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Contractualism and the Right to Strike

David A. Borman[1]

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Abstract This paper explores the moral and legal status of the right to strike from a contractualist perspective, broadly construed. I argue that rather than attempting to ground the right to strike in the principle of association, as is commonly done in the ongoing legal debate, it ought to be understood as the assertion of a second-order moral right to self-determination within economic life. The controversy surrounding the right to strike thus reflects and depends upon a more basic question of the legitimate scope of reason giving. I conclude that the right to strike, understood as an assertion of a right to self-determination, enjoys presumptive or pro tanto legitimacy apart from the merits or demerits of particular strike demands.

Keywords Contractualism · Discourse · Labour · Labour rights · Self-determination · Strike

My aim in this paper is to explore possible contractualist justifications for the right to strike, a right which has lately come under aggressive assault, from Wisconsin to Ottawa. This is intended as an exercise in non-ideal theory: it explores what justification may be had for the right to strike in our actual social world, the social world of advanced capitalist, formally democratic class societies. By 'contractualist,' I refer to the use of the term in moral theory, as I will explain in the first section below, and neither to the classical social contract tradition in political theory, nor to the various ways 'contractualism' is used in the labour relations literature. I intend to take this moral 'contractualism' quite broadly so as to include, without much attention to their differences, T.M. Scanlon's contractualism, Jürgen Habermas' discourse ethics, Rainer Forst's 'right' to justification, and Seyla

✉ David A. Borman
davidborman@nipissingu.ca

[1] Department of Political Science, Philosophy, and Economics, Nipissing University, 100 College Drive, Box 5002, North Bay, ON P1B 8L7, Canada

Benhabib's 'right to have rights'. These authors agree upon the central claim that legitimate norms are the product of deliberation under some description, and that the subject matter for which agreement is sought is what is *right*, not what is mutually advantageous (except in those special cases where there is prior agreement that what is right *is* to maximize mutual advantage). Insofar as I am looking to explore the justifications available for the strike within this broad approach, I will also make no effort to defend such contractualist arguments against alternatives (either for or against the strike); this would require another paper entirely and, in any case, we need to formulate the relevant contractualist arguments first.

The forms of contractualism I have in mind are also and importantly forms of metaethical constructivism: that is, they view norms as arising from agreement among those affected, and so deny the existence of antecedent normative facts. Thus, if there is a right to strike, it would be because affected parties grant it to one another (caveats to follow), and so 'construct it' through some rational procedure. The attempt to combine contractualism with constructivism in this way has been criticised for emptiness or circularity. It is not my aim here to pursue these metaethical questions (see Borman 2015b). But there is an analogous worry about applying contractualist-constructivism (which I will hereafter simply call 'contractualism') to the sorts of non-ideal conditions of which labour relations in class societies are an example: namely that, in point of fact, the affected parties do not reciprocally recognize a right to strike. One is tempted to say, 'Well, they should!' and so to beat a hasty retreat into ideal theory. But the critics may seem to have a point here: under existing conditions, it *appears* to be difficult to answer why affected parties should so agree without violating the contractualist-constructivist premise that all norms are the product of agreement. That is, it *looks* as though we will need to draw on some antecedent norms which do not originate from or within agreement.

This worry plays out somewhat differently, as I will show, depending on whether the relevant agreements are taken to be actual or hypothetical. But in either case, it is one of the central aims of this paper to argue that this worry is a false one: contractualism, in the constructivist sense I am defending, can provide a defence of the right to strike precisely in the non-ideal conditions of a class society, and without appeal to anything other than the procedures for rational agreement. This defence will rest on two inter-related points: first, that for contractualists of whatever stripe, the question raised by the strike is not so much one of the case for or against a particular right, as it at first seems, but of the scope of morality or of reason-giving itself; second, that the strike represents the assertion of a second-order moral right to self-determination, which is to say a right to justification regarding the conditions of one's labour. If I am correct in this, then the historical and contemporary controversy surrounding the strike is best seen as concerning not the plausibility or merit of this assertion taken on its own terms, but the salience in the first place of moral assertion in this particular area of human life. Taking together the two points mentioned above, I will argue that within a properly understood contractualist framework, the right to strike enjoys *pro tanto* or presumptive legitimacy.

Contractualist Rights and Justification, First- and Second-Order

Since I have proposed a specifically contractualist approach to justifying the right to strike here, and since I mean something quite particular by that, it will help prevent misunderstandings to begin with an outline of the general contractualist account of moral right. First of all, then, although I have been and will continue to write of a *right* to strike, I do so as a shorthand for acts and entitlements that can be justified by legitimate moral principles; I do not wish to put any special weight on the proposal to derive rights, specifically. Scanlon has been criticized for failing to sufficiently explain the connection between justified moral principles—what we owe to each other—and rights as entitlements (see Wenar 2013), and, in response, he has maintained that the question of which justified principles are best captured in the language of rights is not one which goes to the heart of the matter of justification (Scanlon 2013, p. 404). I follow him in thinking that the interesting question is, in this case, whether or not strike action is morally justified as a matter of principle, not whether and how this justification may be best captured in Hohfeldian language.

