

# Hollywood Writers and the Gig Economy

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## I. INTRODUCTION

The notion that large numbers of workers are independent contractors not entitled to unionize or to the protections of employment law is a product of twentieth-century legal categories that are a poor fit for twenty-first-century companies and labor markets. But it is an error to assume that the free market cultural ethos of worker entrepreneurialism in the high-skill sector of the gig economy—by which I mean short-term jobs, often with little supervision except as to results—is at odds with the basic framework and assumptions of labor and employment law.<sup>1</sup> In my view, it is both feasible and normatively desirable to extend to gig economy workers the protections of labor and employment law. Though some scholars sympathetic to protective labor legislation assert that some (but not all) Progressive and New Deal Era statutes must be amended to cover short-term, decentralized work of the gig economy,<sup>2</sup> I

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<sup>1</sup> JEAN-CLAUDE VINEL, *THE EMPLOYEE: A POLITICAL HISTORY* (2014); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); DAVID WEIL, *THE FISSURED ECONOMY: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); Guy Davidov, *Who Is a Worker?* 34 *INDUS. L.J.* 57 (2006); Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 *ABA J. LAB. & EMP. L.* 279 (2011); Veena Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, 105 *CAL. L. REV.* 65 (2017).

<sup>2</sup> See Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, THE HAMILTON PROJECT DISCUSSION PAPER (Dec. 2015) (“[C]ourts do not have sufficient authority to ensure a fully efficient solution to the problems created by the emergence of independent workers,” a category of workers who “provide[] personal services only when [they] choose[] to do so” and whose work relationship “can be fleeting, occasional, or constant, at the discretion of the *independent worker*” and who differ from employees for the crucial reasons that “they do not make themselves economically dependent on any single employer, they do not have an indefinite relationship with any employer, and they do not relinquish control over their work hours or the opportunity for profit or loss.”).

contend that the experience of writers shows that current law can easily accommodate bargaining by gig economy workers. Independent, entrepreneurial, short-term workers have bargained collectively for eighty years to the significant benefit of themselves and the industry in which they work, and neither labor law nor antitrust law should be seen as precluding collective bargaining in the gig economy.

Hollywood writers since the advent of the movie industry in the first decade of the twentieth century have worked in a gig economy. Embracing twin roles as labor and entrepreneurs, writers in the 1930s formed a union and created an administratively complex but functional system for regulating wages, conditions of employment, and intellectual property rights in an industry characterized by short-term, episodic, independent, and erratically supervised work in geographically dispersed locations. Their union, the Writers Guild of America, bargains on a sectoral, multi-employer basis on behalf of writers at the low end and the very high end of pay, power, and responsibility. The Writers Guild represents workers who employers in other industries might deem independent contractors or supervisors ineligible for unionization. In a sense, to quote Kate Andrias's important new work, the "new labor law"<sup>3</sup> has been working in Hollywood for eighty years.

Part II of this Article describes the history of the Writers Guild in Hollywood and shows how studios and production companies tried unsuccessfully to exploit the employee-independent contractor dichotomy to block writer unionization in the 1930s and 1940s. The companies eventually abandoned the fight to deem writers to be independent contractors and have been bargaining collectively with writers ever since. Then, as now, employers deployed the independent contractor notion strategically against protective labor legislation and, especially, to enable enforcement of antitrust law to thwart worker collective action. Then, as now, deployment of antitrust law to block worker collective action was an illegitimate strategic exploitation of legal ambiguity in labor and antitrust law.<sup>4</sup> This history shows that the contemporary use

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<sup>3</sup> Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016). The power of talent unions in Hollywood stems, in part, from the breadth of their membership and bargaining on a sectoral, multiemployer basis. Multiemployer bargaining has long been crucial in the construction trades because of the short-term, gig economy nature of that labor market as well. *Id.* at 19 n.79.

<sup>4</sup> On antitrust law and gig economy workers, see Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOYOLA U. CHI. L.J. 969, 988–90 (2016) [hereinafter Paul, *The Enduring Ambiguities*]; Sanjukta Paul, *Uber as a For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERK. J. EMP. & LAB. L. – (forthcoming 2017), <https://ssrn.com/abstract=2817653> [hereinafter Paul, *Uber as a For-Profit Hiring Hall*]. On antitrust and collective action against independent contractors in the high-skill sector, see *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (agreement among court-appointed counsel for indigent criminal defendants not to accept new clients until government increased fees

of the independent contractor label has historical antecedents, and it also suggests that neither labor law nor antitrust law should bar collective negotiation by independent workers.

Part III turns from history to ethnography, showing that writers in Hollywood today do not see the demands of entrepreneurial self-promotion to be inconsistent with their status as labor. I interviewed thirty-two working television writers and three executives from 2013 to 2016.<sup>5</sup> From senior writers and showrunners<sup>6</sup> down to entry-level and staff writers, every writer in my sample described unionization as being crucial to his or her standard of living and to the high quality of contemporary TV. Thus, collective bargaining by independent workers today is an important and effective way of accommodating employer flexibility with employee protection. My study also shows that collective bargaining works in part because the Writers Guild represents *all* writers at every level of pay and authority, from showrunners down to assistants. Even though some Hollywood writers work under conditions that resemble those of independent contractors or supervisors—categories of worker who are not entitled to unionize or bargain collectively—writers insist on their status as employees and union members. The problems that are said to arise from independent contractor and supervisor unionization have never materialized.

For all their many faults and stresses, talent union-management relations in Hollywood appear to be relatively stable precisely because “talent” (writers, actors, and directors) understand they benefit from

paid to appointed counsel constituted a conspiracy in restraint of trade in violation of federal antitrust law and was not immunized by First Amendment).

<sup>5</sup> This Article is based on semi-structured in-person interviews with thirty-two writers and three network or studio executives currently working in U.S. film and scripted TV. The sample was not random nor representative of all working TV writers. It was a snowball sample, and I oversampled women (nine of thirty-two), showrunners (twelve of thirty-two), and people working on so-called quality shows. Most worked in drama, though a few worked in comedy. The vast majority worked primarily in TV, most in both cable and broadcast. Two worked primarily in film, and two making webisodes for internet-only distribution platforms. All but two are or appeared to be white (I did not ask about race or ethnicity). They ranged in career stage, from a few with about five years' experience, to a few with experiences dating to the late 1960s; most have been working in TV for ten to twenty years. All but two of the writers were Writers Guild members, and a few have been Writers Guild officers; one other writer was a novelist, and one was an Animation Guild member. Each interview lasted between sixty and one hundred-forty minutes, and all occurred in Los Angeles between August 2013 and February 2016.

<sup>6</sup> Showrunner is the term used to describe the executive producer of a television show, who is usually the head writer and is sometimes the show's creator. The showrunner hires and supervises the writing staff, and oversees almost every aspect of production. See Catherine L. Fisk & Michael Szalay, *Story Work: Non-Proprietary Autonomy and Contemporary Television Writing*, TELEVISION & NEW MEDIA (2016); see generally BRETT MARTIN, *DIFFICULT MEN: BEHIND THE SCENES OF A CREATIVE REVOLUTION* (2013) (describing the significance of the showrunner in contemporary television and profiling the showrunners of several acclaimed shows).

unionization, and the companies understand they benefit from the partnership with the talent guilds. All of that turns on talent (from the highest to the lowest paid) being “employees” within the meaning of the National Labor Relations Act (NLRA).

