THE POND SEPARATES CULTURES BUT NOT VALUES: A COMPARATIVE LOOK AT THE FRENCH CODIFICATION OF RIGHT TO WITHDRAWAL OF LABOR AND THE AMERICAN CONCEPT OF AT-WILL EMPLOYMENT

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Abstract

The differences and similarities between the United States common law concept of "right to work" and the modern development in France of the right to withdraw labor following the "Yellow Vest" movement in 2018 demonstrate a parallel diminution of workers' rights. These changes are motivated by the same values inherent within capitalism that are superimposed through the law. This Article analyzes the social and legal contexts in both countries which demonstrate that the superimposition of these values through law is a continuing modern western trend. The key difference is that while the French model is designed to decrease the pressure for strike actions by workers, it also serves as a protection to workers as compared with the American model which exists as a tool to remove workplace protections by substantially altering the terms and conditions of employment. Further, this Article demonstrates that these concepts are both divergent and convergent in terms of core shared values and the peripheral aspect of laws setting cultural norms. This Article then concludes through comparative analysis that while the French right to withdraw labor is a product of legislative supremacy, and the American view within the common law is that at-will employment is the standard, the French model is a product of generations of social negotiations. The American model is a product of the easily swayed influences within the common law that allow a new legal theory with little to no precedential value at the time of its proposal to be adopted in sweeping fashion with very little civil discourse.

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INTRODUCTION

On the heels of nationwide strike actions, protests, and immense pressure from the business sector, the French General Assembly codified the right to withdrawal of labor for unsafe work conditions. The deep cultural value and regard within France for strike actions harkens back to the working-class values that developed within the French Revolution.[1] That value and regard was similarly seen with ongoing labor unrest surrounding the codification in 2008 and which continued through the Yellow Vest Movement more than a decade later. The codification of these values within the French Labor Code for the right to withdraw labor represents significant social negotiations over the course of generations.[2] In stark contrast, the American common law tradition of right to work is generally regarded as developing from the seemingly overnight sweeping adoption of the concept of at-will employment in the late nineteenth century.[3] In both situations, these efforts represent convergent parallel diminutions of workers' rights motivated by the same values inherent within capitalism that are superimposed through the law.

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1. Colin Randall, *The French Cling Fiercely to Their Strike Culture*, NAT'L NEWS (Apr. 7, 2018), https://www.thenationalnews.com/opinion/comment/the-french-cling-fiercely-to-their-strike-culture-1.719507 [https://perma.cc/8GB6-8Q4C].

2. Melissa De Witte, *France's Yellow Vest Movement Has Morphed Far Beyond a Carbon Tax Protest, Stanford Economist Says*, STAN. NEWS (Jan. 23, 2019), https://news.stanford.edu/2019/01/23/know-frances-yellow-vest-movement/ [https://perma.cc/6T2E-LR4D].

3. *Compare* HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (Albany, John D. Parsons, Jr. 1st ed. 1877) (the first published treatise on at-will employment within American common law), *with* Michael J. Philips, *Toward a Middle Way in the Polarized Debate over Employment at Will*, 30 AM. BUS. L.J. 441, 444–45 (1992) (discussing the development of the at-will rule in the late nineteenth century).

I. OVERVIEW

This Article explores in Section II the apropos modern historical developments of both the codification of the right to withdrawal of labor in France as a civil code jurisdiction and the evolution of at-will employment in the American common law tradition. Relying on primary and secondary sources for both systems, historical materialism demonstrates a clear superimposition of capitalist values through law as a continuing modern trend. While the French model is designed to decrease the pressure for strike actions by workers, it also serves as a protection for workers as compared to the American model, which exists merely as a tool to remove workplace protections by substantially altering the terms and conditions of employment.

Next, this Article analyzes in Section III the comparative difference and similarities in both jurisdictions. Both the right to withdrawal of labor and the evolution of at-will employment are simultaneously divergent and convergent in terms of core shared values and the peripheral aspect of laws setting norms. The hyper oscillation of these values becomes evident through the differences in both countries by the treatment of personal jurisdiction and contractual violations, as discussed in Section III.A. Additionally, both jurisdictions have converging legal processes reflected by European Council Regulations and the Federal Rules of Civil Procedure, as analyzed in Section III.A. However, there is a stark divergence in applying these processes, evident through compensation for injuries on the job, unification and stratification of the administrative state, minimum wage laws, and maximum hours. This Article concludes by asserting that repeatedly within this analysis the values superimposed by law in both jurisdictions represent a divergence in the application of the law between the two countries and a convergence in the applied value of the economics of a cryptotype supporting capitalism.

II. MODERN HISTORICAL DEVELOPMENTS

Centering historical materialism provides the deepest understanding of the social contexts surrounding the codification and implementation of the French right to withdrawal of labor and the American concept of at-will employment evolving into the right to work. Historical materialism searches for how societies engage in decision making based off their material, economic, and social needs. In Section II.A below, the codification in France is discussed in detail. While Section II.B further explores the American evolution of at-will employment and the common modern conflation with the right to work. Historical materialism demonstrates a clear superimposition of capitalistic values through law

as a growing western trend,[4] raising the comparative presumption of similarity.[5] Within France, the general social distrust of judges[6] leads to hierarchical judicial subordination,[7] as reflected in the model of legislative supremacy; comparatively, in the American tradition, the Supreme Court is the final arbiter in interpreting the law—despite the common law ideal of coordinated judicial authority.[8]

A. *French Yellow Vest Movement and the Codification of the Right to Withdrawal of Labor*

Like most powerful populist social protest movements, what began with a spark quickly ignited into a raging fire of social discontent during the Yellow Vest Movement. Since 2008, French motor vehicle drivers have been required to keep a high-visibility yellow vest, or *gilete juane*, in their vehicles for safety related matters in case of breakdown on the roadside or similar situations where a motorist might need to be visible to others.[9] In 2018, the vest itself became a symbol of protest and social redress of working-class issues related to business interests within French culture.

