

## THE CRIME OF STAGING AN EFFECTIVE STRIKE AND THE ENDURING ROLE OF CRIMINAL LAW IN MODERN LABOR RELATIONS

*Ahmed A. White*

---

*This article concerns the role of criminal law in modern, post-New Deal labor relations. I emphasize the continuing function of the criminal law in limiting basic labor rights (to organize, strike, and provoke collective bargaining) as reflected in several common practices: the prosecution of labor organizing and protest activity as crimes; the persistent use of injunctions by the courts to curtail labor rights; and the indirect use of the criminal law by the courts and the NLRB to define unfair labor practices and to limit the scope of worker protections under the labor law. I hope to show how these functions reflect both change and continuity relative to the criminal law in pre-New Deal times.*

*The modern criminal law's labor-repressive functions are far less crude and overt, and administered in a far more professional fashion, than in the days when criminal conspiracy, syndicalism, and vagrancy laws, for example, were used so extensively and blatantly to undermine labor rights. And rather than simply destroying labor rights, these functions operate alongside, and are incorporated into, a body of labor law designed to protect labor rights. On the one hand, this shift has been of real benefit to labor; allowing workers and organizers much more freedom in their struggles with employers. On the other hand, I argue, modern criminal law still plays a significant role in limiting labor rights. The very factors that now ease the criminal law's impact on workers—the subtlety, professionalism, and procedural regularity with which it is applied, and its coexistence alongside a functional system of labor laws—also obscure and rationalize its real effects on labor rights, making it easier for governments to use the criminal law against labor and harder for labor activists to challenge such practices. My goal is to help unmask these functions of the criminal law with the hope that organized labor and its supporters might better work against and around them.*

---

The labor movement in America is probably weaker today than it has been since the 1920s. Evidence of this is everywhere: the percentage of the workforce represented by unions is at a historic low; strikes have become uncommon and risky affairs, often lost by the union; and unions have seen their political strength decline steadily over the last several decades. Among the many reasons for this dismal situation is the tendency of this country's labor law to actually work against the interests of labor. Although the labor law supposedly guarantees the basic labor rights to organize, collectively bargain, and strike, it makes it very difficult for workers to actually exercise these rights in a meaningful way. Critics have identified instances of this in many areas of labor law, including, for example, the law's reliance on procedures for establishing union representation that are easy

for employers to flout and manipulate. Similar criticisms have been aimed at the labor law's failure to provide timely and effective remedies, even when employers commit the most serious unfair labor practices. But perhaps the most notable example of the labor law's duplicity is its position on the right to strike, which the law all but eviscerates with a set of doctrines that prohibit most strikes during the term of a collective bargaining agreement and with a rule that gives employers the right simply to replace striking workers, in many cases permanently.

One issue often overlooked, though, in accounts of how the law fails organized labor, is the criminal law's enduring role in limiting the right to strike. As students of labor relations know, until the New Deal era, American labor law was practically composed of an array of criminal laws and doctrines. These were employed by governments at every level to deny workers the right to organize unions, to collective bargaining, and most especially to strike. In many instances, this denial of labor rights was accomplished with criminal laws devised especially for antilabor purposes, as was the case with the labor conspiracy doctrine, the labor injunction doctrine, and criminal anarchy and criminal conspiracy statutes. In countless other instances, labor rights were denied by the blatantly discriminatory enforcement of everyday criminal laws, something particularly notable in the widespread use of vagrancy and other public-order crimes to punish strikers and harass union organizers.

One might think, however, that the advent of modern labor law during the New Deal ended this reign of criminal law as an important means of labor regulation. The major New Deal labor law, the Wagner Act (1935), enshrined the basic rights of labor to organize, provoke collective bargaining, and strike. Along with the other key labor statute of the period, the Norris-LaGuardia Act (1932), the Wagner Act inevitably had the effect of repealing or preempting the more overt and blatant uses of criminal law to limit labor rights, as such practices were so obviously at odds with its effort to grant these rights to workers. Moreover, unlike child labor and wage and hour laws passed in this period, neither the Wagner Act nor the Norris-LaGuardia Act enacted new criminal laws to enforce labor rights. Instead, the Norris-LaGuardia Act sought to advance labor rights in a rather "negative" way, by limiting the ability of the government (courts, specifically) to intervene in labor disputes. The Wagner Act codified a more affirmative system of labor rights, but entrusted their enforcement to an administrative agency, the National Labor Relations Board (NLRB—the "Board" when it acts in an adjudicative or law-making capacity) with strictly civil authority. Even the Taft-Hartley Act and Landrum-Griffin Act (1959), which so notoriously rolled back the relatively labor-friendly provisions of the Wagner and Norris-LaGuardia acts, did not rely directly on criminal provisions to do this.

These changes have so suppressed the role of the criminal law in the modern system of labor law that even a fairly knowledgeable person might reasonably assume the criminal law plays little or no role in defining modern labor rights—at least outside of the context of government employment, where criminal prohibitions on strikes have long been commonplace. This is actually

how labor law is usually discussed by labor scholars, described by media, and taught in law schools and labor-relations programs.

As many union members and labor activists already know, the reality is quite different than this view suggests. Rather than having been banished by modern labor laws from the realm of labor relations, the criminal law continues to play a decisive role in limiting the right to strike. Nowadays, though, this antistrike function is a more ancillary and insidious one, as the criminal law is brought to bear to compel workers to surrender to the authority of the labor law itself, particularly in regards to how the law allows employers to respond to strikes and how, in turn, labor may counter this. Especially significant is the use of the criminal law to protect employers' right to defeat strikes by resuming business with scabs: workers who cross the picket line and replacement. The criminal law essentially ensures that employers may break a strike by this means strikers without any real fear that unions might lawfully use the strike itself to counter this; it thus secures for employers an enormously powerful weapon. As I will try to show, this huge advantage is thoroughly unilateral, as the criminal law affords organized labor no comparable advantage in vindicating its rights under the labor law.

The criminal law carries out this function in three distinct but mutually reinforcing ways. The first involves the arrest and prosecution of unionists who resort to overly militant tactics in trying to frustrate employers' use of scab workers. Used in this fashion, the criminal law prohibits the very tactics that proved so vital to labor's momentous organizing gains in the 1930s and 1940s—and the only tactics liable to foil an employer's attempt to break a strike today. The second way that criminal law touches the right to strike is by employers' use of court injunctions, backed by the prospect of criminal contempt, to bar strike activity. Like the straightforward arrest or prosecution of workers, this second approach is very much a resurrection of a practice all too common in pre-New Deal times, complete with a usual focus on supposedly violent, destructive, and threatening conduct. The difference, though, is that nowadays injunctions are issued in the name of vindicating rights under the labor law, even if this means the right of employers to break strikes. The third way the criminal law is used to undermine strikes involves the Board's (and courts') use of the criminal law to define union unfair labor practices and to draw the boundaries of strike activity that will be protected by the labor law from employer reprisals. This approach leaves workers whose actions surrounding a strike are so much as arguably criminal vulnerable to being disciplined or fired, especially if they do this trying to prevent the use of scabs.

In these ways the criminal law maintains a key role in limiting the right to strike and ultimately preventing labor from using the strike to mount any effective challenge to employers' hegemony over the workplace. As I have already suggested, appreciating this function of the criminal law can be difficult, though. For the suppression of labor rights seems no longer to be what criminal law is all about in modern society. Prior to the New Deal, it was difficult for anyone *not* to perceive the use of the criminal law in labor disputes as a crude

assault on workers' rights. Nowadays, though, things seem very different. Not only is the labor law itself, properly speaking, devoid of important criminal provisions; but the criminal law is seldom used as a bludgeon against unionists. It is rare to find the trumped-up charges, the lack of any semblance of proper procedures, the crimes tailor-made to undermine unions, or other outrages of the sort so common through most of the first half of the last century. When the criminal law is brought to bear, it is in the name of neutral enforcement of the law and vindication of the labor law itself.

These changes have undoubtedly benefited organized labor, saving workers and their supporters from the blatant and often devastating acts of legal repression that prevailed a few generations ago. But as I will show in the pages that follow, they have not ended the criminal law's function as an antistrike device. If anything, they have helped conceal this function, lending the use of criminal law in labor relations far more legitimacy than this practice enjoyed in pre-New Deal times. Now when police arrest strikers for assaulting strikebreakers or police, blocking streets, or destroying property, it is, by all appearances, for very good reasons that reveal nothing about the law's proemployer bias. Who, after all, is generally in favor of violence, destruction, and disorder, let alone when such acts constitute obvious violations of the criminal law and are enforced by seemingly neutral authorities? The same can be said of injunctions and unfair labor practice proceedings involving criminal conduct. The practice actually seems legitimate because it involves criminal behavior.

