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### Ownership Work and Work Ownership

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#### POST

# Ownership Work and Work Ownership by Hiba Hafiz

Professor Lee Fennell’s groundbreaking *Slices and Lumps* incisively reconceptualizes how the gig—or “slicing”—economy impacts the structuring of work. But it goes even further to alert us to how “delumping the working experience” (p 6) can transform the infrastructure of work, from an individual’s task design to the agglomeration costs and benefits of untying and retying workers to desks, work to benefits, and worksites to surrounding communities. This Essay takes seriously her invitation to refine and adapt its insights to radically readjust work law in two ways. First, it explores how employers’ property rights over worksites are “lumpy” when they allow employer accrual of “opportunity cost” rents by: (1) exploiting “lumpy” benefits of first possession and the unilateral right to exclude to reduce output, increase prices to consumers, or restrict workers’ more innovative and productive property use, thereby foreclosing alternative, more productive uses of worksites; and (2) foreclosing workers’ receipt of competitive wages or higher productivity contributions in alternative employment by exercising labor market power over them (Part I). Second, this Essay explores creative solutions for tackling the inefficiencies or social costs resulting from those rents. Specifically, it re-envision[s] labor law doctrine pertaining to workers’ lawful interference with employers’ property, which requires balancing employers’ state law property rights against employees’ and unions’ labor rights under the National Labor Relations Act (“NLRA” or “the Act”) (Part II). Inspired by Professor Fennell’s contributions, it proposes a rebalancing of both sides of the ledger: on the state property rights side, it calls for an efficiency-based “slicing” of employers’ property control (“ownership work”) (Part II.A), and on the labor rights side, redesigning a new “choice architecture” that enables a broader set of options for workers’ protected activity to function as countervailing power against employer rent collection (“work ownership”) (Part II.B).

Concentrating on the “slicing” economy’s impact on the structuring of work, Professor Fennell “explores how new business models that slice time, effort, attention, and risk in unprecedented ways are changing how people work,” not least through the gig economy’s “decoupling work from many of its standard accompaniments, including health insurance” (p 6) As a result, “[c]hanging ways of working may require new assemblages of risk pools that stand outside of the traditional

employment model—. . . new forms of lumping as well as slicing” (p 131) For example, “many jobs feature *temporal indivisibility* coupled with *temporal immobility* or *fixity* in that they occupy fixed and contiguous lumps of time within the worker’s schedule. . . . Temporal indivisibility and fixity are logically separable—a task could require eight consecutive hours of work that could be completed at any time” (p 120) Employers may cause indivisibilities and rigidities at work—hiring employees for work supplied in “lumpy” configurations or not at all to maximize revenue, minimize shirking, and reduce turnover costs (p 121). As with *work-time*, so with *work-sites*. Law and culture can establish or remove barriers to make certain features of worksites more or less immutable. For example, adapting the “theory of the firm” literature on make-or-buy firm decisions to “homemade-or-outsource” decisions in housing complements (public parks, laundromats, libraries), Professor Fennell highlights how contingent housing demands for “a fixed amount of space” are when the private home sphere can shrink or expand to share or absorb amenities (p 158). Similarly for workplaces: in a “slicing” economy, employers and workers can more cleanly delineate the boundaries and expectations of workplace amenities depending on legal requirements and cultural norms that fuel heterogeneous preferences but also opportunities for wage discrimination. And work and work production functions are *themselves* “lumpy”: there are discontinuities and non-linearities where work product may only be complete upon reaching certain thresholds or when work outcomes “do not increase smoothly and proportionately in response to inputs” (p 12) Achieving the right level of granularity so people can make meaningful contributions “manageable enough to fit within the envelope of excess capacity that a particular person has available” requires accommodation strategies. Professor Fennell notes that “the smaller the grains, the easier it is to fit everything in” and that “[b]ulky time commitments . . . require more strategizing” (p 96)