Justified principles are those that satisfy the following negative test: in Scanlon's version, an act is morally wrong 'if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement' (Scanlon 1997, p. 272). That the agreement should be 'unforced' excludes not just ordinary coercion and threats of coercion, but also compulsions which arise from inferior bargaining positions. In other words, the agreement relies on, as Habermas puts it, a sincere orientation toward consensus regarding what is right. Contractualists like Scanlon regard the relevant agreements as hypothetical—as individual moral agents, we are to imagine such discourses and anticipate their outcomes—chiefly in light of a degree of pessimism about the empirical prevalence of such a commitment to moral justification (Scanlon 1997, p. 273; also Scanlon 1998, p. 393n5, 395n18; Borman 2015a). Habermas, Forst, and Benhabib, by contrast, all insist on the need for actual discourses as the ground of legitimate norms, and they each invoke transcendental features of argumentation as such to distinguish genuine and legitimate consensus from cases of manipulation and imposition. Forst's version centres on the nature of 'good reasons', as invoked by Scanlon, which Forst insists must be characterized by generality and reciprocity:

> in justifying or challenging a moral norm (or a mode of action), no one can make specific claims that she or he denies to others (reciprocity of contents); moreover no one can simply assume that others share his or her perspective, evaluations, convictions, interests, or needs (reciprocity of reasons), such that one would claim, for instance, to speak in the 'real' interest of others or in the name of an absolutely indubitable truth beyond the reach of justification. And, finally, it follows that no affected person may be prevented from raising objections and that the reasons that are supposed to legitimate a norm must be such that they can be shared by all persons (generality) (Forst 2011a, pp. 969; also Forst 2011b).

Benhabib's version, like Habermas', is more strictly proceduralist and is oriented around the formal features of discourse itself, eschewing any attempt to antecedently specify what will be found to be a good reason. The relevant formal features include:

> the equality of each conversation partner to partake in as well as initiate communication, their symmetrical entitlement to speech acts, and reciprocity of communicative roles: each can question and answer, bring new items to the agenda, and initiate reflection about the rules of discourse itself. These formal preconditions, which themselves require reinterpretation within the discursive process, impose certain necessary constraints upon the kinds of reasons that will prove acceptable within discourses, but they never can nor should they be required to, provide sufficient grounds for what constitutes 'good reasons'. (Benhabib 2007, p. 17)

The latter must be left to the determination of actual participants engaged in actual discourses. This is in fact an important difference dividing otherwise similar contractualist views from one another, and its roots go down into the question of the nature or purpose of morality itself: while Scanlon regards morality as a question of articulating the standards for legitimate decision-making on the part of the individual agent, Benhabib like Habermas insists that moral discourses play a fundamentally practical, social role in resolving the conflicts, disagreements, misunderstandings, and lack of solidarity that arise when shared norms are lacking or break down. (Benhabib 2007, p. 17; also, Borman 2015a)

An intermediate position in this debate is conceivable: although his instrumentalist view of reason distinguishes his position from those I am interested in here (Nielsen 1989, p. 125), Kai Nielsen's 'good reasons' approach represents such a middle ground. It is worth describing briefly since its apparently paradoxical nature might be thought to characterize non-ideal contractualism as well. Nielsen describes the function of morality as the adjudication and harmonization of conflicts of interest and desire, with the aim of giving all parties

> as much as possible of whatever it is that each one will want when he is being rational, when he would still want what he wants were he to reflect carefully and when his own wants are constrained by a willingness to treat the rational wants of other human beings in the same way (Nielsen 1989, p. 124).

This is more compromise than agreement, as I have mentioned, and reflects an instrumental view of reason. But, in response to objections raised by Michael Lerner, according to whom any advocacy for the reconciliation of conflicting interests in a class society could only be ideological, Nielsen clarifies that the good-reasons approach must be taken as elucidating the *normative structure* of moral reasoning rather than its operation at present. Indeed, Nielsen admits that, insofar as a fair balancing of interests could only come about between mutually self-interested partners who are roughly equal in power, 'the conditions which make it possible for morality to function, as I describe it functioning, do not obtain' (Nielsen 1989, p. 128). Thus, on the one hand, like Scanlon, and at least at present, moral discourses for Nielsen could only be hypothetical; on the other hand, with

Habermas, Nielsen believes that moral discourses are *supposed* to be action-coordinating. Despite my differences with Nielsen, it will be worth bearing this outcome in mind in what follows—that is, the possibility that the function of contractualist morality is impossible to fulfill under current conditions.

One final and important point: Contractualists agree that persons have a right to justification, as Forst puts it. That is, we have a right to demand and be given good reasons when deliberating over matters that affect us in important ways. But Forst and Benhabib in particular call special attention to the structure of such a right. In Forst's formulation, the right to justification is logically prior to and entails a right to participate in those discourses in which substantive rights are 'constructed' by determining—as persons in the case of moral rights, or as a specific community in the case of political rights—what entitlements and protections 'could not be denied to others without violating reciprocity and generality' (Forst 2011a, p. 969). Inversely, when individuals or groups are treated as though they are 'invisible' for the purposes of justification, so that they are subjected to rules or relations 'without adequate justification', they are 'dominated' and their human dignity is violated (Forst 2011a, p. 967). In a still more extreme case, Forst describes as 'violence' not the simple rejection of claims to justification, but the circumvention of the process of justification as a whole which is unilaterally replaced by other means for the coordination of action. Such violence is often concealed by ideological restrictions of the space of reason-giving, which present certain institutions or relations as natural or unalterable (Forst 2011a, p. 970).