This tendency to recast the labor law's proemployer bias in the morally simplistic and politically compelling vocabulary of crime is what makes the modern regulation of strikes by criminal law so pernicious. The enforcement of the criminal law in cases of strike-related violence, destruction, and disorder might well seem like so many appropriate exercises in moral retribution and public safety. But this conveniently uncritical depiction unravels when one grasps that such conduct is typically the only means that strikers have of countering the right the labor law gives employers to break their strikes with scabs, and is undertaken with that goal in mind. In this sense, strike-related crimes are at least as much assertions of an alternative view of labor rights as they are crimes in the traditional sense, and are at least as laden with issues of class conflict and domination as they are morality and public safety. This truth is fully revealed when one also confronts the criminal law's very conspicuous irrelevance to cases where employers commit serious violations of worker rights under the labor law.

### **Strikes, Scabs, and Criminal Prosecution**

Congress's enactment of the Wagner Act was famously met with contempt by most employers, who anticipated either that Congress would eventually repeal the law or that the U.S. Supreme Court would declare it unconstitutional, as it had done a few years earlier with the National Industrial Recovery Act. In one of the most extraordinary developments in American history, organized

labor checked this move with a massive wave of militant protest, at the center of which were hundreds of sit-down strikes between late 1936 and early 1938. While the exact effect of this great wave of protest is difficult to gage, it seems almost certain that the Supreme Court's landmark 1938 decision in *NLRB v. Jones & Laughlin Steel* upholding the essential constitutionality of the labor law (and, indeed, the constitutionality of the whole New Deal program) was partially inspired by the threat of escalating militancy that these strikes suggested would follow another roll-back of labor rights.<sup>1</sup> Even more certain than this, the sit-down strikes were integral to the successful organization of hundreds of thousands of workers in the previously unorganized basic industries. Largely unable to mobilize an effective campaign to reclaim their property and resume production, and unable to ignore the organizing strength reflected in these often disciplined and audacious protests, employers in industries like glass, automobiles, and steel by and large accepted the validity of the new labor law and the fact of union representation.<sup>2</sup>

Even though the sit-down strikes helped earn these great victories for organized labor, individual sit-down strikers still faced the fact that the strikes themselves were inherently criminal in nature, involving criminal trespass in the act of seizing the factories and other workplaces, and various types of assault in the effort to hold these places against attempts to oust them. Many strikers were arrested, charged, and prosecuted for such crimes, often in large numbers;<sup>3</sup> and the labor law afforded them no defense whatsoever. From the very outset, the NLRB never really challenged the basic prerogative of criminal justice authorities, federal, state, or local, to intrude in labor relations in this way. Even as the Board attempted in some early cases involving the criminal arrest or prosecution of workers to prevent employers using this fact alone to justify their attacks on those workers' labor rights, neither the Board nor (especially) the courts made any effort to curtail the right of criminal justice authorities to prosecute these cases in the first place. This position is clearly reflected in two important cases of this period, *NLRB v. Fansteel Metallurgical Corp.* and *Southern Steamship Co. v. NLRB*, both of which would ultimately be decided (on somewhat different grounds, which are discussed further in the text) by the Supreme Court.<sup>4</sup>

The underlying logic of the sit-down strike in all these cases, *Fansteel* and *Southern Steamship* included, was not simply to seize the workplace for the sake of annoying or intimidating the employer—although there likely was some of that as well—but rather to prevent the employer from continuing to operate its business with replacement workers (or “cross-overs”). Already by 1938 the Supreme Court had decided in *Mackay Radio & Telegraph Co. v. NLRB* that employers retained the right to do just that, notwithstanding the Wagner Act. *Mackay Radio* gave employers the right to hire scabs to permanently replace striking employees, provided only that the strike was motivated by anything other than the employer's violation of the labor law; and it gave them the right to hire temporary replacement workers in all cases. How the court arrived at this rule in *Mackay Radio* remains questionable, particularly relative to permanent replacements, as the case was before the court on different legal grounds

(seemingly rendering the court's statement on replacement workers irrelevant *dictum* rather than controlling precedent). Moreover, not only is the statute itself silent on this issue, but Congress' intention about replacement workers is quite ambiguous. Still, the rule quickly established itself as a firm and enduring precedent in the labor law.

With *Fansteel* and *Southern Steamship* the Supreme Court made it abundantly clear that workers could not lawfully protect their jobs against the use of scabs by seizing the workplace. If workers did seize their workplace, these cases affirmed that police and even national guards could be brought in to oust them as trespassers, and that they could be subsequently prosecuted and punished for that crime and any others committed in the course of the strike. During the great wave of sit-down strikes in 1936–1938, the authorities actually declined (or were politically unable) in some instances to press the issue—most famously in the case of the greatest sit-down strike of them all, the 1936–1937 strike at General Motors in Flint, Michigan. Sit-down strikes actually continued to occur with some regularity into the 1940s.<sup>5</sup> But already this relative tolerance was giving way to a more aggressive approach to this kind of protest.<sup>6</sup> By the 1950s, the sit-down strike had all but disappeared from American labor relations.

While the prerogative of authorities to quash sit-down strikes was affirmed, it initially remained unclear exactly how far states or local governments could go in enforcing the criminal law in other ways to prevent workers from deterring the use of strikebreakers: for example, by use of aggressive pickets, roadblocks, or other tactics that might conceivably involve violations of the criminal law. Notwithstanding *Fansteel* and *Southern Steamship*, there had to be some limits to what state and local governments in particular could do to regulate strikes with their criminal laws.<sup>7</sup> For if there were none, states and local governments could use the criminal law to eviscerate the labor law, either by selective enforcement of their existing laws or by the enactment of criminal laws that directly nullified basic labor rights.

Legally, the issue raised a question of preemption. In *Jones & Laughlin Steel*, the Supreme Court made clear that Congress had the power under the Commerce Clause of the U.S. Constitution to legislate in the realm of private labor relations. Under the Constitution's Supremacy Clause, then, such lawful legislation must bar any enforcement of state or local laws that conflicts with or flouts the labor law. Nevertheless, by 1942, the Supreme Court had confirmed that Congress had not intended the labor law to function as a general bar on the enactment or enforcement of all state and local laws that happen to touch on labor relations.<sup>8</sup> In fact, since then the courts have consistently maintained that the state and local governments retain inherent "police power" in the context of labor disputes, the use of which must be balanced against Congress' general intention to regulate labor relations by federal law and the administration of the NLRB.<sup>9</sup>

In general, courts, which have the final say on preemption questions, have been most willing to strike this balance in favor of allowing state and local governments to assert jurisdiction where the state or local law or regulation only

peripherally concerns the federal law, or, alternatively, “touches interests so deeply rooted in local feeling or responsibility” that Congress is presumed to have disclaimed preemption.<sup>10</sup> Accordingly, courts have held that the right of state and local governments to enforce their criminal laws in the context of labor relations is especially strong where enforcement can be justified in terms of public safety or a general interest in preventing violence, destruction, and disorder. With this prerogative, officials may arrest and prosecute unionists for assaults, property damage, and other crimes committed in the course of picketing or other types of labor protest, without much regard to the biased effect that this might have on the overall course of the labor dispute. Subject to a limited right of workers to picket on their employer’s property (provided, above all, they are peaceful and do not interfere excessively with the employer’s use of its property, and that there is no other place to picket),<sup>11</sup> officials may also enforce criminal trespass laws against strikers and their supporters who enter or remain on company property for this purpose. State and local governments may actually go so far as to enact and enforce criminal laws that deal expressly with strike-related conduct, provided this is styled in a fashion that focuses on violence, coercion, and the like, and disclaims any attempt to rewrite basic labor rights.<sup>12</sup>

The importance of these doctrines for the issue of scabs is obvious. Attempts by strikers to rout replacements or cross-overs routinely involve fights and scuffles, verbal threats, rock throwing, blocking of roads and entrances, damage to property, and so forth. In fact, such conduct is not only an ideal way to deter scabs, it is the likely result of aggressive antiscab tactics like mass picketing that might start out with the more or less peaceful and lawful designs. States have free reign to bring to bear their criminal laws to prevent or punish all of this. Predictably, critics of organized labor, trotting out problematic cases, persist in claiming that this power is often either not used at all or not used in a sufficiently aggressive manner.<sup>13</sup> The record, though, suggests otherwise. Every effort by unions to prevent the use of strikebreakers by forceful means is likely to result in arrest and, in many instances, prosecution. Where scabs have been exposed to scattered acts of violence, intimidation, or obstruction of public roads, the authorities have responded with scattered arrests; and where unionists have attempted *en masse* to protect their jobs by these means, they have been arrested *en masse*.<sup>14</sup>