While many have explored the question of who benefits from “lumping” and “slicing” work arrangements, less explored are the legal conditions for the possibility of deciding aggregation and disaggregation questions at work: How do legal defaults favor certain decision-makers over others in decisions about combining and “slicing,” and why? For example, municipal legislative reforms prohibiting “clopenings”—requiring the same workers to close and open a business—suggest that, while employers had exclusively decided how to aggregate work time for scheduling employees, government disaggregation of “closings” from “openings” may reduce employer control in ways that the market was unable to, offering welfare benefits to workers and reducing externalities (such as child care costs and sick workers). But where labor and employment law rules can be “lumpy” (p 25), Professor Fennell’s book suggests that “market-based models” mostly outpace legal reforms as “delumping” engines (p 141). And as “delumping” engines, the market can be liberatory—individual and collective abilities to “slice” work frees up scheduling flexibility and enables private ordering that allows families, friends, and communities to realign temporal commitments in ways most beneficial to them. But employers also take advantage of navigating and side-stepping “liability cliffs” to displace the legal infrastructure and shift the status of “employees”—situated at the acme of work protections—to “independent contractors” (p 191), “supervisors,” “domestic workers,” and others, situated at their nadir.

And the ground beneath both legally protected and unprotected workers is quite literally the domain of state law property regimes that establish default lines of control through possessory rights and rights to exclude. These default lines overlay a more profound current running through Professor Fennell’s analyses of how traditional property rights can be more or less “sticky” when it comes to “slicing” forces (p 157). Just as urban infrastructure is “lumpy”—a means for “realizing the agglomeration benefits (and costs) that flow from the underlying clustering of complementary activities in cities”(p 173)—so, too, is the infrastructure of work: it directs use to certain ends that are hard to dismantle and redirect to other ends. But evidence of the decline of labor’s share of income, labor market concentration, employer monopsony and oligopsony power, and employer collusion suggest that the infrastructure of work—including its legal regulation—is currently directed towards agglomeration benefits to capital and shareholders and has proven difficult to redirect to worker or broader social gains. A core source of the “stickiness” is employers’ “lumpy” property rights.

## I. Employers and Opportunity Cost Rents

Professor Fennell’s book uncovers how “slicing” exposes a range of opportunity costs that arise from the “lumpy” way we structure assets. For example, AirBnB uncovers the opportunity costs of home usage relative to the possibility of fracturing any idle capacity into seemingly infinite microtransaction rentals that expand opportunities for exploitation (pp 142–43). Crucially, however, the potential for controlling when and where to reduce opportunity costs for more efficient or exploitative uses is—absent legal reform—almost exclusively within the purview of property owners. Professor Fennell imagines employer property owners facing

a larger standing workforce . . . com[ing] with a lower opportunity cost [to an employer] if lower-priority tasks can be taken up during downtime (which may depend on the granularity of those tasks) or if there are ways to reallocate workers across firm sectors that have different cycles of high and low demand. In theory, a firm could contract out its workers to another firm during slow periods, although administrative hurdles may make this avenue impractical. (p 123).

“If the [employment] contract with the employer serves to get workers started on a task, then the returns that employees internalize from finishing the entire project may carry them beyond the agreed-upon hourly terms—even though most of the surplus goes to the employer” (p 122) Employers can restructure work in “minutely divided segments”—“sliced” rather than “lumpy” service inputs—displacing the “lumpy service requirement” presented by permanent employees to temporary contracts made at various stages of a worker’s productive life, increasing and decreasing an employer’s opportunity costs relative to other sources of labor inputs or substitute capital (p 22). Such restructuring is subject to restraints on employers generated by worker preferences regarding “increasing wage sequences” (p 135). Additionally, workplace restructuring

has enabled “widespread participation in slicing markets,” but employer ownership preserves any “tailoring [of] transactional unit[s]” to the employer as the “exclusive agenda setter” for worksite productivity (or lack thereof) (p 142). While Professor Fennell outlines exit options for workers—through “[p]olicies that help workers manage risk outside of traditional employment . . . to support entrepreneurship and innovation” (p 132)—the impacts of wage penalties and worker resistance *within* inefficient worksites is underexplored.

