

# Criminal Labor Law

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*This Article examines a recent rise in civil suits brought against unions under criminal statutes. By looking at the long history of criminal regulation of labor, the Article argues that these suits represent an attack on the theoretical underpinnings of post-New Deal U.S. labor law and an attempt to revive a nineteenth century conception of unions as extortionate criminal conspiracies. The Article further argues that this criminal turn is reflective of a broader contemporary preference for finding criminal solutions to social and economic problems. In a moment of political gridlock, parties seeking regulation increasingly do so via criminal statute. In this respect, “criminal labor law” should pose concerns, not only for scholars concerned about workplace democracy, but also those focused on overcriminalization and the increasing scope of criminal law.*

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## I. INTRODUCTION

Labor law is dead, or at least so say the labor law scholars.<sup>1</sup> Almost eighty years after the passage of the National Labor Relations Act (“NLRA” or “Wagner Act”),<sup>2</sup> a statute that ushered in a new era of legal recognition for organized labor, traditional, private-sector labor law doctrine has stagnated. In 1983, Paul Weiler wrote that “American labor law more and more resembles an elegant tombstone for a dying institution.”<sup>3</sup> A decade later, James Brudney observed that “collective action appears moribund.”<sup>4</sup> And, in her 2002 article *The Ossification of American Labor Law*,<sup>5</sup> Cynthia Estlund wrote that “[e]vidence of [labor law’s] morbidity abounds . . . . [L]abor laws have failed to deliver an effective mechanism of workplace representation, and have become nearly irrelevant, to the vast majority of private sector American workers.”<sup>6</sup>

Certainly, some U.S. workers are still unionized; unions continue to organize shops; and courts continue to rule on legal questions relating to union elections, dues, and political contributions. However, as the unionized portion of the U.S. workforce continues to dwindle, the statutory protections and requirements of the NLRA have ceased to occupy the privileged position they once held as the critical legal regulations

1. See, e.g., Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 827-28 (1996); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97 (1993); Benjamin Sachs, *Revitalizing Labor Law*, 31 BERKELEY J. EMP. & LAB. L. 333, 334 (2010) (“[F]or more than three decades now, labor scholars have been withering in their criticism of the National Labor Relations Act. The critique is that the statute fails to fulfill its central statutory purposes.”); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694-2700 (2008) [hereinafter Sachs, *Employment Law as Labor Law*]; Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. C.R.-C.L. L. REV. 59, 123 (2014) [hereinafter White, *Workers Disarmed*] (“[T]he system of liberal labor law erected by the Wagner Act and the Taft-Hartley Act lingers in place, even as the rights the acts purport to advance and the future of the labor movement both teeter on the edge of extinction.”).

2. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2012)).

3. Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

4. James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (1996).

5. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); cf. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (arguing that the Wagner Act failed to vindicate the pro-union values that led to its passage, ultimately yielding an economic and legal climate hostile to unionization).

6. Estlund, *supra* note 5, at 1527-28.

undergirding the nation's labor markets.<sup>7</sup> The doctrine taught in a traditional labor law course—the NLRA and the statutory scheme of which it is a part<sup>8</sup>—increasingly has become a niche area of legal practice, rather than the essential component of a workplace lawyer's toolkit.

The responses to the obsolescence consensus have been creative and varied. Indeed, “the field is beginning the process of reinvention,”<sup>9</sup> with labor lawyers, activists, and scholars attempting to imagine new frameworks or identify different legal regimes that might be able to fill the gaps in the regulation of the workplace.<sup>10</sup> Some have focused on employment law or immigration statutes as vehicles through which to advance workers' interests,<sup>11</sup> while others have argued for a more expansive definition of “unions,” directing attention less to the formal strictures of the NLRA and more to methods of facilitating collective action or voice in workplace and political arenas.<sup>12</sup> Still others have identified pre-election, private arrangements between unions and employers as the new locus for legal and scholarly intervention.<sup>13</sup> Proponents of unionization have not given up on the project of organizing workers or re-situating the balance of power between workers and employers, but they have recognized a need to confront and incorporate other doctrinal realms in their analysis.

This Article enters the realm of extra-NLRA (or, post-NLRA) labor law scholarship, but does so by emphasizing a largely under-explored and ostensibly anachronistic dimension of contemporary labor regulation:

7. See Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 375-76 (2007) [hereinafter Sachs, *Labor Law Renewal*].

8. Doctrinal NLRA labor law, combined with later statutory additions, comprises a legal scheme concerned primarily with the organizing and bargaining rights of unions and unionizing workers. See Sachs, *Employment Law as Labor Law*, *supra* note 1, at 2688.

9. Sachs, *Labor Law Renewal*, *supra* note 7, at 376.

10. See *infra* notes 11-13.

11. See, e.g., Ellen Dannin, *Hoffman Plastics As Labor Law—Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393 (2009); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 165 (2007); Sachs, *Employment Law as Labor Law*, *supra* note 1.

12. See generally CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005); Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561 (2014); Catherine L. Fisk, *Reimagining Collective Rights in the Workplace*, 4 U.C. IRVINE L. REV. 523 (2014); Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857 (2014); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L. J. 148 (2013).

13. See, e.g., James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 825 (2005); Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589, 1591 (2008); Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695, 697 (2012); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 370-72 (2001).

criminal law.<sup>14</sup> In this respect, this Article not only uses criminal law as a frame for examining labor law, but it also uses labor law as a lens through which to address the role of criminal law as a social-structuring mechanism. Dating to the early nineteenth century, the legal paradigm for worker organizing was criminal, with organizing workers subjected to conspiracy prosecutions.<sup>15</sup> In the twentieth century, the Norris-LaGuardia Act,<sup>16</sup> the New Deal, and the Wagner Act brought about a period of union legitimacy, but criminal law has never lost its hold entirely, as Racketeer Influenced and Corrupt Organizations Act (“RICO”)<sup>17</sup> prosecutions and federal investigations have maintained a cloud of venality over unions.<sup>18</sup>

Today, criminal law is hardly the dominant mode of regulating unions, but labor law is showing its criminal roots. The era of outright criminal prohibitions on unionization is long gone,<sup>19</sup> but criminal statutes remain a component of the legal web that structures labor markets. Indeed, despite the attention paid to how other doctrinal areas interact with the NLRA, in the current moment of labor law “ossification” and declining union power, criminal statutes have become new weapons for union opponents seeking novel angles of attack.<sup>20</sup> Therefore, this Article contends, criminal law remains pertinent to the question of unions’ continuing relevance and

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14. As discussed in Part II.A, *infra*, scholars have devoted much attention to the criminal dimensions of labor law as a historical matter. However, scholarly attention to labor law’s criminal dimensions (or criminal law’s labor dimensions) tends to dissipate as discussions move from the purely historical to the current moment of workplace regulation. Indeed, most of the work on this relationship tends to take as its endpoint the legal treatments of the ties between organized crime and the Teamsters. See, e.g., JAMES B. JACOBS & KERRY T. COOPERMAN, *BREAKING THE DEVIL’S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB* (2011); JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* (2006).

15. See generally CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993) [hereinafter TOMLINS, *LAW, LABOR, AND IDEOLOGY*]; CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985) [hereinafter TOMLINS, *THE STATE AND THE UNIONS*]; MARJORIE S. TURNER, *THE EARLY AMERICAN LABOR CONSPIRACY CASES, THEIR PLACE IN LABOR LAW: A REINTERPRETATION* (1967); Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 TEX. L. REV. 303 (1962); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919 (1988); Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 574-87 (2012) [hereinafter Levin, *Blue-Collar Crime*]; Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law As Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 120 (2013) [hereinafter Levin, *American Gangsters*].

16. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (2012)).

17. Pub. L. No. 91-452, § 901(a), 84 Stat. 941-44 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2011)).

18. See generally, Levin, *Blue-Collar Crime*, *supra* note 15 (describing the relationship between criminal law and the cultural framing of unions); Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649 (2006) [hereinafter White, *Economic Radicalism*] (describing criminal law’s role in marginalizing labor radicalism).

19. See generally Levin, *Blue-Collar Crime*, *supra* note 15, at 587-96.

20. See *infra* Part III.

viability. While most “new labor law scholarship” that looks beyond the NLRA focuses on the potential *benefits* of alternate legal regimes,<sup>21</sup> this Article highlights the way in which venturing outside of doctrinal federal labor law is not without its *risks*. The NLRA may have ceased to do much work as a tool for pro-unionization advocates, but it still represented a departure from and an obstacle to criminal regulation.<sup>22</sup> Looking beyond the NLRA means not only embracing possible alternate vehicles for worker collective action, but also confronting a new (or old) set of attacks. Stepping away from strict adherence to the labor preemption doctrine offers flexibility and promises for more vital worker organizing. But without the shield of the NLRA and preemption, worker organizing faces a range of legal assaults.

Through a set of controversial, quasi-criminal statutory mechanisms, opponents of organized labor have harnessed criminal statutes and criminal law principles as a means of fighting unionization campaigns.<sup>23</sup> Specifically, criminal law has reared its head in two significant arenas as a vehicle for regulating the workplace: civil suits brought pursuant to RICO and § 302 of the Labor Management Relations Act (“LMRA” or “Taft-Hartley Act”)<sup>24</sup>—both federal felony provisions.

First, recent decades have seen a rise in largely unsuccessful RICO suits brought by employers against unions engaged in aggressive organizing drives known as “corporate campaigns”<sup>25</sup> or “comprehensive campaigns.”<sup>26</sup> The central allegation in these suits is that the organizing campaign itself amounts to extortion, as defined in the criminal context by the Hobbs Act.<sup>27</sup>

21. *E.g.*, Sachs, *Labor Law Renewal*, *supra* note 7, at 376-77.

22. *Cf. id.* at 375 (“When it came to labor law’s core functions—facilitating and regulating the self-organization of workers and the collective interactions between labor and management—there was to be a single legal channel: Neither other federal laws nor state or local legislation was to interfere with the dominance of the NLRA and its administrative agency, the National Labor Relations Board.”).

23. *See infra* Part III.

24. 29 U.S.C. § 186(a)(2) (2012).

25. *See* James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 738 (2010) [hereinafter Brudney, *Collateral Conflict*] (“These campaigns may be broadly defined as union attempts to influence company practices that affect key union goals—securing recognition and bargaining for improved working conditions—by generating various forms of extrinsic pressure on the company’s top policymakers.”).

26. *See, e.g.*, *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 574 (S.D.N.Y.), *aff’d*, 355 F. App’x 508 (2d Cir. 2009); *Wackenhut Corp. v. SEIU*, 593 F. Supp. 2d 1289, 1290 (S.D. Fla. 2009); *Smithfield Foods, Inc. v. United Food & Commercial Workers Int’l Union*, 585 F. Supp. 2d 815, 817 (E.D. Va. 2008); *A. Terzi Prods., Inc. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 489 (S.D.N.Y. 1998); *Petrochem Insulation, Inc. v. N. Cal. & N. Nev. Pipe Trades Counsel*, No. C-90-3628 EFL, 1991 WL 158701, at \*1 (N.D. Cal. Apr. 30, 1991), *aff’d sub nom. Petrochem Insulation, Inc. v. United Ass’n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. of the U.S. & Can.*, No. 92-15511, 1993 WL 378807 (9th Cir. Sept. 24, 1993); Brudney, *Collateral Conflict*, *supra* note 25, at 737-39; Levin, *Blue-Collar Crime*, *supra* note 15, at 619-23.

27. 18 U.S.C. § 1951 (2012).

That is, a union is guilty of extortion if it attempts to organize a shop and exact concessions from an employer.

Second, workers, frequently represented by the National Right to Work Legal Defense Foundation, or other anti-union organizations, have sued both unions and employers, asserting claims under § 302 of the LMRA. Section 302 makes it a felony for an employer to give or for a union to receive any “thing of value” (subject to limited exceptions).<sup>28</sup> Asserting an implied private right of action under the criminal statute, the § 302 plaintiffs have alleged that pre-election neutrality agreements<sup>29</sup> between employers and unions amount to felonious corrupt bargaining.<sup>30</sup> While both the RICO and § 302 suits are framed as civil actions and are brought by private parties, they tend to rest on legal arguments that—if accepted by the courts—would make a victory for the plaintiff(s) amount to a holding that the defendant(s) had more likely than not committed a felony.

Invoking the historical framing of labor’s criminal regulation, this Article explores the problems inherent in the use of criminal statutes and quasi-criminal civil suits as a means of disciplining labor markets. In focusing on the recent RICO and LMRA actions, this Article identifies two major problems with this civil-criminal hybrid as a legal avenue for challenges to union activity. First, this Article argues that private suits brought pursuant to criminal statutes create a troubling dynamic by which plaintiffs may act as private prosecutors, essentially obtaining declaratory relief that the union (in the case of the RICO suits) or the union and the employer (in the case of the § 302 suits) have committed felonies. Although similar civil-criminal hybrids exist under other statutory schemes,<sup>31</sup> this

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28. See, e.g., *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211, 1213-14 (11th Cir. 2012), cert. granted, 133 S. Ct. 2849 (2013), and cert. denied, 134 S. Ct. 822 (2013), and cert. dismissed as improvidently granted, 134 S. Ct. 594 (2013).

29. “Typically, a ‘card check’ or ‘neutrality’ agreement is an agreement between the employer and the union ‘in which they agree that (a) the employer will not speak for or against the union (neutrality) and/or (b) the employer will recognize the union if it can get signed authorization cards from a majority of the unit members (card-check).’” *Adcock v. Freightliner LLC*, 550 F.3d 369, 371 n.1 (4th Cir. 2008) (quoting Matthew T. Bodie, *The Market for Union Services: Reframing the Debate*, 94 VA. L. REV. IN BRIEF 23, 26-27 (2008)). See, e.g., *Brudney*, supra note 13, at 825; *Cooper*, supra note 13, at 1591 (“The story of neutrality agreements begins with unions’ frustrations in trying to counteract the decline in union density in the latter half of the twentieth century.”); *Brishen Rogers*, “Acting Like a Union”: *Protecting Workers’ Free Choice by Promoting Workers’ Collective Action*, 123 HARV. L. REV. F. 38, 38-39 (2010).

30. See generally Part III.B, *infra*.

31. See *infra* note 265 and accompanying text. See also Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1023 n.5 (1985) (“Parallel civil actions may be completed before the criminal action has commenced or may proceed concurrently with criminal actions. Examples include taxpayer suits for refunds during prosecutions for tax fraud, wrongful death damage actions against persons accused of criminal negligence, actions to require criminal defendants to forfeit ownership of property used in crime, business or professional license revocation proceedings resulting from criminal indictments, and civil actions for violations of antitrust, securities, or banking laws, or laws regulating the use of drugs or cosmetics.”). However, as discussed at

Article argues that the unique history of labor's relationship to state violence makes this dynamic particularly troubling in the union context. Second, this Article contends that continued use of these criminal statutes is illustrative of a broader pattern in the U.S. legal system whereby criminal solutions and the ostensible moral clarity of criminal sanctions are preferred over civil remedial or regulatory schemes. This Article further argues that the contemporary vitality of these criminal provisions and principles of criminal liability in the union context: (1) perpetuates the cultural ties between workers' collective action and criminality, and (2) reinforces societal preferences for criminal legislation over civil regulatory or tort principles.

In examining the criminal dimensions of labor law and the role of hybrid civil-criminal enforcement mechanisms in resolving labor disputes, this Article proceeds in three Parts. The first Part briefly outlines the long history of criminal prohibitions on unionization and criminal prosecutions relating to organized labor. This Part begins with the nineteenth century conspiracy prosecutions of trade unionists; arrives at the passage of the NLRA and its attendant legitimation and legalization of certain forms of organizing activity; and finally addresses criminal law's continued application to unions in the ensuing decades. This brief history addresses the shift from a criminalization of unionization in and of itself to the use of criminal law to police the conduct of union members and officials. In tracing this evolution, this Part also notes the imagined identity of the victim (*e.g.*, the state, the market, the employer, or the worker) under each scheme.

The second Part focuses specifically on the § 302 and civil RICO suits, addressing the issues inherent in private rights of action under criminal statutes. In doing so, this Part emphasizes the peculiar dynamic whereby a judge may rule, as a matter of law, that a felony has more likely than not been committed before a prosecutor has brought charges. Even if prosecutions have not yet followed, they might come on the heels of such a suit in the right political moment. Further, the invocation of the state's authority to exact criminal punishment still brings with it the social stigma and moral component that—punishment theorists argue—are critical distinguishing features between civil and criminal liability.<sup>32</sup> Because these private suits have not been followed by state action and the attendant state violence of punishment, we have not been forced to confront the

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length *infra*, this Article argues that this dynamic is particularly troubling in the context of labor law and may also serve as a useful illustration of certain pathologies of criminal law. See *infra* Parts III-IV.

32. See, *e.g.*, Donald Dripps, *The Exclusivity of the Criminal Law: Toward A "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199 (1996); Victor Tadros, *Criminalization and Regulation*, in THE BOUNDARIES OF THE CRIMINAL LAW 163 (R.A. Duff et al. eds., 2010).

pathologies of criminal law. Should we be disturbed by the blending of civil and criminal principles that normalizes the criminal in private disputes?<sup>33</sup>

Following on this question, the third Part steps back from the discussion of the specific statutes and addresses the civil-criminal distinction as it applies to the contemporary treatment of organized labor. First, this Part emphasizes the special significance of criminal law and state violence in the labor context. This Part then identifies the potential costs of continuing to use criminal law to regulate unions in the workplace, using “criminal labor law” as a lens to examine social choices about criminal law’s reach. Entering into conversation with a growing literature on the relationship between criminalization and economic regulation,<sup>34</sup> this Part emphasizes the trade-offs inherent in employing criminal rather than civil methods to structure labor markets and discipline the workplace. Ultimately, this Part argues that a civil-criminal hybrid approach that continues to rely on criminal statutes obscures the crucial analysis of social costs that should accompany decisions to use criminal solutions to solve social and economic problems. That is, the turn to criminal statutes or the language of criminal liability normalizes and naturalizes a legal realm that should be both distinct and exceptional.

## II.

### LABOR’S CRIMINAL HISTORY

The story of organized labor in the United States begins with criminal prosecutions. This Part does not purport to tell exhaustively the criminalization and decriminalization story that has been told many times before;<sup>35</sup> instead, this Part provides a brief overview, highlighting the

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33. Cf. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 809-13 (1997) (discussing the fraught relationship between civil and criminal punishments).

34. See, e.g., BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 578 (2012); Darryl K. Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL’Y 657, 659 (2011) [hereinafter Brown, *Criminal Law’s Unfortunate Triumph*]; Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521 (2004); Bernard E. Harcourt, *On the American Paradox of Laissez Faire and Mass Incarceration*, 125 HARV. L. REV. F. 54 (2012); Matthew Titolo, *Privatization and the Market Frame*, 60 BUFF. L. REV. 493, 509 (2012); Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1213 (2012).