## II. WRITERS’ EMPLOYMENT STATUS IN THE 1930S AND 1940S

From the beginning of the industry, Hollywood writers knew they needed constantly to promote themselves, to switch jobs, and to endeavor to get their contracts renewed by proving to producers that they were worth what they were paid. Writers may have been neoliberal entrepreneurs,<sup>7</sup> but they were also committed unionists. Writers call their organization a *guild*, not a union, because it protects their interests as professionals, as highly paid and often quite autonomous masters of a craft. And whenever they have had to strike to secure protection for their rights as authors—in 1948, 1952, 1959–60, 1973, 1981, 1985, 1988, and 2007–08, always involving compensation for re-use of their work in new media—they expressed awkwardness about resorting to a strike and picketing.<sup>8</sup> They take pains to distinguish themselves from people who “work on a loading dock” (as TV writer Bob Barbash said about picketing writers during the 1960 strike), or coal miners or farmworkers (as writer-showrunners said to me about the 2007–08 strike).<sup>9</sup> But they still have to act like labor to protect their rights as authors.

Legal disputes over whether workers are employees arise only in the context of particular laws creating rights or prohibitions. Three such laws have been important in the history of film and TV writers, as will be explained more fully below.

In the early history of the movie business, the most important law pertaining to employee status was the Copyright Act of 1909, which made the employer the author of any “work made for hire” created by an employee within the scope of the employment.<sup>10</sup> When writers are not “employees,” that is, are not subject to the direction and control of

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<sup>7</sup> Sociologist Tomas Marttila has argued that neoliberalism transformed an existing concept with a specific meaning (entrepreneur as the founder of a business enterprise) into an all-purpose aspiration for how all people should be and “a general role model for how to get things done.” TOMAS MARTTILA, *THE CULTURE OF ENTERPRISE IN NEOLIBERALISM: SPECTERS OF ENTREPRENEURSHIP* 4, 5 (2013).

<sup>8</sup> See CATHERINE L. FISK, *WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE* 161, 246–48 (Harvard Univ. Press 2016).

<sup>9</sup> MIRANDA BANKS, *THE WRITERS: A HISTORY OF AMERICAN SCREENWRITERS AND THEIR GUILD* 8 (2015) (quoting Bob Barbash); Interviews with Writer 1 and 12, in Los Angeles, Cal. (2013, 2014). Henceforth writer interviews are referred to by Writer [number] to preserve writer anonymity. On the 1981 strike, see Aljean Harmetz, *Tentative Accord Reached in Strike of Screen Writers*, N.Y. TIMES, July 12, 1981.

<sup>10</sup> 17 U.S.C. § 201(a).

the employer in the creation of the work,<sup>11</sup> the employer can acquire the copyright in the work only if the writer chooses to assign it.<sup>12</sup>

The legal status of writers became crucial at two other points in the history of the broadcast and screen entertainment industries. First, the National Labor Relations Act, as amended by the Taft-Hartley Act of 1947, protects only an “employee’s” right to unionize, and excludes from protection “any individual having the status of an independent contractor, or any individual employed as a supervisor.”<sup>13</sup> The significance of the employee-independent contractor distinction matters not only for whether workers have a statutory right to unionize without employer retaliation but also for whether their union will be exempt from antitrust scrutiny.<sup>14</sup>

Writers in film, and later radio, and still later television, initially disclaimed being employees, both as a matter of professional dignity and to keep intellectual property rights in their work. The studios and networks insisted writers were employees because of the work-for-hire rule of copyright. Being the owner at the moment of creation freed the studios from having to demand a formal assignment of the copyright once the script was complete, and also affected the ability of the studio to apply for a renewal of the copyright.<sup>15</sup> Thus, studios insisted that writers were employees, assuming a writer who was paid to write was an employee without regard to the extent of supervision or control of his or her work.

#### A. Writers as Employees in the 1930s: Employees under the Wagner Act

Although screenwriters in the 1920s and early 1930s chafed at the low-status connotations of the employee title and at the loss of ownership of the copyrights in their scripts, they went along with the employee designation because it was the price of getting work in Hollywood.<sup>16</sup> But when the opportunity to negotiate collectively for more control, advance notice of layoffs, a minimum wage, and control over screen credit arose with the enactment of the National Labor Relations

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<sup>11</sup> *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1990).

<sup>12</sup> 17 U.S.C. § 201(a).

<sup>13</sup> 29 U.S.C. § 152 (3).

<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> *Id.*

<sup>16</sup> *Actor's Equity Unable to Join Art Federation—Reason that Federation of Labor Must Be Considered*, *THE SCRIPT* 1 (May 6, 1922); *Will Hays Told About What the Guild Stands For—Mayor Woods Writes to Him of Photoplaywrite Schools and Others*, *THE SCRIPT* 1, 3 (June 3, 1922). Both sources are available in the Margaret Herrick Library of the Academy of Motion Picture Arts and Science, Beverly Hills, CA. See generally FISK, *supra* note 6, chapter 2.

Act of 1935, Hollywood writers saw that embracing the legal label “employee” was the key to collective action.<sup>17</sup>

Writers typically were hired on short-term contracts lasting from several weeks to six months or a year. In March 1936, for example, screenwriter Seton Miller, a Yale graduate who had been working in Hollywood for fifteen years and had about thirty-five screen credits, signed a one-year employment contract with Warner Brothers Pictures at the rate of \$1250 a week (in 2014 dollars, \$21,300 per week, or \$1.1 million for the year).<sup>18</sup> In Miller’s contract, which was typical in all respects except pay, the writer promised to “conscientiously perform the services required of him hereunder solely and exclusively for and as requested by the Producer,” to do so “whenever and wherever the Producer may request or deem necessary or convenient,” and to “promptly and faithfully comply with all requirements, directions, requests, rules and regulations made by the Producer.”<sup>19</sup> The writer promised not to write or work on “any stage, radio, dramatic, or motion picture production” other than for his own studio, or to allow his name to be used to promote any production except by that studio.<sup>20</sup>

Writers had to agree that the copyright in anything they wrote or dreamed up during the contract term belonged to the studio as a work made for hire, and to execute a standard certificate of authorship stating that the studio was the author of anything they wrote for any medium. The studio, for its part, had the right, with seven days’ advance notice, to lay off its writers without pay for twelve consecutive weeks during the contract year.<sup>21</sup> Studios usually had the right to renew the contract several times for up to seven years, but writers did not have the same option to renew if the studio didn’t want them.<sup>22</sup>

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<sup>17</sup> See FISK, *supra* note 8, chapter 2.

<sup>18</sup> Seton I. Miller Contract, March 24, 1936, item number 12631B, Warner Bros. Archive, University of Southern California; IAN HAMILTON, *WRITERS IN HOLLYWOOD, 1915–1951*, 35 (1990); MARC NORMAN, *WHAT HAPPENS NEXT: A HISTORY OF AMERICAN SCREENWRITING* 95 (2007).

<sup>19</sup> Seton I. Miller Contract, *supra* note 18.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* This kind of contract was used for decades in film and was adopted for writers working in TV. For example, in 1953, John Twist, who had a career writing westerns and other B-movie action pictures from the 1930s to the early 1960s, signed a similar year-long contract with Warner Bros. with a one-sided option for a one-year renewal. John Twist Contract, October 28, 1953, item number 12840A, Warner Bros. Archive, USC. On the typicality of the pay in Miller’s contract, see CHRISTOPHER ANDERSON, *HOLLYWOOD TV: THE STUDIO SYSTEM IN THE FIFTIES* 237, 252 (1994); LEO ROSTEN, *HOLLYWOOD: THE MOVIE COLONY, THE MOVIE MAKERS* 324 (photo. reprint 1970) (1940) (data on 1938 salaries of writers at Warner Brothers, Twentieth Century Fox, and Columbia showed that thirteen percent received \$1000 or more a week, and six percent received \$1500 or more a week); Metro-Goldwyn-Mayer Studios, 7 N.L.R.B. 662, 689 (1938) (describing terms of standard writers’ contracts submitted in case seeking union representation of writers).

