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BOOK REVIEW

Coercion, Contract and Free Labor in the Nineteenth Century

(A Response to Gunther Peck)

ROBERT J. STEINFELD†

Ordinarily I do not respond to reviews (nothing could be less interesting than two academics crossing swords over obscure footnotes), but recently a review of my book *Coercion, Contract and Free Labor In the Nineteenth Century* appeared in this journal and presented such a serious misreading of the book that I feel compelled to set the record straight, to make clear precisely what the book is and is not about.¹

Coercion, Contract and Free Labor was written against a particular historical tradition. The reviewer, who otherwise seemed so concerned about historiography, ironically failed to appreciate the importance of this tradition, and as a result missed, for the most part, the point of the book. This historical tradition presumes that wage labor in Great Britain and the United States over the last two centuries normally took the form of employment at will and was a natural outcome of the operation of free markets. To be sure, this tradition has been modified in

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1. See Gunther Peck, *Contracting Coercion? Rethinking the Origins of Free Labor in Great Britain and the United States*, 51 BUFF. L. REV. 201 (2003) (reviewing ROBERT J. STEINFELD, *COERCION, CONTRACT AND FREE LABOR IN THE NINETEENTH CENTURY* (2001)).

recent years thanks to the work of a number of historians (Willy Forbath, Amy Stanley, and Christopher Tomlins among others) who have pointed to the variety of ways in which class legislation added to the subordination of wage workers—laws that outlawed or restricted union activity, laws that imposed harsh terms on poor relief, laws that gave workers no legal redress for workplace accidents, and vagrancy laws that could be used to pressure the unemployed into work. These writers have added immeasurably to our understanding of the numerous ways in which the state operated to support employers in their efforts to extract labor at the lowest possible price, but they have not directly addressed the notion that wage labor normally took the form of employment at will—with all the connotations traditionally associated with it.

Coercion, Contract and Free Labor demonstrates that over the century following the Industrial Revolution a significant portion of the skilled manufacturing wage labor force in both Britain and the United States did not work as employees at will but under contracts that bound them to continue in their jobs for shorter or longer periods of time. These contracts were enforced through harsh remedies for breaches—prison terms in the British case and wage forfeiture in the American. This evidence is important because it alters our basic understanding of the economic dynamics of wage labor in the first century of industrialization. The story of wage labor as employment at will has traditionally been tied up with a particular account of the nature of wage labor markets. In this account wage labor markets are governed by the law of the vast reserve army of the unemployed. The coercion in wage labor markets is an economic coercion that grows out of the fear of unemployment. The main disciplinary power of employers is the power not to offer work except on extremely harsh terms and the power to fire peremptorily for any infraction of an employer's unilaterally imposed work requirements. In this account employment at will is an optimum employer strategy for extracting cheap labor because wage labor markets are permanently overcrowded. Under these conditions labor contracts for a term make no economic sense from an employer's perspective.

And yet what the evidence presented in *Coercion, Contract and Free Labor* reveals is that employers in both Britain and the United States often did rely on such

contracts. This evidence necessarily forces reconsideration of the employment at will picture of wage labor and of the nature of wage labor markets during the nineteenth century. It turns out that in the normal operation of the trade cycle periodic shortages of skilled manufacturing wage labor regularly developed. Unemployment among skilled manufacturing wage workers in England, for example, has been estimated to have been below 4 percent in 11 of the 15 years between 1860 and 1875.² Under such labor market conditions employers benefited economically by using labor contracts to bind their workers to jobs for shorter or longer periods. In England, prosecutions for labor contract breaches normally soared in years when skilled unemployment was low. But employers also used binding labor contracts as an additional disciplinary device to enforce work requirements. Failure to obey orders at work represented a breach of contract and could be punished by imprisonment or wage forfeiture. The widespread use of enforceable contracts in wage labor necessarily alters basic understandings about the nature of wage labor following the onset of industrialization.