What for Forst is a right to justification is for Benhabib—modifying a phrase from Hannah Arendt—a right to have rights. This is, in Benhabib's account, a right of every human being to be recognized by others as a person entitled to moral respect and legal inclusion. But she specifies these entitlements as protections for the communicative freedom of individuals (Benhabib 2007, p. 9). Rights-claims, she argues, therefore take the following form: 'I can justify to you with good reasons that you and I should respect each other's reciprocal claim to act in certain ways and not to act in others, and to enjoy certain resources and services' (Benhabib 2007, p. 13). Given this constructivist form, I cannot enjoy rights except insofar as I can justify my rights-claims to you; but that means I must acknowledge your communicative freedom, your right to have rights, which is to say, your right 'to accept as legitimate only those rules of action of whose validity [you have] been convinced with reasons' (Benhabib 2007, p. 13). And this holds reciprocally: you cannot enjoy any rights except insofar as you recognize my right to have rights. Thus, all specific first-order rights-claims presuppose a recognized second-order right to have rights. The hypothesis that all first-order or substantive rights claims entail a second-order or logically prior right to justification or right to have rights will be especially important in the argument that follows.

A Few Preliminaries on the Legal Status of the Right to Strike in North America

Philosophical treatments of the right to strike are scarce. A reasonably vigorous search turns up considerable debate over the justification for particular strikes where the public interest may be threatened, especially strikes among health care workers;

but these presuppose as settled the question of a general justification for the right to strike. Within contractualism, there is to my knowledge no discussion of this topic whatsoever.[1] Indeed, even the related questions of the right to collectively bargain and the 'right to work' (an expression now grotesquely misappropriated by the political right-wing as opposed to the right to unionization) receive scarcely a word. On the side of the law, and beginning with the case of the U.S., there is, de facto, no right to strike: that is, workers do not have protection for the refusal to work at jobs which they continue to regard as their own; they do not have protections for preventing replacement workers from taking those jobs; and they are explicitly denied the right to strike in solidarity with workers employed by others. Protections against replacement are, in my view, central to the right to strike: without them, the right to strike is nothing but the right to quit which, outside of slave societies, has never been in dispute.

For a few reasons, the de jure case is more complicated. Consider, for instance, the state of international law on the subject: The International Labour Organization (ILO) interprets its Convention 87—on 'Freedom of Association and Protection of a Right to Organize'—to include protection of the right to strike, though the latter is not explicitly stated. But this interpretation has not proved binding on member states of the ILO, not even among those who (unlike the U.S.) have ratified Convention 87. Article 8 of the *International Covenant of Economic, Social, and Cultural Rights* (1976) explicitly grants a right to strike 'provided that it is exercised in conformity with the laws of the particular country'. Given the domestic legal situation with respect to labour rights, the caveat largely taketh away what the right giveth. The U.S. Constitution, for instance, does not include a distinct right to strike, while the jurisprudence around the question is a mess. The right has sometimes been assumed by legal opinions in the United States; it appears in the *National Labour Relations Act* (1935), and was upheld by the Supreme Court's overturning of key provisions in a restrictive anti-strike law in *Charles Wolff Packing Co. v. Court of Industrial Relations* [262 U.S. 522, at 540–544 (1923)]. But rather than providing an effective precedent for constitutional interpretation, the Court never revisited or reaffirmed the right to strike and instead allowed increasingly severe restrictions on strikers, to the point of rendering them de facto unprotected. To wit: In *Lyng v. Auto Workers*, the Court assumed the existence of the right to strike, but held that denying food stamps to the families of striking workers did not infringe upon it [485 U.S. 360, at p. 368 (1988)]; in *NLRB v. Mackay Radio & Telegraph Co.* [304 U.S. 333, at 345–346 (1938)], the Court upheld the right of employers to permanently replace striking workers; in *United Brotherhood of Carpenters & Joiners v. NLRB* [341 U.S. 707 (1951)], the Court ruled secondary strikes unlawful; and in *Postal Clerks v.*

[1] A partial exception is Macfarlane (1981). Macfarlane surveys a variety of ethical frameworks in relation to the strike, including Rawlsian justice. But the treatment of Rawls is thin and severed from context. For instance, Macfarlane writes: 'Thus a practice like striking may be held to be just if persons in the original position would have found it compatible with the two principles [of justice]: that is to say if, given the relationship of capital and labour inherent in industrial society, they would as potential employers or workers have accepted that workers ought to have such a right' (Macfarlane 1981, p. 27). However, it is a serious distortion of Rawls' account to apply the device of the original position in this way, stipulating 'the relationship of capital and labour inherent in industrial society' as a premise.

Blount [325 F.Supp 879 (D.D.C.), affirmed 404 U.S. 802 (1971)] it upheld the legitimacy of prohibiting strikes by public sector workers (Pope 2004; Pope 2010; on the historical development of the right to strike in the U.S., see Lambert 2005).

