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A LAWYER'S WORST NIGHTMARE: THE STORY OF A LAWYER AND HIS NURSE CLIENTS WHO WERE BOTH CRIMINALLY CHARGED BECAUSE THE NURSES RESIGNED EN MASS

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INTRODUCTION

Imagine that a group of foreign registered nurses approaches you because they feel abused and want to quit their jobs. They signed an employment contract with a $25,000 liquidated damage provision agreeing to remain employed for three years and are unsure of their rights. You advise your clients that they have the right to quit, and after they act on this advice, you find yourself at the center of a massive criminal and civil controversy. Both you and your clients are criminally charged with endangering the welfare of patients and related crimes because the nurses resigned en masse without notice. This may seem strange in light of the Thirteenth Amendment's ban on involuntary servitude, but in 2007, this happened to ten nurses and their lawyer.[1]

There is a serious shortage of Registered Nurses in this country, and as a result, nurses are widely recruited from the Philippines to work in hospitals and nursing homes.[2] The nurses in question were sponsored immigrant

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[1] *See* Indictment No. I-769A-K-07, People v. Vinluan, No. 00769a-2007 (N.Y. Crim. Ct. Mar. 22, 2007) [hereinafter Vinluan Indictment], *available at* http://a1022.g.akamai.net/f/1022/8160/5m/images.newsday.com/media/acrobat/2007-10/33024601.pdf (link). The registered nurses maintain a web site, http://www.s27plus.com (link), as well as a blog, http://www.justiceforsentosa27.blogspot.com (link). Their plight has attracted attention in the media. *See, e.g.*, Vesselin Mitev, *Attorney Faces Criminal Charges After Clients Quit Their Nursing Jobs*, LAW.COM, Feb. 27, 2008, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1204026532354 (link); Joseph Berger, *Filipino Nurses, Healers in Trouble*, N.Y. TIMES, Jan. 27, 2008, § LI, at 1 (link).

[2] Jeff Miles, *The Nursing Shortage: Wage-Information Sharing Among Competing Hospitals, and the Antitrust Laws: The Nurse Wages Antitrust Litigation*, 7 HOUS. J. HEALTH L. & POL'Y 305, 310 (2007) ("There is unanimity of opinion that an RN shortage exists . . . ."); Berger, *supra* note 1 (stating that Filipino nurses have become "a mainstay of the New York area's hospitals and nursing homes").

workers from the Philippines working legally in the United States. As part of their sponsorship, all had signed identical employment agreements. These contracts required the nurses to remain employed for three years and included a $25,000 liquidated damages provision.[3]

After the nurses resigned on April 7, 2006, various legal proceedings involving the nurses and their attorney, Felix Vinluan, began. Most notably, a claim of patient abandonment was filed with the New York State Education Department, which regulates the nursing profession, although that charge has since been dismissed.[4] Nevertheless, a Grand Jury indicted the nurses on eleven counts of misdemeanor crimes, including endangering the welfare of pediatric patients.[5] The indictment also charged their lawyer with conspiring to commit these crimes, alleging that he advised the nurses to resign en mass without notice.[6] Significantly, the indictment does not allege that any shift at the nursing home went uncovered or that any child was actually harmed as a result of the nurses' resignation.[7]

In September of 2007, the court denied motions to dismiss for insufficient evidence filed by both Vinluan and the ten nurses. With regard to Vinluan, the court emphasized the fact that the mass resignations could have had disastrous consequences because many of the nurses' patients

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[3] Each of the nurses' contracts has identical language, except that different facilities contracted with each of the nurses. Affidavit of James Druker, at ¶ 9, People v. Vinluan, No. 00769a-2007 (N.Y. Crim. Ct. May 21, 2007) [hereinafter Druker Affidavit] (on file with the Northwestern University Law Review). Specifically, the contract provided:

> 20. The employee agrees to be employed by the Employer under the terms of this contract for three full years from his/her date of employment. . . .
>
> 21. Both the Employer and Employee agree that the Employer has or will incur substantial expenses and has or will expend enormous resources and time in recruiting the Employee for employment as contemplated herein, sponsoring the Employee for an Immigrant Visa, training the Employee in practice and procedures, and orienting the Employee to living in the New York area. In as much as the parties agree that damages would be difficult to calculate if the Employee willfully, voluntarily, and without reasonable cause terminates the agreement before the completion of the three (3) year term, the parties agree that such an act shall result in an obligation by the Employee to pay the Employer Twenty-Five Thousand Dollars ($25,000.00) as a liquidated damage penalty. . . .