These findings are significant in a second way. They alter the larger picture historians have developed about the forms labor typically took in the English/American metropolitan core vs. the forms it typically took in the periphery of an expanding capitalist universe. Over recent decades historians have become increasingly aware of just how common coerced labor was in the periphery of the new world economy in the nineteenth century. Quite frequently this coerced labor took the form of indented or contract labor in which a principal source of the coercion came from the labor contracts themselves, which could be legally enforced against workers through the use of bodily coercion: corporal punishment or imprisonment. These historians of coerced labor in the periphery generally presume that contractual coercion of this kind was a departure from the norm, the supposed norm being the employment at will of the metropolitan core.

Some of these historians have developed explanations for this departure from the norm of free labor. One popular explanation holds that the widespread availability of land

2. ROBERT J. STEINFELD, *COERCION, CONTRACT AND FREE LABOR IN THE NINETEENTH CENTURY* 76-77 (2001).

and the scarcity of labor in the periphery compelled employers to resort to coerced labor to obtain and hold workers. In the metropolitan core by contrast wage labor markets were overcrowded and land was not freely available, hence employers had no need to bother with contracts that were legally enforceable through bodily coercion; they could simply rely on the coercion of the market.

The finding that in England it was common for employers to use such contracts explodes this picture of the qualitatively different forms that labor took in the core vs. the periphery. Simultaneously, it discredits attempts to explain these supposed differences by reference to the abundance or scarcity of land or labor. In England land was certainly not freely available and there was no general scarcity of labor; yet employers found good economic reasons for using criminally enforceable labor contracts. Employers also found solid economic reasons, however, for resorting to labor contracts that could be enforced bodily in the periphery where land was freely available and labor was scarce. Hence, the general abundance or scarcity of land or labor do not explain why labor contracts enforceable through bodily coercion were used in certain places. Employers found uses for such contracts where land was abundant and labor scarce but also where land was scarce and labor was abundant. Yet there were places where labor contracts were not ordinarily enforced through bodily coercion. The northern United States after the 1830s is an example. If land/labor ratios cannot explain the absence or presence of bodily coercion in labor contracts what can? *Coercion, Contract and Free Labor* makes very clear that an explanation has to be sought in factors other than land availability and labor scarcity.

Whether labor was compelled through non-pecuniary pressures seems to have depended on whether the state was willing to authorize imprisonment for breaches of labor agreements. Furthermore, this decision does not seem to have depended on whether labor was abundant or scarce. However abundant labor may generally have been, conditions arose in advanced market economies that made the enforcement of labor through the threat of physical confinement economically beneficial for employers. On the other hand, however scarce labor may have been, a state might still balk at authorizing the use of certain kinds of pressures to compel labor. As a general matter it seems pretty clear that

employers of both waged and contract labor would ordinarily have wanted to possess the legal power to use non-pecuniary pressure to enforce labor contracts. Only where states failed to cooperate with these ambitions would we expect employers not to possess this kind of power.³

The crucial factors in determining whether bodily coercion occurred in labor relations were political, legal and normative—not the scarcity or abundance of land or labor. As to why bodily coercion was not ordinarily permitted to enforce labor contracts in the northern United States after the 1830s the book is equally clear.

[A]merican contract rules that foreclosed the use of criminal sanctions to enforce labor agreements have to be understood as decisions taken by northern polities through their legal systems to authorize certain kinds of pressures in labor relations, but not others. Local political (including the scope of the suffrage), legal, cultural and economic conditions all played roles in the adoption and maintenance of these rules. They were a product of a long and complex history of conflict. What emerged from this history was a collective determination in most places in the North, and later in the United States as a whole, to outlaw slavery, and along with it forms of labor directly analogous to slavery.⁴

Before I turn to address some of the criticisms leveled against the book there is one additional aspect of the argument of *Coercion, Contract and Free Labor* that I should mention. The use of bodily coercion to enforce labor contracts in England during the nineteenth century raises a fundamental issue. Today it is an uncontroversial proposition, accepted even by staunch conservatives,⁵ that the use of bodily coercion or criminal punishment to enforce labor contracts makes labor involuntary servitude. But in the nineteenth century despite the use of these kinds of threats in English wage labor that labor was commonly classified as free labor. This change raises a fundamental issue about how labor comes to be classified as coerced or free. *Coercion, Contract and Free Labor* argues that neither free nor coerced labor exist independently of social, legal, or political convention but involve judgments about which

3. *Id.* at 83.