35. See, e.g., *supra* note 15 (collecting sources); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); JOHN V. ORTH, *COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM, 1721-1906* (1991); SAMUEL YELLEN, *AMERICAN LABOR STRUGGLES: 1877-1934* (1936); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1111 (1989); Raymond Hogler, *Law, Ideology, and Industrial Discipline: The Conspiracy Doctrine and the Rise of the Factory System*, 91 DICK. L. REV. 697 (1987); Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461 (1989); Wythe Holt, *Labor Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22

shifting status of organized labor and shifting legal attitudes towards unions' place in U.S. social, economic, and political life. To this end, the Part proceeds in three loosely chronological sections: (1) a pre-history of contemporary labor law, focusing on the criminal conspiracy as the operative regulatory paradigm; (2) the passage of the Wagner Act and the attendant moment of de-criminalization; and (3) the post-Wagner Act re-imposition of criminal strictures on organized labor. In providing this historical grounding, this Part further emphasizes the peculiar nature of "labor law" as it emerged in the twentieth century—a doctrinal realm shaped by statutes that legalized and gave administrative structure and legitimacy to conduct that previously had been governed solely by criminal law.

### A. *Pre-NLRA: Union as Conspiracy*

The U.S. legal system emerged from a political tradition that was outwardly hostile to the practice of worker organizing.<sup>36</sup> In the eighteenth century, English common law explicitly criminalized unionization and forbade workers from collectively acting in an effort to gain higher wages or to affect the conditions of their employment.<sup>37</sup> Christopher Tomlins has identified the English legal hostility to worker organizing as a part of a broader fear of the link between "conspiracy and challenge to royal authority."<sup>38</sup> As he argued, in the context of 1718's "Proclamation Against Combinations of Woollen Weavers," "[C]onspiracy" was invoked as a charge against journeyman's organizations because of their bare assertion of concerted regulatory authority unsanctioned by the Crown. It was, indeed, this 'outlaw' status that, even distinct from anything they actually did, enabled public authority to label journeymen's groups 'unlawful' or 'lawless' combinations."<sup>39</sup> Accordingly, in the eighteenth century, "the country saw a rapid . . . expansion in statutory condemnation of journeymen's organizations . . ."<sup>40</sup> Not only did workers' organizations attempt to extort employers for higher wages,<sup>41</sup> but they also risked

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OSGOODE HALL L.J. 591 (1984); John T. Nockleby, *Two Theories of Competition in the Early 19th Century Labor Cases*, 38 AM. J. LEGAL HIST. 452 (1994); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926).

36. See generally Forkosch, *supra* note 35 (chronicling the criminal prosecution of organizing workers).

37. See TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 115.

38. *Id.*

39. *Id.* at 118; see also Levin, *American Gangsters*, *supra* note 15, at 118-20 (arguing for an expansive reading of conspiracy prosecutions as rooted in a fear of non-state social and political structures).

40. TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 118.

41. Cf. ORTH, *supra* note 35, at 5 ("'Combination' first entered the statute book in 1721 as the legal name for labour organizations. Earlier statutes had labelled their precursors 'conspiracies' or

upsetting the basic institutions of English life. That is, workers' organizations were viewed as threatening to both the Crown and existing market structure. As such, workers' organizations were subject to the institutionalized violence of the criminal law.

Along with many other elements of the English common law, this hostility to labor organizing crossed the Atlantic.<sup>42</sup> In the first half of the nineteenth century, criminal conspiracy law emerged as the dominant paradigm through which to address workers' collective action.<sup>43</sup> During this period, at least twenty-three "labor combinations" were prosecuted in six states.<sup>44</sup> Convicted workers were fined or incarcerated.<sup>45</sup>

Workers acting in concert were found criminally liable under one of two theories.<sup>46</sup> First, in some jurisdictions, unionization (or, perhaps, less anachronistically, workers collectively seeking higher wages or better working conditions) was illegal *per se*.<sup>47</sup> That is, the collective nature of workers seeking to improve their worklives became a crime in and of itself. Such a theory, therefore, resonates strongly with Tomlins's characterization of English law and with the concern about unionization as constituting a crime against the state, or perhaps democratic society.<sup>48</sup> Non-state collective action raised the specter of alternate modes of social, economic, and political organization—modes that might threaten both the state and the formal economy.<sup>49</sup> While this doctrine was famously renounced by the

'confederacies'. All the names were bad. Conspiracy, perhaps the worst of all, was predominantly used to describe the common-law crime that was coming to be recognized when a group agreed to injure an individual, but combination was bad enough.") (footnotes omitted).

42. See TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 124-27.

43. See *id.* at 189.

44. *Id.* at 128.

45. *Id.* at 179.

46. See JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 100-01 (1916).

47. See, e.g., *Old Dominion Steam-Ship Co. v. McKenna*, 30 F. 48, 50 (C.C.S.D.N.Y. 1887) ("All combinations and associations designed to coerce workmen to become members of such combinations or associations, or to interfere with, obstruct, vex, or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members . . . are *pro tanto* illegal combinations or associations . . ."); *People v. Cooper* (N.Y. Ct. Gen. Sess. 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 277, 311 (John R. Commons et al. eds., 1910); *Commonwealth v. Grinder* (Pa. Rec's Ct. 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 335, 340 (John R. Commons et al. eds., 1910).

48. See *supra* notes 38-41 and accompanying text. Additionally, in tracing the labor conspiracy doctrine's transatlantic voyage, it is important to note the distinction between the political economies and governing structures of England and the United States. See TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 124-27. That is, addressing collective action in civil society in the Early Republic necessarily implicated debates about the proper relationship between the state and civic associations, or, more broadly, between private and public. *Cf. id.* In a monarchic system, where state legitimacy was presumed and where Enlightenment values and democratic principles did not purport to shape all aspects of governance, decisions about how to reconcile state and union (as representative of public power and private power, respectively) were inherently less laden. See *id.*

49. See Levin, *American Gangsters*, *supra* note 15, at 111-20.

Massachusetts Supreme Judicial Court in its 1842 decision, *Commonwealth v. Hunt*,<sup>50</sup> the per se criminalization of unions would retain some legal force for decades.<sup>51</sup> As Justice Oliver Wendell Holmes noted in dissenting from the grant of an anti-picketing injunction in *Vegeahn v. Gutner*,<sup>52</sup> fifty-four years after *Hunt*, “there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful.”<sup>53</sup>

Alternatively, other jurisdictions reached (and criminalized) the same worker conduct by focusing on some threat—explicit or implicit, physical or economic—to the employer.<sup>54</sup> This theory, the “labor conspiracy doctrine,” outlived the per se criminalization of union activity and retained its force into the early 1900s.<sup>55</sup> Even if the focus were largely on the collective nature of the defendants’ conduct, liability only attached when a court or jury identified some threat or harm to an employer.<sup>56</sup> Under this theory, the crime of conspiracy had a victim distinct from the state or some amorphous market-based society. Workers who organized or attempted to obtain concessions from their employers harmed their employers. In a zero-sum employment dispute, the workers’ gains would be the employers’ losses, rendering any such action on the part of the workers extortionate. Under either theory, the labor conspiracy cases established criminal law as the space in which to address labor disputes.<sup>57</sup>

Even in the wake of the nineteenth century’s labor conspiracy cases, judicial hostility to workers’ collective action continued to employ the rhetoric and methods of criminal law. Indeed, labor injunctions, which authorized the use of force to quell union activity, became a staple of the latter part of the nineteenth and early twentieth centuries,<sup>58</sup> shifting unions

50. 45 Mass. 111 (1842); see also TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 199-216; Hovenkamp, *supra* note 15, at 922-23.

51. See Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 427 (1922).

52. 44 N.E. 1077 (Mass. 1896).

53. *Id.* at 1081 (Holmes, J., dissenting).

54. See, e.g., *People v. Faulkner* (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 47, at 315.

55. See, e.g., White, *Economic Radicalism*, *supra* note 18, at 667.

56. See, e.g., *Hunt*, 45 Mass. at 121; *People v. Cooper* (N.Y. Ct. Gen. Sess. 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 47, at 277; *Commonwealth v. Grinder* (Pa. Rec’s Ct. 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 47, at 335.

57. See, e.g., *Commonwealth v. Pullis* (Pa. 1806), reprinted in 3 A DOCUMENTARY HISTORY, *supra* note 47, at 59; *People v. Cooper* (N.Y. Ct. Gen. Sess. 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 47, at 277; *People v. Faulkner* (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 47, at 315; *Commonwealth v. Grinder* (Pa. Rec’s Ct. 1836), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 47, at 335.

58. See Forbath, *The Shaping of the American Labor Movement*, *supra* note 35, at 1151; White, *Economic Radicalism*, *supra* note 18, at 667-68.

into a status of “semi-outlawry.”<sup>59</sup> While the injunctions resulted from tort suits and other claims rooted in private law, their enforcement often involved state violence in the form of police, or even military, involvement. That is, these suits were not explicitly criminal; they frequently implicated the infrastructure of state violence and the criminal justice system. Enforcement of the injunctions entailed violent interventions in labor disputes and quickly turned striking workers into criminals who were subject to arrest.

Between 1890 and 1930, the injunction replaced the prosecution as the preferred mode of labor regulation, with courts issuing over 4,300.<sup>60</sup> Second Circuit Judge Ralph Winter describes this moment of labor regulation as one in which ideologically motivated judges frequently interceded in labor disputes to aid employers: “Acting without legislative guides, federal judges were inclined to decide labor controversies according to their own predominantly conservative social and political views, and rendered decisions which were generally hostile to the union’s use of economic power.”<sup>61</sup> Or, as Justice Holmes put it in his *Vegeahn* dissent:

The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes . . . . It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.<sup>62</sup>

In realist terms, these labor decisions were decisions about the distribution of economic power, and the judiciary had thrown in its lot with capital, rather than labor.

Beyond the explicit charges of conspiracy, those engaged in organizing, picketing, or otherwise employing “economic weapons” against

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59. Forbath, *The Shaping of the American Labor Movement*, *supra* note 35, at 1185.

60. *Id.* at 1151.

61. Ralph K. Winter, Jr., Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 71 (1960). Judge Winter’s observation, published in a student note in 1960, just over two decades before he took the bench, is remarkable for two reasons. First, he accurately assessed the regime of labor regulation by injunction that existed during the Classical Legal Thought era preceding the New Deal. Second, he strikingly acknowledged the role of political and social factors in shaping judicial decision-making. While such an observation is largely tangential to this Article, Judge Winter’s note stands as a reminder of: (1) the contemporary acceptance of at least some of legal realism’s tenets; and (2) the development of a consensus that at certain historical moments, courts’ decisions and legitimacy are properly imbedded in larger conversations about dominant political, social, or economic ideologies.

62. *Vegeahn v. Gutner*, 44 N.E. 1077, 1080-81 (Mass. 1896).

their employers risked: conspiracy prosecutions, criminal penalties for the violation of labor injunctions obtained by employers, and prosecution under a range of generally applicable statutes.<sup>63</sup> Indeed, Ahmed White has argued that “specialized security statutes, like the federal Espionage Act of 1917 and the criminal syndicalism laws that about half the states began adopting that same year” were not only enforced for, but also *enacted* “for the purpose of routing radical unionists.”<sup>64</sup> Additionally, the Sherman Antitrust Act,<sup>65</sup> another non-labor-specific statute, provided criminal punishment (and injunctive relief) as a means of resolving labor disputes.<sup>66</sup>

It is worth noting, though, that even the suits that were not explicitly criminal, namely the ubiquitous labor injunction cases rooted in tort law, carried with them the clear threat of state violence. While any legal or regulatory regime may operate in the shadow of state power, state violence in the union context has a long history. Even those legal injunctions—like the one at issue in *Vegeahn*—that were the result of purportedly “private” actions frequently carried with them the threat of police and even military involvement.<sup>67</sup> Worker organizing was treated as a legal wrong—whether initially civil or criminal<sup>68</sup>—that might trigger state violence and the mechanisms of criminal enforcement. In short, by the early twentieth century, a complex and diffuse web of laws governed workers’ collective action, but the legal strands that bound the web implicated the state violence associated with criminal enforcement.<sup>69</sup>

### B. *The NLRA: Towards a Regulatory Model*

In the 1930s, as the United States shifted away from the economic policies that had underpinned the Gilded Age, unions began to take on an unprecedented position of legal privilege. Passed in 1932, the Norris-LaGuardia Act marked a legislative commitment to intervening—on behalf

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63. See Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667 (2004); White, *Economic Radicalism*, *supra* note 18, at 667-68; White, *Workers Disarmed*, *supra* note 1, at 66.

64. White, *Workers Disarmed*, *supra* note 1, at 66.

65. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2012)).

66. See, e.g., White, *Economic Radicalism*, *supra* note 18, at 667.

67. See *infra* note 273.

68. Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 918 (2010) (endorsing a theory of tort law as embodying moral judgments about wrongful conduct).

69. In Part IV, I will return to the question of what makes regulation criminal rather than civil. Scholars and courts have struggled with this distinction, and this larger theoretical question falls outside the scope of this project. For the time being, it is worth noting two key components of criminal regulation that I will focus on and that I view as central to the ongoing project of “criminal labor law”: (1) the imminence or possible imminence of state violence or arrest in the enforcement of a legal decision, and (2) a strong form of moral condemnation or social de-legitimation.

of unions—in the escalating labor disputes across the country.<sup>70</sup> The Act barred federal courts from issuing “any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of” the Act.<sup>71</sup> This marked a stark departure from even the civil treatment of unions in many contemporary labor disputes.<sup>72</sup>

Not only was the statute’s passage a victory for organized labor, but it also signaled a legislative inclination to create a distinct space for “labor law”—a legal regime designed specifically for addressing unions, labor-management relations, and labor disputes.<sup>73</sup> In this regard, the Norris-LaGuardia Act, as a precursor to the NLRA, demonstrates a normalization and legitimation of unions; rather than interlopers in the labor market, organized groups of workers were legally recognized parties capable of engaging in disputes with employers without judicial interference or the threat of conspiracy prosecutions.

Building on this principle, the Wagner Act took the next step towards welcoming unions into the U.S. labor market as equal players.<sup>74</sup> The Act moved beyond simply preventing anti-union judges from resolving labor disputes via injunction and went so far as to guarantee workers the substantive “right[s] to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”<sup>75</sup> Further, the Statute defined a range of “unfair labor practices”<sup>76</sup> and established a remedial scheme whereby the National Labor Relations Board (“NLRB”) could act as a specialized arbiter of labor disputes and address any such alleged unfair practices.<sup>77</sup>

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70. See Levin, *Blue-Collar Crime*, *supra* note 15, at 587-88; Winter, *supra* note 61, at 71 (“The Norris-LaGuardia Act embodies policies designed to effect profound changes in the role of the federal government and federal institutions in the regulation of labor disputes.”).

71. 29 U.S.C. § 101 (2012).

72. See FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT*, *supra* note 35, at 59-127 (chronicling the use of labor injunctions and the “semi outlawry” of unions in the early twentieth century).

73. See Sachs, *Labor Law Renewal*, *supra* note 7, at 375 (“In 1935, the Seventy-third Congress of the United States established a rigorously centralized regime of labor law. With the [NLRA] Congress moved to encompass all of American labor policy within a single federal statute to be interpreted, administered and enforced by a single federal agency . . . . [T]here was to be a single legal channel: Neither other federal laws nor state or local legislation was to interfere with the dominance of the NLRA and its administrative agency, the National Labor Relations Board.”).

74. See Richard Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 992 (1984) (“[T]he Wagner Act brought about a revolution in the American law of labor relations. . . . [and a] tilt towards unions . . . .”).

75. 29 U.S.C. § 157 (2012).

76. *Id.* § 158.

77. *Id.* § 160.

No longer treated as criminal combinations inimical to the state, capitalism, and democracy, unions were now deeply imbedded in the legal architecture of the market and framed as necessary to compensate for “[t]he inequality of bargaining power between employees . . . and employers[.]”<sup>78</sup> Indeed, as Karl Klare and others have argued, the Act took an aggressively pro-union stance, not only recognizing unionization as a legitimate option for workers, but explicitly adopting a normative preference for organized labor.<sup>79</sup> As the “findings and declaration of policy” section that accompanies the Act’s substantive provisions states:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.<sup>80</sup>

Certainly, the statutory scheme was not without its limitations, but it inscribed the union into the legal architecture of the U.S. labor market as a non-criminal force for positive, socially beneficial, worker empowerment.<sup>81</sup> Or so it seemed.

78. *Id.* § 151; *see also* Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 346 (1944) (stating that the NLRA grants “statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.”).

79. *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 1-43 (1983) (describing the promise of the NLRA and the ways in which courts undercut its effectiveness); Klare, *supra* note 5, at 265-70 (arguing that the NLRA “was perhaps the most radical piece of legislation ever enacted by the United States Congress,” as it embodied a radical vision of unions’ social and economic importance, and that this vision was undermined by conservative judicial opinions interpreting the Act’s scope). *But cf.* David M. Rabban, Book Review, *Radical Assumptions About American Labor Law*, 84 COLUM. L. REV. 1118 (1984) (critiquing Atleson’s account of the Wagner Act’s radical agenda as revisionist history); Comment, *The Radical Potential of the Wagner Act: The Duty to Bargain Collectively*, 129 U. PA. L. REV. 1392, 1426 (1981) (“Contrary to Klare’s argument, the Supreme Court was not confronted with a variety of reasonable alternative interpretations of section 8(5) [of the NLRA] from which it chose the nonradical collective bargaining model. Rather, from the time it was proposed and enacted, the Wagner Act embodied only reformist ideals, and between 1937 and 1941 the courts and the NLRB worked to interpret and implement the Act consistently with them.”).

80. 29 U.S.C. § 151; *see also* Walling v. Portland Terminal Co., 330 U.S. 148, 154 (1947) (Jackson, J., concurring) (“From the beginning it was apparent that there were but two ways of giving real force and meaning to this Act without throwing all industry and labor into strife and litigation. One was to give decisiveness and integrity in borderline cases to collective bargaining.”) (citing *J. I. Case Co. v. NLRB.*, 321 U.S. 332 (1944); Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342 (1944)).

81. *See* Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court’s Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 276 (2004) (“The Wagner Act was by no means fundamentally radical; it did not in any way portend the destruction of private property, wage labor, or capitalism. At the same time, the Wagner Act was a remarkably progressive legal document, consistent with a genuinely reformist vision of labor relations.”).