As President Macron and the French General Assembly sought to impose carbon taxes that would increase fuel prices in November of 2018, the French public took to the streets to protest. "We are in a state of insurrection, I've never seen anything like it," said Jeanne d'Hauteserre, the Mayor of Paris's 8th District.[10] The protests, similar to the Occupy Movement in America, rapidly became a clearinghouse of social unrest for a variety of issues. In response to the nationwide unrest, President Macron conceded by not implementing the fuel tax for consumers, raising the minimum wage, and even lowering other taxes.[11]

These concessions however were representative of over a decade's worth of labor unrest and social negotiations within France regarding

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4. JOHN HENRY MERRYMAN ET AL., COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA 33–34 (2010).

5. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 39 (Tony Weir trans., 3d ed. 1998).

6. At the threshold it should be noted that even within prized French fictional literature such as the 1833 famed account of *Notre-Dame de Paris*, or the Hunchback of Notre Dame in the English version, the antagonist Claude Frollo was a judge and archdeacon of Notre Dame.

7. Inga Markovits, *Playing the Opposites Game: On Mirjan Damaška's* The Faces of Justice and State Authority, 41 STAN. L. REV. 1313, 1316 (1989).

8. *Id.*; c*f.* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 50 (1986).

9. Vanessa Friedman, *The Power of the Yellow Vest*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/fashion/yellow-vests-france-protest-fashion.html [https://perma.cc/8BNG-94DV].

10. *The 'Yellow Vest' Movement Explained*, AL JAZEERA (Dec. 4, 2018), https://www.aljazeera.com/news/2018/12/4/the-yellow-vest-movement-explained [https://perma.cc/H7G7-8LD6].

11. De Witte, *supra* note 2.

modern labor policy reforms and generations worth of working-class struggles. In 2007, the General Assembly promulgated Article L4131-1 of the French Labor Code which states that "[t]he worker shall immediately alert the employer to any work situation that he has reasonable grounds to believe presents a serious and imminent danger to his life or health and to any defect he finds in the protection systems."[12]

Enactment of the article in 2007 followed on the heels of strike actions across France similar to the Yellow Vest Movement. In the lead up to the adoption and codification of the right to withdrawal of labor, French workers took to the streets to protest the restrictions within previous proposals.[13] In 2008, the current law went into force through the legislative codification of Order 2007-329 in the Official Journal of the French Republic.[14] The law aimed to decrease the pressure on employers from strike actions by allowing workers the opportunity to withdraw from unsafe working conditions. The public law was negotiated in the public forum and achieved balance between the interests of employers and French organized labor. In Section III, this tension between business interests and workers will be further analyzed regarding differences in each system for contractual violations, as well as discussing divergences in application in each system.

Labor unrest came to the forefront again a decade later in these social negotiations when tragedy struck the French rail system and the right to withdrawal of labor within France came to the forefront of social negotiations during the Yellow Vest Movement.[15] As an important aside, French legal culture itself went through an entire codification movement in the nineteenth century while the common law is regarded in many respects as having codiphobia.[16] Similarly, the *Confédération Générale du Travail* (CGT), or the labor organization representing train operators

12. CODE DU TRAVAIL [LABOR CODE] art. L4131-1 (Fr.).

13. Elaine Sciolino, *France Drops Labor Law That Led to Protests*, N.Y. TIMES (Apr. 10, 2006), https://www.nytimes.com/2006/04/10/world/france-drops-labor-law-that-led-to-protests.html [https://perma.cc/3MZN-K82Y].

14. Ordinance to Labor Code, Ordonnance No. 2007-329 (2007) (Fr.).

15. *Compare* Jake Cigainero, *Who Are France's Yellow Vest Protestors, and What Do They Want?*, NPR (Dec. 3, 2018), https://www.npr.org/2018/12/03/672862353/who-are-frances-yellow-vest-protesters-and-what-do-they-want [https://perma.cc/HR4C-2FU2], *and* Alissa J. Rubin, *Hundreds of Thousands in France Protest Taxes by Blocking Roads*, N.Y. Times (Nov. 17, 2018), https://www.nytimes.com/2018/11/17/world/europe/french-drivers-protest-fuel-taxes.html [https://perma.cc/86GM-NLYL], *with* QUENTIN RAVELLI, FUEL FEUD. THE POLITICAL ECONOMY OF THE YELLOW VEST 13 (The Political Economy of Social Movements Working Paper, In press. 2021), https://hal.archives-ouvertes.fr/hal-03101145/document [https://perma.cc/P2XX-LFJG] (demonstrating the buildup of labor unrest within the Yellow Vest Movement from 2018 through the invocation of the right to withdraw labor in 2019).

16. Aniceto Masferrer, *French Codification and "Codiphobia" in Common Law Traditions*, 34 TUL. EUR. & CIV. L.F. 1, 8 (2019).

within France, itself has a storied background within the French socialist movement at the turn of the twentieth century.[17]

Here, these two culturally significant aspects of French culture were on a collision course. Author Anne-Laure Peries summarized:

> Between the 18th and the 21st of October 2019, following an accident between a regional train and a truck at a level crossing in the North of France, French train drivers (between 700 drivers, according to the SNCF management, and 17,000 drivers, according to the CGT union) refused to keep working since they considered themselves in danger.[18]

This accident brought Article L 4131-1, or the right to withdrawal of labor, into the scope of the Yellow Vest Movement because of the continuing labor unrest with regard to law's favoring the economic interests inherent within capitalism.[19] Peries continued:

> The collision on October 16, 2019, had cut all the alerting equipment, forcing the slightly injured driver, to walk around one kilometer along the railway line, in order to raise the alarm, leaving behind seventy passengers alone in the train. The drivers and later the CGT union representatives complained that, unlike in earlier times, the regional train did not have a ticket inspector on board. They argued therefore that train drivers were in danger and the drivers interrupted their work, even in trains which did have a ticket inspector on board (such as high-speed trains).[20]

The train collision led to three labor unions, including the CGT, for the French National Railway Company or the *Société nationale des chemins de fer français* (SNCF), to declare a strike in December 2019.[21] The significance of the ticket inspectors became a major flashpoint between organized labor and the French government because of the duty of each worker to alert the employer to the withdrawal of labor prior to

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17. *See* JOINT LEGIS. COMM. INVESTIGATING SEDITIOUS ACTIVITIES, N.Y. STATE SENATE, REVOLUTIONARY RADICALISM: ITS HISTORY, PURPOSE AND TACTICS 99–106 (1920) [hereinafter REVOLUTIONARY RADICALISM] (discussing the expansive history between the socialist movement and CGT in France).

18. Anne-Laure Peries, *France – Withdrawal from a Work Situation Versus the Right to Strike*, LEXOLOGY (Nov. 8, 2019), https://www.lexology.com/library/detail.aspx?g=d6815eab-9211-46f5-8610-96d6948f025a [https://perma.cc/Q9SJ-MPLT].

19. Caroline Haskins, *The Paris 'Yellow Vest' Protest Shows the Flaws of Capitalism*, VICE (Dec. 14, 2019), https://www.vice.com/en/article/nepkpw/the-paris-yellow-vest-protests-show-the-flaws-of-capitalism [https://perma.cc/DA45-X5G3].

20. *Id.*

21. Angelique Chrisafis, *France Grinds to Halt in the Biggest Strikes of Macron's Presidency*, GUARDIAN (Dec. 5, 2019), https://www.theguardian.com/world/2019/dec/05/france-braces-for-biggest-strike-of-emmanuel-macron-presidency [https://perma.cc/L97T-B4QF].

entering unsafe working conditions. The duty to alert the employer to unsafe conditions will be further discussed in Section III discussing convergences in legal processes.

French labor organizations quickly mobilized to protest further social reforms proposed by President Macron during the Yellow Vest Movement. Citing issues with pension reforms:

> French rail workers, air-traffic controllers, teachers, and public sector staff staged walkouts and took to the streets against proposed changes to the pension system. Rail services almost ground to a halt, with eighty-two percent of drivers on strike and at least ninety percent of regional trains cancelled, amid fears that the open-ended transport disruption could continue for days. In Paris, eleven out of the sixteen metro lines were shut, forcing commuters to scramble to hire bikes and scooters.[22]

The French government critiqued the strike actions as "wild strikes,"[23] similar to the American characterization of unmeritorious strikes under the National Labor Relations Act as wild cat strikes.[24] Historically, the socialist aims of CGT have not been to overthrow government but to make it "evolve towards that time when it will meet the requirements of industrial democracy."[25] Modernly, these pressure tactics on employers and government in France have been met with increased concerns over the impact on business interests. Peries' analysis concluded:

> [T]his type of accident cannot justify a right of withdrawal for all the other drivers who operate a train without a ticket inspector. The absence of an inspector cannot be considered as a serious and imminent danger. The exercising of a right of withdrawal is even more debatable for those drivers who operate a train with a ticket inspector. The analysis could have been different if a fault in the security systems had been identified for each driver who stopped working.[26]

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22. *Id*.

23. Peries, *supra* note 18 (referring to the characterization of wildcat strikes or unauthorized withdrawals of labor, similar to NLRA, § 7, as unmeritorious and unlawful strike actions).

24. Morrison Handsaker & Marjorie L. Handsaker, *Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts Have Ruled*, 22 CATH. U. L. REV. 279, 279 (1973).

25. REVOLUTIONARY RADICALISM, *supra* note 17, at 106.

26. Peries, *supra* note 18.

Peries' view is indicative of that across the business sector, in parts of government, in mainstream journalism, and even within a large part of French culture at the time.[27]

Peries' view represents an overarching value inherent in capitalism that places restrictions on workers' ability to implement pressure tactics on employers through strike actions in favor of business interests. Despite this, the basic concept of an employee or subordinate is vastly different in France as compared to America, which will be discussed in turn in the next Section elaborating on the evolution of at-will employment within America toward the modern judicially imposed national fiat of "right to work."[28] Repeatedly one sees that in both jurisdictions business interests have a dominant presence.

B. *American Evolution of At-Will Employment*

The at-will employment rule has been rooted firmly in American common law since its widespread adoption at the end of the nineteenth century.[29] Some scholars suggest its almost overnight adoption was rooted in the advancement of capitalism.[30] Others disagree with that dialectal analysis and have tactfully delineated its operation during colonial times, while still agreeing that its more widespread adoption by the judiciary was because of the economic conditions of post-colonial America.[31] Despite those nuances between law and economics, legal academia has come to the consensus that Horace Wood's 1878 treatise delineating the rule of at-will employment greatly influenced the concept of an employee in America, towards its brief constitutional canonization during the *Lochner* era.[32]

New Deal legislation, such as the National Labor Relations Act (NLRA), attempted to level the playing field between workers and employers by making terms and conditions of employment collectively

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27. *French Railway Strikes Cause Misery for Passengers*, NAT'L NEWS (Apr. 3, 2018), https://www.thenationalnews.com/world/europe/french-railway-strikes-cause-misery-for-passengers-1.718472 [https://perma.cc/35ZN-RQCD].