The language in writers' contracts was boilerplate, yet the power the contracts gave to studios was complete. As anthropologist Hortense Powdermaker said in her 1950 ethnography, *Hollywood, the Dream Factory*, talent contracts established a feudal relation, as they bound the worker to the studio for years if the studios chose to exercise their renewal options, and yet studios had the power to terminate writers at will.<sup>23</sup> Leo Rosten, who worked as a screenwriter after earning degrees in social science at the University of Chicago and the London School of Economics, made a similar observation in the 1940 report he made with a team of social scientists who came to Hollywood to study the movie business under the auspices of the Carnegie Corporation and the Rockefeller Foundation. As Rosten put it in that study, writers' legal status determined their working conditions and their self-conception. Being an employee was "the key to many of the problems, dilemmas, and agonies of the writer in Hollywood":

He is handed collaborators whom he dislikes. He is ordered to introduce a tap dancer into a story about an African safari. He is asked to "add a few jokes" to the scene he fought to keep poignant; or to "speed up the story" at precisely the point where he wanted to develop the characters; or to invent a "smart" but unnatural opening, or a "sock" but phony climax. *He is an employee.*<sup>24</sup>

Or, as Powdermaker's ethnography put it, a "bon mot in the community is that 'writers in Hollywood do not have works but are workers.'"<sup>25</sup> Because they neither owned nor controlled what they wrote, they did not "have works." Because of their subordinate position to studio heads, writers were workers. And because of both of these things, writers embraced their status as labor and formed a union.<sup>26</sup>

The contract terms that writers most resented and that drove them to unionize were those that gave the studio the right to control every aspect of what writers wrote, along with one-sided renewal options, the work-for-hire doctrine, and the power to lay off writers without notice. Such terms made it logical that even people as highly paid as Miller would describe themselves as labor. Radical writers embraced the idea of writing for a wage as a political stance because of the membership it

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<sup>23</sup> HORTENSE POWDERMAKER, *HOLLYWOOD, THE DREAM FACTORY: AN ANTHROPOLOGIST LOOKS AT THE MOVIE-MAKERS* 85 (1950).

<sup>24</sup> ROSTEN, *supra* note 22, at 306–07 (emphasis added).

<sup>25</sup> POWDERMAKER, *supra* note 23, at 150.

<sup>26</sup> *Id.*; Jill B.R. Cherneff, *Dreams Are Made Like This: Hortense Powdermaker and the Hollywood Film Industry*, 47 *J. ANTHROPOLOGICAL RES.* 229 (1991).

was imagined to confer in the working class. But in embracing their status as labor, film writers had to distance themselves from the critically lauded literary writers with whom they sometimes wished to identify. They did so in part because money was the recompense for the loss of autonomy, and in part because film writing could be quite factory-like. Screenwriters at Paramount in the 1930s jested about writing on an “assembly line” run by producers “who doled out *dramatis personae*” to teams of writers and who would “assemble” the dialogue “jigsaw style, into a final script.”<sup>27</sup> Mary McCall, Jr., a successful writer of the 1930s and 1940s, said she wanted a big salary, “not because I need it,” but because it would:

give me authority. Then when a producer says, “Look, sweetheart, I have a terrific angle on this opening; we fade in on a bed,” I can say, “That’s silly,” and he will listen to me because I will be so very expensive. I say “That’s silly” now, but he rarely listens to me.<sup>28</sup>

But still it required an attitude adjustment for writers to embrace the legal label “employee.” However odd it seemed that the most successful writers would form a union, writers at all levels of pay and prestige realized that unionization benefitted the vast majority of writers financially. And even those who earned huge salaries (which writers describe as being like winning a lottery<sup>29</sup>) knew that studios would never concede that screenwriters, like New York playwrights, were not employees. If they were not employees they would own their scripts, could veto changes to the script, and (they thought) could not be banished from the set during filming. The status of employee was, thus, about more than just copyright ownership or the right to form a union. It was about trying to reclaim some modest degree of creative power and respect through collective bargaining.<sup>30</sup>

For their part, studios also adopted contradictory positions with respect to writers’ legal status as labor. While resisting giving writers creative control and insisting writers were employees for purposes of the copyright work-for-hire doctrine, studios opposed writers’ efforts to bargain collectively by arguing to the National Labor Relations Board

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<sup>27</sup> HAMILTON, *supra* note 18, at 184.

<sup>28</sup> ROSTEN, *supra* note 22, at 81 (quoting Mary C. McCall, Jr., *Hollywood Close Up*, REVIEW OF REVIEWS, May 1937, at 44).

<sup>29</sup> The metaphor that finding a job was like winning the lottery has persisted, as it was used by more than one of my interview subjects. A staff writer (Writer 25) on an acclaimed drama said: “Hollywood is a fucking lottery, you know? Especially for talent.” Interview with Writer 25.

<sup>30</sup> Metro-Goldwyn-Mayer Studios, 7 N.L.R.B 662, 669, 686–87 (1938).



(NLRB) that the writers were not employees eligible to unionize. Writers, the studios said, performed services that were “creative and professional in character, whereas the Act applies to the more standardized and mechanical employments.”<sup>31</sup> Unions were for “wage earners in the lower income brackets.”<sup>32</sup> Screenwriters were not employees because they were not required “to observe regular office hours or to maintain office discipline,” nor “to produce any fixed amount of work,” and they were “free to develop screen material in accordance with their own ideas.”<sup>33</sup> The employers renewed this same argument with respect to radio writers in the 1940s, TV writers in the early 1950s, and freelance film writers in 1959 when writers struck over payment for reuse of material on TV. The argument consistently failed because studios insisted on control over what writers wrote.<sup>34</sup>

When studios in 1937 argued that writers were not employees eligible to unionize, the NLRA covered “any employee”;<sup>35</sup> there were no exclusions for highly paid or managerial workers, independent contractors, professionals, those who were not closely supervised, or those who did mental rather than manual labor.<sup>36</sup> Indeed, during the drafting process Congress omitted a proposed provision requiring that a worker must be under the continuing authority of the employer to qualify as an employee, and thus supervision was not essential to the employee definition.<sup>37</sup> So writers pointed to their individual employment contracts, which, like Seton Miller’s, gave studios control over the time, place, and content of their work. Writers testified that producers exercised that control in assigning writers to particular stories or parts of stories, in moving a writer from one project to another, and in requiring writers to

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The NLRB’s findings about the industrialized process of script development was drawn from testimony of both writers and studio executives, including Benjamin Cahane, Vice President of Columbia Pictures, who described in detail the way that the producer chose a literary property and hired a writer to adapt it for the screen and then assigned other writers to write dialogue, to add jokes, and so forth. My account draws on the NLRB decision; on Ronny Regev’s dissertation, for which she read the full record of the case in the NLRB archive in the National Archive, College Park, Maryland, Case No. XXI-R-149, Boxes 515, 516, 517, 518, Ronny Regev, “*It’s a Creative Business: the Ideas, Practices, and Interaction that made the Hollywood Studio System*, Ph.D. diss., Princeton University (2013), <http://arks.princeton.edu/ark:/88435/dsp01jm214p26m>; and on NANCY LYNN SCHWARTZ, *THE HOLLYWOOD WRITERS WARS* (1982).

<sup>34</sup> On this in 1959, see BANKS, *supra* note 9, at 142.

<sup>35</sup> 29 U.S.C. § 152(3).

<sup>36</sup> Congress added an exclusion for independent contractors and supervisors as part of the Taft-Hartley Act, 29 U.S.C. § 152(3), and the Supreme Court added exclusions for managerial and confidential employees. *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (holding university faculty are managerial and therefore not employees); *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267 (1974).