In Canada, the right to strike is in a state of turmoil. The *Canadian Labour Code*, modelled on the U.S. *Wagner Act*, spells out the legal terms of strikes and lockouts and recognizes as legitimate restrictions on the right to strike only serious dangers to the health or safety of individuals or communities (Section 424 [1][d]). Yet in recent years, conservative federal and provincial governments have moved aggressively to intervene in labour disputes and to legislate against strike action (against postal workers, rail workers, airline workers, and public sector employees generally), particularly through the use of 'essential services' legislation. Challenges mounted by labour groups against these restrictions were finally heard by the Supreme Court and, in early 2015 (*Saskatchewan Federation of Labour v. Saskatchewan* [2015] SCC 4; hereafter, Saskatchewan 2015), the Court surprised even close observers by reversing their own 1987 decision, in which they had explicitly denied that the associational clause of the Charter entailed a right to strike (*Reference re Public Service Employee Relations Act* (Alta.), [1987] 1 S.C.R. 313), by granting the right to strike—in the words of Justice Rosalie Abella, writing for the majority—'constitutional benediction' (Saskatchewan 2015, para. 3). Part of the reason for the surprise is that, as the dissenting Justices complained, the nature of the challenge did not obviously require dealing with the question of a stand-alone constitutional right to strike: Since collective bargaining has already been granted protection under the associational clause of the Charter, the case might have been decided solely on the matter of whether the essential services provisions undermined collective bargaining. Indeed, the decision remains ambiguous in its reasoning: certainly the dominant line of argument is the Court's repeated affirmation, cited also in the test for an infringement, that the right to strike is justified *because* it is necessary for meaningful collective bargaining, and that '[t]he question of whether other forms of collective work stoppage are protected by s.2(d) of the Charter is not at issue here' (Saskatchewan 2015, para. 2).[2] In this light, the decision seems to fall short of a standalone constitutional right to strike, per se. But elsewhere, the Court—noting the distinct history of striking and collective bargaining—suggests that striking, parallel to collective bargaining, protects the values that lie behind the associational clause of the Charter and is itself 'an essential component of the process through which workers pursue collective workplace goals.' The relevant values are wide-ranging and clearly moral in nature:

> The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives. (Saskatchewan 2015, para. 53)

[2] In linking the strike instrumentally with bargaining, the Court also appeals to ILO jurisprudence (para. 69), and to parallel decisions by the European Court of Human Rights [Enerji Yapi-Yol Sen v. Turqui, No. 68959/01, April 21, 2009 (HUDOC)] and the German (para. 72) and Israeli courts (para. 73).

While the decision is no doubt historic, and is clear in its assertion that striking is protected by the Charter, its precise consequences will for some time remain unclear. The government of Saskatchewan has been given one year to re-draft its essential services law in light of the ruling; and questions have been raised about the implications of the decision for existing restrictions in the *Labour Code*, for instance, regarding strike activity in relation to bargaining efforts, the terms of collective agreements, organization through a union association, and so on.

The Right to Strike is Not an Associational Right

My purpose in canvassing the ambiguous legal situation regarding strikes in North America is not simply to suggest the potential usefulness of directing greater philosophical attention to the matter. That, too. But I also want to highlight two important facts: first, as I mentioned at the outset, there is no generally agreed upon or recognized right to strike; second, that the prevailing strategy for justifying such a right—coming principally from the ILO—has been to attempt to derive it from the freedom of association—that is, the freedom to form groups and organizations for the pursuit of common, constitutionally protected purposes, which the ILO has tied closely to collective bargaining. Despite the recent legal success in Canada, I do not believe this to be a philosophically promising avenue. First, it has the considerable demerit of misrepresenting in a basic way the demands of the labour movement, whose struggles historically underlie any such putative right. Although employers decried what were quaintly called worker 'combinations', the right to combine is transparently instrumental: it is what the combination would *do* that was the subject of and motivation for struggle. It is especially important to note in this connection, and against the tendency to assume that the strike must be viewed instrumentally as a tool within collective bargaining (so that the former is subordinate to the latter), that the assertion of the right to strike in protest against unjust conditions historically precedes the advent of collective bargaining; it is the latter that is introduced as an additional tool toward the same end (see Pope 2010; Montgomery 1987, pp. 9–13; and Lambert 2005, p. 4).

Secondly, framing labour rights in these terms leads directly to some of the problems confronted by the labour movement today: if my freedom is simply to 'combine' or 'associate' then, as the U.S. Supreme Court believes (and as the dissenting Justices in *Saskatchewan* argued), that right may in no way be abrogated by my employer's decision to replace me; or, at least, it remains very much undecided what sorts of constraints may be legitimately placed on the activities of combinations once combined. There is no clear and direct path from the freedom to associate to the right to strike. Perhaps more troubling still: if I am 'free to associate,' I am nevertheless not obliged to do so, and thus do so-called 'right to work' advocates lobby against mandatory dues collection. Stipulating compulsory dues payment as a practical solution to the collective action problem generated by free-riders is practically sensible, but *ad hoc* and philosophically unsatisfying: it seems likely to rely either on controversial views of consent via benefit, or on unattractive utilitarian arguments which essentially concede that the rights of the

few are indeed to be sacrificed to those of the many. The general point here, then, is not just that the right to associate—like any other abstract right—has unclear contours which can only be set by their institutionalization; rather, it is that there is simply no intrinsic connection between the freedom to form groups, or even the specific right of workers to organize, and the right to withhold one's labour and the labour of others in response to unacceptable conditions. No doubt there are ways of framing the right of workers to organize that are more substantive and which would therefore include a greater array of protections, perhaps including the right to strike; but as the situation stands at present, though I disagree with the U.S. Supreme Court Justices, I do not see that it is possible to convict them of simple fallacious reasoning from the premises of associational protections.[3] That is reason enough to explore alternative justifications. There are, of course, various options: the complainants in *Saskatchewan* had also argued that striking was an expressive activity, intended in part to communicate with the employer, other workers, and the public, so that Charter protections for free expression should apply; and there is a long history of arguing that real freedom of contract requires strike protections to balance power, a view that was partly reflected in the U.S. *Norris-LaGuardia Act* (1932) and in the *Wagner Act* (1935). But the question of historical adequacy mentioned above offers a compelling motive, it seems to me, for pursuing the contractualist route here.