4. *Id.* at 35.

5. See generally *United States v. Kozminski*, 487 U.S. 931 (1987) (Opinion of Justice O'Connor).

forms of pressure applied in labor relations produce coerced labor and which do not. And these judgments do and have changed, as the case of bodily coercion in English wage labor makes clear.

How the line between free and coerced labor is drawn is a matter of convention but is often also highly controversial. In the nineteenth century, many working people and advocates for working people denounced wage labor as a form of "slavery" because they viewed the economic pressures that compelled ordinary people to labor long hours at taxing and dangerous jobs for low pay as a form of coerced labor. But the view that market pressures create coerced, as opposed to free, labor was a controversial proposition then and remains so.⁶ It has become even more controversial today with the nearly total triumph of neo-liberal ideas. The book argues that the fact that it is uncontroversial that threats involving the deprivation of bodily liberty yield coerced labor while it remains controversial that threats involving economic pressures can ever produce coerced labor is the result of a deep seated assumption that bodily coercion operates completely differently than economic pressure in the way it works in labor relations. In light of the near hegemony of neo-liberal ideas it is no longer sufficient to rely on old shibboleths and passionate denunciations. *Coercion, Contract and Free Labor* aims to produce, as rigorously as possible, a demonstration that physical and economic pressures operate in surprisingly similar ways, and that there are well founded grounds for viewing them as comparable. It thereby makes out the case that both kinds of pressures can plausibly be said to produce coerced labor.

The book argues that ordinarily when we speak about coercion in labor, even physical coercion, we do not mean that an employer has physically taken a worker's hand and forced her/him to perform a task. What we normally mean is that an employer has confronted a worker with a difficult if not impossible choice, work up to my standards or be whipped, work up to my standards or be placed in solitary confinement. In most cases the work that is performed is the result of a decision by the worker that as awful as the work is it is a better choice (under the limited set of choices with which s/he is confronted) than the whipping or the

6. *Id.*

confinement. When we say that this worker did not perform the work voluntarily, that s/he was coerced into it, really had no choice, we do not actually mean that s/he did not make a kind of choice, what we mean is that we consider that kind of choice so illegitimate that we call the work involuntary. As a logical matter, it is possible to say that this worker did make a free choice. Consequently when we characterize the labor as coerced, we are making a normative judgment that the choice set with which the worker was confronted was so illegitimate that we will not permit the decision to labor to be described as voluntary. What this way of looking at labor coercion reveals is precisely why labor performed as a result of harsh economic choices can continue to be characterized as free and voluntary. But it also reveals that economic pressures to labor do not operate all that differently from so-called physical or legal pressures. Why would a wage worker labor under appalling conditions for long hours at starvation wages? Because s/he is confronted with a choice set that makes the labor, as bad as it is, a better choice *under the circumstances* than the alternatives: work or starve, work or become homeless, work or go cold, work or try to qualify for a pittance on welfare, or in the case of immigrant miners laboring in isolated western towns, work or try to walk away from the town through hundreds of miles of wilderness.