Although not as common as during the first few decades after the Wagner Act, arrests and prosecutions of unionists for strike-related crimes do continue today. In many instances, the underlying charges are assault and related crimes, usually involving clashes between strikers and scabs or police.<sup>15</sup> In other cases, the charges are disorderly conduct or criminal mischief related to rock-throwing, property damage, or scuffles and other minor assaults.<sup>16</sup> In still other instances, charges relate to criminal trespass.<sup>17</sup> Probably most common of all are charges related to blocking roads or sidewalks, which in some cases involves intentional acts of nonviolent protest and, in others, everyday strike activity.<sup>18</sup>

Most of these arrests and prosecutions occur in relatively small labor disputes and are correspondingly small in scale. But even in fairly recent times, in

the late 1980s and 1990s, quite a number of labor disputes have featured mass arrests and prosecutions, sometimes repeated several times over the course of a strike. For example, a strike by six unions of Detroit Newspapers (a consortium of the *Detroit Daily News* and the *Detroit Free Press*) in the late 1990s resulted in hundreds of arrests and criminal complaints against union members and supporters.<sup>19</sup> Only a few years earlier, in 1990 and 1991, a strike at the *New York Daily News* resulted in over 150 arrests of strikers amidst almost 600 “incidents,” as the police described them.<sup>20</sup> And just a few years prior to that, scores of striking meatpackers at Hormel’s Austin, Minnesota facility were arrested.<sup>21</sup> Perhaps most remarkable in this period is the United Mineworkers strike of Pittston Coal in 1989 and 1990, during which there were some 4,000 arrests of strikers and their supporters.<sup>22</sup>

Consistent with the general pattern, the underlying cause in each of these cases was an effort by strikers and their supporters to stop production by stopping the use of scabs. In fact, it is no accident that these disputes coincided with a significant increase in the tendency of employers to bring in replacement workers, a shift often tied to the ascent of the Reagan administration, the emerging crisis of postwar liberalism, and the overall collapse of labor and capital’s postwar entente.

Notably, the Hormel and Detroit Newspaper strikes ended in failure for the unions, largely because the strikers were unable to stop the use of replacements and cross-overs.<sup>23</sup> The *New York Daily News* and Pittston strikers fared somewhat better, but only by taking enormous risks of prosecution, incarceration, and massive fines.<sup>24</sup> Moreover, as is always the case with this kind of coercion, the effect of such practices goes well beyond these cases where arrests actually had to be made. In countless other cases, strikers undoubtedly stood by and watched as their jobs were taken away and their strike destroyed by scabs, knowing that anything they might do that would actually prevent this would probably land them in jail. This fact emphasizes the full function of criminal arrest and prosecution in modern labor disputes, which is not merely to keep the peace and punish those who breach it, but to signal to workers the importance of acceding to aspects of a *civil* system of labor law that works decisively against their interests.

### **Injunctions and Criminal Contempt**

Injunctions played a notorious role in denying labor rights in the pre-New Deal Era. The Norris-LaGuardia Act (which was actually signed into law by Herbert Hoover and is really a pre-New Deal law) dramatically limited this practice by limiting the power of federal courts to issue injunctions in labor disputes. It did this in two ways. First, it declared a number of activities completely beyond the jurisdiction of the federal courts to enjoin, including membership in a union, withholding of labor, and peaceful protest. Second, while Norris-LaGuardia preserved the power of federal courts to issue injunctions in cases where unions or their members engaged in “unlawful acts,” it also

established significant procedural and evidentiary prerequisites to the use of this power. *Norris-LaGuardia* requires that an employer seeking the injunction to have “clean hands”; that compliance cannot be achieved through the services of local officials; that the injury to the employer, likely if the injunction is not issued, outweighs the injury to the union if it is issued; and that the injunction only issue against parties actually shown to have engaged in prohibited behavior.<sup>25</sup> Although *Norris-LaGuardia* always applied only to federal courts, about half of states eventually enacted so-called Little *Norris-LaGuardia* Acts that restrained their courts in similar ways.<sup>26</sup> The overall effect of these statutes was to radically reduce the role of the courts in overseeing labor relations and, with the *Wagner Act*, to remove this function to the primary jurisdiction of the NLRB.

This policy of ousting the courts from the field of labor relations was seriously undermined by the *Taft-Hartley Act*, and later the *Landrum-Griffin Act*, which inserted into the *Wagner Act* provisions mandating injunctions against unions chargeable with unlawful secondary boycotts, jurisdictional disputes, and organizational and recognition picketing.<sup>27</sup> Even more importantly, § 301 of the *Taft-Hartley Act* broadly authorized courts to resume jurisdiction of labor disputes in the guise of enforcing collective bargaining agreements. Section 301 was construed by the Supreme Court to give courts the power to enjoin parties to arbitrate issues that their collective bargaining agreements submit to arbitration,<sup>28</sup> and eventually to enjoin strikes over issues that the collective bargaining agreement submits to arbitration—even where the collective bargaining agreement does not contain an expressly worded no-strike clause.<sup>29</sup> This interpretation of § 301 has been enormously important in limiting the right to strike, as most collective bargaining agreements can be interpreted in this way to bar strikes over most important issues. Such cases are not an important source of criminal contempt cases, however; for although they may be the subjects of injunctions under § 301, the courts have disfavored the punishment of individual workers for violations related to no-strike clauses.<sup>30</sup>

Another kind of court intervention that has persisted notwithstanding the *Norris-LaGuardia* acts (“big” and little) and that does lead to criminal punishment is the use of injunctions by state courts to preempt aggressive labor protests, to bar protest activity of any kind that can be couched as excessively intimidating or coercive, and generally to protect employers’ property rights. As demonstrated in separate studies by labor law scholars Eileen Silverstein, Benjamin Aaron, and James Atleson, state courts in the post-New Deal era have had no trouble ignoring even the most explicitly worded anti-injunction statutes in enjoining not only picketing and other protests that might actually portend violence or the destruction of property, but also protest activity that so much as interferes with employers’ property rights or inconveniences them in their effort to keep running their businesses.<sup>31</sup>

While not itself an example of criminal jurisdiction, the use of injunctions nevertheless contemplates criminal authority, in two ways. First, injunctions, especially where issued by state courts to forestall violence, disorder, and the

like, borrow from the criminal law of assault and trespass to define the limits of acceptable strike behavior. Quite simply, if strike conduct can be described as criminal in these ways it is almost certainly subject to injunction. Second, insofar as courts may enforce injunctions by resorting to criminal contempt proceedings, all injunctions, federal or state, imply the possibility of criminal liability. In fact, the distinction between criminal and civil contempt has actually never been fully clarified. Just about any injunction may become criminal in nature if the judge either holds a party in contempt without giving them the opportunity to comply with the injunction, or enforces the injunction with sufficiently severe sanctions. The latter fate befell the United Mine Workers in the Pittston Coal strike, when it was fined \$64 million by a state judge for contempt of the court's picket-line injunction. Fortunately for the union, the company waived the part of the injunction earmarked for destruction of its property in the settlement of the strike; and the Supreme Court declared the remaining \$52-million fine for contempt of the judge's picket-line injunction unenforceable because it was, in effect, a criminal sanction imposed without benefit of adequate criminal procedures.<sup>32</sup>

As a review of newspaper records and published judicial opinions amply confirms, injunctions remain a common feature of modern labor disputes. Typically, such injunctions are secured by employers from state court judges and directed at restraining violence and intimidation, vandalism, and obstruction of entrances. Most are ultimately aimed at strikers' efforts to stop the use of replacement workers or otherwise to prevent the employer resuming business. As in the pre-New Deal era, these injunctions typically feature some combination of provisions limiting the size and location of picket patrols, excluding particular people from protesting, and barring violent, harassing, or destructive conduct.<sup>33</sup> Also as in these earlier times, many injunctions originate as temporary restraining orders, which typically means they are issued without the union or workers who are the targets having much opportunity to contest the matter.<sup>34</sup>