28. Thomas D. Aaron Wazlavek, *Defending Exclusive Representation: Tyranny of the Minority in the Workplace for Educators Poses Special Risks to Charter School Teachers*, SSRN (July 24, 2020), https://ssrn.com/abstract=3786361 [https://perma.cc/ZVN5-P7KL] (discussing the nationally imposed judicial fiat of right to work in America post Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018)).

29. *See* WOOD, *supra* note 3, at 134, 272.

30. Jay Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 127 (1976) (portion discussing the development of the rule as favoring middle-level managers in the late nineteenth century, motivated by the developing capitalist economy).

31. Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. & EMP. L.J. 75, 105 (1995).

32. Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 688 (1994).

negotiable for organized groups, including causes for termination, on one hand.[33] On the other hand, the French Labor Code, which presumes all forms of employment to be based on a binding contract,[34] creates an obligation by the employer to inform workers of the conditions applicable to the contract or employment relationship,[35] and further requires the employer to provide a written statement containing all specified terms and conditions.[36]

As segregation came into the forefront of the American psyche, so too did the superimposition of the concept of right to work.[37] With at-will employment already firmly cemented by the judiciary, the next push was for the removal of the protections of the NLRA *vis-à-vis* legislation and advocacy designed to pit members of the working class against each other based on their race.[38] The repeated attempts to nationalize right to work through legislation over decades have consistently failed, but the end goal of the concept was imposed by judicial fiat in *Janus* by attacking the entities formed by workers.

These entities formed by workers in America are the only effective concertedly pooled resource that consistently challenge discrimination in the workplace under subsequent legislation, such as Title VII of the Civil Rights Act of 1964. A point of divergence exists within the core of shared values in both jurisdictions disfavoring discrimination, as reflected by the gravity of the nature of the offense within the law. In France, discrimination is strictly barred within the Labor Code for employment contexts,[39] and separately is a much broader misdemeanor within the

33. Richard F. Watt, *The New Deal Court, Organized Labor, and the Taft-Hartley Act*, 7 LAW. GUILD REV. 193, 204 (1947).

34. 1 BERND WAAS & GUUS HEEMA VAN VOSS, RESTATEMENT OF LABOUR LAW IN EUROPE: THE CONCEPT OF EMPLOYEE 200 (2017) (discussing employment relationships).

35. *Id*. at 525–26 (discussing employer notification obligations through Council Directive 91/533/EEC, art. 2, 1991 O.J. (L 288) 32 (EC)).

36. CODE DU TRAVAIL [LABOR CODE] art. L1221-3 (Fr.).

37. *Compare* Berry Craig, *Right to Work Founder Was a Klan Fan*, AFL-CIO (Aug. 22, 2017), https://aflcio.org/2017/8/22/right-work-founder-was-klan-fan [https://perma.cc/DD8A-Q36D] (discussing the origins of right-to-work under Jim Crow laws), *with* Olivia Paschal, *The PRO Act Would Undo Decades of Southern Anti-Union Laws Rooted in Racism*, FACING SOUTH (Mar. 11, 2021), https://www.facingsouth.org/2021/03/pro-act-would-undo-decades-southern-anti-union-laws-rooted-racism [https://perma.cc/6PX9-LE4N] (detailing the background of right to work legislation and its codification within states as a product of racial discrimination stemming largely not from business interests but anti-segregation, and how the current PRO Act would address this systemic failure).

38. *See generally* International Alliance of Theatrical Stage Employees (@IATSE), TWITTER (Jan. 21, 2021, 8:27 PM), https://twitter.com/iatse/status/1352427628515516416?s=21 [https://perma.cc/7MXK-JW46] (quoting Vance Muse).

39. CODE DU TRAVAIL [LABOR CODE] art. L1132-1 (Fr.).

Penal Code punishable by a maximum of three years imprisonment and up to €45,000.[40]

Both jurisdictions represent the superimposition of the values inherent in capitalism through law as a continuing modern western trend. In France, the right to withdrawal of labor simultaneously decreases the pressure on business interests from strike tactics, while serving as a socially negotiated protection for workers on the job. In America, the evolution of at-will employment towards right to work imposition by judicial fiat in *Janus* has functioned as a tool to remove workplace protections. These similarities in strongly favoring business interests illustrate this modern western trend favoring capitalism.

What started in America as an attempt to modernize the concept of the employment relationship by the rapid widespread implementation of the at-will employment rule transformed into twenty-first century ongoing trench warfare over racism. Legislation criminalizing discrimination in its many forms still has yet to take hold in many American jurisdictions, leaving communities in peril and their workers subject to the predatory tendencies of capitalism to encourage a race to the bottom. While France and America both diverge and converge in core shared values and the peripheral aspect of laws setting norms, despite France's abundance of safeguards for workers, its policymakers are similarly too easily influenced by economic interests that converge with core shared values favoring capitalism.

III. COMPARATIVE ANALYSES

The right to withdraw labor in France and the evolution of at-will employment into the modern nationwide judicial imposition of right to work in America simultaneously diverge and converge in core shared values and the peripheral aspect of laws setting norms. These divergences and convergences become clearer through the differences in both jurisdictions by treatment of personal jurisdiction and contractual violations. Further, both the French Civil Code and the American common law have convergent legal processes but diverge in legal applications. Damaška cautioned comparativists not to fall for superficial similarities.[41] Sacco encouraged scholars to find formants, such as those contained in declamatory statements within constitutions and codes, and for the reasons learned individuals give to reach legal conclusions.[42] The treatment of issues between the civil code and common law reveals a strong cryptotype favoring business interests in both countries.

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40. CODE PÉNAL [PENAL CODE] art. 225-2 (Fr.).

41. DAMAŠKA, *supra* note 8, at 1.

42. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMPAR. L. 1, 31–34 (1991).