Id. at ex. B.

[4] *See* Email from Daniel Kelleher, Director of Investigation, New York State Education Department, to Felix Vinluan, the attorney representing the nurses (Sept. 13, 2006) (on file with the Northwestern University Law Review); Email from Felix Vinluan, the attorney representing the nurses, to Daniel Kelleher, Director of Investigation, New York State Education Department (Sept. 9, 2006) (on file with the Northwestern University Law Review); *see also* Petition for a Writ of Prohibition Under Article 78 ¶ 59, People v. Vinluan, No. 2008-02568 (N.Y. App. Div. Mar. 18, 2008) [hereinafter Article 78 Petition].

[5] *See* Vinluan Indictment, *supra* note 1.

[6] *See id.* at 5–7. Mr. Vinluan asserts that he never counseled the nurses to resign, but that he advised them of their right to resign under the law. *See* Mitev, *supra* note 1.

[7] *See* Vinluan Indictment, *supra* note 1; *see also* Druker Affidavit, *supra* note 3, at ¶ 4.

were gravely ill.[8] With regard to the nurses, the court rejected the claim that under the Thirteenth Amendment a person cannot be criminally punished for quitting her job. The court interpreted the charges as not punishing the nurses for simply resigning, but because they resigned en masse, which the prosecution argued, endangered their patients.[9] Vinluan and the nurses successfully brought a proceeding to stay their criminal prosecutions pending a determination on whether the trial court correctly denied the motions to dismiss.[10] On January 13, 2009, the Second Judicial Department of the Appellate Division reversed the lower courts and held that neither the nurses nor their attorney may be criminally prosecuted.[11]

This Essay examines this troubling case and the public policy issues that it highlights. Part I reviews the nature of employment contracts and concludes that the Thirteenth Amendment and related legislation prohibit enforcing the nurses' three-year time commitment through specific performance. Part II examines whether criminal prosecution of the nurses is preempted by the National Labor Relations Act (NLRA)[12] and concludes that criminal prosecution is preempted because it interferes with the free play of economic forces that NLRA aims to protect. Part III explores legal issues surrounding the criminal prosecution of an attorney based on advice he may have given. The Essay concludes by explaining that the liquidated damage provision, which may have sparked this entire controversy, was probably unenforceable as a penalty, that the criminal prosecution was unwarranted, and that the Appellate Division's decision was correct.

I. INVOLUNTARY SERVITUDE & PEONAGE

The prohibitions on involuntary servitude and slavery contained in the Thirteenth Amendment and related legislation apply to situations in which an individual is either required to work under the law or forced to work

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[8] People v. Vinluan, No. 00769A-2007, slip op. at 2–3 (Nassau Co. Sept. 27, 2007), *available at* http://www.co.suffolk.ny.us/da/press/2007/pdf/People%20v%20Felix%20Vinluan.pdf (link).

[9] People v. Jacinto, Indictment No. 00769 (B-K)-07, slip op. at 2 (Nassau Co. Sept. 28, 2007), *available at* http://www.co.suffolk.ny.us/da/press/2007/pdf/People%20v%20Elmer%20Jacinto.pdf (link).

[10] Vinluan v. Dolye, 2008 NY Slip Op 68098(U) (N.Y. App. Div. April 14, 2008), *available at* http://www.nycourts.gov/reporter/motions/2008/2008_69098.htm (link).

One of the nursing homes also brought a breach of contract action against three of the nurses and a claim for tortious interference with contract against Vinluan. On April 12, 2007, the court denied the defendants motion to dismiss on procedural grounds. Avalon Gardens v. Almendrala, Index No. 021330/06 (Nassau Co. April 12, 2007), *available at* http://decisions.courts.state.ny.us/10jd/nassau/decisions/index/index_new/bucaria/2007apr/021330-06.pdf (link). It is not clear why a breach of contract action was not brought against all ten nurses.

