

Steinfeld, Robert J. *Coercion, Contract, and Free Labor in the Nineteenth Century*. Cambridge, UK: Cambridge University Press, 2001. xi, 329 pp.

Review by William A. Sundstrom, Santa Clara University, published in *Business History Review* 76 (Summer 2002), 347-350.

The meaning and legal origins of “free labor” in Britain and the United States are the subjects of Robert Steinfeld’s important new book. *Coercion, Contract, and Free Labor in the Nineteenth Century* enriches and extends the story begun in his earlier volume, *The Invention of Free Labor*.¹ In the new book, Steinfeld’s emphasis shifts somewhat from America to England, and forward in time to focus on nineteenth-century developments in labor contract law.

Steinfeld stresses the tension between two notions of freedom in the employment relationship. *Freedom of contract* would suggest that employers and employees should be free to set the terms of the labor contract, such as duration, and free to accept contracts that could be enforced with penal sanctions for breach. Such an interpretation of free labor actually governed labor contract law in Britain through much of the nineteenth century. In Steinfeld’s words, “Freedom of contract implied that workers should not be constrained to enter only revocable agreements but should be free to bind their labor irrevocably as well” (p. 9).

The competing notion of free labor, which would come to predominate in British and American law, was essentially the idea of *employment at will*, under which workers and employers are free to terminate their relationship at any time, and labor contracts are not enforced using penal or other nonpecuniary sanctions. The triumph of employment at will ruled out many contracts that might have been entered into voluntarily by both parties, and thus narrowed freedom of contract.

Steinfeld’s contention is that both conceptions of free labor were broadly consistent with the liberal and common-law traditions of England and the United States, and thus it was not a foregone conclusion that free labor would come to mean employment at will rather than freedom of contract. The

¹ Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: University of North Carolina Press, 1991).

specific history mattered, and his book is a careful study of the evolution of case law and legislation that created free labor as we have come to understand it.

A further theme of the book is that neither notion of free labor meant freedom from coercion. Coercion under freedom of contract was often overt, taking the form of contract enforcement through penal or other criminal sanctions, especially in the British setting. But even employment at will entailed a kind of coercion, in the sense that workers could be confronted with a choice between disagreeable alternatives— say, work at low pay versus starvation. Any system of wage labor requires state coercion, if only to enforce property rights to the means of production.

Part I of the book, by far the larger part, deals with the emergence of modern free labor in the British setting. The story begins with the provisions of British labor law regarding penal sanctions for breach of labor contracts, including quitting before the end of the contract term. Steinfeld notes that penal sanctions had a long history, and were available to British employers up until 1875. The 1823 Master and Servant Act reaffirmed the place of penal sanctions in labor contracts, allowing for up to three months of hard labor for contract breach. Although courts could not compel specific performance of labor contracts, the threat of incarceration under the Act could be used in practice to compel workers to complete the terms of their contract.

Interpretation of the Master and Servant Act evolved over the 1840s and 1850s in a series of court decisions discussed by Steinfeld in considerable detail. The overall trend was to broaden the coverage of the Act, most notably to include pieceworkers, and to weaken the doctrine of mutuality, under which workers and employers under contract had symmetrical protection against termination by the other party. The latter trend reduced the attractiveness of medium- and long-term contracts to workers. Thus the organized voice of the working class became increasingly unanimous in its calls for reform or repeal of the Master and Servant Act.

Penal sanctions were effectively eliminated in Britain with the passage of the Employers and Workmen Act in 1875. Steinfeld proposes several factors that help explain this change in the law. First,

extension of the franchise to some segments of the working class and growing labor militancy during the early 1870s increased the influence of the working class and its advocates in Parliament. Second, somewhat ironically, the shift by the courts away from mutuality made it increasingly difficult to get workers to sign long contracts, because contracts no longer provided them with protection against reductions in wages or employment. Employers were thus divided on the desirability of reform, with many arguing that repeal of criminal sanctions was necessary to prevent the wholesale displacement of labor contracts by employment at will in the form of so-called “minute” contracts.

Part II considers the American case. By the 1830s, penal sanctions had disappeared in the enforcement of labor contracts for most white workers in the United States. But the conflict between the two conceptions of free labor persisted in interpretations of the term “involuntary servitude” in the employment of African-Americans in the territories and after the Civil War. The legitimacy of penal sanctions to enforce voluntary contracts tended to hold sway in the employment of blacks in the South, and was even upheld by the U.S. Supreme Court as late as 1897 in a case involving white merchant seamen. Finally, in the 1908 *Bailey v. Alabama* case, the Court reversed itself and eliminated the use of penal sanctions in employment contracts altogether.

For white workers in the North, where such sanctions were generally unavailable, labor contracts could still be enforced by wage forfeiture. According to Steinfeld, written contracts for northern factory operatives often included a provision that required a worker to give advance notice of quitting, or forfeit to the employer any wages owed. The sting of forfeiting one’s back pay clearly depended on how much was owed, which in turn depended on the length of the pay period. Wage forfeiture would come to be regulated in some states through restrictions on the length of pay periods.

Steinfeld’s command of the legal history in both Great Britain and the United States is impressive, and he makes a compelling case for his view that the modern notion of free labor only triumphed in the late nineteenth century as a set of restrictions on freedom of contract. The emphasis on the law, however, leaves open some nagging questions. One is simply how many workers were under

contracts of various durations, and how contract enforcement affected actual worker and employer behavior. Without this information, the reader is left wondering just how important the legal changes were in practice. Steinfeld does provide interesting data on the number of prosecutions for master and servant violations during the period 1857-1875, but he acknowledges that such statistics are subject to diverse interpretations.

Steinfeld has a tendency to treat workers and employers as collective agents, and in places his analysis would have benefitted from greater attention to the play of market forces. He presumes, for instance, that because the shift away from the mutuality doctrine directly favored employers, it ultimately threatened the demise of longer contracts because workers would refuse to sign them. In a labor market, however, employers who found binding labor contracts cost-effective would have been willing to induce workers to sign them by offering a compensating wage differential. In other words, we need to ask whether enforceable labor contracts increased the size of the pie to be shared by employers and employees, perhaps by reducing turnover costs and increasing effort. If so, what would preclude individual workers and employers from striking a mutually agreeable bargain?

One potentially significant obstacle to longer-term contracts may have been the problem of asymmetric information. Consider the case of wage forfeiture. Although the prospect of forfeiting some accumulation of back wages could serve as an incentive to a worker to prevent quits and enhance effort, it created the potential for employer moral hazard: namely, as the end of any pay period approached, an employer might have found it attractive to dismiss a worker on false pretenses, or induce a quit, and effectively pocket the wages owed. It is not surprising then that workers in the United States were concerned about lengthy periods between paychecks. Whether an employer would find it in his interest to engage in such opportunism depends on a number of factors, such as the potential for adverse effects on reputation, future recruitment, or the morale of continuing employees. In this context, an interesting advantage of penal sanctions for breach was that they did not confer any direct financial benefits on the employer, and thus created no incentive for this kind of malfeasance.

Clearly, like any good history, Steinfeld's has raised a number of important new questions as it has answered many others. It challenges economic and business historians to consider more carefully the constraints on agents arising from the structure of labor contracts. And it invites more quantitative research into the extent and consequences of alternative means of contract enforcement in nineteenth-century labor markets.

William A. Sundstrom is professor of economics at Santa Clara University. He is the author of numerous articles on the history of American labor markets, most recently "Discouraging Times: The Labor Force Participation of Married Black Women, 1930-1940," *Explorations in Economic History* 38 (January 2001), pp. 123-146.