<sup>37</sup> ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW 37–38* (2004).

attend story conferences and demanding writers follow the producer's "very definite ideas as to the changes to be made in a script."<sup>38</sup>

The NLRB decided screenwriters were employees because producers had the power (even if it was not always exercised) to dictate the content of writers' work, to assign parts of stories, and to stipulate where writers were to write.<sup>39</sup> The Board noted but found unimportant that some writers were employed on a "free-lance basis under contracts providing for a week-to-week continuation of the employment or for the completion of a certain piece of work at a specified aggregate compensation," because "there is no essential difference between a free-lance writer and a writer working under contract for a term in the manner in which they performed their work and that the only difference between the two is one of length and tenure of employment."<sup>40</sup>

#### B. Writers as Employees in the 1940s: Employees under Taft-Hartley and Antitrust Law

The question whether writers were employees or independent contractors arose for a second time when radio writers tried to unionize in the 1940s, but the legal context was different. The hardest-fought dispute over writer unionization in radio was with the ad agencies that handled every aspect of production of radio dramas and some variety shows. (The radio networks directly employed staff writers for some shows, and network staff writers succeeded in unionizing earlier than the writers employed by ad agencies and independent producers.)<sup>41</sup> Although the Radio Writers Guild (RWG) briefly presented itself to ad agencies as a professional association of independent contractors, it quickly decided that freelance writers were employees and that it was a union.<sup>42</sup> The resistance of advertising agencies to the RWG was not about money. Most agencies, especially for prime-time shows, which were sponsored by major advertisers, paid writers more than what the RWG proposed as a minimum. They resisted because they refused to accede to Guild demands for air credit or writer ownership of scripts. To thwart the RWG's demand for bargaining, ad agencies made two legal arguments, both of which resonate with today's gig economy workers.

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<sup>38</sup> *Metro-Goldwyn-Mayer*, 7 N.L.R.B. at 688.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 687–89.

<sup>41</sup> FISK, *supra* note 8, chapter 3.

<sup>42</sup> See Bulletin 1439A, *infra* note 45.

First, ad agencies insisted that the writers worked for their clients (the sponsors), not for the agencies, and the clients did not give them authority to negotiate any agreement. Moreover, the agencies claimed, any agreement negotiated by a committee of advertising agencies would not be binding on the shows' sponsors, who, the agencies stated, were the actual employers of the people who wrote their shows.<sup>43</sup> In contemporary legal parlance, the agencies claimed they were not the joint employers of writers and, rather, that the sponsors were the employers. Radio writers could not accept this argument because if they were to get anywhere in bargaining, they needed to bargain with the entity that effectively controlled their terms of employment—the ad agency. The agencies' effort to disclaim employer status quickly foundered on the facts, as the agencies, hired, fired, paid, and supervised writers, and the sponsors had little involvement except to approve scripts.<sup>44</sup>

The agencies' second, and more plausible, legal argument was that writers were not employees of anybody but were, instead, independent contractors. Therefore, the agencies argued, Radio Writers Guild and its demands for collective bargaining were a federal crime under the Sherman Act, rather than protected concerted activity under the National Labor Relations Act.<sup>45</sup>

As scholars of labor and antitrust have observed for decades, the announced purpose of the antitrust law was to target corporate monopolies and trusts that controlled the production or sale of sugar, tobacco, oil, and a host of other products in the Gilded Age. Whatever Congress's intent, the Supreme Court held labor unions and collective bargaining agreements to fall within the statutory prohibition on conspiracies in

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<sup>43</sup> Memorandum from A.K. Spencer to Miss. Pederson & Mr. Colwell (June 21, 1945), Edward G. Wilson Papers, J. Walter Thompson Archive, Hartman Center for the Study of Advertising, Perkins Library, Duke University.

<sup>44</sup> See FISK, *supra* note 8, chapter 3.

<sup>45</sup> See, e.g., Bulletin 1439A, American Association of Advertising Agencies, Radio Writers' Guild Seeks Minimum Basic Agreement with Agencies (June 22, 1945) (on file with author) [hereinafter Bulletin 1439A]; Bulletin 1441A, American Association of Advertising Agencies, A.A.A.A. Radio Committee Counter Proposal to Radio Writers Guild (July 17, 1945) (on file with author) [hereinafter Bulletin 1441A]; Memorandum from Edward G. Wilson to John Reber (Apr. 1, 1947). Memorandum from Edward G. Wilson, Radio Writers' Guild (Aug. 15, 1947) (on file with the J. Walter Thompson archive). The agencies first proposed that the RWG should go to the NLRB to be certified as a union representing employees, hoping that the Board would decide that freelance radio writers were not employees, or at least not employees of the ad agencies. The RWG's lawyers advised against going to the NLRB for a definition of freelance writers because it was too hard to predict what the Board might do, as there "are not many precedents in literary fields on which the NLRB can go in deciding a dispute of this sort." Erik Barnouw to membership of RWG. May 15, 1948. Edward G. Wilson Papers. All of these documents are in the Edward G. Wilson Radio Writers Guild Files in the J. Walter Thompson archive at the Duke University, Perkins Library, Hartmann Center for the Study of Advertising.

restraint of trade in *Loewe v. Lawlor*,<sup>46</sup> a 1908 decision arising as the result of sustained efforts of a group of hatmakers in Danbury, Connecticut to improve their working conditions through unionization.<sup>47</sup> When Congress amended the federal antitrust law in the Clayton Act of 1914,<sup>48</sup> labor secured a specific statutory exemption for labor organizations and collective bargaining; as amended, the statute provides that “the labor of a human being is not a commodity or article of commerce” and that “[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.”<sup>49</sup> The Supreme Court once again resisted the congressional protection for unions,<sup>50</sup> but in 1940 the Court overruled itself and read the antitrust law to allow workers to form unions under the specific statutory exemption and unions and employers to engage in collective bargaining under what the Court termed a non-statutory exemption.<sup>51</sup>

As Sanjukta Paul has observed, there is some lack of clarity about how the statutory and non-statutory antitrust exemptions apply to workers who work somewhat autonomously.<sup>52</sup> Part of the difficulty lies in the dramatic overbreadth of the statutory language of section one of the Sherman Act, which makes “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade” illegal.<sup>53</sup> It is simply not possible to read it literally, and the Supreme Court does not,<sup>54</sup> because, as Justice Brandeis once noted, restraint is the very essence of every contract.<sup>55</sup> The Court has held that some strikes or concerted action for increased compensation by some independent contractors constitute unlawful horizontal restraints of trade and possible illegal price fixing, a per se violation of antitrust law,<sup>56</sup> “particularly if

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<sup>46</sup> 208 U.S. 274 (1908).

<sup>47</sup> *Id.*; DANIEL ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995).

<sup>48</sup> 38 Stat. 730 (1914); 15 U.S.C. § 12.

<sup>49</sup> *Id.*

<sup>50</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (interpreting the Clayton Act as exempting from antitrust liability only the activities of labor unions and their members that were legal before the Clayton Act).

<sup>51</sup> *United States v. Hutcheson*, 312 U.S. 219 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

<sup>52</sup> Paul, *The Enduring Ambiguities*, *supra* note 4, at 969, 977.

<sup>53</sup> 15 U.S.C. § 1.

<sup>54</sup> *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

<sup>55</sup> *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *see also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687–88 (1978) (quoting Justice Brandeis positively).

<sup>56</sup> Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights*

it is aimed at affecting prices or other elements of the bargain and often even if it is not, is illegal price-fixing, unless some specific exception applies.”<sup>57</sup> In other cases, however, the Court has found efforts of independent workers to be outside the scope of antitrust law.<sup>58</sup> In the context of civil rights boycotts aimed at forcing white-owned businesses to hire black employees, the Supreme Court held that the First Amendment protected the boycotters from state antitrust liability.<sup>59</sup>

The most closely analogous antitrust case involving the efforts of writers to protect themselves from the concerted power of producers was a 1945 decision of the Second Circuit about the Minimum Basic Agreement (MBA) between the Dramatists Guild and New York theatre producers. The suit, *Ring v. Spina*,<sup>60</sup> was filed by a producer of a play, *Stovepipe Hat*, who got into a dispute with the playwrights over allegedly unauthorized changes in the play.<sup>61</sup> When the playwrights invoked arbitration under the MBA and terminated the production contract, the producer sued them, along with the Dramatists Guild and the Authors League, alleging that the MBA violated the federal antitrust law. The Dramatists Guild asserted it and its MBA were within the labor exemption from antitrust liability, just as were the Screenwriters Guild and their agreement with the movie studios. It set the terms on which workers would sell their labor in a labor market in which workers switched jobs frequently in an industry dominated by an oligopoly of relatively few employers. And concerted action was necessary among the workers in order to counteract the collective power of the relatively few employers who contracted for their services.<sup>62</sup>

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for “*Dependent Contractors*”, 26 BERKELEY J. EMP. & LAB. L. 143, 168–69 (2005).