[11] Vinluan v. Dolye, No. 2008-02568, 2009 WL 93065 (N.Y. App. Div. Jan. 13, 2009) http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2009/D20723.pdf (link). The Appellate Division consolidated the nurses' case with Vinluan's. As this Essay goes to press, it is unknown whether an appeal to the New York Court of Appeals will be sought.

[12] 29 U.S.C. §§ 151–69 (2006) (link).

through physical coercion.[13] Additionally, the Supreme Court has long recognized that states cannot force specific performance of employment contracts mandating a specified length of employment. As the Court explained:

> Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.[14]

Subsequent legislation enacted to enforce the Thirteenth Amendment outlawed the practice of "peonage"[15]—the "status or condition of compulsory service, based upon the indebtedness of the peon to his master."[16] *United States v. Mussry*[17] provides a modern day example of this horror. The defendants held poor, non-English speaking Indonesians as servants against their will by enticing them to travel to the United States, paying them very little, and withholding their passports and return airline tickets while requiring them to work off the transportation debt as servants.[18]

In 1979, the New York Court of Appeals addressed the constitutionality of a local law, which made it a misdemeanor to abandon or intentionally fail to perform a home improvement contract. The court found that this law violated the Thirteenth Amendment and that enforcement of this statute involved unlawful peonage. The statute essentially criminalized quitting one's job.[19]

There is little question that attorney Vinluan's advice was correct in that the Thirteenth Amendment protected the nurses' right to quit. Indeed, it is hornbook contract law that a breach of a personal service contract is not subject to the remedy of specific performance.[20] Alternatively, compelling their labor by the threat of contractual sanction is a form of peonage and therefore unlawful.[21]

The Appellate Division decision did not discuss personal service contracts. Instead, the court concluded that criminal prosecution was precluded by virtue of the Thirteenth Amendment because "the prosecution has the

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[13] United States v. Kozminski, 487 U.S. 931, 944 (1988) (link).

[14] Pollock v. Williams, 322 U.S. 4, 16 (1944); Baily v. Alabama, 219 U.S. 219, 245 (1911).

[15] *See* United States v. Redovan, 656 F. Supp. 121, 128 (E.D. Pa. 1986).

[16] Clyatt v. United States, 197 U.S. 207, 215–16 (1905).

[17] 726 F.2d 1448 (9th Cir. 1984).

[18] *Id.* at 1451 (citing Baily v. Alabama, 219 U.S. 219, 241 (1911)).

[19] People v. Lavender, 398 N.E.2d 530 (N.Y. 1979).

[20] *See, e.g.*, CORBIN ON CONTRACTS § 1204 (2006). Significantly, however, it has long been recognized that a party that breaches a personal service contract can be liable for money damages. *Clyatt*, 197 U.S. at 215; Raley v. Jackson, No. 3:04-0977, 2007 WL 1725254 (M.D. Tenn. June 12, 2007).

[21] *See Clyatt*, 197 U.S. at 215–16.

practical effect of exposing the nurses to criminal penalty for exercising their right to leave their employment at will."[22]

However, the Thirteenth Amendment does not prohibit all forms of compelled labor.[23] As recognized by Professor Michael H. LeRoy, there is a public service exception, which is part of the ancient common law doctrine of *Trinoda Necessitas*.[24] Because the medical profession is arguably public service and involves health and safety, this public service exception is implicated.

The Supreme Court recognized a public service exception in *Butler v. Perry*[25] to uphold a Florida criminal statute, which mandated that men work six days a year on roads and bridges. Looking to English common law, the Court reasoned:

> [U]nless restrained by some constitutional limitation, a State has the inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes the public.[26]

The Court held that the Thirteenth Amendment did not introduce any "novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State."[27] The Court recognized this public service exception as recently as 1988, by stating, "the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform civic duties."[28]

Turning to the case at bar, it is very doubtful that the public service exception supports the criminal charges brought against the nurses. The NLRA anticipates that a sudden cessation of work in the medical profession raises important health and safety issues. In fact, the statute was amended in 1974 to add strike notice requirements for unionized employees of health care institutions—nursing homes, for example—but the statute does not contain any provisions that would mandate that hospital or other workers

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[22] Vinluan v. Dolye, No. 2008-02568, slip op. at 9 (N.Y. App. Div. Jan. 13, 2009).