### C. Post NLRA: Criminal Law's Continued Relevance

While the NLRA ostensibly enshrined labor rights and a pro-unionization bent in the nation's legal and social consciousness,<sup>82</sup> the ensuing decades would prove more challenging for unions. Indeed, no sooner had the Wagner Act set forth a legislative commitment to collective bargaining and worker collective action than concerns began to surface and gain ground about unions as corrupt, undemocratic, and dangerously powerful.<sup>83</sup> The statute had spoken in legal realist terms of equalizing the balance of power between worker and boss,<sup>84</sup> but in the years that followed, union critics argued that the pendulum had swung too far. Strengthened by the NLRA, the booming wartime economy, and post-war economic trends, unions had become more powerful—too powerful in the eyes of some critics. Echoing the concerns that had given rise to the labor conspiracy doctrine and the earlier prosecutions, critics argued that this consolidation of power in the hands of organized labor: (1) threatened employers and industries that might be held captive or extorted, and (2) undermined workplace democracy and workers' rights by holding workers in thrall to unaccountable labor leaders.<sup>85</sup>

In response to these concerns, legislators sought to recalibrate the balance of power in the workplace. Passed in 1947, the Taft-Hartley Act<sup>86</sup> marked a retreat from the Wagner Act's pro-union sentiments.<sup>87</sup> The Taft-Hartley Act, passed over President Truman's veto,<sup>88</sup> comprised a set of amendments to the NLRA. Specifically, the new Act (1) permitted states to pass "right to work laws,"<sup>89</sup> (2) outlawed "closed shops,"<sup>90</sup> and (3) protected

82. See, e.g., ATLESON, *supra* note 79, at 1-43; Klare, *supra* note 5, at 265-70.

83. See *United States v. Int'l Union United Auto.*, 352 U.S. 567, 578 (1957).

84. See 29 U.S.C. § 151.

85. See, e.g., Arroyo v. United States, 359 U.S. 419, 425-26 (1959); *Int'l Union United Auto.*, 352 U.S. at 578; Michael H. Leroy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63, 67 (2001); Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1127 (1986).

86. Part III.B addresses the Act, its justifications, and its applications at greater length.

87. See HARRY S. TRUMAN, VETO OF THE TAFT-HARTLEY LABOR BILL, H.R. 3020, 80TH CONG. (1947), reprinted in 1947 U.S.C. CONG. SERV. 1851, 1852 (1947) ("Much has been made of the claim that the bill is intended simply to equalize the positions of labor and management . . . . Many of the provisions of the bill standing alone seem innocent but, considered in relation to each other, reveal a consistent pattern of inequality."); Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 4 (1947) (arguing that Taft-Hartley amendments "represent an abandonment of the policy of affirmatively encouraging the spread of collective bargaining . . ."); Estlund, *supra* note 5, at 1533-35 ("The Taft-Hartley Act . . . represented a major setback for the labor movement.").

88. See *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 184 (1981) ("Although President Truman vetoed the Taft-Hartley bill, the bill nevertheless became law when Congress successfully overrode the veto.") (citations omitted).

89. 29 U.S.C. § 157.

the rights of workers not to join unions and granted workers remedies if unions violated these rights.<sup>91</sup> While scholars have engaged in extended debate about just how radically pro-union the Wagner Act actually was, and, consequently, how much Taft-Hartley “de-radicalized” labor protections,<sup>92</sup> there can be no question that the 1947 amendments changed the fundamental terms and dynamics of the statutory scheme. As the Supreme Court identified the doctrinal shift, “[i]t was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights.”<sup>93</sup>

Legislators worried that unions had grown—or might grow—too powerful. Therefore, workers might be concerned not only about coercion at the hands of employers, but also at the hands of organized labor. Whether this concern was accurate or overstated and whether powerful capital and powerful labor can be distinguished meaningfully are serious questions. Indeed, much of the debate, scholarship, and jurisprudence concerning unions over the course of the last half century could be reduced to some version of these questions.<sup>94</sup> But their reach extends well beyond this Article’s scope and this Part’s role in setting the stage for the contemporary relationship between criminal law and labor law.

For purposes of this Article, though, the LMRA bears emphasis because of its criminal provisions.<sup>95</sup> After the Wagner Act’s establishment of a unified system of *civilly* governing the workplace, the Taft-Hartley Act backtracked. While the amendments left in place the essential structures and unitary scheme of the NLRA,<sup>96</sup> they also created a chink in the legislative

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90. *Id.* § 158(a)(3).

91. *Id.* § 164(b).

92. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2034-35 (2009) (describing the contours of the debate).

93. *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 738 (1961).

94. See, e.g., David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268 (1988); Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 HARV. J. ON LEGIS. 51 (1990); George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187 (1994); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Disclosure and the Problem of DeBartolo*, 1990 WIS. L. REV. 149 (1990); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685 (1985); Lee M. Modjeska, *The Supreme Court and the Duty of Fair Representation*, 7 OHIO ST. J. ON DISP. RESOL. 1, 2-3 (1991); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker’s Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000).

95. See *infra* Part III.B.

96. See Estlund, *supra* note 5, at 1534-35 (“But the 1947 amendments worked largely by addition, not subtraction; they left the core provisions of the original New Deal text—and in particular the original employer unfair labor practices—essentially intact.”); Charles J. Morris, *How the National Labor*

armor that protected unions from the bad old days of the labor conspiracy doctrine.

The newly enacted § 302(a), to which I will return in the next Part, provides that:

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value

- (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
- (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
- (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
- (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.<sup>97</sup>

Further, subsection (d) makes any such violation a federal crime *punishable by up to five years in prison*.<sup>98</sup> And, subsection (b) prevents unions from accepting “things of value” under similar terms.<sup>99</sup> While § 302 has often been applied to disputes involving retirement accounts, pensions, or other employee benefits,<sup>100</sup> union opponents recently have sought to extend its reasoning to a broader class of cases.<sup>101</sup>

Section 302 is certainly a far cry from the common-law condemnation of organizing workers as outlaws.<sup>102</sup> And it would require a suspension of disbelief to argue that the prohibition of certain forms of contracting

*Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 7 (2012).

97. 29 U.S.C. § 186(a) (2012).

98. *Id.* § 186(d).

99. *Id.* § 186(b).

100. See Carolyn D. Gentile, “*The Check Is in the Mail*” – *Mastering the Maze of Employer Contributions to ERISA Plans*, 72 MARQ. L. REV. 349, 352 (1989); Donald T. Weckstein, *The Problematic Provision and Protection of Health and Welfare Benefits for Retirees*, 24 SAN DIEGO L. REV. 101, 105-08 (1987); Note, *Protection of Beneficiaries Under Employee Benefit Plans*, 58 COLUM. L. REV. 78, 95-98 (1958).

101. See *infra* Part III.B. In *United States v. Ryan*, the Court explicitly rejected a narrow reading of the statute that would apply only to the problem of welfare fund theft. 350 U.S. 299, 305 (1956).

102. See *supra* Part II.A.

amounts to the form of per se conspiracy law discussed above. But it is important to note that the—potentially broad and open-ended—terms of the statute re-inscribe criminal law into the regulation of organized labor.<sup>103</sup> The NLRA had defined a new legal regime for worker organizing, and Taft-Hartley ensured that criminal law would serve a role in the regulatory framework. As in the earlier historical moment, unions were imagined as potentially powerful. And with this new power, came the potential for corruption and criminality.<sup>104</sup>

If this fear of organized labor's power were not enough to cause public skepticism about labor law's pro-union sympathies, it also commingled with two other prevalent fears: communism and organized crime. That is, the same moment that witnessed unions' ascendancy to greater social and political prominence also saw the rise of other, more publicly feared forms of collective action. Both communists and organized crime (most commonly identified in the form of the Mafia) operated as extra-social, or extra-democratic collectives.<sup>105</sup> They possessed their own internal hierarchies, enforced their own internal rules, and obeyed their own internal forms of governance.<sup>106</sup> Much like the workers' combinations that had given rise to the English labor conspiracy doctrine, these post-war collectives raised the specter of a domestic threat to state hegemony.<sup>107</sup> At once extra-legal and extra-social, they provided spaces that were ordered but also independent of state authority and public values or ideological commitments.

In light of this long history of discomfort with non-state collective action, it is hardly surprising that communists, the mob, and unions would become conjoined in legal discourse and the public imagination.<sup>108</sup> In the middle part of the twentieth century, public and legislative preoccupation

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103. Part III.B will address, at much greater length, § 302, its function in regulating unions, and its place in the contemporary criminal and quasi-criminal enforcement mechanisms that quietly shape labor disputes.

104. For criminal applications of the statute, see, for example, *United States v. Ryan*, 350 U.S. 299, 307 (1956) (finding union representative prosecutable for accepting cash payments from employer during bargaining); *United States v. Douglas*, 634 F.3d 852, 857 (6th Cir. 2011) (convicting union representatives for refusing to end a strike “unless the two unqualified relatives of Union members finally received journeyman jobs”); *United States v. Inciso*, 292 F.2d 374, 376 (7th Cir. 1961) (convicting union representative for receiving hundreds of thousands of dollars from employers).

105. See Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 182-89 (1956) (arguing that communist groups should not receive First Amendment protections because they were internally undemocratic and defined by hierarchical and authoritarian beliefs).

106. See *id.* at 183-84.

107. See Levin, *American Gangsters*, *supra* note 15, at 138-45; Levin, *Blue-Collar Crime*, *supra* note 15, at 610-14.

108. See generally GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* (1999) (arguing that labor law doctrine was shaped by public imaginations of unions as inherently tied to violence).

frequently waffled between two alternate critiques: (1) unions had become repositories for communists and communist sympathizers who sought to implement and advance repressive, violent, and anti-democratic agendas;<sup>109</sup> and (2) unions had become repositories for the Mafia and gangsters who sought to implement and advance repressive, violent, and anti-democratic agendas.<sup>110</sup> In fact, the power vacuum in union leadership created by the purge of those suspected of communist ties allowed for the expansion of organized crime's reach in some unions.<sup>111</sup>

James Jacobs has argued that organized labor's demise in the United States can be traced directly to organized crime's infiltration of union leadership positions.<sup>112</sup> By controlling organized labor, Jacobs argued, the Mafia undermined the ability of workers to create, shape, and expand an egalitarian and vital U.S. labor movement.<sup>113</sup> Through violence and corruption, the racketeers subdued worker democracy and transformed unions into institutions to be feared, rather than respected.<sup>114</sup> The concerns about non-state action, identified above, become all the more pressing when they are coupled with both real and perceived instances of violent union leaders. As David Witwer argued, unions were haunted by the "shadow of the racketeer, a menacing depiction of organized labor's power that antiunion forces invoked throughout the postwar era."<sup>115</sup> In the twentieth century, unions not only faced an uphill battle in order to escape their historical legal and social framing as "conspiracies";<sup>116</sup> they also faced the public perception that they were led either by treasonous communists or the murderous gangsters.

Further, and critically for this Article, ties to communists and the Mafia naturally catapulted organized labor back into the ambit of criminal law. Even if some union opponents continued to view organized labor as un-American, thuggish, or generally suspicious after the Wagner Act, Congress

109. See HARRY S. TRUMAN, VETO OF THE TAFT-HARTLEY LABOR BILL, H.R. 3020, 80TH CONG. (1947), reprinted in 1947 U.S.C. CONG. SERV. 1851, 1853 (1947); JACOBS, *supra* note 14, at 257-58.

110. See THADDEUS RUSSELL, OUT OF THE JUNGLE: JIMMY HOFFA AND THE REMAKING OF THE AMERICAN WORKING CLASS 88-90 (2001) (describing the public perception of links between the Teamsters and the Mafia); DAVID WITWER, CORRUPTION AND REFORM IN THE TEAMSTERS UNION 236 (2008) [hereinafter, WITWER, CORRUPTION AND REFORM] ("[U]nion corruption served as justification for a much more intrusive level of government intervention into union affairs."); *Eisenhower Insists on End of Blackmail Picket Lines*, CHI. DAILY TRIB., Aug. 7, 1959, at 5 (quoting President Eisenhower as advocating for "a law to protect the American people from the gangsters, racketeers, and other corrupt elements who have invaded the labor-management field.").

111. See JACOBS, *supra* note 14, at 257-58.

112. See *id.* at 257-61.

113. See *id.*

114. See *id.*

115. DAVID WITWER, SHADOW OF THE RACKETEER: SCANDAL IN ORGANIZED LABOR 241 (2009) [hereinafter WITWER, SHADOW OF THE RACKETEER].

116. See *supra* Part II.A.

and the courts had offered their blessing to the project of organizing U.S. workers. The new labor law regime stood for the proposition that unions were not necessarily criminal enterprises, and they should not be regulated as such.<sup>117</sup> But acceptance was generally not extended to communists, who were widely viewed as inherently criminal,<sup>118</sup> or to gangsters, who were, by definition, criminal. When unions were imagined as the embodiment of workers' self-determination and collective voice (as framed by the Wagner Act), they might certainly have been fallible, but they were not the province of criminals.<sup>119</sup> But when imagined as rooted in the criminal underworld or treasonous sleeper cells, unions once again returned to the domain of criminal law.<sup>120</sup> As law professor and union democracy advocate Michael Goldberg put it, "[t]he vast majority of American unions, of course, are untainted by corruption or organized crime. But a little racketeering can go a long way."<sup>121</sup>

The LMRA did not represent the full set of criminal prohibitions that unions faced or the exclusive vehicle by which a union or its members could be hauled into court on criminal charges. Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"),<sup>122</sup> for example, "[made] it a crime for a member of the Communist Party to serve as an officer or (except in clerical or custodial positions) as an employee of a labor union."<sup>123</sup> While the Supreme Court later struck down this section as an unlawful bill of attainder in *United States v. Brown*,<sup>124</sup> the LMRDA's passage and the judicial interpretation of its provisions speak to the continued concern that criminal law might be necessary to "protect the national economy" from the threat of over-zealous, or politically radical unions.<sup>125</sup>

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117. That is not to say that criminal law might not reach union members or leaders who had otherwise committed crimes. Rather, the organization and operation of unions, along with their interaction with management, were identified as the proper subjects of a specific set of non-criminal legal doctrines. See generally Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2012)) (setting forth a civil regulatory regime for organized labor).

118. See, e.g., *Dennis v. United States*, 341 U.S. 494, 516-17 (1951); *Gitlow v. New York*, 268 U.S. 652, 665-66 (1925).

119. Cf. HARRY S. TRUMAN, VETO OF THE TAFT-HARTLEY LABOR BILL, H.R. 3020, 80TH CONG. (1947), reprinted in 1947 U.S.C. CONG. SERV. 1851, 1859 (1947) ("One of the major lessons of recent world history is that free and vital trade unions are a strong bulwark against the growth of totalitarian movements. We must, therefore, be everlastingly alert that in striking at union abuses we do not destroy the contribution which unions make to our democratic strength.")

120. See WITWER, SHADOW OF THE RACKETEER, *supra* note 115, at 241-53.

121. Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 906 (1989) [hereinafter Goldberg, *Cleaning Labor's House*] (footnote omitted).

122. 29 U.S.C. § 504 (2012).

123. *United States v. Brown*, 381 U.S. 437, 438 (1965).

124. See *id.* at 461.

125. *Id.* at 438-39.

In addition to these criminal statutes, RICO became a powerful vehicle for the criminal regulation of labor. Passed as Title IX of the Organized Crime Control Act of 1970,<sup>126</sup> RICO was designed to facilitate “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”<sup>127</sup> Although not exclusively targeted at organized labor,<sup>128</sup> RICO became a weapon of choice in combatting the alleged abuses of racketeer-controlled unions.<sup>129</sup> As scholars and courts have noted, RICO, with its broad scope and long list of predicate acts, has been a boon to federal prosecutors seeking to identify a statutory hook to address alleged misconduct.<sup>130</sup> Further, the collective focus of RICO made it a natural fit for attempts to discipline the collective-action space of unions.<sup>131</sup> “Whereas traditional conspiracy law focused on individuals who had agreed to engage in group crime, RICO struck directly

126. 18 U.S.C. §§ 1961-1968 (1970).

127. S. REP. NO. 91-617, at 76 (1969). To this end, the statute announced four new criminal offenses: (1) to “use or invest” money derived from statutorily defined “racketeering” behavior to affect interstate commerce, 18 U.S.C. § 1962(a); (2) to use such money in the maintenance of an interstate enterprise, *id.* § 1962(b); (3) “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt,” *id.* § 1962(c); and (4) to conspire to commit any of the acts outlined in the preceding three sections, *id.* § 1962(d).

128. *But see* S. REP. NO. 91-617, at 78 (1969) (“Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft of union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loansharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate businesses, so, too, it cannot be tolerated here.”) (footnote omitted).

129. *See* James B. Jacobs & Lauryn P. Gouldin, *Cosa Nostra: The Final Chapter?*, 25 CRIME & JUST. 129, 141 (1999); Levin, *American Gangsters*, *supra* note 15, at 159-62; Ehren Park Reynolds, *Protecting the Waterfront: Prosecuting Mob-Tied Union Officials Under the Hobbs Act and RICO After Scheidler*, 10 BOALT J. CRIM. L. 2, 68-69 (2005); Victoria G.T. Bassetti, Note, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103, 104 (1992).

130. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 248-49 (1989) (“Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways.”); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 775 (1988) (“[RICO] was a weapon of such power that it has become the Justice Department’s mainstay against traditional racketeering and other types of complex crime.”); Frank D’Angelo, Note, *Turf Wars: Street Gangs and the Outer Limits of RICO’s “Affecting Commerce” Requirement*, 76 FORDHAM L. REV. 2075, 2076 (2008) (“Over the decades that followed, prosecutors, seeking to test just how liberally courts would construe the Act’s language, invoked RICO to charge members of a panoply of new and increasingly noneconomic criminal enterprises.”); Barry Tarlow, *RICO: The New Darling of the Prosecutor’s Nursery*, 49 FORDHAM L. REV. 165, 167-71 (1980).

131. *Cf.* 18 U.S.C. § 1961(4) (2012) (“[E]nterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any *union* or group of individuals associated in fact although not a legal entity[.]”) (emphasis added); *United States v. Turkette*, 452 U.S. 576, 580-81 (1981) (“There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact.”).

at the organizational structure that allowed conspiracies to succeed. Under RICO, the criminal enterprise replaces the individual as the cornerstone of each trial.”<sup>132</sup> And, indeed, violations of other labor-related statutes could serve as predicate acts under RICO,<sup>133</sup> rendering the statute a sort of “penalty enhancer” for garden-variety labor law violations.<sup>134</sup>

Accordingly, U.S. Attorneys pursued a wide range of RICO prosecutions against those allegedly engaged in “labor racketeering.”<sup>135</sup> In his exhaustive 1987 study of RICO prosecutions, Second Circuit Judge Gerard Lynch identified 29 of the 236 (twelve percent) reported RICO prosecutions as resting on a predicate act of “labor corruption.”<sup>136</sup> As Judge Lynch observed, “[o]rganized criminal control of unions has long been a principal concern of law enforcement, business, and public interest groups, and RICO appears to have provided the government with the tools to make significant cases.”<sup>137</sup> Therefore, while the next Part will address the wide-ranging use of RICO’s *civil* provisions in disciplining union leaders run amok, RICO’s criminal reach clearly encompassed—and shaped—the structure of postwar union governance.