The demands which have in fact been at the heart of labour struggles are, of course, various and depend to some extent on context. But the most common include not just a 'living' wage (originally, a 'family' wage), but a fair wage structure, 'decent' or 'human' treatment, some say in the implementation and uses of labour-replacing technology and in the distribution of burdens that arise when cuts are unavoidable, worker participation in grievance resolution, and some responsibility for determining safe working conditions.[4] If workers indeed have a rights-claim to any of these things, it is neither a right of association nor is it clearly derivable from such a right. Instead, rights to collective bargaining, to strike in response to unjust conditions, and (distinctly) to strike as a means of making bargaining effective—if there are indeed such rights, they are rights to self-determination, rights to be subjected only to those regulations of which one can regard oneself as author and which one can obey because—from the perspective of

[3] For a sophisticated attempt to 'derive' the right to strike from the right to freedom of association, see Leader (2010) and Leader (1992). Leader's derivation justifies only a 'qualified' version of the right to strike: because strike activity has a coercive element that intrudes on the freedom of others, he believes that strikes can only be justified when they are undertaken for 'appropriate reasons.' But that means that what really justifies the right in such cases is not, after all, the right to freedom of association, but whatever are the reasons that identify the particular strike as appropriately motivated.

[4] On the German Workers' Movement see Moore (1978); see also Thompson (1966), Montgomery (1987), and Lambert (2005). Lambert notes that unsuccessful efforts were made early in the American labour movement to defend the right to strike as a First Amendment right (of expression), and also as protected by the Thirteenth Amendment's prohibition of involuntary labour. Indeed, Lambert himself defends the proposal to constitutionalize the right to strike through an expanded understanding of the Thirteenth Amendment and the connection between citizenship and free labour. He roots the relevant conception of citizenship in a substantive view of civic republicanism according to which rights to strike are 'collective rights' (2005, p. 192), a move I think unnecessary and, for reasons I cannot go into here (but which involve familiar criticisms of the idea of group rights), unattractive.

their impact on the interests of those affected and from the perspective of consistency with important normative convictions—they are *right*.[5]

As an interpretation of the history of labour rights-claims, this does not stand in need of philosophical defence: the interesting philosophical questions concern how such claims might be grounded. But allow me to note how, beyond doing greater justice to the actual history and demands of labour, such an interpretation easily resolves some of the difficulties of the associational approach, described above. Assuming for the moment that I have a right to self-determination within economic life, such a right would clearly be violated should an employer replace me with another worker in the event that I attempt to actually exercise my self-determination rights. This would be analogous to a government deporting or at least unilaterally removing some citizens from their own electoral district, should those citizens attempt to exercise their voting rights in ways or in support of causes of which the government does not approve. More interestingly, we could then say without embarrassment that, although one has a right to self-determination, one is not obligated to exercise that right. On the other hand, one would no more have the right to opt out of union participation in a unionized workplace, or to opt out of the regulations that result from the participation of one's union compatriots, than one presently has the right to opt out of obeying the laws passed by a democratically elected government for whom one did not oneself vote. In both cases, the caveat is that the decision-procedures must themselves be democratically open and legitimate.

One final point of clarification is needed before I proceed to the question of grounding, and it concerns the precise relationship between the specific right to strike and general right to self-determination. Clearly, self-determination implies much more than the right to strike alone: if indeed workers have a right to self-determination concerning the conditions of their labour, then they can be said to have a right to some form of economic democracy. By consequence, under current conditions, unilateral disposition over the means of production—and, as Elizabeth Anderson has recently argued, the legal structuring of capitalist firms which subjects workers to the arbitrary rule of their bosses, save for those rights 'specifically reserved to workers in law or a [statistically rare] negotiated contract' (Anderson 2015, p. 63)—constitutes a form of domination. I accept these far-reaching consequences with enthusiasm, but have no intention of attempting to defend them here. At the same time, it is conceivable that one could accept the right to self-determination in labour but not a right to strike. Doing so under present conditions would be absurd, like accepting a right to education while refusing any taxation to fund schools, predictably leaving huge numbers of people with entirely inactionable, mere paper-rights. But the absurdity seems to disappear if we posit other plausible mechanisms for realizing self-determination: for instance, in the early twentieth-century, labour unions proved willing to consider as an alternative to the strike a right to demand compulsory arbitration of cases based on substantive merits (unlike the current U.S. National Labor Relations Board, which deals only with

[5] Although she does not discuss the right to strike, Elizabeth Anderson (2015) offers a compelling and in some ways parallel account of the importance of self-determination in workplace governance.

procedural fairness). Tellingly for my argument below, nothing came of the proposal because the large employers of the day refused to submit their own demands to such legitimating conditions (Lambert 2005, p. 91ff) which would, as Anderson's argument suggests, have amounted to a renunciation on the part of the employer of their legally grounded managerial right to rule by fiat within the confines of the law by, for instance, firing workers 'for any or no reason' (Anderson 2015, p. 63).