But Professor Fennell’s book does expand the framework from which to evaluate opportunity costs beyond the value of the next-best use to property owners to costs that are more broadly suffered with respect to overall welfare. To the extent it is more profitable to property owners to abstain from a next-best-use but it is more costly to overall welfare for the next-best or other uses *not* to be exploited (because of high transaction costs and/or externalities) (pp 64–79), I argue that property owners should be viewed as gathering “opportunity cost” rents, or rents accrued by engaging in personal-preference usage at the expense of alternative and more valuable usages for overall welfare.

When employers exploit their first possession rights to unilaterally exclude others from worksites, they can passively accrue opportunity cost rents from foreclosing alternative, more productive uses. There are a couple circumstances where alternative uses could be more productive for overall welfare (and therefore, the employer’s choice extracts an opportunity cost “rent”) when and if the employer: (1) reduces output and increases prices to consumers or restricts workers’ more innovative and productive use of the property; and (2) exploits its labor market power—whether sourced in labor market concentration, search frictions, double-sided matching costs, information asymmetries, heterogeneity, or anticompetitive conduct—to tie workers to sites of employment, foreclosing worker receipt of more competitive wages or higher productivity through alternative employment opportunities.

First, employers may exercise monopoly power or collude with competitors to reduce output and increase prices in downstream product markets, appropriating rents at the expense of consumers and resulting in deadweight loss. But there are also circumstances where workers could enhance the efficiencies of employers’ otherwise idle or relatively unproductive capital—making it more “productive” than it otherwise would be or increasing its value relative to its alternative next-best uses, through increasing artificially suppressed output, innovation, or surplus labor above and beyond employers’ receipt of returns on capital (a reclaimed “labor theory of value”). When these circumstances occur, employers’ control of the property—their right to exclude higher outputs, productivity, and a range of worker conduct—is “tragically lumpy” (p 74): the employer’s private valuation falls short of the socially beneficial use. And “[t]here are efficiency gains from employing all resources more fully . . . and achieving a tighter fit between what is required and what is provided” (p 129)

Likewise, when employers' monopsony, oligopsony power, or anticompetitive conduct reduces labor market competition through wage-fixing, no-poaching agreements, non-compete agreements, or other restraints, they foreclose workers' ability to receive compensation matching their marginal revenue product, artificially limit workers' outside options, and create under-, mis-, or unemployment. Further, just as the "suitability of a particular dwelling for a particular household depends not just on its structural features and location, but also on the surrounding regulatory and market forces," so too with particular workplaces and worksites (p 157). Workplaces depend on amenities that nurture them from the outside, and employers extract benefits from these features, whether through exploiting lower labor costs by squeezed intermediary suppliers in a fissured economy, subsidization through government social safety net programs to maintain healthy workforces, or exploitation of traditional gender roles in providing home care for children, elders, and individuals with disabilities. Thus, the employer can extract rents by precluding higher social value generation in order to preserve inefficient private valuation resulting from tying workers to idle or underproductive worksites and taking advantage of externalities.

When an employer's exclusion of employees "generates substantial negative externalities, intervention by the state may be warranted," and "[u]nderstanding the core challenges of aggregation and division . . . will enable policy makers and entrepreneurs to improve the fit between supply and demand" (p 120). The intervention of labor protections—altering workers' "use rights" or "modalities of access" (p 137)—could serve as a countervailing force to correct the inefficiencies produced by the employer's market power and make the property more productive and socially valuable by increasing output or innovation. "Slicing" the employers' ownership and control of opportunity-cost rents—rents gained from controlling any and all next-best uses of worksites—can allow workers to create new social value through innovative alternative uses. "Lumps" and "slices" can recalibrate supply-demand and market efficiencies. By curating the bundle of employers' property rights and expanding workers' choice architecture, we can construct a more socially productive organization of work.