There are some limits to what some courts will allow in this realm. For one thing, appellate courts have rejected some injunctions as statutorily barred, often on the grounds that they are not backed (as required by the Norris-LaGuardia acts, big and little) by proof of inadequacy of local law enforcement.<sup>35</sup> Appellate courts have also rejected injunctions on the ground they are preempted by the National Labor Relations Act (the Wagner Act, as amended, or NLRA) because they concern matters (e.g., whether the law entitles picketers to occupy some part of an employer's property) that are subject to Board resolution under that statute.<sup>36</sup> On the other hand, the U.S. Supreme Court, paralleling its view of traditional criminal law in the labor context, has clearly held that the power of state courts to issue injunctions is not preempted in cases involving claims of violence or blocking of access.<sup>37</sup>

In line with this idea that judges retain broad powers to issue injunction to protect property and public safety, injunctions continue to pose real difficulties for unions trying to frustrate the use of scabs. If strikers use force or violence against scabs, or even threaten to do this, or if they block access to the business

or threaten as much, an injunction will readily be issued preventing this. Many labor injunctions are addressed specifically at preventing strikers and their supporters from blocking the movement of scabs or, in retail contexts, customers.<sup>38</sup> Other injunctions sweep more broadly, albeit with the same effect, barring mass picketing, picket-line violence, or other actions that might intimidate scab workers.<sup>39</sup> The 1997 Teamsters strike at UPS generated some twenty injunctions of one kind or another geared to limiting the strikers' conduct on the picket lines.<sup>40</sup>

However they are worded, the overall effect of these injunctions is generally the same: Unions and their members are prevented from using the only strike tactics that are actually likely to work against replacement workers and cross-overs. With some injunctions this purpose is clearly engrained in the injunction itself. But even the most mildly worded injunction will limit the time, place, and manner (especially size) of pickets and inevitably diminish the pressure that unions can bring to bear on employers, scabs, and the public. Neither is litigating the legality of the injunction usually a viable option, even where the strikers have a solid case. For even if an appellate court overturns an injunction or a trial court rules against making a temporary injunction permanent, the damage typically will have already been done. In the meantime, if the injunction is obeyed, the scabs will have overcome their fear or reticence about taking the strikers' jobs or returning to work; and production has been resumed; and the strikers will likely have been thoroughly demoralized by their failure to prevent all this.<sup>41</sup> Not that deterrence always comes easily, though. Unions and their members both continue to incur criminal contempt liability for violating these injunctions, with individuals sometimes serving time in jail or paying sizable fines.<sup>42</sup> On the other hand, all strikers, even those who have never been subject to injunction, must know what may await them if they test the limits of appropriate strike behavior.

### **Criminal Law and the Right to Strike under the NLRA**

The third way the criminal law affects the right to strike involves two closely interrelated issues: the circumstances under which strikers' criminal behavior deprive them of the protections from employer discipline provided by the labor law's employer unfair labor practice provisions under § 8(a) of the NLRA; and the circumstances under which unions and their member are themselves subject to unfair labor practice liability under § 8(b) of the statute for strike-related conduct. Both come to bear when strikers try to deter the use of scabs.

The use of the criminal law to limit protections from employer actions is a matter of how much authority the Board has to remedy employer decisions that unlawfully undermine workers rights. Or, to put it differently, the issue inevitably is how much and in what fashion the alleged criminality of workers' actions would disentitle them to the protections of the law *and*, at the same time, insulate employers' violations of the law from any meaningful penalty. This question was actually at the center of the two Supreme Court cases, mentioned earlier, that

were decided soon after the original Wagner Act become effective: *Fansteel* and *Southern Steamship*. In both instances, the Court resolved the question to the detriment of organized labor.

In *Fansteel*, nearly 100 sit-down strikers seized their employer's suburban Chicago factory and held it for over a week. The strikers violently repelled an initial attempt by police to evict them from the property before finally being ousted, arrested, and, (thirty-seven of them) convicted of criminal contempt for their defiance of a state court's order to vacate the factory. Though obviously criminal and violent, the strikers' conduct was actually a response to Fansteel Corporation's repeated violation of the workers' rights under the labor law. As the Board later found, Fansteel had committed various unfair labor practices prior to the sit-down strike by, among other things: its use of spies to undermine the strikers' organizing efforts; its issuance of antiunion statements; its effort to establish a company-dominated union and refusal to recognize any union not dominated by the company; and its refusal to bargain with the union once it had established majority support. During the strike Fansteel discharged the sit-down strikers as well as other employees who aided them during the strike, later offering only some of them reinstatement, and only on the condition that the returning employees drop their demand for union representation. While the Board made no determination whether the mass discharge constituted an unfair labor practice in its own right, it confirmed that the strike was caused by Fansteel's other violations of the labor law. The Board also refused to hold that participation in the strike deprived the strikers of their status as employees under the labor law or otherwise disentitled them to benefit from the Board remedies. Accordingly the Board ordered that Fansteel remedy its unfair labor practices by offering the strikers and their allies reinstatement to their old positions. The Board considered such remedies essential to effectuating the labor law's central goal of protecting basic labor rights from undue employer interference.<sup>43</sup>

Central to the Supreme Court's review of the case was the appropriateness of this remedy and its importance in effectuating the Wagner Act. Affirming an earlier ruling by a court of appeals, the Supreme Court, by a vote of six-to-two, rejected the Board's position, ruling that the strikers' "unlawful conduct in seizing or committing depredations upon the property of their employer" placed them beyond the Board's remedial powers. For the Supreme Court, the matter was clear: the strike was "illegal in its inception and prosecution" because it was characterized by the use of "force and violence to compel the employer to submit." The Court continued: "When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of termination of their employment."<sup>44</sup> Likewise, the Court held, Congress simply could not have contemplated that such people would benefit from the Board's jurisdiction, even where the Board demonstrated that the remedy was necessary to effectuate the boarder aims of the labor law; and it certainly could not have contemplated that they would benefit at the expense of such an assault on employers' property rights. On similar grounds, the Court also denied the Board authority to reinstate the strikers' allies.<sup>45</sup> Notably, the

Court took no apparent notice of the Board's instance that its decision in the case did not embody the view that workers' criminal conduct would be irrelevant, only that it would not always decide the case. Rather, the Court's decision was worded to suggest that workers must simply forfeit the protections of the law whenever their actions were so flagrantly criminal.

The Court would expand on this position only a few years later, in its decision in *Southern Steamship*. In several respects the facts in *Southern Steamship* were very similar to those in *Fansteel*. A group of seamen launched a strike aboard a ship owned by Southern Steamship Company as it lay fast to the dock in Houston. Like the workers in *Fansteel*, the *Southern Steamship* strikers were motivated by their employer's resort to a series of unfair labor practices to foil their organizing efforts. Unlike in *Fansteel*, though, the workers' union in *Southern Steamship* had actually won a Board-supervised election. Moreover, the strike itself was different. The strikers never actually took control of the vessel; they merely refused to perform duties necessary to getting the vessel under way. The strike was also nonviolent and was resolved peacefully after a few hours when the employer agreed to negotiate recognition of the union; although as soon as the voyage was completed, the strikers were discharged. And while the case would turn on the notion the strikers had committed mutiny under federal labor law, the strikers were never arrested or charged with mutiny, let alone fined and jailed like in *Fansteel*. For the Board, these differences distinguished the case from *Fansteel* and, together with the employers' manifest violations of the labor law, justified an order to reinstate the fired strikers. Indeed, the Board in *Southern Steamship* found that the discharges were in themselves unfair labor practices.<sup>46</sup>

While it upheld most of the underlying unfair labor practice charges, by a six-to-three vote the Supreme Court rejected the reinstatement remedy as inconsistent with its ruling in *Fansteel*. Amplifying its position in *Fansteel*, the Court declared that Congress simply could not have intended to allow the Board to fashion a remedy that "trenched" upon the policy of criminalizing as mutiny shipboard protests—never mind that the mutiny statute in question was enacted one hundred years before the Wagner Act; or that under this statute and its accompanying case law it remained an open question whether the kind of behavior the *Southern Steamship* strikers engaged in was a mutiny in any case; or that the strikes were never arrested or charged.<sup>47</sup>