There are two things to say about this as it relates to a putative right to strike. First and most importantly, under a system in which employers refuse to subject labour conflict to judgments of substantive merit, which is to say that they reject that workers have a right to conditions of employment that they accept as justified, the strike represents the assertion by workers to the contrary. That is, under actually existing conditions, striking—*whatever* the substantive demands—simply *is* the assertion of the right to self-determination in labour, and so the question of whether there is a right to strike hangs on whether the right to self-determination is justified in this context. Accordingly, my argument is focused chiefly on the latter. Second, and somewhat more remotely, if it is granted that the right to self-determination is justified, and if we imagine that some alternative system of arbitration is settled upon as the principal mechanism through which this right is to be realized, we should still ask whether in this scenario the moral right to strike would indeed be quite dissolved. I think that it would not be, but that it would become a right of last resort, like the moral right to civil disobedience, which is legitimately invoked to protest procedurally correct decisions which nevertheless misfire in some morally important way. I will not pursue this second line of defence here since, given its counterfactual premises, first things ought to come first. Still, the theoretical possibility of alternative mechanisms is sufficient to show that the connection between the right to self-determination and the right to strike is not conceptual: the implication is a product of the non-ideal conditions of our social world, specifically, the problem of class domination reflected in asymmetrical property relations and the legal institutionalization of the capitalist firm.

Contractualism and the Right to Strike

By striking, workers declare their right to self-determination within economic life, the right to cooperatively determine the rules and conditions of labour which affect them in essential ways, materially and psychologically. This assertion of a right to justification is activated when normative conflict of some kind arises (as reflected in the list of common demands given earlier). As Don Locke argues in his non-contractualist defence of the right to strike, strikers—irrespective of the particular, first-order claims involved (better pay, better hours, etc.)—are thus

> making, in effect, a certain sort of moral, or quasi-moral, claim: a strike is not simply a refusal to continue working on the terms currently on offer; it is also, in effect, a claim that those terms are unacceptable [i.e., unjustified or

> unjustifiable], and it is because they are unacceptable that the strikers refuse to accept them. (Locke 1984, p. 192)[6]

This is a normative claim: if it were simply descriptive ('these terms *are* unacceptable'), strikers could not legitimately prevent others from coming into take these jobs on those terms (which would constitute an empirical refutation of the descriptive claim) and, if that were the case, there would be no right to strike at all but only a right to quit. The claim, then, is that no one should perform these jobs under those conditions, even if there are many who for reasons of comparative desperation might consent to do so. The actual act of striking is, therefore, not a punitive boycott aimed strategically at forcing the hand of employers (and therefore a strategy for reaching a compromise between conflicting interests); it is, according to Locke, an 'exculpatory boycott,' in which we refuse to perform an act because it would be wrong (for anyone) to do so (Locke 1984, p. 193). The strike is therefore one salvo in a process aimed at reaching an agreement regarding justified conditions (and this, whether or not it is pursued in tandem with organized collective bargaining). Of course, workers can be unjustified in their particular or first-order assertions and demands; this is no way alters the fact that, whatever the content of those demands, the making-of-them implies a second-order claim to a right to self-determination which, like the right to freedom of expression, protects even its wrong-headed use. This second-order claim can be taken both as a targeted complaint against a particular employer and, as it has been historically, as a protest against the structural domination of the capitalist labour market.

From the point of view of the law within liberal states and of (the relevant sort of) large employers, on the other hand, there is no right on the part of workers to self-determination in labour (for an excellent defence of this position, see Anderson 2015). Consequently, strikes are seen as assertions of interest, to be evaluated along strategic lines: as the political economists taught, and as employers historically argued, the strike is simply a strategic attempt 'to test the state of the market for labour' (Marfarlane 1981, p. 46). The employers' lockout and the employees' strike are thus not symmetrical: the former is not an attempt to insist that employees be receptive to good reasons understood in contractualist terms; it is an assertion of power, a reminder of the employers' legally enshrined unilateral control over the conditions of labour and access to the means of production (for agreement on the asymmetry, see Macfarlane 1981, pp. 46, 76–77).

I suspect that this judgment will strike many readers as polemical and perhaps idealizing, so let me say a little more about why I think it justified. First of all, it is a judgment about the structural position of large employers and of the government as shaped by existing law and by political- and economic-class relationships. No doubt

[6] For additional support for the moral claim, see Lambert (2005), pp. 10–11, and Marfarlane (1981), p. 48. The best available discussion of workers' conviction that they retain the jobs they are striking is Gourevitch (2014). Whereas Locke's argument appears to require that workers allege something morally unacceptable about the conditions of their specific job, Gourevitch's account focuses on the fact that the moral offence committed by scab workers is seen by workers themselves as a compounding of structural injustice: that is, what is wrong with scab labour is not just the failure to appreciate the unacceptability of the conditions of some particular job, but what the use of scab labour means for the position of all workers.

there may still be some Frederick Engels or Robert Owen out there who voluntarily attempts to hold his structural privilege in abeyance (just as some fictional union might voluntarily accept a contract that included unilateral determination of conditions by their employer); but not only are such cases obviously exceptional, to insist upon their relevance is either to deny the significance of the legal and economic structuring of employment relations (for instance, investor and shareholder agreements that make prioritizing profit legally binding), or simply to miss the forest for the trees. Secondly, it is admittedly easy to imagine an employer attempting to defend his position in apparently moral terms and so denying the asymmetry I have claimed: 'I have a moral right to dispose over my private property as I deem fit' he might say (and he did say, historically), 'and so also to impose terms upon those who seek access to it.' Such an argument is demonstrably without merit: the employer cannot reasonably claim a unilateral right to determine the working conditions of other people as a consequence of his or her own self-determination.[7] But that is not the real point here, in any case: the point is that even attempting to legitimize this argument would, according to contractualism, require the employer to concede that it is only justified if it is agreed to by all those affected on the basis of generally acceptable reasons. And *that* concession is fundamentally incompatible with the unilateral nature of the declared right: he might as well say, 'I'll command you, if you'll agree'. To put the same point differently: for the contractualist, there can be no unilaterally declared rights; and so the employer here is abusing the language of rights and is not, after all, making a rights claim which is symmetrical to the claim made by the striking worker.

