make are always dependent on bargaining advantages conferred by, among other factors, background legal entitlements: rules of property, tort, contract, labor law, family law, corporate law, etc. “Freedom of contract” is a slogan whose practical meaning is that the state should not—at least, not very visibly—change the rules to disturb the legal system’s *status quo* distribution of state power to coerce people through rights to grant and withhold valuable resources, and its conferral of organizational capacity.³³

The corollary insight is that practical freedom in contracting is often enhanced by state-mandated or prohibited terms, rather than leaving the parties “free” to bargain away all their freedom, especially by “bargaining” in the form of tacit acquiescence to default terms they probably don’t expect or know anything about. Laws that require payment in legal tender and weekly payments, prohibit personal service contracts longer than seven years, criminalize physical abuse of workers, legislate non-waivable minimum safety standards, and refuse enforcement to the remedies of injunctions to return to work, punitive damages and overbroad covenants not to compete are good examples; as are laws that compel employers whose employees vote to form a union to bargain in good faith with the employee’s collective bargaining agent, forbid employers to fire union organizers, or grant workers a legal right to strike, and so forth. The shift over the nineteenth century from the *Stark* court’s “entirety” rule denying restitution to the worker who quits, to gradual adoption of the *Britton* court’s rule permitting restitution was a tiny redistribution of state force in favor of practical freedom. How important the doctrinal change actually was would of course depend on things that study of appellate cases mostly does not reveal, such as whether any but the exceptional worker could actually sue to enforce his rights.

The final purpose is to emphasize that background conventions, legal doctrines, and common understandings of contract relations change, and do so

³² Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

³³ For a bravura description and analysis of the views of Hale and fellow Progressive lawyer-economists, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* 29-70 (1998).

because parties or their interest groups, supporters, or reformers and their institutional and managerial practices, lobbies and social movements act to change them. The rules are contested; the shape they eventually take is the result of political struggles, contingent social forces, and—not least—conflicting interpretations of convention, policy and principle. They are therefore unstable and contestable. The content of implicit workplace contracts in the primary sector of employment, for example, seems to have changed dramatically in the last generation from a norm of expected lifetime employment security to a norm in which (ideally at least, the reality is considerably more disappointing) the employer promises no security, but does undertake to equip workers with general, flexible skills they can take to the next job—although none of these implicit bargains is legally enforceable.³⁴ We are best positioned to see the contingent, constructed nature of our legal-social relations by comparing them to what they were in the recent past, or to those of other societies.³⁵ What we now learn as the law of contracts was not always thus, nor will it be the same twenty years from now, depending on how the people concerned go about altering their conventional expectations and building them into institutions, and how, in response, their lawyers and legislatures and the courts decide to act.

³⁴ See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

³⁵ In teaching the employment at will rules, for example, I bring in both historical materials from the United States and comparative just-cause-dismissal materials from Europe.