[23] The constitutionality of forced labor turns, in large measure, on the nature and amount of work required. Courts have rejected claims of involuntary servitude with respect to mandatory community service requirements for High School graduation, *Immediato v. Rye Neck School Dist.*, 73 F.3d 454, 459 (2d Cir. 1996), attorney pro bono work, *United States v. 30.64 Acres of Land*, 795 F.2d 796, 800–01 (9th Cir. 1986), military service, *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) and jury duty, *Hurtado v. United States*, 410 U.S. 578, 589 n.11 (1973).

[24] Michael H. LeRoy, *Complusory Labor in a National Emergency: Public Service or Involuntary Servitude? The Case of Crippled Ports?*, 28 BERKELEY J. EMP & LAB. L. 331, 361 (2007) (discussing common law doctrine of *Trinoda Necessitas* and referring to it as a "civic duty principle").

[25] 240 U.S. 328 (1916).

[26] *Id.* at 330–31 (citing 1 WILLIAM BLACKSTONE COMMENTARIES *357).

[27] *Id.* at 333.

[28] United States v. Kozminski, 487 U.S. 931, 944 (1988).

stay on their jobs.[29] Thus, the statute specifically anticipates that there may be work stoppages in health care institutions and provides the public with certain protections in the form of notice—at least in unionized facilities. These protections, however, do not include compelled labor or the criminalization of resignation. The NLRA as the statement of national policy and its lack of a provision authorizing criminal sanctions strongly suggests that the nurses' behavior—quitting en masse—should not be included in the public service exception to the Thirteenth Amendment.

The Appellate Division correctly recognized the existence of a public service exception. However, the court found it inapplicable because the nurses were engaged in private employment and because no real danger to patients existed because the nurses resigned *after* completing their shifts and their resignations thus left no shift uncovered.[30]

II. THE RIGHT TO ENGAGE IN CONCERTED ACTIVITY AND LABOR LAW PREEMPTION

This Essay next turns to a series of cases involving concerted activity and strikes in the health care field in order to examine whether criminal prosecution is preempted by federal labor law. While discussing the issue of strikes and concerted activity may seem a bit awkward because the nurses resigned without striking, laws concerning concerted activity are vital to this discussion because, if the nurses had the right to strike without fear of any criminal penalty, then they also had the right to quit without any criminal penalty.

A. Concerted Activity

Section 7 of the NLRA provides that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[31] This statutory right is not limited to employees who are members of unions. In *NLRB v. Washington Aluminum*,[32] for example, the Court held that an employer violated Section 7 by

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[29] *See* 1 THE DEVELOPING LABOR LAW 1052–57 (Patrick Hardin, John E. Higgins, Jr., Christopher T. Hexter & John T. Neighbours eds., 5th ed. 2006) [hereinafter LABOR LAW] (discussing notice requirements). The health care notice requirements only apply to unionized employees. Walker Methodist Residence, 227 N.L.R.B. 1630 (1977).

The fact that the nurses who quit were not in a union is immaterial because, while a strike in a unionized facility without proper notice is considered unprotected activity, see *Minn. Licensed Practica Nurses Assoc. v. NLRB*, 406 F.3d 1020, 1027 (8th Cir. 2005), the manner in which these unorganized nurses quit (en mass) was also unprotected activity under the NLRA. *See infra* Part II.A (discussing distinction between protected and unprotected activity under the NLRA).

[30] *See* Vinluan v. Dolye, No. 2008-02568, slip op. at 10–11 (N.Y. App. Div. Jan. 13, 2009).

[31] 29 U.S.C. § 157 (2006).