Finally, one might object that nothing in contractualism stipulates that the relevant normative agreement must take place at the level of the individual firm: we might instead have a contractualist justification for a system of self-interested bargaining under which our employer might indeed enjoy the entitlements to which he lays claim. The employer's lockout would in that case remain an act of power, but so too would the worker's strike be. It is quite true that we can imagine such a possibility consistent with some kind of contractualism. There are even some indications that Habermas, in his later work, is attracted to a similar view. But so

[7] This is the direction of argument that Anderson develops in detail: in particular, she argues that the authority of employers is the product of an active infrastructure provided by the law, and that labour, property, and corporate law should be seen as 'public goods provided by the state' and therefore as 'properly subject to evaluation and control by democratic processes' (2015, p. 64). She, too, denies that appeal to property rights can justify the dictatorial authority of managers in the capitalist firm, and she persuasively argues that appeals to liberty of contract ignore the demonstrable fact that very view people engage in any form of contract negotiation as part of being hired. The 'free contract' approach in general 'conflate[s] capitalism with the market, and therefore imagine[s] that the labor contract is the outcome of market orderings generated independently of the state' (2015, p. 50).

Anderson does, however, accept an argument for workplace hierarchy based upon considerations of efficiency, although she denies that this hierarchy need be dictatorial. I do wonder whether this concession is compatible with a right on the part of workers to withhold their labour in protest of unjust conditions, a subject which she does not address. It also seems to me that, in attributing the *existence* of hierarchical capitalist firms to the functional imperatives of efficient, large-scale cooperation (2015, p. 60), Anderson is implausibly rationalizing history. It is noteworthy, for instance, that absent from her account of capitalist consolidation is anything corresponding to Marx's discussion of primitive accumulation.

much the worse for Habermas: neither is it the case that the current organization of labour relations is the product of any such agreement—to the contrary, it is transparently the result of force—nor is it even conceivable that workers could have hypothetically and reasonably agreed to a system of self-interested bargaining which is premised on such unequal power. This possibility, then, is pure ideal theory, in the worst possible sense.

To summarize: the conflict between labour and capital and government which is made manifest in a strike is not located at the first-order level where a specific schedule of putative rights is to be justified or constrained; instead, it takes place at the more fundamental level where the right to have rights (in this domain), or the salience of normative justification, is itself contested. In the strike, a demand for justification is confronted with (often, is inspired by) a refusal to justify: implicit or explicit (second-order) moral claims collide with (unjustified) norm-excluding assertions of interest. If this characterization is correct, then non-instrumental contractualism might appear to have advanced no farther than Nielsen, when he awkwardly concludes that the conditions are not yet right for morality. Although agreements here concern what is right, contractualists do not exclude consideration of existing interest positions: to the contrary, they argue in one form or another that a norm is to be judged legitimate if it can be reasonably accepted from the point of view of all affected, taking into account the effects the general observance of the norm could be anticipated to have on their interests (Habermas 1990, p. 65). But if this is so, then the present prospects for justifying a right to strike might be thought bleak indeed. As Nielsen observed, the recognition of such a right is very much in contradiction to the existing interests of employers, so that a consensus on this point 'would only be possible if the capitalists generally—and not just in isolated instances [*alà* Engels and Owen, above]—would in the interests of fairness and humaneness de-class themselves voluntarily. But,' Nielsen sagely concludes, 'it is an idle dream to expect this to happen' (Nielsen 1989, p. 127).

Prima facie, given the difficulty just described, hypothetical-agreement-contractualism might seem to have an important advantage over its rival: namely, its willingness to declare that some interests—such as the interest in maintaining positions of asymmetrical power—are not legitimate (Scanlon 1997, p. 278). But for the actual-agreement contractualist, there are two problems with this response. First, it is not clear that there is a defensible point of view from which we are able to distinguish unilaterally and conclusively between legitimate and illegitimate interests on someone else's behalf—hence Forst's prohibition of such claims or, better, 'diagnoses'. Second, even if I am able to carry through the argument that the interests standing in the way of justifying a right to strike—which do so by blocking the communicative orientation or a presupposed right to self-determination in the first place—are such that they may be 'reasonably rejected', it is not clear to the actual-agreement contractualist (a position influenced by pragmatism) what the good would be of such a unilateral defence. Typically, the motivational significance of deontological justification is to deprive the would-be violator of rights of all legitimate reasons for their actions (for instance, by proving that there can be no good reason for cheating). But in the case at hand, depriving opponents of their ability to justify their refusal to recognize rights is pointless, since that refusal takes

the form of a refusal of justification itself. Put differently: we cannot leap to the question of whether employers would be unreasonable to reject the right to strike, since we must first deal with the question of what types of reasons or considerations are relevant and it is here that the disagreement is stalled.