*Fansteel* and *Southern Steamship* left no doubt how the Board would have to decide not only sit-down strikes, but any case where an entire strike could be characterized as a criminal venture, or for that matter where the remedy contemplated was incompatible with some important federal policy.<sup>48</sup> Actually, the Supreme Court recently called on these principles when it barred the Board from ordering back pay or reinstatement on behalf of undocumented workers.<sup>49</sup> Less clear was how *Fansteel* and *Southern Steamship* would govern cases involving other questions of "misconduct," in particular more isolated acts of criminality as well as criminality directed not at the employer but at other employees. The Board has struggled to resolve these uncertainties while giving due consideration to both the spirit of *Fansteel* and *Southern Steamship* and the fundamental purpose

of the Wagner Act, to protect basic labor rights amidst the tumultuous reality of the picket line and the shop floor. The Board early on took the view, for example, that minor transgressions, even if manifestly criminal in nature, would not bar reinstatement or back pay.<sup>50</sup> Only “serious” misconduct would entitle an employer to discipline or discharge a worker in a manner that violates the labor law (as by discriminating on the basis of union membership or strike participation) without fear of Board remedy. Moreover, while *Fansteel* clearly held that sit-down strikes are illegal, the Board (with the assent, by and large, of the courts) has determined that on-the-job strikes are not unlawful and unprotected unless they are characterized by a significant impairment of the employer’s property rights or are otherwise accompanied by violence or threats.<sup>51</sup>

Likewise, to its credit the Board also attempted to preserve the option of granting remedies to workers who were never convicted of the criminal conduct in question, even if relatively serious in nature. But the courts rejected this approach, citing *Southern Steamship* for the proposition that even where an employer justified its decision to discipline or discharge a worker on grounds that she engaged in criminal behavior, the Board could not require a conviction as a prerequisite for denying reinstatement or other remedy.<sup>52</sup> This rebuke by the courts cleared the way to an approach that would define misconduct more broadly to entail all kinds of violent or threatening behavior, from physical assaults, to rock-throwing, to shadowing scabs, to verbal threats.<sup>53</sup>

The broader definition of misconduct that emerged from this exchange between the Board and the courts reflected aspects of the Taft-Hartley Act, which in several key respects was intended by Congress to codify the spirit of *Fansteel* and *Southern Steamship* and rein in Board attempts to preserve a robust view of basic labor rights, notwithstanding these cases.<sup>54</sup> First, Taft-Hartley revised § 10(c) of the statute, which deals with the NLRB’s remedial powers, to bar the Board from ordering reinstatement or back pay to any worker who has been “suspended or discharged . . . for cause.”<sup>55</sup> Second, the Act revised the statute’s right to strike language in § 13, codifying in general terms the limits imposed by *Fansteel* and *Southern Steamship*.<sup>56</sup> Third, and in some ways most importantly, Taft-Hartley added an array of union-unfair labor practices, among which is § 8(b)(1)(A), which bars union-sanctioned conduct that “restrain[s] or coerce[s]” employees in the exercise of their basic labor rights as outlined in § 7—which was itself amended by Taft-Hartley to include the right to refrain from union-related activity and thus to cross picket lines.<sup>57</sup> Although an unfair labor practice can only occur if the conduct in question is endorsed by a union, the Act’s supporters made clear their desire that the idea expressed in this section also limits the Board’s remedial power in misconduct cases, even where there has not been such endorsement.<sup>58</sup>

The overall intent of these changes was thus to dramatically constrain labor rights in accordance with *Fansteel* and *Southern Steamship*. But even after receiving these instructions from Congress, the Board understood that it could not do this in an overly simplistic fashion. For although the authors of the Taft-Hartley Act had given these antilabor instructions, they also left largely intact the

provisions of the law protecting basic labor rights: § 7 and the unfair labor practice provisions of § 8(a) (the old § 8 of the Wagner Act). Unavoidably, this left the Board still having to establish some balance between such principles as the right of worker to strike or to organize free of the threat of employer discrimination, on the one hand, and the idea that workers who engage in violent protest and other kinds of misconduct, criminal or otherwise, could not benefit from the law's protections, on the other.

For the most part, the Board has earnestly tried to reconcile these opposing positions, noting that "minor acts of misconduct must have been in the contemplation of Congress when it provided for the right to strike."<sup>59</sup> In some important respects, this approach has continued to operate to the benefit of workers. The Board has, for example, taken the view that workers guilty of misconduct do not forfeit the right to reinstatement if the employer has condoned their behavior, as by already rehiring them.<sup>60</sup> Likewise, under the so-called Thayer Doctrine, the Board reserved to itself the prerogative, under some limited circumstances, to order back pay or reinstatement for workers who engaged in misconduct, provided the employer has itself committed serious violations of the Act and the overall purposes of the Act would be best effectuated by the remedy.<sup>61</sup>

The courts have continued to express unhappiness with this relatively worker-friendly approach, however.<sup>62</sup> Citing such pressure, the Board did retreat somewhat with its 1984 decision, *Clear Pine Moldings, Inc.*, in which, referring specifically to *Fansteel* and the legislative intent of Taft-Hartley, it declared that conduct by strikers that "reasonably tend[s] to coerce or intimidate employees in the exercise of rights protected under the Act" will itself be unprotected.<sup>63</sup> With this, at least half of the Board's members at the time seemed to reject the approach reflected in its earlier cases of balancing the "severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct."<sup>64</sup> In subsequent cases, the Board also made clear that the *Clear Pine* rule is an objective and reasonable test, and as such does not require proof that any employees were in fact subjectively intimidated for those engaged in the intimidating conduct to lose protection.<sup>65</sup>

Nevertheless, the more severe implications of *Clear Pine* were actually qualified somewhat by later Board decisions, which still reflect some interest in balance. The Board has since made clear that *Clear Pine* did not completely overturn the Thayer Doctrine;<sup>66</sup> and that it did not hold that every instance of misconduct will forfeit a worker's right to reinstatement or back pay.<sup>67</sup> Likewise, the Board continues to hold that an employer may not knowingly tolerate conduct by non-strikers that it relies on as grounds to discipline or discharge strikers.<sup>68</sup>

Unfortunately for many strikers, though, these limitations on *Clear Pine* are perhaps least effective where the conduct in question can be characterized as criminal in nature. Well before even that decision, the Board (again, following instructions from the courts and Congress) made clear that workers will almost always forfeit their right to reinstatement where they commit assault or threats

of future assault,<sup>69</sup> malicious destruction of property,<sup>70</sup> and contempt of court injunctions barring future criminal acts.<sup>71</sup> Although not essential, a conviction makes such a result that much more certain. If the conduct in question is endorsed by the union, it will also provide the basis for § 8(b)(1)(A) liability, which would then allow the Board not only to deny reinstatement, but also to order the union to renounce the conduct.<sup>72</sup>

These doctrines make clear that if workers use aggressive means to prevent their jobs from being taken and their strike from being reduced to an irrelevance, they face the risk not only of arrest, prosecution, and injunction, but also of losing their jobs. This outcome is actually almost certainly more likely than the others—and more likely to be done in a strategic fashion that benefits the employer by creating optimal feelings of fear and vulnerability among *all* workers—simply because it is something over which the employer has immediate control. The employer fires the worker, leaving it to the Board (typically months later) to decide whether to order the employer to reverse its decision. As the legal rules just described suggests, it is far from likely that an employee discharged under such circumstances will prevail at all. Board decisions involving criminal conduct (besides those already mentioned) make this point even clearer.<sup>73</sup> Workers simply cannot expect any help from the Board if they undertake such aggressive strike tactics.

## Conclusion

The foregoing account makes clear that the criminal law continues to play an important role in limiting workers' right to strike. It does this indirectly and derivatively, by the way it enforces otherwise civil, noncriminal rights that the labor law grants to employers, particularly to replace striking workers and continue operations in the face of a walkout. How one understands this attenuated relationship is critical to how one perceives the criminal law's role in this context. On its account, one might be tempted to discount the characterization of the criminal law as a mode of labor regulation and an instrument that destroys the right to strike. One might conclude, for example, that all the criminal law really does in this regard is guarantee enforcement of the law, and by ostensibly neutral statutes enforced by neutral authorities. In this light, the criminal law might truly seem like no more a device for regulating labor relations than is, say, the law of property or corporate governance, which also indirectly affect the right to strike.

The tendency to see the matter in this fashion is mistaken in two ways. First, it proves too much to say that all the criminal law does is provide a neutral legal framework for imposing decisions made by the labor law proper; and that in this respect the criminal law has no special bearing on labor relations. To the extent that this characterization is true, it merely underscores how far beyond the labor law itself the legal framework of labor relations actually extends—or, to make the same point a little differently, how thoroughly the labor law has been reconciled with a larger system of laws that consistently gives employers the upper hand.

Tellingly, this is actually the legacy of *Fansteel* and *Southern Steamship*; for there the Supreme Court told the Board to do exactly this with the labor law—to make it the stepchild of other bodies of law and limit labor rights accordingly.