<sup>57</sup> Paul, *The Enduring Ambiguities*, *supra* note 4, at 977; *see also* FTC v. Ind. Fed’n of Dentists, 476 U.S. 447 (1986) (collective action by independent dentists); *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. 679; *Spence v. Se. Alaska Pilots’ Ass’n*, 789 F. Supp. 1007, 1010 (D. Alaska 1990) (antitrust analysis involving association representing independent contractor pilots). Social or economic benefits do not constitute exceptions. *FTC v. Superior Court Trial Lawyers Ass’n (SCTLA)*, 493 U.S. 411, 423–24, 428 (1990) (holding that attorneys’ “concerted action in refusing to accept further CJA assignments until their fees were increased was . . . a plain violation of the antitrust laws”); *see also* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985) (“This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of § 1 of the Sherman Act.”).

<sup>58</sup> In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court rejected antitrust liability for railroads and truckers (some of whom may have been self-employed drivers and others trucking companies), in their dueling publicity and lobbying campaigns seeking advantages for their respective industries in the long-haul freight business.

<sup>59</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>60</sup> 148 F.2d 647 (2d Cir. 1945).

<sup>61</sup> *See generally id.*

<sup>62</sup> *See generally id.*

The court of appeals did not see it that way because playwrights sold their completed work to producers, unlike movie writers who were mainly hired to write. The court reasoned that an “author writing a book or play is usually not then in any contractual relation with his producer.” And “[i]f and when he does contract, he does not continue in the producer’s service to any appreciable or continuous extent thereafter.” The court distinguished the dramatists’ collective agreement from the screenwriters’ on the ground that the wages in the dramatists’ agreement “are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold.”<sup>63</sup>

*Ring v. Spina* was of intense interest to the advertising agencies and radio networks. The agencies wanted to use the decision to argue that radio writers were sellers of intellectual property like dramatists, not sellers of labor like screenwriters, and therefore collective bargaining would be illegal. Relying on *Ring*, the agencies asserted that they were under no legal obligation to bargain and any collective agreement about terms of employment would violate the antitrust law. As Erik Barnouw, president of the RWG later recalled, these arguments gave writers “a skillful runaround” for almost a decade.<sup>64</sup>

It was indeed a runaround because what the agencies asserted in negotiations differed from what at least some of their lawyers believed. JWT’s in house counsel, Edward Wilson, concluded that JWT radio staff writers and freelancers were employees of the agency because JWT controlled what and when they wrote. On *Lux Radio Theatre*, for example, Wilson privately conceded that the head writer, Sanford Barnett, had a desk in JWT’s Hollywood office and worked with JWT staff in adapting plays or movies for radio, and was “subject to supervision by the client, through us.” On *Kraft Music Hall*, Wilson described working conditions for writers that looked a bit like film and a lot like what quickly became standard in TV, and that were enough to establish writers as agency employees:

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<sup>63</sup> *Id.* at 652. *Ring v. Spina* did not spell the end of the Dramatists Guild. Later iterations of the litigation avoided definitively ruling that bargaining agreements between dramatists and theatre producers were unlawful antitrust conspiracies, although at various points both playwrights and producers accused each other of violating law by conspiring to set the price of labor. The Dramatists Guild renegotiated the MBA on the same essential terms over the decades since, and bills to clarify the law have been introduced in Congress but never passed. Meanwhile, playwrights own the copyrights in their scripts and have creative control of stage productions of them. Producers pay playwrights a minimum percentage of the box office, share earnings beyond the minimum, and split receipts from sales of film rights. Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1420–22 (2010).

<sup>64</sup> ERIK BARNOUW, MEDIA MARATHON 112 (1996) (on file with the J. Walter Thompson archive).

A JWT representative or director would meet with the writers in what they refer to as a premise meeting. At this meeting the writers would be told who the guest artist would be the following week and our representative and the head writer would attempt to work out the situations around which the scripts would be written. Each writer would then go off and prepare the portions which were assigned to him. Their efforts would be turned in and coordinated by the head writer. If their material was okay, they had nothing more to do. However, if the whole thing did not shape up all the writers including the head writer would be called in and they would work together until they completed the script. Each writer would get [paid] the same amount each week, no matter how much work he had to do.<sup>65</sup>

In a legal memo prepared for JWT clients, Wilson concluded “the script writers on your shows are employees,”<sup>66</sup> later adding that they were “undoubtedly employees of the sponsor,” but because the agency “act[s] for the sponsor in supervising them, it seems clear that we should handle all matters relating to their work and should, therefore, do the negotiating.”<sup>67</sup> JWT did briefly consider the possibility of restructuring its relationship to its clients such that the agency would employ the freelancers and sell or lease scripts to the clients, but ultimately decided not to.<sup>68</sup>

As a matter of legal doctrine, freelance writers did not easily fit into a box. On the one hand, they worked independently. Many wrote at the hours they wanted, without supervision over their work, at least until the script was done and a producer asked for revisions. Many writers proposed their own topics, and the structure of the finished work was dictated more by the conventions of the medium than by the employer. On the other hand, every media company insisted (then as now) on the power to force the writer to rewrite. Rod Serling was forced in 1955 to rewrite a story about the Emmet Till lynching to remove even the slightest hint of race. Erik Barnouw, a successful radio writer who served for several years as president of the Radio Writers Guild in the 1940s, was forced to remove any reference to gas chambers in a radio play about

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<sup>65</sup> Memorandum to Miss Pederson & Mr. Colwell from A.K. Spencer, June 21, 1945. Edward G. Wilson Papers.

<sup>66</sup> Memorandum from Edward G. Wilson, Radio Writers' Guild, *supra* note 45, at 2.

<sup>67</sup> *Id.* at 1.

<sup>68</sup> *Cf.* Edward G. Wilson, Radio Writers' Guild (Jan. 12, 1948) (on file with the J. Walter Thompson archive); Edward G. Wilson, Radio Writers' Guild (Jan. 19, 1948) (on file with the J. Walter Thompson archive).

the Nuremberg Trials because the program sponsor was a public utility.<sup>69</sup>

The agencies wanted to narrow the category of writers to which the agreement would apply to exclude a vague category of “independent contractors,” without being able to explain who was an employee or independent contractor. The RWG proposed that a writer would be an employee and covered by the collective agreement if “the company has the right by contract to require him to perform personal services in making revisions, modifications or changes,”<sup>70</sup> and that independent contractors were those who sell or license rights to material “without contracting to perform personal services with respect to revision, modification or change.”<sup>71</sup> But the companies would not agree, because they insisted on the right to demand revisions from anybody. The agencies’ inability to define the scope of their proposed exclusion ultimately proved fatal to their negotiating position.<sup>72</sup> Since the agencies insisted that radio writers were not their employees, and sponsors insisted that they weren’t their employees either, but both insisted on control over their work, the Radio Writers Guild thought the effort to exclude an ill-defined group of writers was close to bad faith.<sup>73</sup>

In the end, the definition of employee writers covered by all Writers Guild agreements in film, radio, and TV<sup>74</sup> focused on the employer’s power to require writers to make revisions to scripts.<sup>75</sup> Employees under the MBA are those who “write literary material . . . where the Company has the right by contract to direct the performance of personal services in writing or preparing such material or in making revisions,

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<sup>69</sup> SCHWARTZ, *supra* note 33, at 46.

<sup>70</sup> *See supra* note 68.