None of this is to say that criminal law has operated as the primary regulatory paradigm for addressing worker organizing in recent decades. Indeed, as noted repeatedly, the NLRA—deficient or ossified as it may have become—remains the law on the books and the law that technically governs private-sector unions. Further, as noted at the outset of the Article, other, non-criminal statutory frameworks have come to greater prominence as vehicles for addressing problems of workplace governance.<sup>138</sup> Similarly, for union opponents, these quasi-criminal suits are but one set of weapons in a broader legal arsenal. Other non-criminal vehicles such as tortious interference suits,<sup>139</sup> right-to-work laws,<sup>140</sup> and attacks on union dues

132. Goldsmith, *supra* note 130, at 774.

133. See, e.g., *United States v. LeRoy*, 687 F.2d 610 (2d Cir. 1982) (LMRDA violation).

134. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 759 (1987) (“The importance of RICO as a penalty enhancer in these cases is evident from the fact that such Taft-Hartley violations were listed as predicate acts in more than half of the labor corruption cases in the sample [of RICO prosecutions].”).

135. See, e.g., *United States v. Browne*, 505 F.3d 1229 (11th Cir. 2007); *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006); *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997); *United States v. Cody*, 722 F.2d 1052 (2d Cir. 1983); *United States v. Sheeran*, 699 F.2d 112 (3d Cir. 1983); *United States v. Greenleaf*, 692 F.2d 182 (1st Cir. 1982); *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982); *United States v. Provenzano*, 688 F.2d 194 (3d Cir. 1982); *United States v. Thordarson*, 646 F.2d 1323 (9th Cir. 1981); *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980).

136. Lynch, *supra* note 134, at 734, 758.

137. *Id.* at 758-59.

138. See *supra* notes 7, 9-13 and accompanying text.

139. See Paul More, *Protections Against Retaliatory Employer Lawsuits After BE&K Construction v. NLRB*, 25 BERKELEY J. EMP. & LAB. L. 205, 217-18 (2004); Stanley J. Brown & Alyse Bass, *Corporate Campaigns: Employer Responses to Labor’s New Weapons*, 6 LAB. LAW. 975, 980-81 (1990).

arrangements<sup>141</sup> have served as powerful vehicles for labor's opponents. But the post-Wagner Act labor racketeering scandals—much like the nineteenth century prosecutions—left the labor movement with a black eye of continued criminality.<sup>142</sup>

By providing a brief historical background of labor's criminal regulation and of criminal law's continued vitality in labor regulation up until the present, this Part has situated the recent quasi-criminal RICO and LMRA suits against a broader backdrop of an historically strong, socio-legal tie between unions and criminality. Such an historicized framing indicates that these new suits should not be dismissed merely as aberrations, anomalies, or clearly misguided departures from the dominant labor law framework.<sup>143</sup> Instead, these invocations of criminal liability exist in a much broader context of criminal regulation of labor markets and—as I will argue below—in a broader context of an eroding distinction between civil and criminal legal regulatory regimes.<sup>144</sup> Certainly, other legal regimes may contain similar civil-criminal hybrid provisions, but the unique criminal history of labor law makes such a dynamic in this context particularly noteworthy. In furtherance of these twin aims, the next Part addresses the recent spate of quasi-criminal civil suits brought against unions under RICO and § 302 of the LMRA.

### III.

#### PRIVATE PROSECUTIONS

As argued in the prior Part, RICO prosecutions of labor leaders and civil suits brought by the government under RICO continue a longstanding tradition of regulating union activity through criminal or quasi-criminal mechanisms. However, those suits dealt with misfeasance that was specifically framed as occurring outside of the proper functioning of unions and union democracy. That is, organized crime “infiltration” or “control” of the Teamsters or other unions was understood to be a subversion of what was otherwise a socially and politically legitimate entity, and criminal law and the federal government were interceding in order to preserve the proper functioning of organized labor in the market.<sup>145</sup> These cases did not purport

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140. See Michael M. Oswalt, Note, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 700-01 (2007).

141. See, e.g., *Knox v. SEIU*, 132 S. Ct. 2277 (2012); see also Sachs, *The Unbundled Union*, *supra* note 12, at 184.

142. See, e.g., WITWER, SHADOW OF THE RACKETEER, *supra* note 115; Levin, *Blue-Collar Crime*, *supra* note 15.

143. See Levin, *Blue-Collar Crime*, *supra* note 15, at 606.

144. See *infra* Parts III-IV.

145. See James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229, 230 n.1 (2003) (“It need hardly be added that focusing on labor racketeering as a

to involve a per se objection to unions as bargaining units or socio-political entities; rather, the cases' stated purpose was to cleanse unions of corrupting influence.<sup>146</sup> In this narrative, unions were not the problem; corrupt unions or corrupt union leaders were. Therefore, such prosecutions, while clearly essential to a broader discussion of criminal law's continued relevance to organized labor, are not the focus of this Article or this Part.

Instead, this Part addresses the recent spate of private, civil suits brought under federal criminal statutes—RICO and the LMRA, respectively. As I discuss, *infra*, these suits differ markedly from government initiated suits and prosecutions for several critical reasons. First, these suits cut to the heart of union activity rather than to the alleged corruption of unions by bad actors. The allegations central to the plaintiffs' complaints are not that rogue leaders have abused their position in an attempt to pursue individual wealth or consolidate power; rather, the claims relate to the functioning of the union itself. The plaintiffs assert that the ways in which unions are doing business, their mechanisms of organizing, and their bargaining techniques are, in and of themselves, *criminal*. In this respect, such claims re-inscribe and reiterate the arguments that animated the nineteenth century and pre-NLRA conspiracy prosecutions. That is, employers are arguing that the organizing process and the way in which unions are bargaining with employers violate the moral and legal code(s) of the marketplace.

Framed against this long history of criminal regulation of organized labor, this Part addresses the two varieties of quasi-criminal civil suits that have begun to appear on federal courts' dockets in the past several decades: those brought under RICO, and those brought under § 302 of the LMRA. In addition to outlining each variety of suit, this Part addresses their shared flaws and the similar ways in which both serve to import (or preserve) criminal principles in the realm of labor law, while ostensibly operating on civil terms. By focusing on these dynamics, this Part draws a parallel to the civil-criminal hybrid realm of labor injunctions, discussed above<sup>147</sup>—the absence of criminal procedure and the formality of prosecution, coupled with the invocation of criminal law principles and the threat of state violence.

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crime problem is no more an indictment of the vast majority of union officials and members than focusing on corporate crime is an indictment of the vast majority of businessmen.”).

146. See Levin, *Blue-Collar Crime*, *supra* note 15, at 617.

147. See *supra* notes 58-64 and accompanying text.

### A. RICO

Few statutes have enjoyed more critical attention than RICO, due to its expansive scope and almost boundless civil and criminal applications.<sup>148</sup> As an extension of broader conspiracy law principles, the statute has been used as a vehicle to address alleged misfeasance by those engaged in some form of collective action.<sup>149</sup> The civil RICO suits that this Part addresses, therefore, are but one data point in a broader constellation of the statute's creative application to collective action. Indeed, even putting aside the criminal RICO prosecutions discussed above, two other categories of RICO suits have helped shape contemporary union governance: (1) civil suits brought by the government in an effort to depose allegedly corrupt union leadership,<sup>150</sup> and (2) *private* civil suits brought by employers against unions for efforts to organize employees or engage in hard bargaining.<sup>151</sup> While this Part will return briefly to the first category in closing, the primary focus of this Part is on the second category of RICO suits—private

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148. See, e.g., *Sedima v. Imrex Co.*, 473 U.S. 479, 507 (1985) (Marshall, J., dissenting); Douglas L. Badow, *The Obscenity of Federal RICO Law*, in *THE RICO RACKET* 33 (Gary L. McDowell ed., 1989); Judah Best et al., *The Racketeer Influenced and Corrupt Organizations Act: Hardly a Civil Statute*, in *RICO: EXPANDING USES IN CIVIL LITIGATION* 3 (Arthur F. Mathews ed., 1984); Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 *IOWA L. REV.* 837, 838 (1980); Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 *VAND. L. REV.* 805, 806 (1990); Brian Nisbet, Comment, *What Can RICO Not Do?: RICO and the Non-Economic Intrastate Enterprise that Perpetuates Only Non-Economic Racketeering Activity*, 99 *J. CRIM. L. & CRIMINOLOGY* 509, 539 (2009); Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 *VAND. L. REV.* 623, 624 (1990); Catherine Reid, Note, *Limiting Political Expression by Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 *RUTGERS L.J.* 201, 203 (1988); William Roquemore Taylor, Comment, *Federalizing Street Crime: The Improper Broadening of RICO's "Affecting Commerce" Requirement*, 46 *HOUS. L. REV.* 139, 140-42 (2009).

149. See Goldsmith, *supra* note 130, at 774.

150. See, e.g., *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Local 30, United Slate, Tile & Composition Roofers*, 686 F. Supp. 1139, 1165 (E.D. Pa. 1988); *United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192, 196-98 (S.D.N.Y. 1986). See generally Goldberg, *Cleaning Labor's House*, *supra* note 121; Michael C. Liebman, *Governmental Civil RICO Actions and Labor Unions: Reorganization and Innocent Persons*, 58 *GEO. WASH. L. REV.* 125 (1989).

151. See cases cited *supra* note 26; see also *Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, 168 F. Supp. 2d 826, 833-35 (W.D. Tenn. 2001); *Teamsters Local 372 v. Detroit Newspapers*, 956 F. Supp. 753, 761-62 (E.D. Mich. 1997); Bassetti, *supra* note 129, at 122; Brudney, *Collateral Conflict*, *supra* note 25, at 733-37; Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 *FORDHAM L. REV.* 2617, 2626 (2011) (“[E]ach [of the RICO suits] alleged that the defendants had committed extortion by threatening to continue the comprehensive campaign until the employer agreed to the union’s demands.”); Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 *U. PA. J. LAB. & EMP. L.* 1, 63 (2005) (“RICO has increasingly been used against unions carrying out comprehensive campaigns on the accusation that labor’s alliances with consumers and shareholders constitute blackmail and should subject the union to criminal prosecution.”); Levin, *Blue-Collar Crime*, *supra* note 15, at 619-24; Herbert R. Northrup & Charles H. Steen, *Union “Corporate Campaigns” as Blackmail: The RICO Battle at Bayou Steel*, 22 *HARV. J.L. & PUB. POL’Y* 771, 773 (1999).

actions alleging that employers have been harmed by unions' extortionate conduct.

RICO explicitly provides a private right of action for "[a]ny person injured in his business or property by reason of a violation of" the statute.<sup>152</sup> To obtain relief, a plaintiff must show that she suffered harm due to the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."<sup>153</sup> Further, demonstrating a "pattern of racketeering activity" requires [proof of] at least two [statutorily defined] 'predicate acts' in a ten-year period."<sup>154</sup>

In the suits brought by employers, the actions that gave rise to the complaints were "comprehensive" or "corporate" campaigns initiated by unions.<sup>155</sup> While "corporate campaigns cannot be defined by either a unique common goal or universal tactic,"<sup>156</sup> scholars have traced use of the term to the late 1970s and the work of the Amalgamated Clothing and Textile Workers Union.<sup>157</sup> The D.C. Circuit has stated that "the term encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer."<sup>158</sup> The D.C. Circuit identified such tactics as including "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public."<sup>159</sup> As an expansive attack on an employer, these campaigns represent an aggressive and popular mechanism for unions seeking concessions from more powerful employers.<sup>160</sup>

The central claim in RICO suits arising from such union strategies is that the comprehensive campaigns have crossed the line from legitimate bargaining tactics into the coercive or extortionate. Specifically, the employers' complaints assert that the unions' attempts to obtain

152. 18 U.S.C. § 1964(c) (2012). The LMRA contains no such explicit authorization of a private right of action, raising an additional set of concerns in the context of the quasi-criminal litigation. *See infra* Part III.B.

153. *Sedima*, 473 U.S. at 496 (footnote omitted).

154. *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 577 (S.D.N.Y.) (citing 18 U.S.C. § 1961(5)), *aff'd*, 355 F. App'x 508 (2d Cir. 2009). The statute provides an extensive list of conduct constituting "predicate acts." *See* 18 U.S.C. § 1961(1) (listing "predicate acts").

155. This Article uses the terms "corporate campaign" and "comprehensive campaign" interchangeably.

156. Paul Jarley & Cheryl L. Maranto, *Union Corporate Campaigns: An Assessment*, 43 INDUS. & LAB. REL. REV. 505, 506 (1990).

157. *See id.* at 505-06; Brudney, *Collateral Conflict*, *supra* note 25, at 737-738.

158. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997).

159. *Id.*

160. *See Jarley & Maranto, supra* note 156, at 506-13; Brudney, *Collateral Conflict, supra* note 25, at 742-44 (describing an "archetypal comprehensive campaign").

concessions from employers amount to conduct akin to blackmail or extortion as prohibited by the Hobbs Act (one of the predicate acts under RICO).<sup>161</sup> Under the Hobbs Act

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.<sup>162</sup>

Further, the Act defines “extortion” as “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>163</sup> Therefore, the theories of RICO liability—though not identical in each case—rely on an argument that the unions are interfering criminally with the employer’s property rights, related to the undisturbed functioning of the employer’s business. While theoretically similar to the tortious interference claims that have been preempted under the NLRA, these RICO suits assert claims that evoke criminal liability.

In *Cintas Corp. v. UNITE HERE*,<sup>164</sup> for instance, the corporate plaintiffs brought RICO claims against the union defendant, focusing particularly on the union’s maintenance of disparaging websites and attempts to generate negative publicity about the plaintiffs.<sup>165</sup> There, the defendant unions sought to obtain a card check/neutralty agreement from the employer (Cintas) and hoped that these tactics would pressure Cintas to enter into such an agreement.<sup>166</sup> In *Wackenhut Corp. v. Service Employees International Union*,<sup>167</sup> the employer, Wackenhut, alleged that the Service Workers International Union (“SEIU”) had undertaken an “extortionate campaign” in an effort to “strong arm Wackenhut into signing labor agreements.”<sup>168</sup> Similarly, in *Smithfield Foods, Inc. v. United Food & Commercial Workers Int’l Union*,<sup>169</sup> the union sought a card check/neutralty agreement and allegedly “smear[ed]” the company in the process.<sup>170</sup> “Smithfield . . . identified three property interests which

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161. See, e.g., *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 577 (S.D.N.Y.), *aff’d*, 355 F. App’x 508 (2d Cir. 2009).

162. 18 U.S.C. § 1951(a) (2012).

163. *Id.* § 1951(b)(2).

164. 601 F. Supp. 2d 571.

165. *Id.* at 575-76.

166. *Id.*

167. 593 F. Supp. 2d 1289 (S.D. Fla. 2009).

168. *Id.* at 1290.

169. 585 F. Supp. 2d 789 (E.D. Va. 2008).

170. *Id.* at 796.

allegedly were ‘wrongfully’ targeted by the Defendants through the Smithfield Campaign.”<sup>171</sup>

While the suits have met with mixed success at the motion to dismiss or summary judgment stage, none have resulted in a holding that a union’s comprehensive campaign violated RICO and the Hobbs Act.<sup>172</sup> To this end, scholars have argued that the RICO suits arising from corporate campaigns are inherently meritless, preempted by the NLRA, or violative of workers’ First Amendment rights.<sup>173</sup> Not only do the plaintiffs allege that the conduct lacks the NLRA’s protection, they also assert that the union’s conduct lacks any lawful basis.

The close nexus between these RICO suits and a general theoretical hostility to the union project finds significant purchase in Herbert R. Northrup and Charles H. Steen’s account of litigating *Bayou Steel Corp. v. United Steelworkers of America*.<sup>174</sup> In describing their representation of Bayou Steel, the corporate plaintiff, Northrup and Steen explicitly argue that contemporary unions have overstepped their bounds and are therefore better governed by the quasi-criminal framework of RICO than by traditional labor law statutes:<sup>175</sup>

It is axiomatic that a corporate campaign pits a union against an employer. Thus, it is tempting to look to labor law, which typically controls the allocation of rights and liabilities between employers and organized labor, for the applicable rules of conduct and corresponding sanctions . . . . Making the conceptual leap from the simple fact of a union-employer conflict to labor law and NLRB’s exclusive jurisdiction, however, is neither necessary nor is it particularly illuminating in the context of corporate campaigns. Labor unions are not specially privileged by federal labor law, or any other source of law, to commit murder, arson, robbery, fraud, blackmail, or a host of other possible offenses—even in pursuit of legitimate collective bargaining objectives—without facing the very same legal sanctions that apply to everyone else. Thus the idea that disputes concerning the lawfulness or unlawfulness of corporate campaign activity must be resolved within the purview of NLRB actually is not well-founded. Moreover, corporate campaigns are by definition comprised of nontraditional tactics directed toward objectives that cannot be attained using traditional means such as elections, collective bargaining, and withholding labor en masse. In other words, corporate campaigns are

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171. *Id.* at 797.

172. Brudney, *Collateral Conflict*, *supra* note 25, at 756 (“The reported decisions in these cases tend to involve a union’s motion to dismiss RICO claims on various grounds; such motions succeed or fail at roughly comparable levels.”).

173. *See, e.g.*, Bassetti, *supra* note 129; Brudney, *Collateral Conflict*, *supra* note 25; Garden, *supra* note 151.

174. No. Civ. A. 95-496-RRM, 1996 WL 76344 (D. Del. Jan. 11, 1996); Northrup & Steen, *supra* note 151.

175. Northrup & Steen, *supra* note 151, at 795-97.

intended by unions to take their disputes with employers outside the traditional labor law model for one simple reason: from the unions' perspective, the model embodied by labor law is inadequate for the unions' purposes. Accordingly, it is valid and worthwhile to analyze the lawfulness of corporate campaign tactics under non-labor laws and particularly under RICO.<sup>176</sup>

In this framing, the union's attempts to obtain concessions become analogs to violent crime, not to hard bargaining, or even tortious interference. The move to creative, extra-NLRA union organizing tactics has triggered a similarly creative, extra-NLRA employer response—a return to a criminal model.<sup>177</sup>

Indeed, particularly in cases that do not involve allegations of violence, the employers' theory of liability comes perilously close to the labor conspiracy doctrine discussed above.<sup>178</sup> Where the Wagner Act stands for the proposition that unions may use social and economic pressure to exact concessions from employers, Cintas, Smithfield, and the other RICO plaintiffs argue that such economic and social pressure are extortionate. Northrup and Steen conceded that “labor unions enjoy special privileges in our society,”<sup>179</sup> but insisted:

not to allow civil recovery under RICO for damages incurred as a consequence of union corporate campaigns would be tantamount to saying, as a matter of law, that labor unions, in addition to their special rights under federal labor law, also are specially privileged to commit organized blackmail in violation of state law to get contracts.<sup>180</sup>

Certainly, unions' rights are limited; the U.S. labor law regime never guaranteed workers free reign in pursuing their interests. Even under the most radical or revisionist reading of federal labor law statutes, the NLRA-sanctioned arsenal of economic weapons available to unions does not include secondary boycotts, general strikes, and forms of violent conduct.<sup>181</sup> Nevertheless, the underlying “extortion,” which the employers allege, lies at the very heart of the legally-recognized function of unions. As Brudney noted in arguing that these RICO suits are meritless, “federal labor law legitimates and indeed protects what might in ordinary meaning terms be thought of as extortionate activity.”<sup>182</sup> To allow relief on the theories advanced by the employers in these cases would be to return to a version of the labor conspiracy doctrine. Recognizing this expansive reading of

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176. *Id.*

177. *See supra* notes 7-13 and accompanying text.