The second is a point I mentioned at the outset of this essay, having to do with the unilateral function of the criminal law in the realm of labor relations. The criminal law is really only relevant in labor relations as a tool for enforcing employers' rights—that is to say, for enforcing limitations on workers' right to strike. For example, workers who have been unlawfully discharged by their employer for trying to form a union—which is the simplest and most effective thing an employer can do to stop an organizing campaign—cannot file a criminal complaint with the police, or get an injunction from the courts backed by the criminal law, to enforce their right under the labor law not to be discharged. Neither can workers or unions turn to police or prosecutors when they or their members have been harassed or threatened with job loss or disciplinary action. To be sure, unionists can theoretically turn to the criminal law if they are the victims of violence or threats of violence in a labor dispute. But occasions of this kind are relatively rare and, more importantly, typically arise in a way that has little direct bearing on the key question: whether the strikers or their employer is going to prevail. Such is the legal advantage employers enjoy over workers that they do not have to resort to criminal behavior to break a strike; they need only exercise their very lawful right to bring in replacement workers. Thus does the labor law leave workers little choice but to resort to criminality if they are to have any chance of prevailing—and thus does the criminal law reveal its true role as a tool of labor regulation.

Even the fact that employers cannot as a matter of law *make* the police or prosecutors play a hand in labor relations—which might be taken to suggest that what they do in this realm is not a kind of labor regulation, and certainly not a convenient weapon for employers—can be stood on its head. Not only are employers much more likely than workers to have sufficient influence with the authorities to convince them to act on their behalf. But also the fact that employers do not themselves legally direct criminal justice authorities probably only adds the appearance of neutrality and legitimacy to what the authorities do when they intervene.

A similar point can be made about the Board's use of criminal law to deny workers the protections of the labor law. Under *Fansteel* and *Southern Steamship* as well as Board decisions culminating with *Clear Pine*, the Board cannot take into account an employer's violation of the labor law in deciding whether workers lose their rights under the statute if they protest this action by means of a criminal strike. Again, as with criminal prosecution, the sword cuts in only one direction. While workers may file all sorts of unfair labor-practice charges against employers who unduly suppresses their rights under the statute, such unfair labor practices are not at all likely to involve claims that the employer has committed criminal acts against the workers. As the history of employer-sponsored labor violence in pre-New Deal America reveals, this is not because employers are somehow inherently less criminally inclined than workers; it is because these

days, employers, unlike workers, do not generally need to resort to criminal behavior to secure their interests. Often enough, they need only exercise their legitimate rights; and yet workers can only counter this by criminal means.

Can this situation be rectified? While it would respond directly to the issue, the decriminalization of strike-related crimes (as by broadening the concept of labor law preemption) is politically unthinkable, even on a limited scale. So too is the idea of achieving fairness by extending the criminal law in the other direction, to encompass employer assaults on labor rights. Somewhat more plausible is the prospect of major reforms of the labor law itself, beginning with the repeal of the replacement worker rule, which would eliminate the bases on which the criminal law becomes a kind of labor law. It would also help if anti-injunction statutes were reinvigorated, particularly at the state level, to narrow the grounds on which injunctions could issue or, if issued and violated, be enforced by criminal contempt. And it would help as well to amend key provision of the labor law, particularly § 7, § 8(b), and § 10(c), such that the Board would be not just permitted, but instructed to take a more balanced view of the effect of criminal behavior on the issues of protectedness and union-unfair labor practice liability. Still, none of this seems particularly likely to happen anytime soon, regardless of who occupies the White House or controls the Congress. In the meantime, organized labor will have to deal with the fact that oftentimes it is only by resorting to criminal means that it can preserve the effectiveness of its most important weapon.

**Ahmed White** is an associate professor of law at the University of Colorado at Boulder where he has taught labor law and criminal law since 2000. Professor White has been a visiting professor at Villanova Law School and Northwestern Law School. Prior to becoming a law professor, Professor White served on the professional staff of the Louisiana State Senate. He is a graduate of Southern University in Baton Rouge and Yale Law School. Address correspondence to Ahmed White, University of Colorado Law School, 463 Wolf Law Building, 401 UCB, Boulder, Colorado (US) 80309-0401. Telephone: 011 (303) 735-0138; Email: Ahmed.White@colorado.edu.

### Note

1. James Gray Pope, "The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957," 102 *Colum. L. Rev.* 1 (2002); Karl E. Klare, "Judicial Deradicalism of the Wagner Act and the Origins of Modern Legal Consciousness," 62 *Minn. L. Rev.* 265 (1978). Cf. Drew D. Hansen, "The Sit-Down Strikes and the Switch in Time", 46 *Wayne L. Rev.* 49 (2000).
2. See Bruce Fine, *Sit-Down: The General Motors Strike of 1936–1937* at 131–133 (Univ. of Mich. 1969) (describing the overall success record of sit-down strikes in this period).
3. See, for example, "21 More Pickets Seized at Store," *N.Y. Times*, Mar. 21, 1937, p. 36 (121 sit-down strikers arrested at New York City Woolworth store); "Sit-Down' Strikers Here to be Ejected by Police on Complaint of Owner," *N.Y. Times*, February 18, 1937, p. 1 (describing new policy of New York police to arrest sit-down strikers); "Douglas Case Group Freed," *L.A. Times*, May 12, 1937, p. 6 (almost 400 sit-down strikers arrested at Douglas Aircraft; twenty-four held for trial on conspiracy to trespass charges).

4. *Fansteel Metallurgical Corp. v. NLRB*, 306 U.S. 240 (1939); *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).
5. See, for example, “1,600 in SKF Sit-Down,” *N.Y. Times*, Sept. 29, 1945, p. 2 (large sit-down strike at Philadelphia ball-bearing factory); “350,000 Workers Idle Through Strike as High Record is Set by New Walkout,” *N.Y. Times*, Sept. 25, 1945, p. 16 (15,000 Philadelphia shipyard workers mount sit-down strike); “600 on Sit-Down Strike,” *N.Y. Times*, June 6, 1944, p. 10 (sit-down strike at New Jersey mill); “Wave of Strikes Besets Pittsburg,” *N.Y. Times*, Jan. 15, 1944, p. 7 (multiple sit-down strikes in Pittsburg steel industry); “Sit-Down Strike Perils Output of Tanks, Planes,” *L.A. Times*, May 9, 1943, p. 19 (sit-down strike at Long Beach factory).
6. See, for example, “Sit-Down Strike of 50 Workers Foiled by Cops,” *Chicago Daily Tribune*, Dec. 3, 1949, p. 14 (sit-down strike by Chicago steelworkers disrupted by police); “Police Oust 40 Hog Butchers When 200 Stage Sit-Down Strike,” *Chicago Daily Tribune* April 23, 1949, p. 13; “Police Rout 130 Sit Strikers; AFL Accuses CIO,” *Chicago Daily Tribune*, June 2, 1944, p. 22.
7. *Southern Steamship* made clear that federal authorities could prosecute strike-related crimes, too. But in practice, this was not ever likely to be a common occurrence, as the federal government has no general police power of the sort that would apply broadly to strikes. And efforts to apply specialized federal racketeering statutes to labor disputes have been turned back by the courts. *United States v. Enmons*, 410 U.S. 396 (1973) (holding anti-extortion provisions of Hobbs Act generally inapplicable to everyday union violence); *United States v. Local 807, Teamsters*, 118 F.2d 684 (2d Cir. 1941) (limiting application Anti-Racketeering Act of 1934 to labor organization). Congress could always create some new grounds of criminal liability in this area, but that seems unlikely.
8. *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942).
9. See *Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Bd.*, 427 U.S. 132 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 275 (1956).
10. *Garmon*, 359 U.S. at 243–44.
11. See, for example, *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).
12. See, for example, Ga. Code 54–801 to 54–805; Mich. Comp. Laws § 750.352.
13. See, for example, Armand J. Thieblot, Jr. & Thomas R. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (Wharton School 1983).
14. For example, a 1946 strike against Columbia Pictures resulted in some of the largest mass arrests in California history, with nearly 700 arrested on one occasion and over 200 on another. See “700 Film Strike Pickets Arrested,” *L.A. Times*, Nov. 16, 1946, p. 1; “219 Arrested in Columbia Studio Strike,” *L.A. Times*, Oct. 15, 1946. Hundreds of those arrested were subsequently tried. See “Studio Mass Trial Underway,” *L.A. Times*, Dec. 17, 1943, p. 1. See also Harold Hutchins, “29 More Arrests Mark L.I. Strike,” *N.Y. Times*, Feb. 22, 1956, p. 1 (scores arrested in strike at Republic Aviation); *106 Hawaiian Pickets Post \$10,800 for Bail*, *N.Y. Times*, July 11, 1949, p. 12 (longshoremen arrested in waterfront dispute); “60 in Picket Line at Y.W.C.A. Seized: Mass Demonstrations by CIO Union Bring Mass Arrests in Brooklyn Strike,” *N.Y. Times*, Mar. 6, 1947, p. 2.
15. See, for example, Frank Tutalo, “Two International Paper Strikers Arrested on Line in Wilmington Mass.,” *The (Lowell) Sun*, Oct. 15, 2003; Michelle L. Klampe, “Union OKs Contract at Auburn Foundry,” *Ft. Wayne Sentinel*, Nov. 22, 1999, p. 1A (two strikers arrested for serious assault); AP, “RMI Titanium, Striking Workers Reach Deal on Wages, Pensions,” *Akron Beacon Journal*, Apr. 10, 1999, p. D8 (six workers arrested in “clashes” with police).
16. See, for example, Christopher Keating, “Two Arrested Pratt Strikers Released With Warning,” *Hartford Courant*, Dec. 5, 2001, p. B3; Kristin Stefanova, “End of Strike at Verizon Not at Hand; Workers Seek Temporary Jobs,” *Wash. Times*, Aug. 10, 2000, p. B8; Peter Y. Hong, “Jesse Jackson Leads Striking Janitors’ Protest,” *L.A. Times*, Apr. 7, 2000, p. 1; Candus Thompson, “Anger Builds Among Brick Workers,” *Baltimore Sun*, Aug. 17, 1999, p. 1A (striker arrested on minor assault charge); Ian Swanson, “Worker Who Crossed Picket Line Tells of Retribution,” *Grand Forks Herald*, June 5, 1999, p. 2 (several arrests for disorderly conduct); Terry Prestin, “Consumers Feel Service Delays from Strike at Bell Atlantic,” *N.Y. Times*, Aug. 11, 1998, p. B1 (numerous arrests on minor charges in phone strike).
17. See, for example, Angela Coulombis, “Display of Solisarity for Striking Wawa Workers,” *Phila. Inquirer*, Oct. 11, 1999, p. B01 (strikers arrested for trespassing while handbilling).