A. *Differences in Legal Systems*

The American common law concept of personal jurisdiction struggles with where a cause of action should lie based on delineated constitutional principles of minimum contacts and reasonable notions of fair play and substantial justice. However, the French Civil Code makes personal jurisdiction much less complicated for French nationals but remarkably leaves millions of foreign workers with a higher barrier for access to justice as plaintiffs.

1. Personal Jurisdiction and Nationality-Based Jurisdiction

Consent generally within both countries is a core shared value but is treated much differently when it comes to personal jurisdiction. Physical presence of the defendant is a peripheral shared value derivatively demonstrating consent to the jurisdiction, and it too is treated differently in each system.

Article 14 of the French Civil Code enables a French plaintiff to bring an action against anyone in French courts based on the plaintiff's French nationality, without regard to whether the defendants or the dispute has any connection to France.[43] The Brussels Convention established wide enforcement of multinational judgments,[44] which continues to this day.[45]

This simplicity in commencing an action for French plaintiffs, especially French citizens, represents a divergence of core shared values with the American common law by establishing personal jurisdiction through consent. It further represents a divergence at the periphery of the actual physical presence of the defendant in the forum state. These stark differences significantly impact the resolution of disputes in each system, rendering recovery simpler for French plaintiffs.

In a rather complicated fashion, the American common law system struggles with balancing reasonableness factors,[46] contact with the forum state and establishing presence within the jurisdiction,[47] notions of fair

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43. Henry P. deVries & Andreas F. Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 317 (1959).

44. *See* Consolidated Version of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters arts. 25–49, 55, Sept. 27, 1968, 1998 O.J. (C 27) 1 [hereinafter Brussels Convention]; *see also* Brussels Convention, *supra*, art. 3.

45. Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU).

46. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–93 (1980) (citing reasonableness factors relevant to personal jurisdiction and resolving the question of transient jurisdiction within forum states); Asahi Metal Indus. Co. v. Super. Ct, 480 U.S. 102, 113–14 (1987) (upholding the *World-Wide* reasonableness factors).

47. Calder v. Jones, 465 U.S. 783, 790 (1984) (intentionality of publisher's acts into forum state satisfied minimum contacts); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (reiterating that the "constitutional touchstone" comports with purposeful availment).

play,[48] and substantial justice.[49] By applying those rules to foreign defendants and foreign law, the mechanical unwieldiness within decision making becomes even clearer.[50]

These significant differences present challenges to plaintiffs in the treatment of American common law claims that French plaintiffs do not endure. The dispositive nature of personal jurisdiction for foreign defendants in America indeed leaves many plaintiffs in a procedural abyss, having to appeal interpretative issues before the highest court to see resolution of basic matters such as service of process before a suit can fully commence.[51] In France, service of process for example is simply reviewed by the court at the threshold of filing as part of the initial proceedings.[52]

In the French Code, a change for this simple concept would require social negotiation and codification. The key difference here is that, while in both jurisdictions service of process is essential, this basic threshold for commencing suit often requires frequent reinterpretation within the common law which enables the gatekeeping function of decision making by the courts.[53] This gatekeeping function by the Supreme Court does not encourage equal justice under law but is instead a systemic restriction for access to justice because it grants a *de facto* advantage to repeat players over lay litigants. Further, it encourages a clogged docket due to the reliance on reinterpretation and delays the administration of justice.[54] The only real social advantage here becomes one to the legal profession itself—demand for repeat players through a monopsony. Perhaps, as some have suggested, changes in the common law's discourse serves only to increase the power of courts themselves.[55]

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48. Pennoyer v. Neff, 95 U.S. 714, 736–37 (1877) (rejecting notorious publication due to lack of personal service in former test for minimum contacts with forum jurisdiction out of concerns for fair play).

49. *Int'l Shoe Co.*, 326 U.S. at 316 (clarifying the notions of fair play and substantial justice).

50. *See* G & G Prods. L.L.C. v. Rusic, 902 F.3d 940, 948 (9th Cir. 2018).

51. Krupski v. Costa Crociere, 560 U.S. 538, 548 (2010).

52. Anke Sprengel, *France: Enforcement of Foreign Judgments Comparative Guide*, MONDAQ (Jan. 20, 2020), https://www.mondaq.com/france/litigation-mediation-arbitration/855058/enforcement-of-foreign-judgments-comparative-guide [https://perma.cc/G993-HZKH].

53. Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 639 (2014) (discussing the gate keeping role of the Court through personal jurisdiction).

54. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure In Historical Perspective*, 135 U. PA. L. REV. 909, 985–91 (1987) (discussing gate keeping and justiciability barriers, natural advantages of repeat players in dispute resolution, and the resulting delayed administration of justice from an overreliance on judicial interpretation).

55. M. Todd Henderson, *From* Seriatim *to Consensus and Back Again: A Theory of Dissent* 37–44 (U. Chi. L. & Econ. Olin Working Paper No. 363, 2008) https://ssrn.com/abstract=1019074 [https://perma.cc/Z6ZU-5GYP].

Restricted access to justice and barriers to dispute resolution over matters such as personal jurisdiction in the American common law tradition represent a gatekeeping function for the law by the Supreme Court, not an effective resolution of claims. It follows then that in the French civil system where workers can hale into court any potential defendant for compensation, there would be a balancing of business interests and equity for workers such as within the codification of the right to withdrawal of labor.