178. *See supra* notes 54-59 and accompanying text.

179. Northrup & Steen, *supra* note 151, at 845.

180. *Id.*

181. *See generally* White, *Workers Disarmed*, *supra* note 1 (describing the ways in which liberal labor law has restricted the radical potential of organizing workers).

182. Brudney, *Collateral Conflict*, *supra* note 25, at 774.

extortion would re-establish a theory of property rights primacy that views worker organizing as a criminal (or quasi-criminal) intrusion on the rights of employers.<sup>183</sup>

In dismissing the employer's complaint in *Cintas*, the court recognized the high ideological stakes of the claims and issued a stinging rebuke to the plaintiffs, concluding that "[t]he Complaint is not the 'short and plain statement' contemplated by Rule 8; it is a manifesto by a Fortune 500 company that is more a public relations piece than a pleading."<sup>184</sup> Further, the court rejected the underlying Hobbs Act claims by observing that "Cintas does not have a right to operate free from any criticism, organized or otherwise."<sup>185</sup> The legal framework for regulating organized labor that the Wagner Act had inaugurated remained, at least in this case, as a barrier between organized labor and the nineteenth century criminal model. In calculating the correct balance between property rights, on the one hand, and associational rights on the other, the analytical paradigm remained rooted in a post-NLRA legal framework.

However, decisions like *Cintas*, the RICO claims' limited success, and the lack of judicial endorsement of the employers' theory do not necessarily undermine the suits' efficacy.<sup>186</sup> Litigation is expensive, and having to defend against a suit in federal court raises the marginal cost to unions that might otherwise seek to organize shops or employ the sorts of aggressive tactics associated with corporate campaigns.<sup>187</sup> These are suits initiated with massive complaints that necessarily require substantial resources to litigate.

Also, as discussed below, the suits themselves, which cast unions as extortionate interlopers in an otherwise civil economy, represent a forceful

183. See, e.g., *Crump v. Commonwealth*, 6 S.E. 620, 630 (Va. 1888) ("The acts alleged and proved in this case [relating to a boycott] are unlawful, and incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpetrated, with impunity, by combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself. Freedom, individual and associated, is the boon and the boasted policy and peculium of our country; but it is liberty regulated by law; and the motto of the law is: 'Sic utere tuo, ut alienum non leadas.'"); *Commonwealth v. Moore* (1827), reprinted in 4 A DOCUMENTARY HISTORY, *supra* note 47, at 99, 105 ("Without turning to books, therefore, or detaining you by an elaborate exposition of the law on the subject of conspiracies, we assume at once, that 'All confederacies wrongfully to prejudice another are misdemeanours at common law, whether the intention be to injure his person, his property, or his character.'").

184. *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 574 (S.D.N.Y.), *aff'd*, 355 F. App'x 508 (2d Cir. 2009).

185. *Id.* at 578 ("[W]ithin the labor context, in seeking to exert social pressure on [plaintiff], the Union's methods may be harassing, upsetting or coercive, but unless we are to depart from settled First Amendment principles, they are constitutionally protected." (citing *Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps.*, 239 F.3d 172, 178 (2d Cir. 2001))); *Beverly Hills Foodland v. United Food & Commercial Workers, Local 655*, 39 F.3d 191, 197 (8th Cir. 1994) ("[T]he prime directive in the Union [organizing] campaign, a boycott of [the target employer] is . . . constitutionally safeguarded," as is the accompanying "activity of peaceful pamphleteering.").

186. See *infra* note 247 and accompanying text.

187. See *Levin, Blue-Collar Crime*, *supra* note 15, at 623.

public relations counterweight to the negative press created by corporate campaigns. One litigation strategy guide for employers even endorses the pursuit of RICO charges targeting unions' corporate campaigns by noting that employers can still win by losing: "unsuccessful litigation can serve as an effective countermeasure against a union corporate campaign. Defending against complex defamation and extortion lawsuits can be costly, but it can provide publicity of the company's position regarding the union's untrue harassing attacks."<sup>188</sup> That is, Cintas or other anti-union RICO plaintiffs may lose the specific legal battles, but they may not be losing the broader economic and public relations war.

Thinking about these suits as a matter of private litigation strategy also adds to our understanding of their place within a broader criminal framework. Despite the underlying criminal theory that animates these claims, the enforcement mechanism remains purportedly private and reliant upon the employers as private attorneys general. In this respect, these suits fall victim to many of the same critiques leveled at such private or hybrid private/public enforcement regimes generally: (1) they empower parties that might not represent the public interest; (2) as a result, they may lead to over- or under- deterrence of undesirable conduct; and (3) they are insulated from the sorts of political accountability that (we hope) attaches to public regulators or prosecutors.<sup>189</sup> That is, like *qui tam* suits or public theories of tort law, these suits ostensibly serve as private vehicles for advancing the public interest.<sup>190</sup> However, by arming individuals with enforcement power,

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188. Ronald Flowers, *Fighting Back Against Union Corporate Campaigns*, WORKFORCE MGMT., (Mar. 11, 2010), <http://www.workforce.com/articles/fighting-back-against-union-corporate-campaigns>.

189. See John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 328 (2011) [hereinafter Goldberg, *Tort in Three Dimensions*] ("The conservative is deeply skeptical. Of the plaintiff-private attorney general he asks: 'Who deputized you to commence these proceedings? What if we don't want you to sue?' In a similar vein he asks: 'How is it that, in a democratic political system with elected and expert policymakers, judges and jurors possess the authority to run a shadow regulatory system that lacks clear rules of operation and is often at odds with the system that first-line regulators have sought to put in place?'" ), *id.* at 335 ("If tort law merely gives occasion to ad hoc efforts at compensation and regulation fenced in by arbitrary limits, we cannot in good conscience hold it up as a model for others."); John C. P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 4 (2004) [hereinafter Goldberg, *Tort Law for Federalists*] ("[T]he tort system is not well designed to function as a form of disaster relief for injury victims because of its high transaction costs and its tendency to produce feast-or-famine compensation. It is also not well equipped to provide public safety regulation because of, among other things, judges' and jurors' lack of agenda control, their limited access to information, and their relative lack of expertise and accountability. In this sense, I maintain, tort law is not defensible as public regulatory law.").

190. See *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) (holding that Congress may authorize "private Attorney Generals" whose "sole purpose is to vindicate the public interest"); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Law*, 34 BUFF. L. REV. 833, 954-57 (1985); James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 498 (1997); Edward A. Fallone, *Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action Under a Structuralist Approach*, 1997 U. ILL. L. REV. 71, 75-76 (1997).

these suits allow for an “ad hoc” mechanism for resolving social problems.<sup>191</sup> Generally dependent on the political motivation and financial resources of the plaintiffs or their attorneys, private suits and *qui tam* actions favor individual assignments of culpability or liability rather than broader systemic reform.

As noted above, this dynamic is hardly unique to the labor context. Other statutory schemes (and even certain common law claims) allow for a private plaintiff to assert a cause of action on the same theory or set of facts that might give rise to criminal liability. However, even if we might find such enforcement mechanisms acceptable in some cases, these RICO suits seem to be a particularly problematic example. For instance, support for expansive tort liability is often justified from scholars on the left as a “‘a weapon of social progress’ . . . providing assistance to and an outlet for ordinary people who have suffered setbacks,”<sup>192</sup> but this rationale loses its appeal when the power dynamic between litigants shifts. That is, when imagined as an area in which the otherwise powerless plaintiff can access the legal system as a means of obtaining some form of relief, perhaps we might view private suits or private enforcement as a (qualified) normative good.<sup>193</sup> But what if the plaintiff is the powerful actor? Or, what if we are less certain that the RICO plaintiffs are serving the public good, as opposed to their own private financial benefit?<sup>194</sup>

If these suits allow employers to impose added costs on unions, to deter organizing efforts, or to make it more difficult for workers to make independent decisions about unionization, we are left with what resembles the pre-NLRA labor injunction—a quasi *qui tam* proceeding in which the plaintiff purports to enforce the law on behalf of the state or the public good. If employers are advancing claims that actually contradict statements of public policy by revitalizing a pre-NLRA imagination of the employer’s right to do business free from union interference, it becomes difficult to view these suits as enforcing the law, rather than trying to reform it.<sup>195</sup>

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191. Goldberg, *Tort in Three Dimensions*, *supra* note 189, at 324.

192. *Id.* at 326 (quoting Allen M. Linden, *Tort Law as Ombudsman*, 51 CAN. BAR REV. 155, 164 (1973)).

193. There may still be good reason to be skeptical about private enforcement, even if we find the distributional consequences appealing. *See supra* note 189 and accompanying text.

194. Of course, the concept that underlies private enforcement mechanisms is that by aligning the private financial benefits with those of the “public,” lawmakers may incentivize litigants to act as private attorneys general. *See* Laura J. Kerrigan et. al., *Project: The Decriminalization of Administrative Law Penalties: Civil Remedies, Alternatives, Policy, and Constitutional Implications*, 45 ADMIN. L. REV. 367, 375 (1993) (“Private citizens who bring these actions reap the benefits of damages in the suits they win or settle out of court. It seems that everybody wins, except the defendant, of course.”). In the anti-union RICO context, then, my concern remains that the private interests of the plaintiffs may not align clearly with “the public interest.”

195. *Cf. supra* notes 184-185 and accompanying text (discussing the claim that an employer holds a property right to do business free from union interference).

Finally, while a discussion of public civil RICO suits (*i.e.*, suits in which the government is the civil plaintiff) is largely outside of the scope of this Article,<sup>196</sup> it is worth pausing for a moment to consider the way in which such suits might operate in tandem with the private RICO suits discussed above and the LMRA suits discussed below in Part III.B. These suits generally involve the state seeking to take control of an allegedly corrupt union, deposing the leaders, and replacing them with some sort of receivership or federal trustee relationship. While the state, in such suits, nominally intervenes on behalf of the workers in an effort to re-establish union democracy,<sup>197</sup> it is important to recognize the limitations of such a project.<sup>198</sup> Corrupt union officials may pose serious issues for the promise of worker self-determination or a democratic workplace,<sup>199</sup> but replacing one set of union leaders with a new, state-sanctioned alternative does not guarantee worker democracy. Rather, it represents a belief that the state can (and should) impose a specific view of what organized labor should look like.<sup>200</sup> As in the earlier moment of labor conspiracy prosecutions focused on curbing threats to the government's monopoly on violence,<sup>201</sup> state involvement in union governance appears geared towards subduing a threatening non-state collective. That is, by effectively "taking over" unions, U.S. Attorneys may ameliorate internal corruption, but such an intervention may carry with it significant normative views about what union governance should look like, or how unions should behave. The government interests that replace those of corrupt leaders may be more aligned with rank-and-file workers; but they may not.<sup>202</sup>

The Wagner Act, like any form of regulation, necessarily carries with it some normative objective. However, the Wagner Act was a statute, a

196. See cases cited *supra* note 150.

197. See JACOBS, *supra* note 14, at 138-60; Goldberg, *Cleaning Labor's House*, *supra* note 121, at 950-55.

198. See Levin, *American Gangsters*, *supra* note 15, at 160-62; see also Eric J. Pritchard, Comment, *RICO and Labor Corruption: The Propriety of Court-Imposed Trusteeships*, 62 TEMP. L. REV. 977, 978 (1989) ("Critics, however, argue that the appointment of a government trustee to control the affairs of a corrupt union deprives members of their federally guaranteed right to control their union and its affairs . . .").

199. See generally KENNETH C. CROWE, COLLISION: HOW THE RANK AND FILE TOOK BACK THE TEAMSTERS (1993) (discussing corruption within the Teamsters); JACOBS & COOPERMAN, *supra* note 14 (same); JACOBS, *supra* note 14, at 138-60 (same); Goldberg, *Cleaning Labor's House*, *supra* note 121; Michael J. Goldberg, *In the Cause of Union Democracy*, 41 SUFFOLK U. L. REV. 759, 763 (2008).

200. See Levin, *American Gangsters*, *supra* note 15, at 161-62 ("[Government control of unions] may prove an effective means of reducing organized crime and may indeed serve the interests of worker democracy in unions overrun by oppressive and violent syndicates. But when we consider the fact that more radical, leftist union leaders had been deposed decades earlier . . . based on similar claims that they were antidemocratic or failed to represent worker interests, there seems to be good reason to think that RICO might weed out politically disfavored or marginalized union leaders and unionization regimes, in addition to those that actually failed to represent worker interests.") (footnote omitted).

201. See TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 118.

202. See Levin, *American Gangsters*, *supra* note 15, at 160-62.

product of legislative compromise, and a *general* legal framework. These RICO suits—even if public rather than private—are, instead, case-by-case affairs.<sup>203</sup> Certainly, the NLRB also deals with individual cases. But it does so through the general framework of *labor law*. RICO, however, exists outside of the compromises, goals, and structures of labor law. State actors intervene in union affairs not because of “unfair labor practices” as defined by the NLRA, but because of allegations of corruption or racketeering. In so doing, they replicate the individualized dynamics and optics of a criminal prosecution, rather than the broader, non-exclusive dynamics of a purely civil regulatory regime. With this tension in mind, the next Section proceeds to address private suits under the LMRA, which similarly take root in stated concerns about unions as hotbeds of corruption.

### B. LMRA

Just over a decade after the NLRA affirmed a national commitment to the unionization program, “Congress enacted the LMRA . . . to curb abuses ‘inimical to the integrity of the collective bargaining process.’”<sup>204</sup> Given that § 302 of the LMRA applies only to labor disputes, it has been the subject of much less judicial and scholarly examination and criticism than RICO;<sup>205</sup> however, it has recently come into the judicial spotlight due to the Eleventh Circuit’s decision in *Mulhall v. Unite Here Local 355*.<sup>206</sup>

*Mulhall* involved a challenge to a neutrality agreement by Martin Mulhall, a greyhound racetrack employee whose employer, Mardi Gras Gaming (“Mardi Gras”) had entered into such a neutrality agreement with the union UNITE HERE (“Unite”).<sup>207</sup> In the agreement, Mardi Gras promised to (1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees.<sup>208</sup> In

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203. Cf. *supra* note 189 and accompanying text (describing the potential issues raised by private enforcement of statutes in the public interest).

204. *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211, 1214 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 2849 (2013), and *cert. denied*, 134 S. Ct. 822 (2013), and *cert. dismissed as improvidently granted*, 134 S. Ct. 594 (2013) (quoting *Arroyo v. United States*, 359 U.S. 419, 425 (1959)).

205. But see Comment, *Payments to Joint Labor-Management Boards Under LMRA Section 302*, 10 STAN. L. REV. 374 (1958) (describing issues posed by payments to joint labor-management boards); Christopher J. Garofalo, Note, *Section 302 of the LMRA: Make Way for the Employer-Paid Union Representative*, 75 N.Y.U. L. REV. 775 (2000) (examining the LMRA’s application to employer-paid union representatives).

206. 667 F.3d 1211 (11th Cir. 2012).

207. See *id.* at 1213.

208. *Id.*

return, Unite promised to lend financial support to a ballot initiative regarding casino gaming.<sup>209</sup>

Neutrality agreements, a product of declining union power and stagnating labor law over the past several decades,<sup>210</sup> involve an employer's promise not to oppose unionization actively prior to employees' vote on whether to join a union.<sup>211</sup> In exchange for the employer's cooperation, the union makes preemptive concessions that if the workers vote to unionize, the union will refrain from striking, boycotting, or engaging in other hostile actions.<sup>212</sup>

Such agreements are clearly imperfect. On the one hand, supporters of organized labor and critics on the left have argued that these agreements deprive workers of a say in their own governance, creating a top-down union model, failing rank-and-file members, and doing more to advance union power or to guarantee a cooperative workforce for employers than to level the playing field between workers and bosses.<sup>213</sup> On the other hand, union opponents and critics on the right have characterized neutrality agreements as sweetheart deals, providing unions with an unfair advantage and lining the pockets of union officials, while leaving anti-union workers and their rights out of the equation.<sup>214</sup>

Warts and all, though, these agreements have become a staple of the contemporary union's playbook.<sup>215</sup> But are they criminal? Does a union's promise amount to "a thing of value" under the LMRA?<sup>216</sup>

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209. *Id.*

210. See, e.g., Cooper, *supra* note 13, at 1591 ("The story of neutrality agreements begins with unions' frustrations in trying to counteract the decline in union density in the latter half of the twentieth century."); Hartley, *supra* note 13, at 372.

211. See *Adcock v. Freightliner LLC*, 550 F.3d 369, 369 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004); Brudney, *supra*, note 13, at 825; Eigen & Sherwyn, *supra* note 13, at 695, 697-98.

212. See *Mulhall*, 667 F.3d at 1213; *Adcock*, 550 F.3d at 371. As such agreements are contractual in nature, their terms necessarily vary from case to case. That is, the specific concessions on the part of the union or what form an employer's neutrality might take is not uniform across organizing campaigns.

213. See, e.g., Richard W. Hurd, *Neutrality Agreements: Innovative, Controversial, and Labor's Hope for the Future*, 17 NEW LAB. F., Spring 2008, at 35-41.

214. See, e.g., Brudney, *supra* note 13, at 841-62; Sean Higgins, *High Court to Review Sweetheart Deals Between Unions, Management*, WASH. EXAMINER (July 2, 2013), <http://washingtonexaminer.com/high-court-to-review-sweetheart-deals-between-unions-management/article/2532570> ("The Supreme Court will now determine whose interest the collective bargaining process is meant to promote: the workers' or the union's.").