The continuing controversy over describing labor offered under economic pressure as coerced arises from at least two sources. First, there is wide disagreement about whether particular choice sets, work or go without food, work or go cold, etc. should be viewed as creating choices that are so illegitimate that we as a society will not permit a decision to labor under these choices to be described as voluntary. But second and perhaps more importantly there is wide disagreement about whether economic choice sets are ever so limited. Aren't there always other choices for those with initiative? Nevertheless, to the extent that it can be shown that work is performed as the result of a choice to avoid going cold or to lose one's home there is a strong case to be made that such a choice should be considered so illegitimate that we ought not to permit it to be described as voluntary in precisely the same way we refuse to permit a decision to perform work to avoid bodily confinement to be described as voluntary. Let me add one

point about the argument of the book. It goes on to show that to an important extent both in the case of bodily coercion and economic coercion it is law that places some people in a position to force other people to make these kinds of hard choices between labor and very disagreeable alternatives to labor. For a more complete account of these arguments please consult the text of the book.⁷

Let me turn now to some of the criticisms leveled against the book. Nearly all of them are based either on serious misreadings of the text or on arguments that will not withstand a moment's scrutiny. In one place, for example, the reviewer says of the definition of coercion offered in the previous paragraph that "it remains unclear as to what, if anything, might be excluded from that definition. Would a corporate executive who feels 'compelled' by the Chairman of the Board to give up his stock options or take a pay cut because of disappointing earnings estimates really be a victim of economic coercion?"⁸ I only wish that the reviewer had tried a little harder to understand the argument of this section of the book because it might have helped him lend a little greater rigor to his own work. Even his formulation of the criticism reflects deep conceptual confusion. Economic as well as bodily pressure is a matter of degree. Both depend upon precisely how disagreeable the choices confronting a worker are. A worker forced to choose between continued hard labor and one day of solitary confinement might not find one day of confinement more disagreeable than continued hard labor. But a worker forced to choose between hard labor and one year of solitary confinement might well decide that hard labor is less disagreeable than a year of solitary confinement. We would say that the coercive pressure is much greater in the second situation than in the first. The same is true of so-called economic pressure. What is different about the executive and an ordinary worker is precisely how disagreeable the alternatives are to the work they are offered. In the case of an ordinary worker these alternatives may be to continue mind numbing work at poverty wages, try to qualify for a pittance on welfare, or face homelessness. The alternatives facing executives are normally quite different, work harder without stock options

7. See STEINFELD, *supra* note 2, at 20-26.

8. See Peck, *supra* note 1, at 212.

or live on \$5 million in accumulated savings—until you can find another lucrative executive position. What is different about the choices facing executives and workers is precisely how much more disagreeable the alternatives to work are in the one case than they are in the other. The full argument about economic coercion is laid out in the Introductory chapter on pages 20-26 of the text.

Part of the argument in this section is to show that law plays a crucial role in shaping the alternatives ordinary workers face. Poor law and vagrancy law have always been especially important in shaping these alternatives for ordinary workers. On page 22 of the text, I offer examples drawn from nineteenth-century English experience to drive home this point. Other historians, Amy Stanley prominently among them, have recently produced vivid demonstrations of just how useful vagrancy law proved in the United States in the post-bellum North to compel so-called free wage labor.

The reviewer also claims that aside from court cases, the voices of contemporary labor are largely absent from the book. I believe any fair-minded reader would conclude that is simply not so. The voices of workers and advocates for workers are quoted throughout the book, from the 1820s when an initial effort was mounted to modify the English Master and Servant Acts, through the 1840s when labor attacked attempts made by Parliament to expand the scope of the Acts, to the 1860s when labor first mounted a sustained campaign to have the Acts changed. Indeed, these voices are an important part of my story of how workers came to refuse to acquiesce in the continued use of criminal sanctions under the Master and Servant Acts.

Nor do I believe any fair minded reader could conceivably conclude that I endorse in the slightest degree Frederick Jackson Turner's argument that labor in the American West was free because land was freely available. The entire thrust of my book is to show that land/labor ratios had little to do with whether labor was subjected to bodily coercion. Whether land was abundant or scarce employers had reasons to want to possess this kind of power over workers under a wide variety of market conditions. Whether employers possessed such power depended upon decisions made by the politics of different states for a variety of reasons (see above) other than land/labor ratios. Nor could any fair-minded reader conceivably conclude that

I argue that bodily coercion was more common in the metropolitan core than in the periphery. The book argues that bodily coercion *was not limited to the periphery* but *also occurred* in the metropolitan manufacturing homeland. It most certainly does not argue that coerced labor was more common in the metropolis than in the periphery.