<sup>71</sup> *Id.*

<sup>72</sup> *See* John Crosby, *Radio in Review: Revision, Modification or Changes*, newspaper clipping from unidentified source, Sept. 17, 1948, in Edward G. Wilson Papers. Letter from Leonard T. Bush, Chariman Compton Advertising, Inc., Louis N. Brockway, Young & Rubican, Walter Craig, Benton & Bowles, Inc. to Erik Barnouw, Nat’l President & Roy Langham, Nat’l Executive Secretary (Sept. 13, 1948) & attached Definition of Employee (Sept. 13, 1948) (on file with the J. Walter Thompson archive).

<sup>73</sup> Erik Barnouw to Leonard Bush, Sept. 22, 1948. Edward G. Wilson Papers.

<sup>74</sup> The fight over the legal status of freelance writers as employees or independent contractors was repeated in 1952 in television, but more briefly. As had the movie studios in 1938 and ad agencies in the 1940s, TV producers wanted to declare that writers were employees for purposes of copyright law, but not for purposes of labor law or for purposes of tax. The writers prevailed. *See* Minutes of a regular meeting of the Executive Board of the Screen Writers’ Guild (Sept. 3, 1952, 8:00 p.m.) (on file with the Writers Guild of America, West, Los Angeles, Cal.). At the time I conducted my research, they were not open to the public. They have since been digitized and may be available to researchers through application to the Writers Guild Foundation.

<sup>75</sup> Letter from David Miller to Mr. Brockway 4 (Jan. 20, 1949) (on file with the J. Walter Thompson archive).



modifications, or changes therein.”<sup>76</sup> As Erik Barnouw later reflected, the lack of creative control—an issue that galled many radio, film, and TV writers—proved the key to their ability to bargain collectively for the rights of attribution, partial ownership, compensation, and respect that they secured in the MBAs in radio, film, and TV writing. It was the power of the employer to force the writer to make revisions—the right of control—that defined who was an employee.<sup>77</sup>

### III. WRITERS AS EMPLOYEES NOW

Turning from history to ethnography, this Part of this Article reveals that writers working in Hollywood television today, like writers in the 1930s and 1940s, do not see the demands of entrepreneurial self-promotion to be inconsistent with their status as labor. Even though some Hollywood writers look rather like what in other fields would be deemed independent contractors or supervisors—and, therefore, not employees entitled to bargain collectively—writers insist on their status as employees and union members. They position themselves as labor for four main reasons. First, they recognize the importance for all writers of maintaining solidarity. Second, even the most powerful and successful feel vulnerable to studio cost-cutting and to being fired, and they value the collectively bargained pension and health insurance programs. Third, they feel that unionization is necessary to preserve writers’ claims to residuals and separated rights, which are all that writers get of the intellectual property rights in their work. Fourth, they recognize that studios and networks have the real power over content, and so they position themselves as labor to maintain a sense of artistic integrity and autonomy and to distance themselves from the bad judgments made in corporate suites.

#### A. Solidarity

The writers and showrunners I interviewed were unanimous in describing their good fortune to be able to find work in a fiercely competitive labor market. They insisted that writers’ solidarity and unionization is what makes writing jobs good in an industry where, as one showrunner said, “people literally would [work] for free. . . . So it’s good that the Guild is there to make sure that there’s minimums and protect people.”<sup>78</sup> They recognize that TV writers enjoy a degree of affluence

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<sup>76</sup> WRITERS GUILD OF AMERICA, 2014 THEATRICAL AND TELEVISION BASIC AGREEMENT, art. 1.B. (theatrical), art. 1.C. (television) (May 2, 2014).

<sup>77</sup> BARNOUW, *supra* note 64, at 122.

<sup>78</sup> Interview with Writer 2.

that makes it difficult to think of themselves as labor in any traditional sense of that word. They acknowledge a wide gulf in pay, status, and power between writers and the below-the-line workers who are, in an important sense, the creators of TV. Yet they attribute some of their success to the Writers Guild collective bargaining agreement with the Alliance of Motion Picture and Television Producers (AMPTP), which protects writers against some downsides of short-term, episodic work. The negotiated rules requiring minimum payments to all employed writers, and screen credit and payment of residuals to credited writers, are significant, even if they offer protection to relatively few and privileged workers. And they all acknowledge the importance of union-negotiated health and pension benefits. As a staff writer on an acclaimed drama explained:

I never met talent that didn't, as a general matter, think the Writers' Guild was fantastic. I mean, we can debate about whether we should have had a strike and all that, but . . . I know a lot of [writers who are] ex-lawyers and bankers and doctors and people who are educated beyond Hollywood and I never heard anyone express the idea that . . . there's some irony in their membership in a union. I feel like we benefit tremendously [from being in the Writers' Guild]. It's hard to imagine how much worse—I mean, we wouldn't have health. I mean, just look at the situation of reality writers [who are not unionized]. It's terrible, terrible.<sup>79</sup>

As that writer observed, many TV writers (all in my sample) are graduates of elite colleges and universities. Several are lawyers. Many others worked as journalists or playwrights before working in Hollywood. One is a doctor. They are extremely articulate. Writing for TV is collaborative and social, but it also requires writers to be quite aggressive in finding a job and in working collaboratively so that they keep their job and are hired for the next season and the one after that. As one said, “[t]o succeed in the business you have to be able to sell, to pitch—whether it's . . . pitching a show, or pitching yourself in a hiring meeting, or pitching to the network that the idea they want to throw out is really worth taking a second look at.”<sup>80</sup>

There was a surprising degree of unanimity among the interview subjects in their answers to the question of why writing for TV remains a union job, and why even showrunners—who hire and fire writers and

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<sup>79</sup> Interview with Writer 25.

<sup>80</sup> Interview with Writer 30.

manage the production of TV shows—are union members and conceive of themselves as labor. Almost everyone identified the minimum compensation negotiated by the Guild as significant for junior writers, even if their own compensation exceeded the contract minimum, and everyone who mentioned the generous health insurance and pension plans noted that writers at every pay level need health insurance and a pension.<sup>81</sup> Many explicitly linked the protections of the Minimum Basic Agreement as being the absolute minimum of fairness given that writers sell the intellectual property rights in their work as a condition of hire.<sup>82</sup> Many also noted the importance of Guild determination of screen credit.<sup>83</sup> And, when asked to explain why new media companies like Netflix and Amazon agreed to the WGA Minimum Basic Agreement, all told the same story: talented writers insist on working under the jurisdiction of the WGA and studios and production companies want talented writers, so Amazon and Netflix agreed to recognize the Guild.

Showrunners embraced their legal status as employees who can unionize and bargain collectively rather than as management who cannot,<sup>84</sup> in part because solidarity between them and staff writers makes it harder for studios and networks to divide writers by setting the showrunners' interests against those of other writers in WGA negotiations. In the 2007–08 strike, showrunners lent their economic and cultural clout to protect the economic position of all writers, from those currently employed to write a TV show, to those who were retired and living on a pension and residuals, and to those waiting tables and working on a screenplay. A very successful showrunner, who at the time of my interview was running the show he created and could not possibly be fired because he had attained the status of auteur that is rarely attained by any TV writer, emphasized the importance of solidarity in the 2007–08 writers strike. He said he shut down production of his show during the strike, costing himself and his crew substantial money, because “I’m obsessed with fairness.” He acknowledged the unusual nature of the senior writer’s position in a strike (“everyone is a writer and a producer, so the writing part of you is on strike, but the producing part of you is not”) but said that the strike worked because of “the power of that collaboration, of collectivization; it was amazing.” This act of sol-

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<sup>81</sup> Interview with Writers 2, 7, 16, 21, 31, 32, 33.

<sup>82</sup> Interview with Writers 12, 21, 31, 32.

<sup>83</sup> Interview with Writer 21.