IV. JURISDICTION FOR CONTRACTUAL VIOLATIONS

The codification of the right to withdraw labor sought to decrease the pressure of strike actions as a form of a public law negotiated in the public forum between the interests of employers and French organized labor. This concept of social negotiation towards codification accords with classical French philosophers, such as Rousseau, who advocated for the social contract theory.[56] Comparatively, in America, our concept of social negotiations necessarily depends on the gatekeeping functions of representatives within a republic—the very concept of indirect democracy that Rousseau despised almost as much as aristocrats and monarchs.[57]

The republican form of government addicted to judicial intervention in America even rears its unwieldy nature in jurisdiction for contractual violations.[58] Surprisingly though, there is also a conscription of the wider latitude supranationally under the Brussels Convention Article 5(1), as amended by Article 4 of the 1989 Accession Convention. This Article sets out the supranational jurisdiction over member states that have opted-in, and enables parties to sue and be sued in a similarly convergent fashion with the concept of minimum contacts:

> [I]n matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated.[59]

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56. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., 1968); *see generally* Brian Duignan, *Jean-Jacques Rosseau*, BRITANNICA (June 28, 2021), https://www.britannica.com/biography/Jean-Jacques-Rousseau [https://perma.cc/Q7C7-MRTW].

57. *Id.* at chs. 3–7 (describing views towards hierarchical systems of government and presenting tension inherent within democracy and self-governance).

58. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985); Travelers Health Assn. v. Virginia, 339 U.S. 643, 647 (1950); *see also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

59. Brussels Convention, *supra* note 44, art. 5.1.

Unsurprisingly though, French law does not yield here for employment contract violations under nationality-based jurisdiction.[60] Instead, it retains the characteristics of "exorbitant jurisdiction" that scholars within the American common law tradition thought should be restrained.[61] In turn, French nationals have choice of forum through the early holding by the Cour de Cassation that *actor sequitur forum rei* was legislatively intended to be undercut in favor of French citizenship.[62] Employment contract disputes then are treated as either falling under Article 5(1) of the Brussels Convention for non-citizens and citizens, or under Article 14 for citizens who wish to invoke nationality-based jurisdiction, with even the highest court hesitant to disturb exorbitant jurisdiction due to legislative supremacy.[63]

In contrast with the uniform treatment within the American common law, French workers who lack citizenship—such as migrants and international workers—fall outside the far reach of Article 14. Observably, these neoliberal capitalist notions that understate and placate the struggle for a basic class identity certainly are not the "apotheosis of rights"[64] but are superimposed by law. This is simultaneously a convergence with common law values of contact and consent by the operation of Article 5(1) of the Brussels Convention (as well as to some degree, nationalism), and a divergence with American common law principles through the wide grant of nationality-based jurisdiction under Article 14 of the French Civil Code.

Brussels Convention, art. 5, Sept. 27, 1968, O.J. (L 299) 32, accessed Mar. 18, 2020, https://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm [https://perma.cc/LJZ8-YYP8].

60. Kevin M. Clermont & John R. B. Palmer, *French Article 14 Jurisdiction, Viewed from the United States*, CORNELL L. FAC. PUBL'NS (Sept. 8, 2004), http://scholarship.law.cornell.edu/lsrp_papers/13 [https://perma.cc/4FWV-PTAU].

61. Joseph Halpern, *"Exorbitant Jurisdiction" and the Brussels Convention: Toward a Theory of Restraint*, 9 YALE J. INT'L L. 369, 373 (1983).

62. Clermont & Palmer, *supra* note 60 (citing Ingelheim v. Fridberg, Cour de cassation [Cass.] [supreme court for judicial matters] req., Sept. 7, 1808, 2 S. Jur. I, 579 (Fr.)).

63. *Compare* Véronique Child & Eric Guillemet, *The Employment Law Review: France*, Deloitte (Mar. 18, 2021), https://thelawreviews.co.uk/title/the-employment-law-review/france (providing an overview of how employment dispute treatment generally occurs *sans* exorbitant jurisdiction), *and* Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Dec. 5, 2018, Bull. civ. II, No. 17-19.935 (Fr.) (case avoiding addressing exorbitant jurisdiction squarely within an employment context due its intended 'internal' jurisdictional uses–i.e., extraterritorial reach for French plaintiffs), *with* Geert Van Calster, *No VAR needed here. French Supreme Court on choice of court ex-EU in employment contracts. X v AS Monaco*, GAVC LAW (Jan. 1, 2019), https://gavclaw.com/2019/01/28/no-var-needed-here-french-supreme-court-on-choice-of-court-ex-eu-in-employment-contracts-x-v-as-monaco/ [https://perma.cc/3S TW-BX37] (explaining the underlying case while detailing the practical treatment of art. 14 being left untouched by the Court).

64. *See* DAMAŠKA, *supra* note 8, at 76–77.

A. *Convergences in Legal Processes*

Other convergences appear within the legal processes of both countries, within both the core and periphery of shared values inherent in consumer and demand driven economies. For example, both jurisdictions attempt to provide streamlined coverage and broad protection for consumer products and employment contracts. Ironically, cases such as *G & G Prods. LLC v. Rusic*, likely would not be an issue for a French plaintiff in an employment matter. Instead, most French workers would just file suit in France, perhaps due to where the injury lies but also a more streamlined administrative system for dispute resolution.[65]

George A. Rutherglen observed, "A further resemblance to choice-of-forum clauses lies in the categorical approach of European Union law to restrict or prohibit such clauses in certain kinds of contracts, particularly in consumer and employment contracts."[66] Further:

> [E]urope generally takes a more categorical approach to choice-of-law questions, facilitating the exclusion of particular kinds of contracts from the presumed validity of choice-of-law clauses. By regulation, the European Union has reconciled and adjusted the principles of freedom of contract, which favor the validity of such clauses, and principles that protect parties in a relatively weak bargaining position, such as consumers and employees.[67]

Here, we have a large convergence of core values between both countries. In the United States, there is a general blanket of coverage for employment under the NLRA, *et seq*. Even those unfamiliar with American labor law are often surprised that the NLRA itself is particularly important within the common law as the initial keystone of labor law because of its precedential weight through interpretation. Even public employment laws contemplate the binding nature of its precedent due to the delayed recognition of the right to collectively bargain in the public sector. The first public sector collective bargaining laws passed in Wisconsin in 1959, fourteen years after the New Deal.[68] Similarly, consumer protections for many products are based in the national Magnuson-Moss Warranty Act.[69] While many states have created even

65. G & G Prods. L.L.C. v. Rusic, 902 F.3d 940, 948 (9th Cir. 2018).

66. GEORGE A. RUTHERGLEN, TRANSNATIONAL CIVIL LITIGATION 37–59 (1st ed. 2016).

67. *Id*. at 57–58; *cf.* Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EC).

68. Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 517 (2013) (discussing the lag in public sector bargaining rights as compared to private sector bargaining).

69. Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 2301–2312).

stronger legislative protections, the national baseline serves as a way to unify treatment of employment and consumer protection matters.

Although plaintiffs are afforded choice-of-forum and choice-of-law within employment contracts under the common law, other important baselines such as the minimum wage and occupational safety related legislation are matters of federal supremacy. While this federal treatment in the common law is also a national framework for legislative protections, it pales in comparison to the rights afforded to French workers enjoy in the French Labor Code. These procedural differences lead to stronger protections for French workers, and better outcomes for workers engaged in concerted activity.

Vastly different procedural outcomes are driven by substantive economic values that both cultures impose by law. Should recent legislative attempts in America enjoy codification,[70] the baseline of protections for workers engaged in concerted activity would be raised to a higher standard similar to the minimum safeguards and protections afforded to workers in France. In turn, higher minimum safeguards and protections for concerted activity in America would quell decades of labor unrest allow labor organizations to bargain for the Common Good.[71] Removing many of the punitive secondary boycott restrictions in America would open the door to coordinated boycott and strike actions that French workers widely enjoy. Through analysis then, there is a similarity in problems and results. However, there is a stark divergence in the application of legal processes, which reveals that there is a presumption of differences driven by a familiar mutual cryptotype affecting players within both jurisdictions: capitalism.

B. *Divergence in Applications of Legal Processes*

Compensation for injuries on the job, unification and stratification of the administrative state, and maximum hours and minimum wage laws, demonstrate that the largest formant in both France and America is that of economic value. While the codification of the right to withdraw labor aimed to decrease the pressure on employers from strike actions by allowing French workers the opportunity to withdraw from unsafe working conditions, a closer examination of the "living law"[72] reveals a divergence in applications of legal processes. The living law reveals that capitalism is a cryptotype at play within both jurisdictions.

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70. Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (as passed by House of Representatives, Mar. 9, 2021).

71. *Stronger Unions, Stronger Communities*, AM. FED'N TCHRS. (Nov. 2017) https://www.aft.org/sites/default/files/report_strong_unions_stronger_communities_11-17.pdf [https://perma.cc/63QT-HWJA].

72. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMPAR. L. 1, 22 (1991).

A fundamental difference between the countries exists in compensation for injuries on the job. Within the common law, workers' compensation acts as an insurance pool for risk paid for by employers. While each jurisdiction in the United States treats income replacement differently, most jurisdictions do not allow recovery of the full amount of wages for injuries on the job. In the Commonwealth of Massachusetts, for example, benefits are limited to sixty percent of income.[73] Layered within the workers' compensation system, injury for workers is industry specific, with varying levels set by federal preemption in some cases.[74]

French treatment, however, regards injury compensation as part of the system of social security. The Cour de Cassation, in interpreting Articles L. 443-2, R. 433-4 and R. 433-7 of the Social Security Code, interpreted reinjury by aggravation as entitling a claimant to additional remuneration.[75] In America, reinjury would be an extension of the benefit claim. Both jurisdictions provide generally up to sixty percent compensation, but French workers' compensation increases to eighty percent after the twenty-nineth day of leave.[76] In extraordinary fashion though, the claimant in the case interpreting the above Articles of the French Labor Code was awarded the compensation level of his higher salary in a new position after he suffered reinjury years later, a far better remedy for workers than just extending the benefit claim for the base salary during the initial injury.

This difference in substantive and procedural outcomes is the result of a divergence between how both cultures value business interests. In France, the social value of an individual being outside of the workforce without wages is higher than the burden of social compensation. When workers can recover and reenter the workforce productively, they can help forward enterprise. In the common law, the limited recovery insurance pools are singularly funded by employers, with limited contributions to the pools by government agencies when there are critical capital shortages budgetarily. Thus, the rudimentary view is that if the cost to an employer is less to contest a claim than the compensation, the net savings represents a victory for profits and costs the entire system

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73. MASS. GEN. LAWS ch. 152, § 34 (2021).

74. *Compare* ch. 236, 35 Stat. 556 (1908) (Federal Employees Compensation Act as enacted, which covers federal sector worker compensation and initially provided up to an entire annual salary), *with* ch. 149, 35 Stat. 65 (1908) (Federal Employers Liability Act as enacted, which covers railway employees' worker compensation and was initially silent on remuneration in terms of salary).

75. Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., July 7, 2016, Bull. civ. II, No. 15-22.038 (Fr.).

76. *The French Social Security System II – Accidents at Work and Occupational Diseases*, CLEISS, https://www.cleiss.fr/docs/regimes/regime_france/an_2.html [https://perma.cc/E8DK-UP8R] (last visited Mar. 18, 2021).

less. In France, the subordinate role of judges to mechanically apply rules is but part of the calculus, with hidden formants still favoring business interests.

Another area of divergence is through the compartmentalized administrative state within the French Civil Code. France largely has a unified single system of administrative resolution, with the Cour de Cassation's Civil Chamber acting as the highest arbiter of civil disputes. In the common law, the stratification of agency review within the executive branch occurs before the multilayering of judicial jurisdictions that interpret rules specific to industries or sectors leading to a patchwork system without uniformity.