## II. Labor Law's Accounting: Employer Property Rights and Employee Labor Rights

One of the most consequential intersections of property and workers' rights is the doctrine pertaining to workers' lawful interference with employers' property under labor law, whether in the context of union access to workers on employer property, workers' communications about unionization at work, or worker strikes and picketing inside the worksite ("inside actions") and outside it. In determining when workers can intrude on employers' use and enjoyment of their property, the National Labor Relations Board ("NLRB" or "Board") and the courts take the property grants at issue as fixed under state law and are tasked merely with *balancing* those rights, on the one hand, against workers' NLRA rights, on the other. Workers' rights lose out to employers' when courts view their right to organize, access information about unionization in the workplace, and

engage in concerted activity as subordinate in the balance to employers' common law property rights. But Professor Fennell's book provides a framework and argument for radically reconceiving both the employer's and the employees' side of that ledger: What if employers' property rights are *themselves* "lumpy" such that they include a range of exclusion rights that were inefficiently allocated and should be "sliced" out by the law? And would expanding and "slicing" the "choice architecture" of workers' protected activity enable more efficient allocations of "lumpy" property rights and enhance social welfare?

Applying Professor Fennell's novel insights to labor law doctrine reveals that, in over- and underestimating how to weigh both sides of the ledger, the Board and the courts may have improperly balanced unions' access to workers, workers' inside actions, and other labor activities relative to employers' property rights. If employers receive rents from over-"lumpy" property rights, instead of taking those rights as a given and balancing them with an arbitrarily narrow spectrum of NLRA rights, the labor law could view the scope of the property rights *themselves*, even *before* balancing, as "slice-able" to avoid inefficiencies, waste, and rents. And the law could reassess the scope of workers' protected activities to accord with a more thorough evaluation of how workers' conduct may correct for those inefficiencies, waste, and rents, on the other side of the ledger. Specifically, the choice-set architecture available to workers—in the form of protected activities to organize and engage in concerted activity under Section 7 of the NLRA—could be reconceived in tandem with reevaluating the scope of employers' property rights. Just as antitrust law's analysis of anticompetitive property rights abuses—including patent abuses and FRAND licensing—can justify and serve as a remedial basis for open-sourcing, shared use, equal access, and non-discrimination duties, so in the labor context: "slicing" property rights can enable social welfare benefits through granting workers "use rights" and "modalities of access" (pp 136–37) to employer's property for leafletting, discussing unionization, and engaging in a range of concerted activity that exercises economic pressure through shared control of employer property. Slicing access to the workplace may change our perception of the underlying property interest, revealing that "what is being assembled is never really property but rather *cooperation*, which might be aggregated either to put things together or break things apart" (p 44). Work can be seen as a mechanism for facilitating coordination between capital and labor inputs that make it productive, and a failure to cooperate—a strike—can be conceived either as a way of breaking apart an existing cooperation or of revealing the cooperation as structurally tainted by employer rent-seeking. If "delumping" can enhance efficiencies, work law can redefine the "proper unit of analysis" through a process of "evaluative aggregation," deciding how widely or narrowly to view when lines ought to be crossed or standards met (p 191).

By reimagining the very property rules that cut through core labor law doctrines—or how property rules can create or reinforce inefficient and socially harmful ownership rights—Professor Fennell's book provides the basis for reimagining labor law itself, enabling a more nuanced vision of how work can generate better forms of cooperation. Thus, by better understanding the conceptual

work done by the property rights regime granted to employers (“ownership work”), we can reevaluate forms of “work ownership,” or mechanisms to ensure beneficial use rights and modalities of access to workers.

## A. Employer Property Rights and “Ownership Work”

Under current law, employers have a range of rights to exclude workers and union organizers from their worksites. Courts have granted employers the right to restrict workers’ discussion of unionization to non-work areas on non-working time and to limit employees’ right to solicit union support in non-work areas if “necessary in order to maintain production or discipline.” Employers can require captive-audience meetings about unionization on work time and presumptively exclude union organizers and subcontracted workers—deemed “non-employees”—from informing employees about unionization as long as such they have reasonable access to employees outside an employer’s property. Employers can temporarily replace employees striking their unfair labor practices and can permanently replace employees engaged in economic strikes for higher pay or better working conditions. And they can fire workers for engaging in inside actions like sit-ins, overtime strikes, partial strikes, or intermittent strikes. Employers decide in the first instance the *space* of work—“which kinds of work are strongly complementary to having fixed work locations and which are served as well or better by floating access” on cost-saving and space-saving measures (p 125). And absent “for cause” restrictions in employment contracts, they can fire employees at will (unless the firing constitutes discrimination for, interference with, or retaliation for exercising labor and employment rights).