<sup>84</sup> See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (managerial employees do not have a right to unionize under the NLRA); 29 U.S.C. § 152 (excluding from statutory definition of employee protected by the NLRA “any individual employed as a supervisor”).

idarity, the showrunner continued, which “cost about \$250 million probably, for those three months” and disrupted the Golden Globe awards and threatened to disrupt the Academy Awards, “feels like justice.”<sup>85</sup>

The notion that solidarity among writers is crucial to the industry takes many shapes. Sometimes writers frame it as their obligation to preserve a system that was created long ago and that has made writing a good job. A junior TV writer said, “Someone a lot smarter than me, several years ago, felt the writers deserved residuals. Someone who had thought this through.”<sup>86</sup> A senior film writer and Writers Guild officer framed union solidarity as the need to preserve a historical legacy and the benefits of a collective bargaining agreement that prior generations of writers fought for, what he called “signature advances of the Guild.” “So, between, you know, pension, health, residuals, credits—all of that stuff—that was done before I got here, you know and I am the beneficiary of it.” In the end, he said, he is involved with the Guild because “I want to make sure of something that seems increasingly difficult. That it remains possible to make one’s living as a writer. And if one does make a lot of money for the people who are employers, he gets something approaching a fair share.”<sup>87</sup>

Sometimes the duty to protect the Guild’s “signature advances” through acts of labor solidarity is framed as what is necessary for a healthy industry. A showrunner explained, “I think that there is this sense among showrunners that we benefit from a healthy ecosystem of writers that are well taken care of.” Explaining that he had recently been to Korea to speak to the television writers’ association there, “I think that their industry is profoundly hurt by the lack of a writers’ union.” Noting that a union “professionalizes a class of people who, under other circumstances, are really easy to exploit,” the showrunner explained that “if you want a healthy world of writers who can write high quality television that can be exported, well, one the price you pay for that, the price that corporate entertainment pays for that, is that they’re going to pay a little bit more to sustain and train all of these people at the lower levels with the idea that eventually they can be successful at creating their own shows.” Without a union to sustain and train junior writers, he concluded, a successful entertainment industry is “very hard to sustain over long periods of time.”<sup>88</sup>

Even writers who believe that their individual success means that they no longer need the protection of the Guild identify some benefits of

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<sup>85</sup> Interview with Writer 31.

<sup>86</sup> Interview with Writer 15.

<sup>87</sup> Interview with Writer 21.

<sup>88</sup> Interview with Writer 16.

unionization for writers. One showrunner said that, although “we’re not working in mines and . . . [i]t’s a pretty wealthy life that we lead, still without the union there would be no residuals.” “Look at the people that did *The Lucy Show*. Never made a penny off *The Lucy Show*. And it’s on somewhere everywhere in the world at every moment of the day and they made nothing.”<sup>89</sup>

## B. Vulnerability

To make a career as a writer is a highly uncertain prospect; as a Guild officer put it, some writers’ careers are “as short as a professional athlete’s.”<sup>90</sup> As a staff writer on an extremely successful show explained: “[S]ometimes your sensibility will match up with something that’s going by, and you’ll have a good little moment. And then you’ll get spit out, because you’re not an agent or an executive. You’ll think you’re worthless for five years, and then you’ll get another chance.”<sup>91</sup> Writers have little job security as shows are cancelled and a writer who succeeded in one genre may find himself out of a job and his work out of fashion. As a senior writer explained, his agent will say, “This isn’t what people are buying.”<sup>92</sup> This is true even of showrunners, who themselves do the hiring and firing of staff writers, because, as one who had recently been fired said, they know that they can be fired by the studio.<sup>93</sup> Even those who are offered a job find they have little bargaining power at the entry level. “Once you are a producer, you can negotiate money, but staff writer, story editor, executive story editor, it’s pretty much: ‘This is what you’ll get paid, like it or lump it.’”<sup>94</sup>

Showrunners are, in some senses, management. They have tremendous control over which writers are hired and the hours they work, even though the MBA controls what writers are paid. As a staff writer—a former playwright—explained:

[I]t depends on the showrunner how long you spend at the office. You can’t set your own hours like you can in TV movies or features or any of that. You can’t. You’re just not in control over your life. They may send you to set [when your episode is being filmed]. . . . When I was working on “Franklin & Bash,” if it was

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<sup>89</sup> Interview with Writer 2.

<sup>90</sup> Interview with Writer 21.

<sup>91</sup> Interview with Writer 25.

<sup>92</sup> Interview with Writer 13.

<sup>93</sup> Interview with Writer 12.

<sup>94</sup> Interview with Writer 19.

my episode, . . . I had to be there at 6:00 in the morning. My husband was out of town. So then, it's a whole set of . . .

She trailed off before describing the struggle to arrange childcare.<sup>95</sup> When she was working on a show on which the showrunner was a father of five children, ages six months to eleven, “[w]e went in at 9:30 and we were gone by 6:00, almost every single night. . . . I was home in time for dinner, every night, which is . . . it’s absurd. [Interviewer: So it’s just whatever the show runner wants—A:] Completely.”<sup>96</sup>

Even successful showrunners often find themselves relatively powerless in the face of network and studio executives. As the creator and showrunner of a successful HBO show explained, when HBO executive Carolyn Strauss called to say:

“You can’t have as many characters, you know, you’re getting too expensive. You’re going to have to fire some actors, or tell them that if they want to be on the show, they’re not going to be regulars anymore.” It was like, to me, it was like, insane. . . . So I had to make the phone calls to these three actors and say, you know, if you want to be on this show, you’re going to make, I don’t know how much less money—one of these guys had a family—like, a lot less money, money that’s going to really affect your life in a huge way. . . . And it was a really hard call to make.<sup>97</sup>

Another writer described the experience of a showrunner who was pressured by a network and studio to cut production costs because of declining ratings. The network and studio demanded that the showrunner cut \$600,000 from the budget, even if it meant cutting “\$50 a week from the assistants,” but they refused even to consider cutting the \$75,000 per episode package fee paid to the talent agency even though the agency had done nothing to earn it except introduce the showrunner to a big-name producer several years before. What explains this? According to the writer, “There’s this incredibly nepotistic, back-scratching bullshit set of relationships between networks and executives and agents, and they protect these pieces of the system, which really make no economic sense.”<sup>98</sup>

Although showrunners exercise supervisory functions in hiring and firing staff writers and managing budgets, they feel they are labor because they, too, are vulnerable to firing or to the decision of a network

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<sup>95</sup> Interview with Writer 19.

<sup>96</sup> *Id.*

<sup>97</sup> Interview with Writer 23.

<sup>98</sup> Interview with Writer 25.

to cancel a show. But they also feel that they must stand with those who are even more vulnerable. As one put it, “I got a call during the strike from a lawyer friend of mine who was like, ‘What the fuck are you guys doing? You’re management. Who pulled you into behaving like labor?’”<sup>99</sup> He answered his own question by saying that he had to stand with all writers because they are all vulnerable to the decisions of studio and network executives. Acknowledging that the strike “was a lot of really rich people striking basically for future writers,” and that “none of the issues of the strike had anything to do with most of us” successful writers,<sup>100</sup> he nevertheless recognized that as a group writers are vulnerable. True, said one, “[t]he amount of money that it actually meant to [showrunners] was a rounding error, like they would never even notice in the difference in their salary.”<sup>101</sup> Or, said another, “[i]f I want two more pennies on a DVD, I can negotiate that for myself.”<sup>102</sup>

Showrunners insisted their participation in the strike “was not just noblesse oblige.”<sup>103</sup> They joined the strike, one showrunner explained, because “everybody is aware that they benefitted from those protections when they were coming up, and in most cases, truly in most cases, they are aware that they probably wouldn’t be writers without that.”<sup>104</sup> Showrunners were keenly aware that while they placed themselves on the labor side of the law’s labor-management divide, their pay and social status made the iconic act of labor protest—picketing—an embarrassment that the studios were all too happy to exploit. The studios derided the acts of protest, one showrunner and film director said, as “millionaires holding picket signs.”<sup>105</sup> Showrunners describing the 2007–08 strike were at pains to note writers are not “coal miners,” “not truckers,” and “not farm workers” as they variously put it.<sup>106</sup> In an era in which picket lines are so unusual, and in which organized protest over pay and working conditions is a strategy of last resort by the most downtrodden of all workers, the networks and studios managed to portray the strike as selfishness by the privileged few, rather than as a determined and principled stand.