[32] 370 U.S. 9 (1962).

discharging non-union employees who walked out without notice because the shop was too cold.[33]

The Supreme Court recognized, however, that not every work stoppage is protected under Section 7:

> It is of course true that § 7 does not protect all concerted activities . . . . The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as 'indefensible' because they were found to show a disloyalty to the workers' employer . . . .[34]

Employees who strike have a duty to take "reasonable precautions to [prevent] . . . foreseeable imminent danger."[35] In the health care setting, the National Labor Relations Board (NLRB) has recognized that "patient welfare and working conditions are often inextricably intertwined."[36] Nevertheless, strikes at health care institutions involving heath care personnel are generally permissible. For example, a two-hour walk out by employees in a catheterization lab in protest of working conditions at a hospital was found to be protected.[37]

This protection, however, is not absolute. A 2004 NLRB Division of Advice Memo concluded that unorganized recovery room nurses at an acute care hospital were not protected under Section 7 when they engaged in an unannounced sickout. The nurses had failed to take reasonable precautions to prevent foreseeable damage as a result of their sudden cessation of work.[38]

Under this standard, there seems to be little question that, in the Vinluan case, the nurses' decision to leave en mass was unprotected activity. The mass resignation could have caused harm and there were precautions the nurses could have taken to prevent that harm, such as resigning at different times. Therefore, had the nurses not resigned and only walked out or struck, they could have been lawfully terminated.

Significantly, however, a walkout or a strike would not have been unlawful;[39] instead, the nurses' activity was simply not protected by the NLRA. As the next section will show, the distinction between Congress

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[33] *See id.* at 14–18.

[34] *Id.* at 17 (internal citations omitted).

[35] Bethany Med. Ctr., 328 N.L.R.B. 1094 (1999).

[36] Valley Hospital Med. Ctr., Inc., 351 N.L.R.B. No. 88, slip op. at 4 (Dec. 28, 2007).

[37] Bethany Med. Ctr., 328 N.L.R.B. 1094 (1999); *see also* Mercy Hospital Assoc., 235 N.L.R.B. 681 (1978).

[38] The Christ Hospital, 9-CA-40750, at 3–4 (Div. of Advice March 26, 2004), *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2004/9-CA-40750(03-26-04).pdf (link).

[39] *See* National Packing Co. v. NLRB, 352 F.2d 482, 485 (10th Cir. 1965) (explaining that unprotected activity is not unlawful unless it directly violates the NLRA); NLRB v. Coal Creek, 204 F.2d 579, 582 (10th Cir. 1953) (stating that a walkout was unprotected but not unlawful).

making certain conduct "unprotected" instead of "unlawful" is important for determining whether prosecution of the nurses is preempted by the NLRA.

B. Labor Law Preemption

The defendants have asserted that their criminal prosecutions are preempted by the NLRA. They have argued that they were engaged in protected concerted activity (quitting their jobs) under this statute.[40] Though the nurses' en masse resignation was not protected under the NLRA, the nurses' criminal prosecution is preempted, but for reasons distinct from whether they engaged in protected activity.

There are two primary forms of labor law preemption: *Garmon* preemption[41] and *Machinists* preemption.[42] In *Garmon,* the Supreme Court explained:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[43]

Matters that are merely of a "peripheral concern" to the NLRA are not preempted; however, an actual conflict with state law is not necessary. A state regulation that "potentially" conflicts with federal regulation is preempted.[44]

Garmon preemption does not apply to activity that "touche[s] interests so deeply rooted in local feelings and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to Act."[45] This local interest exception was founded upon the "compelling state interest . . . in the maintenance of domestic peace" and applies to "conduct marked by violence and imminent threats to the public order."[46] At least three circuits have held that the NLRA does not preempt federal enforcement of criminal statutes.[47] Addi-

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[40] *See* Article 78 Petition, *supra* note 4, ¶¶ 29–48.

[41] *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[42] *See* Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976); *see* Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008) (discussing various forms of labor law preemption).

[43] *Garmon*, 359 U.S. at 244–45; *see also* Marquez v. Screen Actors Guild, 525 U.S. 33 (1998) (reaffirming *Garmon* principles). Under *Garmon*, it is not necessary for a actual charge to be filed alleging a violation of the NLRA. *See* LABOR LAW, *supra* note 29, at 2357.

[44] *Garmon*, 359 U.S. at 243–44, 246.