Let me conclude by addressing two final points the reviewer makes. The reviewer questions whether the American anti-slavery movement of the late eighteenth and early nineteenth centuries can explain the differences between the continued English willingness to use criminal sanctions for labor contract breaches and the refusal in the American North after the 1830s to permit such sanctions. Britain after all had a powerful abolitionist movement of its own. But there were two crucial differences between conditions in Britain and conditions in the northern United States. Britain did not have domestic slavery. British abolitionism was aimed at British slavery overseas. At the time of the American Revolution nearly all northern states had slave populations. The confrontation with slavery in the American North was a confrontation with an institution with which northerners lived their daily lives. It was not a confrontation with an abstract institution that existed somewhere else. As northerners moved painfully and slowly to rid themselves of slavery, they were forced to address and forbid practices, such as indentured servitude, that people could use to preserve slavery. It was only as a result of this very concrete, painful and extended struggle with domestic slavery that northerners gradually hammered out a new view of criminal sanctions to enforce labor contracts. The second crucial difference is that by the 1820s many American states had expanded their suffrage to include white working class men. The same thing did not happen in England until much later in the nineteenth century. Indeed, one of the critical factors that finally made possible the repeal of criminal sanctions to enforce labor contracts in England in 1875 was the extension of the suffrage to male urban workers under the Second Reform Bill in 1867.

Finally, the reviewer criticizes my statement that although "many nineteenth-century working people, in the United States as well as in England. . . denounce[ed] all wage labor as coerced labor" and commonly referred to it as "wage slavery," nevertheless "'wage slavery' was considered 'free labor' by nearly everyone, at least insofar as it stood in

contrast to serfdom and real slavery."⁹ It is typical of the reviewer's method that he omits the final clause of the last sentence, then asserts (incorrectly) that I cite no contemporary workers for this proposition—only Karl Marx. A quick check would have revealed that the next sentence on the very same page quotes a contemporary English coal miner and labor advocate, Richard Fynes, for this very proposition.¹⁰ Moreover, it is slightly preposterous to dismiss Karl Marx as a voice for English labor during this period.

The reviewer goes on to suggest that I should have consulted genuine labor voices of the time like Richard Oastler who would have made it perfectly clear that "wage slavery" could not possibly have been referred to as "free labor." Now Oastler is an interesting case. He was not a member of the working classes himself nor from a working class background but was converted to Tory Radicalism as a young man and dedicated himself to advocating on behalf of those who were less fortunate than he. He became a powerful voice for labor, mounting campaigns to pass a ten hour bill, abolish child labor, and repeal the poor law reforms of 1832. He also mounted a march of the "factory slaves" and repeatedly denounced the treatment of "white slaves" in wage labor as worse than the treatment accorded to black slaves.¹¹ But did Oastler also refer to "wage slavery" as "free labor"? Here is what Oastler observed as he testified before a Select Parliamentary Committee in 1834. He said, "I am sure the present effect of *free labour* is poverty, distress and death. . ."¹² I can only hope that the reviewer exercises greater care in the way he goes about constructing his own scholarship than he has in constructing his review of mine.

9. STEINFELD, *supra* note 2, at 13.

10. STEINFELD, *supra* note 2, at 13, 13 n.26.

11. See CECIL DRIVER, *TORY RADICAL: THE LIFE OF RICHARD OASTLER* (Oxford University Press, 1946); RICHARD OASTLER, *KING OF FACTORY CHILDREN: SIX PAMPHLETS, 1835-1861*, 121 notes (Arno Press 1972).

12. Quoted in E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 298 (London 1964) (emphasis added).