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<sup>99</sup> Interview with Writer 16.

<sup>100</sup> Interview with Writer 2.

<sup>101</sup> Interview with Writer 16.

<sup>102</sup> Interview with Writer 2.

<sup>103</sup> Interview with Writer 16.

<sup>104</sup> *Id.*

<sup>105</sup> Interview with Writer 11.

<sup>106</sup> Interview with Writers 1, 2, 12.

### C. Labor and the Loss of Intellectual Property Rights

Staff writers and showrunners alike identify with labor as they describe how they feel about being dispossessed of the copyrights in their work. A number of writers connected unionization to the work-for-hire doctrine of copyright law, under which the entity who hires a person to write either as an employee or on commission becomes not only the owner of the copyright but also its legal author. They see unionization as a necessary trade-off for the loss of intellectual property rights. A showrunner and creator of a hugely acclaimed show put the case for writers being labor succinctly: “What’s the thing Walter Benjamin says, that the ideal business is prostitution—the workers own the means of production?” He continued, explaining that his show has made millions of dollars, “What should I be getting? I can’t get caught [as a millionaire] complaining about it, but it is not a just distribution.”<sup>107</sup> As the former showrunner of another successful show explained:

So the thing is that, you are spending an incredible amount of time to create material that then you don’t get that. . . . So, you know, I had no ownership in [the show he ran] and that was the number one show. I was paid a fee and, you know, and these companies just make gazillions of dollars.<sup>108</sup>

He described himself as labor and as someone who needs the protection of a union because his contract says he is working for a studio and that he does not own the rights in the show he creates.

### D. Artistic Integrity

Finally, writers identify with labor because they feel that their disavowal of the network or studio heads as management safeguards the prestige that TV writers as a group have successfully accrued over the last twenty years. By and large, staff writers and showrunners unite over their shared alienation from the studio: they are labor because they agree to resist creative input from the studio and network. Staff writers and showrunners in my interviews described a shared craft identity as writers that requires a united front against creative input from network and studio executives. In this respect, to be a writer was to resist being too responsive to, or even aware of, the desires of employers.

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<sup>107</sup> Interview with Writer 31.

<sup>108</sup> Interview with Writer 12.



At the same time, both showrunners and staff writers describe creative control in distinctly legal terms when discussing ownership, their contracts, and what it means to be an employee. As a showrunner explained, when writers feel that “the showrunner’s just going in a, a direction that the rest of the staff doesn’t feel is the right direction, [he advises them] ‘it’s the showrunner’s show.’”<sup>109</sup> But he qualified, of course “the showrunner has to then turn around and say, ‘It’s the studio’s show.’”<sup>110</sup> A staff writer described the additional layer of obligation: “When you’re hired as a TV writer, your job is to execute the showrunner’s vision. Your job is not to write the best show that you want to write.”<sup>111</sup>

Showrunners portray themselves as labor in describing incidents when the studio or network threatened their creative control as writers. In my interviews, showrunners objected a bit to the legal fact of a corporation’s ownership of their work, not all to their compensation or working conditions, but vociferously about those who demanded revisions to that work. A senior writer and creator of a number of shows of the 1980s articulated a complaint from the earliest days of television: that it is nearly unbearable to be told how to write by someone who doesn’t write.<sup>112</sup> He despised “getting nitpicked on every script” by young network executives who had “no idea what’s going on in the world.”<sup>113</sup> Another writer explained that when she was working on a critically acclaimed show of the late 1990s, they didn’t get many notes because critics admired the offbeat and inventive quality of the show, so “it was very hard for them to tell us what to do.”<sup>114</sup> But she did recount with obvious amusement a huge battle with the network over whether two female characters could kiss: “We finally got down to like, they can kiss once, but not twice, because twice means they liked it. I’m not kidding—that was the note.”<sup>115</sup> She compared the autonomy that the critical acclaim earned for that show with terrible creative experiences she had with another network and a well-known studio, which were “enormously distrustful of my ability to write the show; it felt like they would just hammer you with notes till the point where you just started doing defensive writing, like ‘I’ll write anything you want

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Interview with Writer 4.

<sup>112</sup> Interview with Writer 3.

<sup>113</sup> *Id.*

<sup>114</sup> Interview with Writer 17.

<sup>115</sup> *Id.* (The kiss is reported by many to be the first same sex romantic kiss shown on TV, and certainly the first in a show set in a high school.)

me to if you'll stop yelling at me."<sup>116</sup> Among those we interviewed, showrunners' distaste at ceding creative control to network and/or studio executives ran far in excess of their distaste at ceding their copyrights to those who employed them.<sup>117</sup>

#### IV. CONCLUSION

Hollywood was a gig economy long before the gig economy was a thing. It has long had workers working short-term jobs with little supervision who might theoretically be deemed independent contractors even though the most important aspect of their work—its content—is subject to control by network and studio executives. The right to dictate revisions is what defines a writer as an employee in Hollywood, and the ability of writers to unionize is what has made writing a good job.

Hollywood—at least in television writing—is also a workplace in which nominal supervisors (showrunners) are employees who belong to the same union as the employees whom they hire and fire and with whom they work. Not a single one of the thirty-two writers interviewed for this project identified that as a problem for the rank and file, the studios, or the networks that exercise the real power. But almost all of them recognize that the ability of writers to bargain effectively over compensation and intellectual property rights depends on showrunners being in the Writers Guild so that studios cannot break the periodic strikes by forcing showrunners to cross writers' picket lines.

Of course, work as a Hollywood writer is unrepresentative of many, many other occupations. One cannot suggest it is a model for app-based ride-hailing, or low-wage or unskilled work. But film, radio, and television writing from the 1930s to the present bear more than passing similarity to some forms of high-skilled work that has gig-economy qualities, including software and video game development and web design. This history suggests, even if it does not conclusively demonstrate the truth of, three important insights about employee classifications, labor law, and antitrust law in the gig economy.

*First:* Collective bargaining has enabled writers to negotiate better compensation, health and pension benefits, recognition, and novel forms of profit-sharing and intellectual property rights that would not exist but for unionization.

*Second:* Independent workers should not uniformly be deemed to be independent contractors whose concerted activity is unprotected by

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<sup>116</sup> *Id.*

<sup>117</sup> Interview with Writers 2, 3, 12, 13, 14, 17, 23, 31, 32.

the NLRA and prohibited by antitrust law. The definition of independent contractor could be substantially narrowed without doing violence to the purpose or policy of labor law and antitrust law. There has been robust competition over terms of employment and in hiring writers. Television and film production have thrived even with talent guilds.

*Third:* Collective bargaining by writers who exercise supervisory and production executive roles has contributed to the successes of the Writers Guild. Thus, contrary to the notion that supervisors must be excluded from the protections of bargaining to protect either the employer or the rank and file from the conflicted loyalties of the supervisor, the inclusion of showrunners in the Writers Guild and its collectively bargained protections is one of the things that has preserved the ability of writers to bargain at all.

Hollywood writers are neither independent contractors nor supervisors under current law. But if they were organizing for the first time now, I would wager that the studios and networks would argue that writers are either or both independent contractors and supervisors, just exactly as the studios and production companies argued in the 1930s for screen writers, the 1940s for radio writers, and the 1950s for TV writers. The lesson that should be drawn from the experience of the writers' union in Hollywood is that the gig economy should embrace bargaining by independent workers in order to realize the potential of the disruptive economy of the future.