[45] *Id.* at 243; *see also* Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 194–97 (1978) (discussing local interest exception to preemption doctrine).

[46] *Garmon*, 359 U.S. at 247.

[47] United States v. Boffa, 688 F.2d 919 (3d Cir. 1982); United States v. Douglas, 398 F.3d 407 (6th Cir. 2005); United States v. Palumbo Bros., 145 F. 3d 850 (7th Cir. 1998).

tionally, several state courts have recognized that state criminal law is not preempted by federal labor law.[48]

The nurses' actions were not protected under the NLRA, and matters of local concern are generally left to state criminal statutes. Therefore, under *Garmon* the state would not be preempted from criminally prosecuting the defendants.

Machinists, however, should probably preempt the nurses' prosecutions. Under *Machinists*, the "crucial inquiry [is] whether Congress intended that the conduct be unregulated and left 'to be controlled by the free play of economic forces.'"[49] *Machinists* preemption recognizes a zone "reserved for market freedom"; in other words, what Congress left unregulated is just as important as what is regulated.[50] *Machinists* preemption does not apply, however, to conduct alleged to be "physically injuring or threatening injury to persons or property."[51]

For example, in *Greater Boston Chamber of Commerce v. City of Boston*,[52] the district court held that a municipal ordinance that made it unlawful to hire replacement workers during a strike or a lockout was preempted under *Machinists*. The court reasoned that the conduct regulated under the ordinance was intentionally left unregulated by Congress.

The nurses' case is strikingly similar to *NLRB v. Lefkowitz*,[53] in which the Commissioner of Health issued an order prohibiting a strike during a dispute over nursing home Medicaid reimbursements. The union challenged the order as preempted by the NLRA. The district court held that a state may not prohibit or restrain employees in the hospitals and nursing homes from exercising their right to strike, noting that "Congress intended to occupy[] this field and closed it to state regulation."[54] Significantly, the court recognized that such a strike may seriously jeopardize public health and safety, but concluded that the NLRA supported the right to strike even when a strike might cut off essential public services.

Thus, a strong argument can be made that the NLRA preempts the nurses' criminal prosecution because it upsets the balance of economic power, which was intended to be left unregulated. On the other hand, an argument can be made against *Machinists* preemption because of the threat to public health.

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[48] *See, e.g.*, State v. Klinakis, 425 S.E.2d 665, 669 (Ga. Ct. App. 1992); Gen. Elec. Co. v. Local 182 Int'l Union of Elec. Workers, 266 S.E.2d 750, 753 (N.C. Ct. App. 1980); Fansteel Metallurgical Corp. v. Lodge 66 of Amalgamated Ass'n of Iron, Steel & Tin Workers of N. Am., 14 N.E.2d 991, 994–95 (Ill. App. Ct. 1938).

[49] Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140 (1976).

[50] Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2412 (2008)

[51] *Lodge 76, Int'l Ass'n of Machinists*, 427 at 151 n.13.

[52] 778 F. Supp. 95 (D. Mass. 1991).

[53] NLRB v. New York, 436 F. Supp. 335 (E.D.N.Y. 1977).

[54] *Id.* at 338 (quoting UAW v. O'Brien, 339 U.S. 454, 457 (1950)).

On balance, the nurses' prosecution should be found to be preempted. Not only is the state, through criminal prosecutions, directly interfering with the nurses' fundamental right to quit, the NLRA specifically deals with the health and safety issues implicated by work stoppages in the health care industry.[55] Congress chose to impose additional notice requirements in unionized facilities, but a violation of these notice requirements results only in a strike being unprotected. Employees engaged in strikes without sufficient notice are not participating in unlawful activity, but are simply not protected from termination under the NLRA. Congress did not criminalize strikes in the unionized healthcare industry without notice. The same result should apply where employees of non-union facilities, which are not even subject to additional notice requirements, quit.

It is doubtful that this preemption defense would apply to attorney Vinluan because he was only acting as an attorney. The preemption issue has become academic in this case, however, because the Appellate Division found that the conduct in question was not unlawful. Although the labor law and preemption issue was briefed, the Appellate Division did not discuss it.