While employers’ property rights can be divided into various “sticks” in a bundle—physical exclusion rights, regulatory rights, and hybrid physical-regulatory rights—the labor law has primarily treated them as a “lumpy” right to exclude when weighing them on one side of the ledger, ignoring opportunity cost rents employers can exploit, effectuated in part by excluding workers and unions from their property, whether in organizing campaigns, during leafletting and strikes, through lock-outs, or by replacing workers with less efficient workers (think The Replacements). Professor Fennell’s book allows us to recognize that “lumpy” rights may be disaggregated to more clearly view them as different types of rights, ones we can “slice.” Arranging “slices” “can carry quite different valences depending on who controls its terms” (p 126). When employers exploit opportunity cost rents by, for example, exercising buyer power over labor inputs or by appropriating rents from discontinuities and non-linearities in work production (p 122), Board and court “slicing” can readjust the components of control enabling those social welfare harms. Professor Fennell’s book alerts us to the fact that there is nothing inherently efficient about existing property rights allocations, and since we can “slice” them up, we can imagine other allocations that could lead to different labor law outcomes. When employers exploit the existing property rights regime to reach inefficient outcomes, reconceptualizing property rights allocations to shift the balance from “lumpy” employer exclusionary rights to more flexible worker use rights and



modalities of access could dramatically shift their relative bargaining power and lead to more efficient outcomes.

In interpreting the scope of employers' property rights, the Board and the courts can "slice" up overinclusive bundles of rights through labor law preemption doctrines or traditional property law doctrines. Under *Garmon* preemption, a state may not punish activity that is clearly or arguably protected under federal labor law. *Machinists* preemption bars states from regulating conduct that the NLRA deliberately leaves unregulated, intending it be left to the "free play of economic forces." The Board or the courts, in interpreting the scope of state property rights, could interpret them to avoid a conflict with federal labor law or view the employer's right to exclude as affirmatively limited by Congress's protection of employees' Section 7 rights or intent to leave union or employee conduct unregulated (and to ensure against trampling on First Amendment-protected activity). Alternatively, the Board or the courts could interpret the scope of employers' property rights under traditional exceptions to the right to exclude, such as adverse possession and necessity defenses.

## **B. Employees' Labor Rights and "Work Ownership"**

As Professor Fennell notes, "[t]he way the choice set is structured . . . can affect the efficiency of the arrangement . . . [S]ocial policy can greatly influence the choice sets that people encounter," so it may "be desirable to consciously structure choice sets to make them chunkier or less chunky." When workers exercise their labor rights to overcome inefficiencies or negative externalities from employer rent-seeking, they should be viewed as "property outlaws" reclaiming "slices" of worksites to make those worksites more productive and socially valuable than employers' exclusion. Choice sets about workers' use rights and modalities of access to employer property, or "work ownership"—including mechanisms of exerting economic pressure to impact employers' use and enjoyment of property—should not be arbitrarily limited by labor law in ways that protect employers' less efficient or harmful use. Thus, in reviewing employees' lawful interference with employer's property rights—whether as to speech on employer property or engagement in concerted activity—the Board and courts should tailor the scope of protected interference in accordance with the "equal bargaining power" purpose of the labor law, which ensures employees' countervailing power against their employer.