215. See Cooper, *supra* note 13, at 1591.

216. It is certainly possible that a neutrality agreement could also involve a monetary payment that would clearly amount to a "thing of value." Indeed, granting *Mulhall* a generous reading, the Eleventh Circuit had concluded that the political support could be monetized easily, rendering it clearly analogous to a *quid pro quo* cash payment. See *Mulhall*, 667 F.3d at 1215-16. However, the general theory underlying *Mulhall* and the other § 302 suits cuts more broadly and focuses on the nature of the neutrality agreement itself, with an emphasis on speech rights rather than cash. See Benjamin Sachs,

Represented by attorneys from the National Right to Work Legal Defense Foundation, Mulhall asserted just such a claim. Bringing suit under § 302, he alleged that the neutrality agreement violated the statute, because his employer and Unite had agreed to exchange “a thing of value.” After the District Court dismissed Mulhall’s complaint, holding that Unite’s assistance in supporting the ballot initiative was not “a thing of value,” the Eleventh Circuit reversed and held that a jury could find that a thing of value had indeed been exchanged.<sup>217</sup>

The decision sparked outrage among union supporters and intense speculation among labor law scholars and practitioners.<sup>218</sup> If the Supreme Court upheld the decision, would all neutrality agreements be barred?<sup>219</sup> How would unions be able to compete with employers successfully in the battle for workers’ hearts and minds?

After hearing argument on the case, in December 2013, the Supreme Court ended almost two years of speculation in what “could [have been] the most significant labor law case in a generation”<sup>220</sup> with a one-sentence order: “The writ of certiorari is dismissed as improvidently granted.”<sup>221</sup> However, Justices Breyer, Kagan, and Sotomayor dissented. Among other objections to the Court’s order, Justice Breyer stated that “I believe we should also ask for further briefing on a third question: the question whether § 302 authorizes a private right of action.”<sup>222</sup> Leaving the Eleventh Circuit’s decision undisturbed and failing to address this question would “raise[] the

*Another Reaction to the Mulhall Argument*, ONLABOR (Nov. 13, 2013), <http://onlabor.org/2013/11/13/another-reaction-to-the-mulhall-argument/>.

217. See *Mulhall*, 667 F.3d at 1213.

218. See, e.g., T. Ward Frampton, *Neutrality Agreements and Article III Standing: Why UNITE HERE Local 355 v. Mulhall is Nonjusticiable* (Oct. 7, 2013) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2336677](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336677); Jack Goldsmith, *The Two Central Issues in Mulhall*, ONLABOR (Aug. 19, 2013), <http://onlabor.org/2013/08/19/the-two-central-issues-in-mulhall-2/>; Josh Eidelson, *Scalia’s Chance to Smash Unions: The Huge Under-the-Radar Case*, SALON (Nov. 13, 2013), [http://www.salon.com/2013/11/13/scalias\\_chance\\_to\\_smash\\_unions\\_the\\_huge\\_under\\_the\\_radar\\_case/](http://www.salon.com/2013/11/13/scalias_chance_to_smash_unions_the_huge_under_the_radar_case/).

219. *But cf.* Brief for United States as Amicus Curiae at 11, *UNITE HERE Local 355 v. Mulhall*, 134 S. Ct. 594 (2013) (Nos. 12-99 and 12-312), <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/Mulhall.Invitation1.pdf> (“Only three circuits have considered whether an employer’s compliance with a voluntary recognition agreement is a ‘payment, loan, or delivery’ of a ‘thing of value’ in violation of Section 302. All three of those courts recognized that employers and unions may voluntarily agree to set ground rules for union organizing campaigns without violating Section 302.”). The Third Circuit had earlier rejected a reading of § 302 analogous to Mulhall’s by concluding that the employer was “unable to provide any legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery.” *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

220. Benjamin Sachs, *The Court and the Future of Unions: Private Sector Edition*, ONLABOR (Aug. 9, 2013), <http://onlabor.org/2013/08/09/the-court-and-the-future-of-unions-private-sector-edition/>.

221. *UNITE HERE Local 355 v. Mulhall*, 134 S. Ct. 594, 594 (2013).

222. *Id.* at 595.

specter that an employer or union official *could be found guilty of a crime that carries a 5-year maximum sentence . . .* if the employer or union official is found to have made certain *commonplace* organizing assistance agreements with the intent to ‘corrupt’ or ‘extort.’”<sup>223</sup> That is, unions might have much bigger worries than their organizing strength, like prison.

While *Mulhall* is the latest § 302 suit to capture the labor community’s attention, it is not unique. Over the same period of time that the anti-union civil RICO suits have begun to emerge as a possible means for employers to combat corporate campaigns,<sup>224</sup> § 302 suits challenging neutrality agreements also began to appear in federal courts across the country.<sup>225</sup> Unlike the RICO suits, however, *Mulhall* was initiated by workers, rather than employers.<sup>226</sup> The theory articulated by Mulhall in his complaint was reflective of this general class of cases: the employer and the union, by agreeing to some set of terms prior to an NLRB-certified election, had unlawfully exchanged “a thing of value.”

Indeed, it is this underlying concern that a union and employer may conspire to benefit at the expense of their employees that has been articulated as the rationale underlying § 302. In *Arroyo v. United States*,<sup>227</sup> the Supreme Court undertook an analysis of the statute’s legislative history, stating that:

When Congress enacted [§ 302] its purpose was . . . to deal with problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process. Throughout the debates in the Seventy-ninth and Eightieth Congresses there was not the slightest indication that [§ 302] was intended to duplicate state criminal laws. Those members of Congress who supported the amendment were concerned with *corruption* of collective bargaining through *bribery* of employee representatives by employers, with *extortion* by employee representatives, and with the possible *abuse by union officers of the power which they might achieve* if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem because of the demands which had then recently been made by a large international union for the

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223. *Id.* (emphasis added).

224. *See supra* Part III.A.

225. *See, e.g.*, *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206 (3d Cir. 2004); *Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714 (N.D. Ohio 2006); *Complaint at 1, Burton v. Auto Workers*, No. 1:14-cv-76 (E.D. Tenn. dismissed May 28, 2014).

226. *See Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211, 1213 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 2849 (2013), and *cert. denied*, 134 S. Ct. 822 (2013), and *cert. dismissed as improvidently granted*, 134 S. Ct. 594 (2013).

227. 359 U.S. 419 (1959).

establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials.<sup>228</sup>

Thus, where the victim in the RICO narrative is consistently the employer that has been harmed by an aggressive organizing campaign,<sup>229</sup> in the LMRA context, the victim is the worker.

According to the logic of these § 302 suits, the allegedly corrupt dealings between union and employer have served to enrich both parties' interests at the expense of the workers. The employer has betrayed its employees by stacking the deck in favor of unionization,<sup>230</sup> and the union has (preemptively) betrayed the worker by agreeing to forego a subset of bargaining techniques and signaling its general willingness to cooperate with the employer.<sup>231</sup> For purposes of this Article, this dynamic is particularly significant for two reasons: (1) its contribution to the framing of unions as criminally corrupt and doing criminal harm *to individual workers*, and (2) its basis as a grounding for the implied private rights of action claimed in the § 302 suits.

First, the identification of worker as victim is critical to such claims as de-legitimizing the union as both a legal and a social entity. By invoking the language and legal violence of criminal law, a private suit under § 302 allows for a holding that a union is criminally harming specific workers. In this way § 302, like RICO, can—at least in some circumstances—harken back to the criminal roots of labor regulation discussed in Part II. By situating the nature of the wrong as criminal and culpable because of harm to specific victims, such suits operate outside of a legal and rhetorical framework that includes unions as a legitimate, non-criminal component of labor markets.

The proliferation of so-called “right-to-work” statutes<sup>232</sup> and the articulation of scholarly and political criticism of unions as inefficient or

228. *Id.* at 424-26 (emphasis added) (footnotes omitted) (citations omitted); *see also Sage Hosp.*, 390 F.3d at 219 (“In short, section 302 ‘was passed to address bribery, extortion and other corrupt practices conducted in secret.’” (quoting *Caterpillar Inc. v. Int’l Union, United Auto.*, 107 F.3d 1052, 1057 (3d Cir. 1997))); *Turner v. Local Union No. 302, Int’l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) (“The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers.”).

229. In this way, the RICO cases serve as a powerful analog to the cases applying the labor conspiracy doctrine. *See supra* Part II.A.

230. *See Brudney, supra* note 13, at 841-62.

231. *See Hurd, supra* note 213, at 41-42.

232. These laws bar “union security agreements”—agreements between unions and employers that allow unions to collect dues from employees as a condition of their employment. *See, e.g.,* Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1645-46 (2014); Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 428 (2012); Oswald, *supra* note 140, at 698-702. Right-to-work laws have been criticized as creating “free rider” problems, as these statutes (combined with the requirements of federal labor law) may require a union to represent

flawed from a distributional standpoint,<sup>233</sup> for instance, demonstrate a hostility to, or at least skepticism about, unionization in certain quarters. However, such anti-union arguments and anti-union laws clearly sound in the register of economic efficiency and distributional fairness. These are legal and political arguments predicated on normative views about how the market should be structured or should operate, based either on descriptive or imagined accounts of what unions do.<sup>234</sup> While these economically grounded critiques may be informed by background assumptions about unions as corrupt, tied to criminality, or perhaps even rooted in a history of violence or thuggery,<sup>235</sup> the arguments themselves, and the right-to-work statutes that they have spawned, do not sound in criminal law. Instead, they are explicitly civil, grounded in the sorts of discourse about efficiency and the proper structuring of firms and markets that are generally associated with tort law or other civil or administrative realms.<sup>236</sup>

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employees who may in turn refuse to pay dues for this service. *See, e.g.*, Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 355 (2012); Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and Its Implications for Public Policy*, 70 U. COLO. L. REV. 871, 930 (1999).

233. *See, e.g.*, MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 228-47 (1980); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1365-67, 1382 (1983); Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 471 (1993) (“[U]nions are seen as economically inefficient—in the sense that society would be wealthier without them—because cartel behavior generally is viewed by economists as inefficient.”).

234. As Raymond Hogler and Steven Shulman contend in their economic analysis of right-to-work statutes, “[e]conomists tend to be either pro-union or anti-union depending upon their sympathy with the goals of the labor movement, their adherence to the ideal of a free labor market, and their reading of the literature on the effects of unions.” Hogler & Shulman, *supra* note 232, at 922.

235. *See* Levin, *Blue-Collar Crime*, *supra* note 15, at 629-31; MINDA, *supra* note 108, at 142-45; WITWER, *SHADOW OF THE RACKETEER*, *supra* note 115, at 9-13; Jonathan H. Adler, *Is “Right to Work” Libertarian?*, VOLOKH CONSPIRACY (Dec. 12, 2012), <http://www.volokh.com/2012/12/12/is-right-to-work-libertarian/> (“I’m not a particular fan of unions as they’ve manifested themselves in the U.S. (Exposure to union thuggery and violence as a child will do that to a chap).”).

236. This is not to say, of course, that economic analysis and discussions of market efficiency are unknown to criminal law and criminal legal scholarship. *See generally* Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299 (1996); Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 UTAH L. REV. 439 (2003); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law As a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 785 (2005); Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985). Indeed, economic analysis of law may be one of the contributing factors to the theoretical breakdown of the criminal-civil distinction discussed *infra*. *See* Steiker, *supra* note 33, at 780 (“The theoretical distinction between remedial and retributive justice, never unproblematic, has become increasingly unstable in light of the ascendance [sic] of economic analysis of law, which strives for a single model of optimal sanctioning that transcends old categories . . . . Economic analysis of law, which has focussed [sic] on the common deterrent purpose of the criminal and civil sanctions, has correlated with the expansion of ‘hybrid’ sanctioning authority in the administrative state.”). Further, this is not to say that economic analysis is politically pure or devoid of moral judgments or political inflection.

In contrast, suits under § 302 take labor disputes and disputes about unionization's normative desirability out of the realm of ostensibly dispassionate economic analysis, and re-imbed discussions of unions' possible shortcomings in terms of corruption, moral culpability, and criminal harm. John Coffee articulates this morality-based view of the civil-criminal distinction:

the factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far more than tort law, the criminal law is a system for public communication of values.<sup>237</sup>

Viewed through such a lens, the moral condemnatory function of stating a claim under a criminal theory (and a criminal statute) transforms what might otherwise be a claim about contractual rights and remedies into an evocation of shared values and an attempt to identify unions and employers that cooperate with unions as somehow deviant.<sup>238</sup>

Granted, some scholars may explain the decision to treat such allegedly corrupt dealings as criminal under § 302 in economic terms as rooted simply in an attempt to obtain optimal deterrence against unions and employers conspiring against employees' interests.<sup>239</sup> Similarly, we might view tort law as embodying a morally condemnatory approach—that is, a

Indeed, much of this Article seeks to break down the clear distinctions between the pure moral discourse often employed by deontological scholars of the criminal law and the pure economic discourse of those who study labor markets. Rather, as I argue in Part IV.A *infra*, in the context of the civil-criminal distinction, it is to say that criminal law and its condemnatory function play a special role in explicitly structuring social discourse and public discussions of morality. By importing the rhetorical and institutional dimensions of criminal law into arguments about the proper structure of the labor market, I argue, we risk confusing debates about efficiency with those about morality, and vice versa.

237. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193-94 (1991).

238. See DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 67-68 (1990) ("[Criminal punishment] is more than an instrument of crime control. It is also a sign that the authorities are in control, that crime is an aberration and that the conventions which govern social life retain their force and vitality"), *id.* at 67 ("[T]he rituals of criminal justice . . . are ceremonies which, through the manipulation of emotion prompt particular value commitments on the part of the participants and the audience and thus act as a kind of sentimental education, generating and regenerating a particular mentality and particular sensibility"); Ely Aharonson, *"Pro-Minority" Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique*, 13 NEW CRIM. L. REV. 286, 291 (2010) (describing a "dominant view that perceives criminal law as a medium through which societies construct collective values and forge social solidarities"); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509, 527-29 (2014).

239. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (constructing a model to determine optimal rates of punishment and enforcement); *cf.* Coffee, *supra* note 237, at 194-95 (critiquing an economic analysis of criminal law as "pricing" rather than "prohibiting" misconduct).

tort may be civil, but it is a *wrong*.<sup>240</sup> Justifications for tortious interference claims or the civil suits that formed the basis of the pre-NLRA labor injunctions may well have rested not only in efficiency rationales, but also in a conception of the morality of the marketplace.

However, to view the use of criminal statutes in the labor context as noteworthy is not to embrace a specific view of tort law's justifications. Rather, as long as we believe that there must be some meaningful distinction between criminal laws and civil ones, the decision to proscribe conduct via a *criminal* statute, rather than a *civil* one requires further inspection. Criminal law has unique costs, and a turn to criminal statutes should require a weighing of those costs against any benefits. While the next Part will return to these larger questions of the civil-criminal distinction and the costs of proceeding under criminal paradigms, I will cabin this theoretical inquiry momentarily. Instead, this Part next turns to the second critical aspect of the § 302 litigation: the (implied) private right of action.

As Justice Breyer's *Mulhall* dissent emphasizes, the actual viability of *any* private rights of action under § 302 remains a live question. In urging the Court to ask for additional briefing, rather than dismiss the case, Justice Breyer

recognize[d] that the Court said, long ago and in passing, that § 302(e) "permit[s] private litigants to obtain injunctions" for violations of § 302. But, in light of the Court's more restrictive views on private rights of action in recent decades, the legal status of *Sinclair Refining's* dictum is uncertain. And if § 302 in fact does not provide a right of action to private parties like *Mulhall*, then courts will not need to reach difficult questions about the scope of § 302, as happened in this case, *unless the Federal Government decides to prosecute such cases rather than limit its attention to cases that clearly fall within the statute's core antibribery purpose*.<sup>241</sup>

Even if § 302 actually does not provide a basis for suits like *Mulhall's* the statute might well continue to serve as a weapon against unionization, as long as the federal government does not prosecute under the theory advanced by *Mulhall* (*i.e.*, a neutrality agreement may constitute a "thing of value").

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240. See, e.g., JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 3 (3d ed. 2012); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1123 (2007) ("On its face, tort law is a law of wrongs. The word 'tort' means wrong. Before tort was identified as a legal category in its own right, torts were known as 'private wrongs.'") (footnotes omitted); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 40-41 (1998).

241. *UNITE HERE Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting) (emphasis added) (citations omitted).

While Justice Breyer's dissent asked whether § 302 implies a private right of action, this Article does not purport to provide an answer.<sup>242</sup> Instead, my focus here is on the issues inherent in attempting to regulate labor disputes, or determine the normative desirability of neutrality agreements, via a criminal statute. Indeed, the legitimate statutory authority for these claims may be less important in the immediate future than their continued use.<sup>243</sup> Much like the pre-NLRA labor injunctions<sup>244</sup> and the private civil RICO suits,<sup>245</sup> discussed above, the very filing of a suit may accomplish many of the plaintiff's goals. Forcing a union to defend against the claim in and of itself may be a victory for opponents of organizing.<sup>246</sup> Litigation is costly, and being able to frame a union's conduct in criminal terms serves a valuable public relations purpose, by conjuring up the "shadow of the racketeer."<sup>247</sup>

Further, the worker-victim dynamic of the § 302 suits frames unions as directly harmful to workers. Where a private RICO complaint might serve as an employer's "public relations piece,"<sup>248</sup> inciting general hostility to unionization, Mulhall's complaint put three specific groups on notice:<sup>249</sup> (1) unions are alerted that neutrality agreements may include additional financial and reputational costs associated with litigating such claims; (2) employers are alerted that, by entering into neutrality agreements, they risk being guilty of conspiring with unions against their employees; and (3)

242. Resolving this question would not only involve an analysis of the LMRA's legislative history, but also an inquiry into how the Court's general attitude toward private rights of action has evolved in the fifty plus years since *Sinclair Refining v. Atkinson*, 370 U.S. 195 (1962). See generally Jack Goldsmith, *Three Problems in Mulhall*, ONLABOR (Aug. 21, 2013), <http://onlabor.org/2013/08/21/three-problems-in-mulhall/>; Jack Goldsmith, *Further Thoughts on the Implications of the Mulhall Dismissal*, ONLABOR (Dec. 11, 2013), <http://onlabor.org/2013/12/11/further-thoughts-on-the-implications-of-the-mulhall-dismissal/>.

243. That being said, a judicial or legislative determination that § 302: (1) did not confer a private right of action; (2) did not apply to neutrality agreements; and (3) was not the proper vehicle for pursuing the issues raised in these suits, would certainly go a long way towards curtailing continued litigation and the collateral consequences of the suits described *infra*. Cf. Brudney, *Collateral Conflict*, *supra* note 25, at 794-95 (arguing that curtailing anti-union civil RICO suits would be a good first step towards broader labor law reform). Put simply, there is a clear difference between: (1) bringing suit under a novel or controversial theory; and (2) continuing to file claims, after receiving an explicit judicial or legislative mandate foreclosing relief, as a means of burdening a defendant. The former may work and may lead to the desired precedent; the latter may lead to sanctions or countersuit under anti-SLAPP legislation. Cf. More, *supra* note 139, at 216 n.44 (discussing the application of anti-SLAPP laws to frivolous anti-union claims).

244. See *supra* notes 58-64 and accompanying text.

245. See *supra* Part III.A.

246. See *supra* note 188 and accompanying text.

247. See generally WITWER, SHADOW OF THE RACKETEER, *supra* note 115 (discussing the cultural framing of union leaders as criminal).