III. THE LEGAL ISSUES SURROUNDING THE ATTORNEY WHO ADVISED THE NURSES

A "lawyer cannot advise (urge, suggest, propose, counsel, exhort) the client to break the law."[56] In labor relations, attorneys often represent parties at collective bargaining negotiations and direct companies' organized opposition to unionization.[57] It should come as no surprise that such attorneys are often involved in—and sometimes even the cause of—unlawful activity known as unfair labor practices.[58] As a practical matter, lawyers that violate the NLRA have little to fear because bar associations generally only go after lawyers for "the most blatant kinds of attorney misconduct."[59] Vin-

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[55] *See* LABOR LAW, *supra* note 29, at 1052–57 (discussing notice requirements).

[56] RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, THE LAWYER'S DESK BOOK ON PROFESSIONAL RESPONSIBILITY § 1.2-4(A) (2008). A lawyer also cannot purposely avoid "knowing" a certain fact by refusing to look. Geoffrey Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 672, 678 (1981).

[57] Andrew J. Kahn, *Problems of Professional Ethics in Labor Law*, 1987 DET. C.L. REV. 731.

[58] Indeed, the problem of professional attorney ethics in labor relations has been well recognized. *See, e.g., id.*; Note, *The Liability of Labor Relations Consultants for Advising Unfair Labor Practices*, 97 HARV. L. REV. 529 (1983). As the Second Circuit stated: "We note in this regard that 'lawyer-consultants' who sometimes skirt the boundaries of questionable conduct have increasingly become involved in combating union organizing drives during the last decade." Abbey's Transp. Servs. v. NLRB, 837 F.2d 575, 579 (2d Cir. 1988).

[59] Kahn, *supra* note 57, at 747. By way of example, an employer in *Abbey's Transportation Services* was found to have violated the law because of the coercive effect of the attorney's interrogation of employees. *See* 837 F.2d at 578–82. Although the court found such conduct "disturbing," no action was taken against the lawyer and the court did not even refer the matter to the state bar. *See id.*

luan's conduct, however, does not present this type of ethical violation because no violation of the NLRA occurred.

Whether Vinluan, acting as a lawyer, committed a crime is a different question. Professor Charles W. Wolfram asserts that most "lawyer crimes" fall into one of two categories: the "totally out-of-role lawyer crime" and the "in-role-but clearly wrongful crime." The former involves a street crime such as murder. The latter involves lawyer activity that is clearly unlawful, such as filing a false affidavit or stealing funds from a client. According to Wolfram, cases that fall into these categories are easy.[60]

There is, however, a third category of cases in which lawyers can face criminal charges for *advice* they may have given to their clients. These cases are difficult and exceedingly rare.[61] As an example, Professor Wolfram cites *United States v. Cintolo*,[62] in which a lawyer was convicted of obstruction of justice because he advised his client to invoke his Fifth Amendment rights against self-incrimination despite government immunity and approved of his client being physically threatened if he testified against another one of the attorney's clients.[63]

The criminal indictment against the nurses and Vinluan alleges that Vinluan advised the nurses to resign en mass. The conspiracy charge against Vinluan arises from this allegation and falls within the relatively rare third category of advice-based lawyer crimes. However, even if Vinluan advised the nurses to quit en mass, which he denies, it is hard to see how he is in any way culpable—criminally or professionally—because the nurses' actions were not unlawful. The fact that the State Education Department did not seek to revoke the nurses' licenses supports that conclusion.

More fundamentally, the Appellate Division found that the criminal prosecution of Vinluan interfered with his First Amendment rights of expression and association.[64] Specifically, the court found that as an attorney, Vinluan had a constitutional right to provide legal advice to his clients, and that prosecuting an attorney for providing legal advice is "profoundly disturbing" because it may chill other attorneys from acquainting clients with their legal rights.[65]

Moreover, restrictions on an attorney's communication with his clients directly undermine his ability to provide legal advice and restrict that

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[60] Charles W. Wolfram, *Lawyer Crimes: Beyond The Law?*, 36 VAL. U. L. REV. 73, 79, 86–87 (2001).