18. Madelaine Vitale, "Local 54 to Plead Guilty in Atlantic City Sit-In," *Press of Atlantic City*, March 8, 2005, p. A1; AP, "Casino Striker Injured at Picket Line," *Bucks County Courier Times*, Oct. 14, 2004, p. 4C (dozens of striking casino workers arrested for blocking street). David Reyes, "15 Arrested During Rally for Supermarket Strikers," *L.A. Times*, Jan. 18, 2004, p. 6 (striking supermarket workers arrested on similar charges). See also Karen Rubin, "Southern California Shoppers Report Intimidation Along Picket Lines," *San Gabriel Valley Tribune*, Dec. 18, 2003. Cf. Andrew Conte, "Parking Lot Attendants Block Downtown Garage," *Pitt. Tribune Rev.*, Oct. 27, 2005 (striking parking lot workers arrested for obstructing facility); "Protesters Charged After Blocking Street," *Providence Journal Bulletin*, Dec. 2, 2005, p. B01 (striking Rhode Island janitors and supporters arrested for blocking street). Steven Greenhouse, "Deal Ends Strike by Fairfield County Janitors," *N.Y. Times*, Nov. 16, 2000, p. B10 (striking Connecticut janitors arrested for blocking street).
19. "In Detroit: City Drops Case Against 286 in Newspaper Strike," *Detroit News*, July 17, 1999, p. D3; "65 Arrested in Detroit Strike," *Grand Rapids Press*, Mar. 29, 1991, p. C7; James Bennet, "After 7 Weeks Detroit Newspaper Strike Takes a Violent Turn," *N.Y. Times*, Sept. 6, 1995, p. A21.
20. David Gonzalez & James C. McKinley, Jr., "Violence and the News Strike: Anger, Blame and Distrust," *N.Y. Times*, Mar. 2, 1991, p. 1.
21. David Hage, "Police, Hormel Protesters Clash; 17 Jailed, 8 Officers Have Minor Injuries," (Minneapolis) *Star Tribune*, Apr. 12, 1986, p. 01A; Conrad deFiebre, "Hormel Protesters Arrested After Blockade," (Minneapolis) *Star Tribune*, Mar. 21, 1986, p. 01A (22 jailed).
22. Bill McKelway, "Judge Declines to Say What Will Resolve Fines," *Richmond Times Dispatch*, Feb. 14, 1990, p. B1 (describing "thousands" of arrests by strikers attempting to block coal trucks, etc.); AP, "Pickets Arrested for Blocking Pittston Mine," *Lexington Herald-Leader*, Oct. 26, 1989, p. A8; Kenneth C. Crowe, "Coal Strike's New Arrests," *Newsday*, Aug. 24, 1989, p. 47; Ron Urban, "Coal Strike Resists Settlement; Both Sides Refuse to Cave in After 100 Days, 3,000 Arrests," *Charlotte Observer*, July 15, 1989, p. 1A.
23. The Hormel strikers not only were forced to accept the concessions over which they struck; about half the strikers were permanently replaced. "Hormel Strike: Bitter Aftermath for Minnesota Town," *N.Y. Times*, Dec. 26, 1986, p. B17. The Detroit News Agency strikers returned to work unconditionally. Iver Peterson, "Detroit Newspaper Unions Offer to Go Back to Work," *N.Y. Times*, Feb. 15, 1997, p. 9.
24. The "New York Daily News Strikers" agreed to significant concessions but did win some in return. George Garneau, "It's a Done Deal: New York Daily News Union Members Ratify Contracts to End their Strike," 124 *Editor & Publisher* 14 (1991); Alan Finder, "Daily New Strike Ends," *N.Y. Times*, Mar. 21, 1991, p. B1. The Pittston striker fared better. Kate Phelan, "Settlement Costly to UMW, Pittston; Union Appears to Make Some Gains," 18 *Energy Report* 108 (1990).
25. 29 U.S.C. §§ 101, 107–108 et. seq. (2000).
26. Note, "Current Legislative and Judicial Restrictions on State Labor Injunction Acts," 53 *Yale L. J.* 553 (1944).
27. 29 U.S.C. §§ 158(b)(4)(B), 158(b)(4)(D), 158(b)(7) (2000).
28. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).
29. See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974); *Boys Market Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Local 74, International Brotherhood of Teamster v. Lucas Flour Co.*, 369 U.S. 95 (1962). Interestingly, though, the Norris-LaGuardia Act continues to bar the injunction of strikes, even where the collective bargaining agreement does contain a no-strike clause, if the collective bargaining agreement does not at least impliedly submit the cause of the strike to arbitration. *Buffalo Forge Co. v. United Steelworkers of America*, AFL-CIO, 428 U.S. 397 (1976).
30. See *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981) (damage actions against individuals improper in cases involving no-strike clauses); *Hobet Mining Inc. v. Local 5817*, UMW, 1193 WL 223772 (S.D. W.Va. 1993) (injunctive relief against individual officers or union members not contemplated by § 301).
31. Eileen Silverstein, "Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction," 11 *Hofstra Lab. L.J.* 97, 113–40 (1993); James B. Atleson, "The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions," 23 *Law & Soc'y Rev.* 41 (1989); Benjamin Aaron, "Labor Injunctions in the State Courts—Part II: A Critique," 50 *Va. L. Rev.* 1147 (1964); Benjamin Aaron, "Labor Injunctions in the State Courts—Part I: A Survey," *Va. L. Rev.* 977 (1964).