248. *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 574 (S.D.N.Y.), *aff'd*, 355 F. App'x 508 (2d Cir. 2009).

249. Of course, the LMRA suits also may serve the same general purpose of inciting public and voter hostility towards unions identified in the RICO context. See *supra* Part III.A.

workers are alerted that unions are engaged in possibly criminal activities that demonstrate that union leadership is more focused on amassing wealth and power than serving workers' interests. These characterizations of the signaling effects of § 302 litigation may suffer from over reliance on generalizations, but the key issue remains: the suits themselves re-cast organizing efforts and frame unions and workers as parties at odds.

Substantively, re-casting the neutrality agreement as a “thing of value” performs a similar legal and rhetorical function as the RICO suits' characterizations of “extortionate” conduct.<sup>250</sup> Unions are once again framed as corrupt, violating the morality of the marketplace. While the allegedly unlawful conduct and the concessions sought by unions in the RICO suits clearly go to the heart of the union's role as an economic unit (at times) oppositional to employers,<sup>251</sup> the conduct at issue in the § 302 suits is less essential to the functions identified in the NLRA.<sup>252</sup> Indeed, as discussed above, the neutrality agreement is a relatively recent development in labor-management relations.<sup>253</sup> Nevertheless, the arguments raised in the § 302 suits would transform a “thing of value” from a tangible, or monetary benefit, which unions, employers, and courts could clearly identify, to an intangible bundle of speech rights. As noted above, there may be good reasons for those concerned about workers' rights to oppose neutrality agreements, but is framing them as tantamount to monetary bribes—and, therefore, criminal conduct—the best way to stop the practice? Given the history of criminalizing workers' speech and associational rights outlined in Part II, I argue that it would be a mistake to embrace such a nebulous (and criminal) definition of what amounts to bribery in the union context.<sup>254</sup>

Much like the RICO suits that allege a criminal violation as their predicate act,<sup>255</sup> the § 302 suits are premised upon an allegation that a felony has occurred.<sup>256</sup> If the terms of a neutrality agreement constitute a “thing of value,” then both union and employer have violated § 302(a) and therefore are subject to the penalties outlined in § 302(d). Or, more precisely, an

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250. See *supra* Part III.A.

251. See, e.g., Brudney, *Collateral Conflict*, *supra* note 25, at 774 (“[I]t is important to recognize that federal labor law legitimates and indeed protects what might in ordinary meaning terms be thought of as extortionate activity.”).

252. *But see* *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004) (concluding that the employer was “unable to provide any legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery”).

253. See *supra* notes 211-213 and accompanying text.

254. See *Sage Hosp.*, 390 F.3d at 219.

255. See *supra* Part III.A.

256. See *UNITE HERE Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting); Benjamin Sachs, *Has the Employer in Mulhall Confessed to a Felony?*, ONLABOR, (Sept. 23, 2013), <http://onlabor.org/2013/09/23/has-the-employer-in-mulhall-confessed-to-a-felony/>.

employer and a union *might* be subject to the penalties if a U.S. Attorney's office were to decide to prosecute.

As of the writing of this Article, a federal prosecutor has yet to advance the National Right to Work Legal Defense Foundation's theory that a neutrality agreement might violate § 302.<sup>257</sup> No criminal charging document identified a neutrality agreement as a predicate "thing of value." Therefore, what is essentially a theory of criminal liability has remained confined to civil litigation. Indeed, *Adcock v. Freightliner LLC*,<sup>258</sup> and *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*,<sup>259</sup> the only appellate decisions other than *Mulhall* to address this broad reading of § 302, make no mention of the statute's criminal provisions or the potential for criminal liability that could stem from the plaintiffs' theory.<sup>260</sup>

Further, in *Mulhall*, Hollywood Greyhound Track, *Mulhall's* employer, explicitly argued in its brief before the Supreme Court that the neutrality agreement was a "thing of value."<sup>261</sup> "In no uncertain terms, then," observed Benjamin Sachs, "the employer is arguing to the Supreme Court of the United States that it—the employer—has violated a federal criminal statute and has committed a felony."<sup>262</sup> This confession might be dismissed as one of the many "strange things" about *Mulhall*,<sup>263</sup> but it also demonstrates the troubling phenomenon that this Article hopes to highlight: the employer effectively disregarded the criminal nature of the statute. In an effort to undercut a union's organizing tactic, the employer (like *Mulhall*, himself) turned to the easiest tool in sight—a criminal statute. But in crafting its argument, the employer explicitly conceded that it (and many other employers in similar situations) had committed a felony. As it defies credulity that this was an oversight on the part of the employer and its attorneys, I argue that we should ascribe this confession to a belief that no

257. *But cf.* cases cited *supra* note 104 (collecting cases in which union officials were prosecuted under § 302 for receiving monetary gifts).

258. 550 F.3d 369 (4th Cir. 2008).

259. 390 F.3d 206 (3d Cir. 2004).

260. *But see* *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 n.3 (4th Cir. 2008). In a single footnote, the Fourth Circuit alluded to the statute's criminal nature by stating that "we need not decide the extent to which intangible items may have value under § 302 or any other criminal statute prohibiting the delivery, conveyance, or acceptance of a 'thing of value.'" *Id.* However, this passing reference marks the court's only acknowledgement that it is interpreting a criminal statute.

261. The first section of the brief's argument bears the title: "A Contractual Agreement in Which a Union Requests and Receives Employer Commitments Not to Oppose Unionization, Access to Employees and Facilities, Voluntary Recognition on the Basis of Authorization Cards and Interest Arbitration Concerning Employment Terms is a 'Thing of Value.'" Brief for Respondent at 10, *UNITE HERE Local 355 v. Martin Mulhall*, 134 S. Ct. 594 (2013) (Nos. 12-99, 12-312).

262. Sachs, *supra* note 256.

263. *See id.* As commentators noted, the case was riddled with possible procedural and jurisdictional defects and peculiarities that ultimately may have led to the Supreme Court's decision to dismiss. *See, e.g.*, Eidelson, *supra* note 218; Frampton, *supra* note 218; Goldsmith, *supra* note 242.

prosecution would follow. That is, while criminal in name and form, for practical purposes, § 302(d) has receded from view, rendering § 302(a) a civil, injunctive provision.<sup>264</sup>

While this dynamic of civil and criminal liability premised on identical facts or theories is hardly unique to the anti-union suits discussed in this Article,<sup>265</sup> the dynamic raises issues peculiar to the labor law context. Principally, the specific history of labor law's relationship to criminal law makes the identification of union or worker conduct as criminal or as *essentially* criminal resonate with the deep-seated cultural narrative that underpinned pre-NLRA U.S. labor regulation.<sup>266</sup> By invoking the specter of criminal liability, the § 302 plaintiffs emphasize the dimensions of labor law that continue to exist outside of the confines of NLRB proceedings. Victory for the plaintiffs in these cases would amount to declaratory relief in the form of a judgment that a union had more likely than not committed a felony, and the union's activity must therefore be enjoined.

These suits stand as a clear analog to the labor injunctions that formed "labor law" in the moment preceding unionization's formal, statutory authorization in the 1930s.<sup>267</sup> As the Third Circuit concluded in rejecting a § 302 claim lodged against a neutrality agreement in *Sage Hospitality*, "[the employer's] interpretation of section 302 would wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions."<sup>268</sup> Indeed, given that "[a] violation of § 302 is one of the enumerated predicate racketeering activities in the RICO statute,"<sup>269</sup> the two statutes would combine to recast labor disputes as the proper province for the sort of criminal and injunctive action discussed in Parts II A and B, *supra*.

With this doctrinal overview of § 302 and the civil RICO suits as a background, the next Part steps back to consider the significance of a potential return to "criminal labor law." What do these suits and their place

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264. Part IV delves more deeply into the potential significance of criminal law without punishment.

265. See, e.g., *United States v. Van Engel*, 809 F. Supp. 1360, 1371 (E.D. Wis. 1992), *rev'd*, 15 F.3d 623 (7th Cir. 1993) (quoting a statement by G. Robert Blakey, "the father of the federal RICO statute," that "[s]ettlements, not only of RICO claims, but also of anti-trust and securities matters always involve the settlement of issues that raise at least a possibility of a parallel criminal prosecution"); Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929, 983-87 (1990) (discussing the dynamics of parallel civil and criminal investigations); Carol E. Longest, *Parallel Civil and Criminal Proceedings*, 24 AM. CRIM. L. REV. 855, 855, n.1 (1987) (identifying statutory bases for parallel proceeding in: "15 U.S.C. §§ 1-3, 15, 15a (1982) (antitrust); I.R.C. § 7201 (1982) (tax); 15 U.S.C. §§ 77t(b), 78u(d) (1982) (securities)").

266. See *supra* Part II.A.

267. See *supra* notes 58-63 and accompanying text.

268. *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

269. *Adcock v. Freightliner LLC*, 550 F.3d 369, 373 n.2 (4th Cir. 2008) (citing 18 U.S.C. § 1961(1)(c)).

in U.S. labor history tell us about unions' place in our current socio-legal moment? And, what might a criminal (or quasi-criminal) turn in regulating unions tell us about the role of criminal law in structuring markets?

#### IV.

##### THE CRIMINAL TURN IN CIVIL REGULATION

Until this point, this Article has focused primarily on the regulation of unions and has treated criminal law as a frame, or lens through which to address the legal structuring of the labor market. This Part takes a broader view and addresses the tension between "civil" and "criminal" legal regimes that underlies the long history of "criminal labor law." Certainly, evaluating the consequences of the civil-criminal distinction overall would be a massive undertaking and would greatly exceed the scope of this Article.<sup>270</sup> Instead, this Part treats labor law as a case study, a space in which we can examine the vitality (or obsolescence) of the distinction and the consequences of criminal law's ubiquity. Indeed, thinking about "criminal labor law" should not only illuminate the institutional decisions undergirding labor law; rather, labor law and its entanglement with criminal doctrine may provide a valuable frame through which to consider broader questions about dynamic trade-offs between criminal and civil regulation.

Labor law's unique civil-criminal history, therefore, serves as an underexplored angle of entry and inquiry into contemporary debates about the proper scope of criminal law and the causes and consequences of overcriminalization. As examined at length in Part II, labor law stands as an unusual doctrinal realm that has fluctuated between civil and criminal regulatory models. The law of criminal conspiracy comprised traditional Anglo-American "labor law,"<sup>271</sup> so the default rules against which the NLRA and subsequent labor law doctrines have operated were those that set up a paradigm of outlawry. In this way, labor law becomes an interesting illustration of criminalization, de-criminalization, and the political economy of each regulatory move. Further, the potential for a return to criminal law in regulating organized labor raises the question of whether the criminal model can (or should) be abandoned following a decriminalization project.

To address these issues, this Part first examines the exceptional qualities of "criminal labor law," specifically its historical roots. Next, I argue that the potential application of criminal statutes in the union context illustrates a broader set of pathologies in U.S. criminal law.

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270. See Coffee, *supra* note 237, at 202 ("Short of a doctrinal treatise or a major empirical study, no article could hope to demonstrate the degree to which the criminal law has encroached upon formerly 'civil' areas of the law.").

271. See TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 189.

### A. *Criminal Labor Law As Exceptional*

As an historical matter, much about the recent attempts by union opponents to resuscitate criminalization of worker organizing feels like *déjà vu*. Faced with a legal system that had rejected the outright criminalization of unionization, union opponents seek to invoke the state violence and delegitimizing force of criminal law. This reprisal of the pre-NLRA injunctive/criminal regulatory regime warrants a look back at the critiques of that period. Returning to the substantial scholarly criticism of this earlier moment of “labor regulation by injunction,”<sup>272</sup> the same issues emerge.

Instead of the specialized dispute resolution mechanisms of the NLRB,<sup>273</sup> the injunction or quasi-criminal system relies on private plaintiffs and on courts acting, frequently in an interlocutory fashion. But, as in the pre-NLRA era, the issue is not simply that private attorneys general might serve as regulators<sup>274</sup> or that Article III judges are the ones levying decisions. Rather, it is the invocation of state violence or the potential for force implicated by the criminal law. As noted above, the labor injunctions of the late nineteenth and early twentieth centuries often involved enforcement by police, military, or some form of explicit use or threat of official force.<sup>275</sup> Similarly, the current re-deployment of criminal principles by private actors implicates at least the threat of state violence. Even if largely ignored,<sup>276</sup> the threat of prosecution hangs, like the Sword of Damocles, over these proceedings.

Thinking back to Judge Winter’s characterization of the highly politicized nature of the pre-Norris-LaGuardia labor injunctions,<sup>277</sup> it is

272. See *supra* notes 58-63 and accompanying text.

273. This is not to say that the NLRB or “labor law” proceedings are immune from these criticisms and are somehow divorced from politics or the same concerns about politicization that infect private suits and judicial oversight of labor disputes. Indeed, scholars have frequently leveled such criticisms at the NLRB and its jurisprudence. See, e.g., James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 221-23 (2005); Joan Flynn, “Expertness for What?”: *The Gould Years at the NLRB and the Irrepressible Myth of the “Independent” Agency*, 52 ADMIN. L. REV. 465, 545 (2000); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 571 (2007); Brian J. Woldow, Note, *The NLRB’s (Slowly) Developing Beck Jurisprudence: Defending A Right in A Politicized Agency*, 52 ADMIN. L. REV. 1075, 1087-88 (2000).

274. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1140-41 (2012).

275. See *supra* note 58 and accompanying text; see also Forbath, *The Shaping of the American Labor Movement*, *supra* note 35, at 1186-87 (“[I]njunctions were invoked by employers, police, and the press to justify measures like arming strikebreakers or jailing pickets.”); White, *Workers Disarmed*, *supra* note 1, at 69, 72, 75; Ahmed A. White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 NEV. L.J. 561, 573, 576-77 (2011).

276. See *supra* notes 261-264 and accompanying text.

277. See *supra* note 61 and accompanying text.

important to recognize the contingency of the current suits.<sup>278</sup> Certainly, from a realist perspective, adjudication in any legal area cannot be divorced from its political context.<sup>279</sup> But, here, the law-politics nexus becomes particularly noteworthy and inescapable. First, labor litigation is deeply imbedded in a long history of highly fraught political disputes about the desirability and function of unions.<sup>280</sup> Second, the presence of private litigants operating not only as attorneys general, but also potentially as some sort of private prosecutors, suggests an implementation of criminal law principles and criminal law's social-structuring effect, without the public accountability formally associated with the criminal justice system. Further, in light of this latter dynamic, the state's decision to (or not to) prosecute, after obtaining what amounts to an indictment via civil suit,<sup>281</sup> signals a political decision about: (1) the normative desirability of unions; and (2) the normative desirability of neutrality agreements.

Ultimately, then, the civil-criminal distinction in these suits may come down to a politically inflected decision about whether a prosecution follows a plaintiff's successful determination. Indeed, it is important to note that none of the suits discussed in Part III were criminal. That is, as a doctrinal matter, each suit involved a civil plaintiff and a defendant. Judgment in favor of the employer-plaintiffs would, of course, have consequences. Unite might have been unable to organize the racetrack workers under a neutrality agreement in *Mulhall*,<sup>282</sup> and the SEIU might not have been able to hold a card-check election in *Wackenhut*.<sup>283</sup> However, neither union (members, or leaders) faced prosecution. Even in the briefly discussed context of public civil RICO suits, the "United States" acted as plaintiff, rather than prosecutor. Despite channeling the rhetorical force of the polity or public

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278. *But cf. supra* note 274 (noting that politics also permeated applications of the NLRA and the NLRB's adjudication).

279. *See generally* MINDA, *supra* note 108. *See also* Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263, 268 (1984); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 81-87, 96-100 (1984); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 414 (1999); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766 (1997). *But see* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1514 (2003).

280. *See generally* ATLESON, *supra* note 79 (critiquing the politics underpinning judicial treatments of workers' rights); MINDA, *supra* note 108 (examining the ways in which ideology and politically laden metaphors shape the legal treatment of labor relations and boycotts, more generally); Forbath, *The Shaping of the American Labor Movement*, *supra* note 35 (tracing the impact of free-market ideology on U.S. labor law and labor injunctions).

281. That is, victory for *Mulhall* or one of the § 302 plaintiffs would require a judgment that, more likely than not, the terms of the neutrality agreement in question violated § 302(a). As the probable violation of § 302(a) would be all a prosecutor would need to seek a charge under § 302(d), the civil judgment would be the same as the determination sought from a grand jury or required in support of a charging document.

282. *See supra* Part III.B.

283. *See Wackenhut Corp. v. SEIU*, 593 F. Supp. 2d 1289, 1290 (S.D. Fla. 2009).

interest,<sup>284</sup> the state, in these cases, did not pursue prison time (or, at least, did not as a part of the same proceeding). But does this mean that “criminal labor law” is not criminal after all?

Perhaps the answer is that criminal law serves as the background against which unions operate. Even if police and state violence play no explicit role in an organizing campaign, they shape the interactions and strategies—unions operate in the shadow of criminal enforcement. As I argued in Part II, the legal and social spheres of labor relations have always been circumscribed by criminal law and the specter of prosecution.

A skeptical reader might well ask how union organizing or bargaining differs from any other (or, at least, most other conduct): We live in a nation that has a police force and has criminal laws, so the threat of arrest for law-breaking or marginal conduct is always present; yet, would it be fair to characterize all social, economic, and political dealings as operating in the shadow of criminal law?<sup>285</sup> Is a bank customer’s withdrawal from a teller governed by criminal law because a police officer stands outside the bank’s door?

Without wading too deeply into this broader set of theoretical questions about the threat of implicit state violence, the role of police in regulating non-criminal exchanges, and even the nature of the public/private distinction in criminal law,<sup>286</sup> we can look to history as a means of explaining the social meaning of criminal law’s continued relevance in labor relations.<sup>287</sup> That is, as discussed in Part II, the historical paradigm for resolving labor disputes involved the frequent intervention of state forces to subdue workers. Indeed, state violence came not only in the form of conspiracy prosecutions, but in the enforcement of labor injunctions (*i.e.* suits that were not explicitly criminal).<sup>288</sup> Any union or collection of

284. Cf. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 11-12 (2009) (emphasizing the social and cultural significance of captioning criminal cases as “United States v. Defendant”).

285. Cf. Goldberg, *Tort Law for Federalists*, *supra* note 189, at 3 (“I do not mean to dispute that there are certain respects in which tort law is public. For one thing it is law, provided by government—no service, no sheriff, no tort law.”). Put another way, perhaps treating the hypothetical as implicating criminal law adopts an over-expansive reading of the function of “background rules” in shaping social and economic relations. Cf. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478-79 (1923) (examining the ways in which legal background rules and distributions of power shape transactions).

286. Cf. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 120 (2008) (“The details of a comprehensive theory of criminalization require nothing less than a theory of the state . . .”).