[61] *See id.* at 77, 91 (stating that there are not many reported decisions involving lawyer crimes committed while representing a criminal defendant).

[62] 818 F.2d 980 (1st Cir. 1987).

[63] 818 F.2d 980, 985–86 (1st Cir. 1987). Professor Wolfram also cites to *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998) as another example where a lawyer was convicted of obstruction of justice. Wolfram, *supra* note 60, at 92.

[64] Vinluan v. Dolye, No. 2008-02568, slip op. at 11 (N.Y. App. Div. Jan. 13, 2009).

[65] *Id.* at 12.

client's fundamental right to meaningful access to courts.[66] Although it did not address this issue directly, the Appellate Division called the prosecution of Vinluan "an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends."[67] Thus, in prosecuting criminal charges against Vinluan, the District Attorney has acted inappropriately.

CONCLUSION

An ironic aspect of this case is that one of the nurses' chief reasons for consulting with Vinluan was likely the $25,000 liquidated damages provision in their employment contracts—a provision which was probably an unenforceable penalty clause.[68] Damages are considered a penalty when they are "plainly or grossly disproportionate to the probable loss."[69]

The liquidated damages provision in the nurses' contracts would almost certainly be found to be a penalty—the contract even used the word "penalty" in the liquidated damage section. The dollar amount appears to have been designed to prevent the nurses from leaving their employ and does not appear to have any reasonable relationship to the loss. Moreover, the $25,000 liquidated damage figure is identical in each employment contract. It defies logic that the company's damages and expenses were the same for each of the nurses.

At the end of the day, while it is not difficult to understand why the nurses quit (they were unhappy with their jobs), it is difficult to understand why they decided to quit en mass. Did they intend to purposely inflict harm? Did they want to send a message to the employer not to sue under the liquidated damage clause because the nurses all stand together? Did they have some other reason? Regardless of their motivation, the nurses had the right to quit.

While the nurses' concerted activity was not protected under the NLRA, and they could have been fired had they not quit, their actions were not unlawful. At most, the nurses could be sued for actual damages for breaching the employment contract they signed.[70] Furthermore, even if

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[66] *See* Matin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982).

[67] Vinluan, No. 2008-02568, slip op. at 12.

[68] *See* Ann-Par Sanitation v. Town of Brookhaven, 804 N.Y.S.2d 758 (N.Y. App. Div. 2005) (finding a $15,000 liquidated damages provision invalid as a penalty where actual damages were limited to $800); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) ("[U]nreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."); *see also id.* § 356 cmt. b (describing the factors for determining whether a penalty is involved). Other states have applied the same standard. *See, e.g.*, NPS, LLC v. Minihane, 886 N.E.2d 670, 673–75 (Mass. Sup. Ct. May 15, 2008) (finding a liquidated damages clause enforceable because the clause provided a reasonable estimation of the actual damages).

[69] JMD Holding Corp. v. Congress Fin. Corp., 828 N.E.2d 604, 610 (N.Y. 2005).

[70] *See id.* at 609 (noting that suit for actual damages can still be maintained even if liquidated damage provision is unlawful).

New York state law provides some basis for alleging that the nurses' behavior was unlawful, criminal prosecution of the nurses should be preempted by the NLRA because it interferes with the free play of economic forces in an area of law that was intended to be left unregulated.

Additionally, the nurses' attorney should never have been prosecuted. Even if he advised the nurses to quit en mass, which he denies, he did not violate the law by advising them to do so; the nurses had a right to quit. Moreover, the First Amendment protects Vinluan's right as an attorney to render good faith legal advice, even if—unlike Vinluan's advice in this case—that advice ultimately proved incorrect. The Appellate Division got it right by recognizing that the chilling effect resulting from the prosecution of an attorney for providing legal advice amounted to "an assault" on our system of justice.

This Essay does not aim to minimize the potential harm caused by a group of health care professionals quitting en mass. From a public policy perspective, however, this harm should not be redressed through criminal prosecutions; it should be redressed through professional licensure proceedings. In New York, the State Education Department regulates the nursing profession. The fact that the state chose not to invoke such proceedings should not give the District Attorney cart blanche to second-guess the Education Department's decision by invoking criminal law.