32. See *UMW v. Bagwell*, 512 U.S. 821 (1995).
33. See, for example, *Armco, Inc. v. United Steelworkers of America*, AFL-CIO, 2000 WL 1886300 (Ohio App. 2000); *Michael Hooper & Taylor Atkins*, “Judge Limits Union Pickets,” *Topeka Capital Journal*, Dec. 17, 2006, p. 1A (Kansas judge issues injunction limiting number of pickets by striking rubber workers); Dan Voorhis, “The Scene Outside Boeing is Quiet, But Striking Machinists Say They Are Just Gearing Up,” *Wichita Eagle*, Sept. 5, 2005, p. B1 (injunction limiting number of pickets).
34. For an illustration of this practice and the difficulties it presents to unions and their members, see, for example, *McCabe Hamilton & Renny Co., Ltd. v. Chung*, 43 P.3d 244 (Hawaii App. 2002).
35. See, for example, *Walmart Foods v. UFCW, Local 588*, 87 Cal. Rptr. 2d 359 (2001); *Acorn Bldg. Components, Inc. v. Local No. 294, UAW*, 416 N.W. 2d. 442 (Mich. App. 1987); *Baton Rouge Bottling v. Teamsters Local No. 5*, 403 S.2d 632 (La. 1981).
36. See, for example, *Riesbeck Food Markets, Inc. v. UFCW, Local 23*, 404 S.E. 2d 404 (1991); *Shirley v. Retail Store Employees Union*, 592 P.2d 433 (Kan. 1979).
37. See, for example, *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978); *United Auto., Aircraft and Agri. Implement Workers of America v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956).
38. See, for example, “Judge Grants Injunction Limiting Number of Pickets,” *Cincinnati Post*, Oct. 25, 2006, p. C10; Greg Bozell, “Locked Out in Illinois: ‘How Can They Do That to a Community?’” *The Progressive*, Dec. 1, 2005, p. 27; David Robb, “Court Guards ABC News Shoots,” *Hollywood Reporter*, Dec. 12, 1998, p. 1.
39. See, for example, *Ormet Aluminum Products, Inc. v. United Steelworkers of America, Local 5724 et al.*, slip opinion, 2006 WL 2045811; *Smitty’s Super Market Inc. v. Retail Store Employees Local 322*, 637 S.W.2d 148, 156-57 (Mo. App. S.D. 1982); *UMW Local 1972 v. Decker Coal Co.*, 772 P.2d 1274 (Wyo. 1989); *General Electric Co. v. Peterson*, 61 N.Y.S. 2d 813 (N.Y. Sup. 1946).
40. Joseph R. Moderow, “Ex-Unloader Wants Trucks Rolling Again,” *National Law Journal*, Aug. 25, 1997, p. B1. See also “Judge Limits Pickets in Tampa,” *St. Petersburg Times*, Aug. 12, 1997, p. 6A; Jennifer Weiner, “Strikers Delivering a Message: They’re Few, Peaceful—and Determined,” *Phil. Inquirer*, Aug. 10, 1997, p. B01; Laurence Hammack, “UPS Strikers Told to Watch Their Language,” *Roanoke Times*, Aug. 9, 1997, p. A5; L.A. Lorek & Tom Stieghorst, “Judge Limits Scope of Teamsters Pickets,” *South Florida Sun-Sentinel*, Aug. 9, 1997, p. 13C.
41. For a brief but sobering account of this dynamic as it played out in a 1986 strike of Boise-Cascade, see Timothy J. Minchin, “Broken Spirits: Permanent Replacements and the Rumford Strike of 1986,” 74 *New England Quarterly* 5 (2001).
42. See, for example, *Kaiser Aluminium and Chemical Corp. v. United Steelworkers of America, Intn.*, 785 So.2d 238 (La. App. 2001) (union members sentenced to forty-eight hours for criminal contempt); *Mosler, Inc. v. United Auto., Aerospace & Agr. Implement Workers of Am., Local 1862*, 633 N.E. 2d 1193 (Ohio App. 1993) (union officer sentenced to five days in jail for assault in violation of injunction; overturned because impermissibly criminal in nature); *Midland Steel Products Co. v. UAW, Local 486*, 573 N.E. 2d 98 (Ohio App. 1991) (strikers sentenced to thirty-days plus fines for criminal contempt); *National Metalcrafters v. Local No. 449, UAW*, 465 N.E. 2d. 1001 (Ill. App. Ct. 1984) (union member sentenced to sixty days for criminal contempt); Ron Clayton, “Judge Fines Labor Union, Leader for Violence at Polk Picket Line,” *Knoxville News Sentinel*, May 30, 1997, p. A4 (local union president sentenced to ten days and \$10,000 for picket-line violence in contempt; sentenced conditionally suspended); “Judge Jails Strikers; Violence Cited at Tent Factory,” *Cincinnati Inquirer*, Dec. 14, 1996, p. B05.
43. *Fansteel Metallurgical Corporation*, 5 NLRB 930 (1938).
44. *Fansteel*, 306 U.S. at 255–57.
45. *Fansteel*, 306 U.S. at 259–61.
46. *Southern Steamship Co.*, 23 NLRB 26 (1940).
47. *Southern S.S.*, 316 U.S. 31.
48. See, for example, *American News Co.*, 55 NLRB 1302 (1944) (no reinstatement for strikers attempting the compel employer to break wage stabilization laws); *Reading Batteries, Inc.*, 19 NLRB 249 (1940); *Thompson Products*, 72 NLRB 150 (1947) (no reinstatement for strikers attempting to compel employer to violate the labor law).

49. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).
50. See, for example, *Ford Motor Co.*, 23 NLRB 342 (1940). See also *Republic Steel Corp. v. NLRB*, 107 F.2d 472 (3rd Cir. 1939), *modified on other grounds*, 311 U.S. 7 (1940).
51. See, for example, *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Molon Motor and Coil Corp. v. NLRB*, 965 F.2d 523 (7th Cir. 1992).
52. See, for example, *NLRB v. Kelco Corp.*, 178 F.2d 578 (4th Cir. 1950). See also *NLRB v. Ohio Calcium Co.*, 133 F.2d 721, 727 (6th Cir. 1943).
53. See, for example, *NLRB v. Moore Business Forms Inc.*, 574 F.2d 835 (5th Cir. 1978); *Teledyne Corp. v. NLRB*, 911 F.2d 1214 (6th Cir. 1960).
54. See *Senate Committee on Labor and Welfare, 80th Cong., 1st Sess.*, Rep. No. 105, reprinted in *Legislative History of the Labor Management Relations Act, 1947* at 428 (Government Printing Office 1974); *House Committee on Education and Labor, 80th Cong., 1st Sess.*, Rep. No. 245, reprinted in *Legislative History of the Labor Management Relations Act, 1947* at 295–297, 318, 321, 333, 335 (Government Printing Office 1974).
55. 29 U.S.C. § 160(c) (2000).
56. 29 U.S.C. § 163 (2000).
57. 29 U.S.C. § 158(b)(1) (2000).
58. *House Conference Report, 80th Cong., 1st Sess.*, Rep. No. 510, reprinted in *Legislative History of the Labor Management Relations Act, 1947* at 544–546 (Government Printing Office 1974).
59. *Cornet Casuals*, 207 NLRB 304, 305 (1973).
60. See, for example, *NLRB v. Colonial Press*, 360 F.2d 59 (8th Cir. 1966) (on condonation); *Federal Prescription Service*, 203 NLRB 975 (1973).
61. See *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954).
62. See, for example, *Associated Grocers of New England v. NLRB*, 562 F.2d 133 (1st Cir. 1977); *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977).
63. *Clear Pine Mouldings Inc.*, 268 NLRB 1044, 1046–47 (1984).
64. *Clear Pine*, 268 NLRB, at 1047.
65. See, for example, *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990).
66. *Mohawk Liqueur*, 300 NLRB at 1076, fn. 3.
67. See, for example, *Detroit Newspapers*, 340 NLRB 1019, 1024 (2003); *Briar Crest Nursing Home*, 333 NLRB 935, 938 (2001).
68. See, for example, *Chesapeake Plywood*, 294 NLRB 241, 204 (1989); *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988).
69. See, for example, *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977) *Associated Grocers of New England, Inc., v. NLRB*, 562 F.2d 1333 (1st Cir. 1977); *NLRB v. Pepsi Cola Co. of Lumberton, Inc.*, 496 F.2d 226 (4th Cir. 1974); *NLRB v. Longview Furniture Co.*, 206 F.2d 274 (4th Cir. 1953); *W.T. Rawleigh Co. v. NLRB*, 190 F.2d 832 (7th Cir. 1951). See also *J.J. Cassone Bakery Inc.*, 350 NLRB No. 6 (2007); *Universal Truss, Inc.*, 348 NLRB No. 41 (2006); *Big Horn Coal Co.*, 309 NLRB 255 (1992); *Gem Urethane Corp.*, 284 NLRB 1349 (1987).
70. See, for example, *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262 (6th Cir. 1945).
71. See, for example, *NLRB v. Hart Cotton Mills, Inc.*, 190 F.2d 964 (4th Cir. 1951).
72. See, for example, *District 1199, Health Care and Social Service Union*, 312 NLRB 90 (1993); *Soft Drink Workers Union Local 812*, 307 NLRB 1267 (1992).
73. See, for example, *Wayne Stead Cadallic*, 303 NLRB 432, 439 (1991); *Teledyne Still-Man*, 295 NLRB 161 (1989); *White Oak Coal*, 295 NLRB 567, 579–81 (1989); *Roto Rooter*, 283 NLRB 771 (1987); *PBA Incorporated*, 270 NLRB 998 (1983) (reinstatement denied where workers made criminal threats).