This patchwork and piecemeal method of basic dispute resolution within the common law leads to constant doctrinal conflict, causing a backlog for straightforward administrative matters.[77] Within the French Labor Code workers still encounter the administrative state, but they do not require a final agency determination before proceeding to civil prosecution for matters like unfair workplace practices as we have seen with nationality-based jurisdiction. This leaves open alternative avenues of redress for French plaintiffs whose claims fail within the compartmentalized administrative state.

Last, the "El Khomri Law" is also indicative of the controlling aspect of business interests in the civil law of France. Proposed in 2016, the law sought to "modernize" the social dialog and secure professional careers.[78] As reported in *Libération*:

> Considered too favorable to businesses, the text has suffered, since its disclosure in February, the crossfire of an inter-union led by the CGT . . . [which] . . . mobilized against it tens of thousands of opponents, who beat the pavement during 12 national days of strikes and demonstrations.[79]

Ironically, the strong push for the law was from the leader of the Socialist Party, French President François Hollande. Many credit the passage of this law as a brokered deal between Hollande's government and French business interests, and the subsequent social upheaval as one of the significant reasons Hollande did not seek a second term as

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77. *See generally* Michael C. Duff, *How the U.S. Supreme Court Deemed the Workers' Compensation Grand Bargain "Adequate" Without Defining Adequacy*, 54 TULSA L. REV. 375 (2019) (discussing examples of even workers' compensation getting entangled between the common law and the administrative state in America).

78. *La loi travail a été promulguée* [*The Labor Law Has Been Promulgated*], LIBÉRATION (trans. Google, accessed Apr. 20, 2021), https://www.liberation.fr/france/2016/08/09/la-loi-travail-a-ete-promulguee_1471176 [https://perma.cc/2TJH-DGGZ].

79. *Id*.

President.[80] The law attempted to reduce overtime payments for the French workweek in excess of thirty-five hours, sought to make it easier for companies to lay off workers, aimed to increase the amount of hours of the work week, and tried to loosen restrictions on work hours.[81]

In the common law, maximum hours and the minimum wage are similarly fashioned by business interests. For example, the Fair Labor and Standards Act (FLSA) is limited in contemplating pure "maximum hours."[82] Similarly, the FLSA sets the national minimum wage. The Railway Act provides pure "maximum hours," but is narrow in scope, applying only to transport workers and related jobs. These laws and decisions share a focus primarily on the cost to employers and the resulting net economic gain for society, not the tangible benefit to workers or positive freedom.[83]

The divergences in the application of legal processes further reveal that the hidden formant in both jurisdictions is a preference for business interests. Capitalism as a cryptotype within both the civil code and common law jurisdictions. As concluded below, these divergences are simply a matter of convenience for policymakers, like Hollande or Macron.

CONCLUSION

The French right to withdraw labor is a product of legislative supremacy stemming from the codification movement in the nineteenth century. The American view within the common law is that at-will employment is the standard, alongside the judicial imposition of right to work for public sector employees. The French right to withdraw labor is a product of generations of social negotiations that continue into modern times. The American model is a product of the easily swayed influences that allow a new legal theory with little to no precedential value at the time of its proposal to be adopted in sweeping fashion with very little civil discourse, and damaging repercussions. The interplay between

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80. Ingrid Melander, *Grim Hollande Says He Won't Seek Second Term as French President*, REUTERS (Dec. 1, 2016), https://www.reuters.com/article/us-france-election-hollande/grim-hollande-says-he-wont-seek-second-term-as-french-president-idUSKBN13Q5F0 [https://perma.cc/WW5T-UZ3P].

81. Jonah Birch, *A French Spring*, JACOBIN (Apr. 28, 2016), https://www.jacobinmag.com/2016/04/france-labor-code-hollande-nuit-debout/ [https://perma.cc/QY46-CSDK].

82. *Compare* Muller v. Oregon, 208 U.S. 412, 423 (1908) (maximum hour laws deemed valid), *and* L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (maximum hour laws invalidated), *with* Wm. T. Pegues and Ben B. Taylor Jr., *The Wage and Hour Law in the Supreme Court*, 3 LA. L. REV. 605, 609 (1941) (explaining the rationales for both cases through the New Deal era).

83. *See generally* ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982) (analyzing the *Muller* decision as an attack on women as workers veiled in the altruism of labor laws).

personal jurisdiction and contractual violations shows that in both systems there are significant flaws to workplace protection that favor business interests over the rights of workers.

Both systems converge and diverge at the core and periphery in terms of shared values that favor business interests that can be observed through cultural context. The formants of both systems demonstrate a cryptotype informed by capitalism, despite the party of the executive or form of government, or the scope of legislation. While French citizens enjoy privileges such as nationality-based jurisdiction and stronger workplace protections, these privileges inscribed in law are meaningless when the executive yields to economic considerations. The common law produces a presumption of difference in the legal applications in favor of this cryptotype. In both jurisdictions these efforts represent parallel diminutions of workers' rights motivated by the same values inherent within capitalism that are superimposed through the law.

It would seem then that Damaška is right about reactive states if they merely exist, especially in the western hemisphere, to resolve disputes between two players. As we have seen repeatedly, more than two forces exist in the form of disputes between workers and employer interests. Comparativists such as Danneman would characterize this as a presumption of similarity, while Zweigert and Kötz might more aptly refer to this as the presumption of differences. Ultimately policymakers and decisionmakers are informed by principles inherent within capitalism as a growing modern Western trend. Those forces play out repeatedly in divergences in application and convergences in processes between the civil code and common law, revealing that this cryptotype is a driving force in not only the formation of laws but the living law.