287. See White, *Economic Radicalism*, *supra* note 18, at 653-54. In his work on the International Workers of the World, Ahmed White has argued for a broader recognition of the “cultural meaning” of the criminal statutes used to prosecute radical labor activists. See *generally id.* He claims, essentially, that these laws are significant not only as a doctrinal matter, but as a means of shaping the legal, social, and political landscape in which workers organized and advocated for their economic interests. See *id.*

288. See Forbath, *The Shaping of the American Labor Movement*, *supra* note 35, at 1185.

workers does not operate in a vacuum. Instead, the workers or the organizers act in a space shaped by conspiracy prosecutions, by violent confrontations, by the “shadow of the racketeer,” and by the nation’s history of labor unrest.<sup>289</sup>

As Gary Minda has argued, judicial treatment of labor disputes remains imbedded in a cultural narrative of labor violence.<sup>290</sup> While the Wagner Act and the New Deal moment legitimated unions as critical components of a democratic society and the national culture,<sup>291</sup> legal attacks on unions and unionization frequently deploy a very different rhetorical framework, a rhetorical framework tied to labor’s criminal history.<sup>292</sup> The threat of criminal enforcement or criminal intervention in such a space, therefore, takes on a specific cultural meaning—a meaning coded with labor’s criminal past.

### B. *Criminal Labor Law As Illustrative*

But what of the substance of the LMRA and RICO suits and their effects? Should we cordon off discussions of civil suits brought under criminal statutes from broader discussions about the role of criminal law in society? And, perhaps more pointedly, should we view the use of (quasi) criminal judgments that go un-accompanied by criminal punishment as a social good? Using these questions as a guide, this Section treats this discussion of criminal labor law as an entrée into broader debates about criminal law’s place in social and economic regulation. Stepping back from the discussion of labor’s unique criminal history, the question of “punishment” remains a problem for: (1) how to conceptualize criminal labor law within the larger framework of civil-criminal hybrids; and (2) how to extrapolate out from the discussion of criminal labor law to address broader questions about criminal law’s scope as a regulatory institution. That is, can there be criminal law without punishment, or what’s “criminal” about criminal law if punishment doesn’t follow?

The absence of punishment, or, perhaps more accurately, the absence of punishment as a necessary and direct result of a legal judgment presents a particular problem for categorizing, classifying, and critiquing the use of RICO and the LMRA. While scholarly opinions vary widely on how to

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289. See *supra* Part II.

290. See generally MINDA, *supra* note 108.

291. See *supra* Part II.B; see also MICHAEL DENNING, *THE CULTURAL FRONT: THE LABORING OF AMERICAN CULTURE IN THE TWENTIETH CENTURY* (1997) (describing positive presentations of organized labor in mass culture and chronicling the role of unions in cultural production during the 1930s).

292. See Crain & Matheny, *supra* note 12, at 577-78.

theorize criminalization or the civil-criminal distinction,<sup>293</sup> most accounts of criminal law and its distinction from civil liability rest on the role of punishment or state violence. In articulating his theory of criminalization, Douglas Husak argued that “[a] law simply is not criminal unless persons who break it become subject to state punishment . . . .”<sup>294</sup> Husak did not “doubt the logical coherence of a proscription without a sanction,” but he “den[ie]d that the proscription would belong to the criminal law.”<sup>295</sup>

The clear distinction provided by Husak’s definition certainly holds intuitive appeal both theoretically and as a practical matter, due to its easy applicability. That being said, other scholars and courts have remained more circumspect about the possibility of reducing the distinction to such straightforward terms.<sup>296</sup> As Husak noted,<sup>297</sup> this definitional difficulty arises in no small part because of the inability of courts and commentators to agree on when sanctions amount to criminal punishment and when they remain in the realm of civil penalties.<sup>298</sup> In a legal climate characterized by expansive criminal liability, as well as a wide range of civil and administrative penalties, the line between civil and criminal has blurred.<sup>299</sup>

293. See HUSAK, *supra* note 286 (examining the expansive role of criminal law and the potential for principled boundaries to criminalization); Tadros, *supra* note 32 (discussing the possible theoretical distinction between civil and criminal punishment); Dripps, *supra* note 32; Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005) (“To the discredit of the juristic and legislative professions, the centrality of the distinction between civil and criminal law to our jurisprudential paradigm has done nothing to enhance its clarity or cogency. It is no exaggeration to rank the distinction among the least well-considered and principled in American legal theory.”); Steiker, *supra* note 33 (describing the theoretical and judicial struggles to define the civil-criminal distinction).

294. HUSAK, *supra* note 286, at 78.

295. *Id.* at 78, 78 n.101.

296. See, e.g., Steiker, *supra* note 33; Tadros, *supra* note 32.

297. HUSAK, *supra* note 286, at 79-82.

298. See, e.g., *Austin v. United States*, 509 U.S. 602, 621-22 (1993); *United States v. Halper*, 490 U.S. 435, 449 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93 (1997); *United States v. Ward*, 448 U.S. 242, 251 (1980); Steiker, *supra* note 33, at 809-13; Gregory Y. Porter, *Uncivil Punishment: The Supreme Court’s Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 523 (1997).

299. See Pamela H. Bucy, *Private Justice*, 76 S. Cal. L. Rev. 1, 4 (2002) (“Reevaluating our approach to modern day wrongdoing requires consideration of new regulatory tools. This Article addresses the tool of private justice.”); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325-26 (1991) (“Today, the distinction between criminal and civil law seems to be collapsing across a broad front. Although the separation between criminal and civil cases is a legal creation both imperfect and incomplete, this basic division has been a hallmark of English and American jurisprudence for hundreds of years . . . . Now, however, there is a rapidly accelerating tendency for the government to punish antisocial behavior with civil remedies such as injunctions, forfeitures, restitution, and civil fines. Sometimes civil approaches completely supplant criminal prosecutions . . . . More frequently, civil remedies are blended with or used to supplement criminal sanctions, as evidenced by the widespread use of forfeiture in drug cases.”) (footnotes omitted); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 327-28 (2008) (“In earlier days, criminal law was understood to involve public offenses against society, and civil law was

Further, in determining “whether an Act of Congress is penal or regulatory in character,”<sup>300</sup> the Supreme Court has articulated a set of factors that provided little guidance:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .<sup>301</sup>

A cursory reading of these factors illustrates the challenge of applying Husak’s rule in practice: as the criminal law and the administrative state metastasize, they often coexist or comingle, making “punishment” and systemic distinctions highly contingent and uncertain concepts.<sup>302</sup>

As a descriptive matter, the criminal-civil distinction may have grown increasingly difficult to identify and—at the margins—may be largely illusory.<sup>303</sup> However, such a conclusion hardly ends our inquiry and hardly compels any normative conclusions. If we conclude that legal actions in a certain regulatory context straddle the civil-criminal divide to a point that any such classification is meaningless, this does not tell us whether we should abandon the distinction or attempt to resurrect it.<sup>304</sup> Or, to adopt the

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understood to govern private disputes between individuals. But this simplistic formulation of the boundary between civil and criminal law has become antiquated in the age of the administrative state. Now, innumerable civil administrative matters can more fairly be characterized as offenses against society than as private disputes. The rise of the administrative state thus necessitated a new model for explaining the boundary between civil and criminal proceedings.” (footnotes omitted).

300. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

301. *Id.* at 168-69 (footnotes omitted).

302. See generally Bucy, *supra* note 299, at 4 (discussing the elision of civil and criminal regulatory regimes)

303. See Steiker, *supra* note 33, at 783-84 (“In the latter part of this century, however, this sharp distinction [between civil and criminal procedures] has become more difficult for courts to maintain with any clarity. This blurring or destabilization of the criminal-civil distinction is partly due to the increase in the sheer number of ‘hybrid’ legal institutions and practices: ‘[f]rom civil penalties to punitive damages, civil forfeiture to criminal restitution, legal devices that are arguably criminal-civil hybrids seem to be more common than they were a century ago.’” (quoting Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 44 (1996))).

304. By way of analog, challenging the distinction between “public” and “private” does not compel the conclusion that all things private *should* be public or that we should embrace a more powerful state. That the theoretical grounding for private property, private speech, or privacy may be shaky does not require us to embrace a stronger state. It simply means that an argument for “private” rests on a normative preference for a certain social ordering, rather than an internally coherent general theory.

Legal Realist formulation, determining what the law “is” does not tell us what the law “ought” to be.<sup>305</sup>

There may be good reason to bristle at the elision of civil and criminal. In *United States v. United Mine Workers of America*,<sup>306</sup> Justice Rutledge emphasized the strong U.S. preference for a hard divide between civil and criminal spheres in the context of a much-publicized labor dispute:

In any other context than one of contempt, the idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge would be shocking to every American lawyer and to most citizens. True, the same act may give rise to all these varied legal consequences. But we have never adopted, rather our Constitution has totally rejected the continental system of compounding criminal proceedings with civil adjudications.<sup>307</sup>

Whether the distinction was ever as clear as Justice Rutledge asserted is a historical question that falls outside the scope of this Article,<sup>308</sup> nevertheless, it is worth noting that the distinction clearly played a strong theoretical and rhetorical role in structuring the U.S. legal system. As discussed above, to the extent that the U.S. legal system retains criminal law and a specific subset of laws that can trigger incarceration or other criminal sanctions, there must be some reason for the distinction. While criminal law and civil regulatory spaces may have become harder to distinguish, it still seems imperative that we retain some justification for why some laws can trigger punishment, incarceration, and severe restraints on liberty.

Perhaps, then, the issue ultimately raised by the “criminal labor law” suits becomes one of criminal law without punishment. As discussed above, the sticking point in scholarly and judicial accounts of the distinction tends to be whether to categorize the harm visited upon the defendant as “punishment” or some other, non-criminal sanction.<sup>309</sup> And, in the case of the RICO and LMRA suits discussed in Part III, the explicit state violence of criminal prosecution and punishment is clearly lacking. Nevertheless, the legal principles at issue remain criminal, and the logic of the suits—if endorsed by courts—might well support criminal prosecution. Therefore, viewed expansively, criminal labor law may represent a space in which

305. See Karl N. Llewellyn, *Some Realism About Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1254 (1931).

306. 330 U.S. 258 (1947).

307. *Id.* at 364 (Rutledge, J., dissenting).

308. Cf. Steiker, *supra* note 33, at 782 (“To speak of the ‘destabilization’ of anything is to imply that there was a time of stability. In the case of the criminal-civil distinction, this would be a somewhat misleading implication. The distinction between criminal and civil wrongs, and the nature of the processes used to address them, have never been static, but rather have continuously changed over time, often dramatically.”).

309. See *supra* notes 294-302 and accompanying text.

criminal law operates without *criminal punishment* as a necessary accompaniment of culpability or liability.

This specter of criminal law without punishment necessarily poses a major challenge for criminal law scholars concerned with the dual plagues of mass incarceration and overcriminalization. Husak defined overcriminalization as having: (1) too many crimes; and (2) too much punishment.<sup>310</sup> But should we still be troubled by the presence of too many substantive offenses if those offenses do not necessarily lead to further punishment or to the ratcheting up of the U.S. carceral culture? If one of the great difficulties for progressive criminal law scholars, prison abolitionists, and others critical of the nation's criminal justice system is how to deal with misfeasance while avoiding the pathologies of our carceral system,<sup>311</sup> should criminal labor law be an appealing alternate model? The RICO and LMRA suits may have a public de-legitimizing effect for unions, and they may impose assorted social, economic, and political costs on unions, but these suits do not carry with them the clear costs of criminalization and criminal prosecutions. Even if criminal labor law might cause concern for labor activists, might it serve as a helpful model for criminal justice reform scholars?

Put simply, no. While "criminal law without punishment" might retain an intuitive appeal for de-carceration scholars and might indeed have some place in the criminal justice system,<sup>312</sup> its application in the labor context should serve as a warning rather than an invitation. As Jonathan Simon, David Garland, Bernard Harcourt, and other critics of criminal law's expansive reach have argued, the criminal law explosion has resulted from the normalization of criminal statutes as the operative regulatory paradigm in structuring disparate corners of social and economic life.<sup>313</sup> In a society in which the state has taken to "governing through crime,"<sup>314</sup> criminal statutes, police, and the other vehicles of administering criminal justice take the place of regulators or civil servants.<sup>315</sup> When a new social problem arises, or when public opinion supports the disciplining of a certain market or set of market actors, the default means of legal redress has increasingly become

310. See HUSAK, *supra* note 286, at 3-4.

311. See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1589-91 (2012).

312. Providing a descriptive and normative account of what "criminal law without punishment" does, might, or should look like would be a separate project.

313. See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); HARCOURT, *supra* note 34; JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); Aharonson, *supra* note 238.

314. See generally SIMON, *supra* note 313.

315. See HARCOURT, *supra* note 34 (articulating a theory of "neoliberal penalty" in which criminal law has replaced civil or administrative regulatory regimes).

criminal.<sup>316</sup> Despite partisan gridlock and political strife, criminal statutes continue to emerge unscathed from legislatures as ostensible evidence of the state's continued potency.<sup>317</sup>

In the 1960s, Sanford Kadish argued that “criminal law is a highly specialized tool of social control, useful for certain purposes but not for others[,]” and “when improperly used[,] it is capable of producing more evil than good . . . .”<sup>318</sup> But in the current political climate, criminal law frequently becomes a place of bipartisan agreement and the institutional mechanism of choice. Rather than a “highly specialized tool,” it has become a legislative Swiss Army Knife—the trusty aide produced to tinker with any problem presented.

Given these “political pathologies” of criminal law,<sup>319</sup> the quasi-criminal suits discussed in Part III should be of particular concern. While they might be appealing as a means of enforcing legal, moral, and market norms without resorting to the (socially and economically) costly institution of prosecution,<sup>320</sup> they also risk further normalizing criminal law and entrenching it as a regulatory default. That is, in weighing the costs and benefits of criminal law, most critics of criminalization focus on the costs associated with *punishment*.<sup>321</sup> The growing opposition to the War on Drugs, for example, tends to center on the problems with punishment.<sup>322</sup> As society has been forced to confront the ugly realities of mass incarceration, the social reformist promise of criminal law in this realm has lost its luster. But what if—as in *Mulhall*—we remove punishment from the criminalization equation, not by eliminating the state's authorization to punish, but by making it unlikely that the state will act on this authorization?

316. See Brown, *Criminal Law's Unfortunate Triumph*, *supra* note 34, at 660-61; HARCOURT, *supra* note 34, at 203-08; Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777, 1794-1803 (2013).

317. See, e.g., NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008) (discussing the impact of electoral politics on the expanding criminal code); Aharonson, *supra* note 238, at 302-03; James B. Jacobs & David Kairys, Debate, *Can Handguns Be Effectively Regulated?*, 156 U. PA. L. REV. 188, 190 (2007) (“There are many types of gun control that range from imprisoning armed felons to imposing tort liability on manufacturers. The most politically popular type of gun control in the U.S. is the severe punishment of crimes committed with firearms. All Americans support severe sentences for firearms offenders, except for those who advocate reduced punishment and imprisonment across the board.”).

318. Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 33 (1968).

319. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

320. See Cheh, *supra* note 299, at 1345.

321. See *supra* notes 310-311.

322. See, e.g., *United States v. Blewett*, 719 F.3d 482, 494 (6th Cir. 2013), *vacated en banc*, 746 F.3d 647 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1779 (2014); Juan R. Torruella, *Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 195-98 (2011).

If the only way to check the political pathology of overcriminalization is to force the polity to confront and internalize the costs of punishment, the “crime without punishment” of criminal labor law poses a great risk. Stripped of criminal law’s obvious costs—costs that have spurred criticism of the War on Drugs, stop and frisk, mandatory minimum sentences, and so forth—the RICO and LMRA suits allow for criminal law’s continued expansion in an unsettlingly anodyne fashion. Considering the difficult time that scholars, attorneys, and activists have had persuading politicians, voters, and judges not to gloss over criminal law’s costs, the doctrinal space that further obfuscates the costs makes criminal labor law a dangerous marker of criminalization’s creeping regulatory force.

## V.

### CONCLUSION

RICO, § 302, and the continued relevance of criminal statutes in the union context tell us a lot about the nature of labor law itself. But labor law, as a space shaped by both civil and criminal statutes and principles, has a great deal to tell us about how criminal law operates as an institutional and social-structuring mechanism. An area ignored in most scholarly discussion and absent from most treatments of criminal law’s reach and social impact, “criminal labor law” defies the logic, the strictures, and the structures of criminal law as it has been theorized and accepted. Similarly, it defies the frameworks and framings of post-1935 labor law.

Defined by statute and by views about the proper structuring of the market and of economic relationships, it is not a realm of *malum in se* criminality.<sup>323</sup> Arguably corrupt labor leaders and overzealous organizers do not grace the FBI’s most wanted list. And, when we imagine the prototypical acts that any theory of punishment must condemn,<sup>324</sup> the facts of *Cintas* or *Mulhall* probably do not come to mind. Indeed, the suits that I have identified as a part of contemporary criminal labor law may even fail to guarantee punishment,<sup>325</sup> rendering their status as “criminal law” suspect.

But, if we accept the proposition that labor law has always been deeply imbedded in cultural assumptions about how society and markets should be structured,<sup>326</sup> or about the relationship between the state and its citizens,<sup>327</sup>

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323. See HUSAK, *supra* note 286, at 103-19 (discussing the role of the *malum in se/malum prohibitum* distinction in the culture of overcriminalization).

324. See generally Donald Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531 (2010) (discussing cultural intuitions about what conduct should be considered criminal or morally culpable).

325. See *supra* Part III.

326. See ATLESON, *supra* note 79, at 3; Richard Michael Fischl, Symposium, *It’s Conflict All the Way Down*, 22 CARDOZO L. REV. 773, 775-77 (2001).

327. See TOMLINS, LAW, LABOR, AND IDEOLOGY, *supra* note 15, at 118.

then the potential return to a criminal or quasi-criminal paradigm for the regulation of organized labor might suggest a powerful naturalization of the criminal model. That is, the potential return to criminal statutes as a legal vehicle through which to address debates about unionization and workplace democracy should be cause for great concern not only to labor law scholars, but to those concerned about the crisis of overcriminalization. In a world where criminal statutes fill gaps in the web of the administrative state, and where the language of criminal liability dominates many conversations of social and economic policy, the paradigmatic regulatory device too often becomes the criminal statute.

As the new labor law scholars have argued compellingly, moments of regulatory failure or ossification may provide an exciting moment for attorneys, activists, and scholars to shape new legal regimes and political spaces.<sup>328</sup> It would be difficult to dispute that changing economic, social, and political factors have made much of the NLRA model outdated or outmoded. But the Act offers a range of important lessons that courts and legislators should remember, even as labor lawyers and scholars begin to look elsewhere. Perhaps most important is the recognition that organized and organizing workers should be treated as democratic units, not criminal conspiracies.

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328. See *supra* notes 7-13 and accompanying text.