Because the conflict occurs at the fundamental level where the types of reasons that are salient is itself in dispute, the actual-agreement approach seems to fare hardly better: the project of justification as it is described by Forst and Benhabib cannot get off the ground. Workers, by making some purportedly legitimate first-order demand, simultaneously assert their right to have rights in the domain of labour; the law and employers refuse to take up that claim in a communicative attitude and insist instead on a compromise-orientation framed by considerations of relative power. Because existing relations of power are so asymmetrical, employers are able today—and at the level of the development of law, have historically been able—to force the orientation toward compromise upon their interlocutors. Of course, the first-order move on the part of employers implies a second-order commitment that the economy operate as a 'norm-free' or 'justification-free' sphere of the play of interests, money, and power, a commitment which itself calls for justification. But the impasse is simply repeated at the second-order level: as I've already argued, there is no genuine effort (nor was there historically) to normatively justify this view in terms acceptable to workers, an effort which would require taking up communicatively, even if critically, the moral-normative claims of workers and so accepting (by presupposition) their right to have rights. Instead, as the dissenting Justices in *Saskatchewan* continued to argue, the economy is to be regarded as a 'delicate', technical system in which competing interest are in a complex balance; the state must have the 'flexibility' to intervene as the system requires and because of this the Court, even when faced with a Charter challenge, must 'demonstrate deference in the field of labour relations' apparently irrespective of the force of reason (Saskatchewan 2015, paras. 107 and 114).

Pro-Tanto Justification and Historical Struggle

Thus, rather than being a question of applied ethics, the issues raised by the strike tend toward the meta-ethical: can the demand to justify itself be justified in a way that is compelling from the perspective of those who refuse to argue? If we could answer this in the affirmative, the right to strike would immediately come under the general defence of justification; the remaining questions to be settled within discourse would concern only the legitimacy of particular strikes and particular demands (none of which would challenge the right to strike itself). There is little hope, I think, of arriving at such a result via informal logic: morality is a practical, historical device and the limits of practices of reason-giving are determined by social struggle. Probably all of the contractualists I have mentioned here would accept this judgment in some form; but it certainly has a greater affinity with, and so perhaps offers some reason to prefer, the approach of the actual-agreement-

contractualists insofar as the latter see the scope of morality as the product of 'political struggles, social movements, and learning processes' (Benhabib 2007, p. 16). For hypothetical-agreement contractualists like Scanlon, morally motivated social struggle must have two distinct stages: first, contractualist reasoners have independent insight into what cannot be reasonably rejected; second, they engage in social struggle, armed with this prior, independent, and already completed justification for their conduct. For the actual-agreement contractualist, at least full justification only emerges at the end of the struggle, with the successful effort to convince others and so reach agreement (see Borman 2015a). When it is a question of opening up some domain of human life to moral questioning, the actual agreement account seems a better fit for the messy outcomes of historical struggle, of which the labour movement is an especially good example. Historically, workers saw labour, its terms and conditions, as a moral question. The presently ambiguous status of the right to strike reflects the unresolved legacy or, to put it more harshly, the historical failure or defeat of the labour rights movement in this regard. Indeed, the 'special interest' character of many trade unions today, which confine themselves to advancing the narrowly defined employment interests of their members (for which they are ridiculed by their anti-union critics) is the result of the systematic repression of a much broader labour movement which actively sought connections with broader concerns of social justice. It is noteworthy, in this respect, that by the 1950s in the U.S., secondary boycotts and sympathy strikes were illegal (Lambert 2005, pp. 62–63).

Where does this leave the right to strike? If morality is regarded as a practical project of coordinating action and action-effects via legitimized norms, then it is enough to show how workers who demand such a right are reasonable to do so while employers who refuse to engage with the claim are not. Operating on the premises of actual-agreement-contractualism, it is in fact easy to accomplish this: I would propose that, because the scope of morality is defined by the pursuit of rationally legitimated norms, every sincerely raised and undefeated demand for justification—every assertion of the right to justification—is presumptively or *pro tanto* legitimate. This does not mean that every particular strike is actually legitimate any more than any proposed substantive right is automatically justified. The right to have rights is justified presumptively as an implication of the mere raising of any given rights-claim, and so similarly, the right to self-determination in labour is justified presumptively by the mere raising of any labour-rights-claim. Any attempt to take-up, even in order to reject the right to have rights would presuppose its recognition, and the same may be said for the right to self-determination. Let me repeat this deceptively simple, though somewhat unsatisfying, outcome: the particular strike implicitly asserts a right to self-determination, as a presupposition of whatever particular claims are made. That right cannot be reasonably rejected since any attempt to reject it on the basis of reasons is self-defeating, guilty—as Habermas might say—of a *petitio tollendum* fallacy. If indeed the right to strike is derivable from the right to self-determination, then there is a presumptively justified right to strike. And this is established without appeal to antecedent normative reasons for believing that those affected *should* agree to such a right.

This does not do away with the practical obstacles that endure in the absence of *full* justification or *recognition* of the right to have rights in labour. We can add for good measure that if the rejection of justification within labour is bolstered only by appeals to the interests of employers taken personally, then the rejection is not based on good, generalizable reasons. If the rejection is, as is more commonly the case in legislative restrictions of the right to strike, 'justified' by first-order appeals to economic efficiency, then the reply is guilty of a fallacy of irrelevance. Of course, employers and governments *could* attempt a second-order justification of the first-order insistence upon compromise-orientation in place of consensus-orientation (that is, a principled, communicatively oriented defence of the claim that economies ought to be regarded as 'norm-free' subsystems evaluated according to their efficiency alone); but doing so would require genuine communicative engagement with the justificatory demands of workers who reject the thesis on the basis of putatively good reasons and would be tantamount to an acceptance of the right to self-determination (here, as agreeing to be governed by principles of compromise-formation). Simply pushing through a compromise-orientation at the second-order level, too, entails that the entire sequence of interactions is reduced to a question of mere power.

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