First, in overcoming employer intimidation and collective action problems to form a union or gain support for a strike, "the choice to cooperate or defect in a situation involving an indivisible goal depends on what one expects *others* to do" because "expectations are critical, anything that helps to align (or disrupt) those expectations can influence the prospects for a cooperative, noncoercive solution"—"salient features of the environment that can help parties land upon a cooperative solution . . . are especially significant" (p 60). Workers' ability to fully exercise their Section 7 rights depends crucially on an open environment of communication, discussing the costs and benefits of

unionization, at risk of discharge or other employer retaliation; “[s]ustained face-to-face contact with employees is crucial in realizing” those rights and “is very difficult to arrange outside of the workplace.” The labor law already “slices” property rights to overcome take-it-or-leave-it (TIOLI) employer offers for work and lodging through granting unions’ access rights to workers—for example, in logging camps, mining camps, mountain resort hotels, and certain state and federal law “slice” employer property rights to allow access to migrant worker camps. The First Amendment also restrains property owner exclusions of state-protected rights of expression and petitioning in privately owned shopping centers to which the public is invited. Thus, expanding workers’ choices on when and where to communicate with each other and with non-employee union organizers on employer property, including their ability to adequately respond after employer captive-audience meetings, could justify under similar rationales “slicing” employers’ property rights to grant access rights that better ensure employees’ equal bargaining power with their employer. This is particularly important where employers are entitled under labor law to make TIOLIs about property uses in collective bargaining without any duty to bargain to impasse with workers—for example, regarding corporate decisions to close plants or work-product decisions. “Slicing” employer property rights is more justified in such circumstances because granting access to those who could counsel employees on mechanisms of self-help is one of the least intrusive means of ensuring equal bargaining power.

Finally, and most importantly, the choice architecture for protected concerted activity could be modified on grounds that workers’ use or access to employer property are warranted to counter employer rent-seeking. Many labor rights under current law are treated as “lumpy” rights. But having a broad menu of concerted activity options can equalize relative bargaining power where employers’ exploitation of opportunity cost rents—protected by property rights regimes—has unduly shifted the balance in their favor. For example, only *full* strikes are protected under labor law. Protecting “slices” of strikes like partial strikes (only performing certain tasks and not others) or intermittent strikes (“quickie,” on-and-off strikes for portions of time) could be more effective in equalizing bargaining power between employers and employees. A broader choice architecture is all the more critical to protect inside actions where employers, making the original decisions on “fixed” versus “floating” workplaces, may leave employees with no effective picket line outside of inside action. Strike protections could also be “sliced” to allow minority and wildcat strikes at least in part because strikes by a smaller set of workers—whether they be underrepresented in the union or particularly necessary for the production process and more difficult to replace—could make strikes more effective without subjecting as many workers to wage losses. Expanding the set of choices available to employees on the other side of the ledger can provide the Board and the courts a more precise mechanism for tailoring the NLRA’s protections so employees can assert countervailing power against employers.

Granting slicing rights as protection for those with possessory interests is not unheard of in real property law. A good example is constructive evictions: a lessee can withhold rent—failing to

perform a contractual obligation—while remaining in their rental property if their landlord breaches the implied warranty of habitability. Professor Fennell’s insight here—pointing out a parallel between constructive evictions and partial strikes—was particularly helpful. Remedial doctrines like constructive eviction that traverse the property/contract interface have been justified on instrumental, redistributive, and humanitarian grounds, and they function as legal mechanisms for slicing and realigning rigid property rules to accommodate overall welfare considerations. “Slicing” strikes can likewise further overall welfare goals and ought to be protected accordingly.

## Conclusion

Professor Fennell’s *Slices and Lumps* invites a reconfiguration of the infrastructure of work, exposing inefficiencies and externalities created by the “lumpy” property rights regimes that pervade its regulation. This Essay expands on her crucial work to consider ways in which we can view employers’ property rights as creating opportunity cost rents, proposing that a new balance of those rights with workers’ labor rights—through curated “slicing” of rights and protections on both sides of the ledger—could avoid those inefficiencies and enhance social welfare.

*Hiba Hafiz is an Assistant Professor of Law at Boston College Law School. The author is grateful to comments and questions from Lee Fennell, Brian Galle, Michael Pollack, and the participants of the Symposium on Slices & Lumps: Division and Aggregation in Law and Life. She is especially grateful to Lee Fennell and Omri Ben-Shahar for the invitation to participate in the Symposium.*

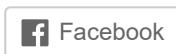
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