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Letter on Review of The Employment Relationship in Anglo-American Law: A Historical Perspective

Marc Linder

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To the Editor:

The brief review in the Fall 1990 issue of this journal of *The Employment Relationship in Anglo-American Law: A Historical Perspective*[1] attributed to the book views that are diametrically opposed to its major theses and purpose.

The reviewer stated, without documentation or foundation, that the author "is certain that 'independent commodity producers' form a fundamental historical category of humans. He is sure that the individualistic sort of independence which liberals constantly strive for is a meaningful goal." The reviewer contrasted this position with the author's alleged view of employees as "so dependent upon their wages as to have no real independence and bargaining power. . . ." Finally, the reviewer characterized

[1]*Labor History*, 31 (1990), 516–17.

the author's proposal of a universal guaranteed basic income as a "vision of socialism as an advanced stage of state-capitalist welfarism," which explained why the book and "old-style Marxism" have failed "to foster socialism in the modern world."

Unfortunately, the reviewer neglected to inform the reader that the book originated as a response to a practical problem confronting the author as an attorney representing migrant farmworkers whose employers denied the existence of an employer-employee relationship in order to avoid paying the minimum wage, social security taxes, unemployment insurance contributions, or workers' compensation premiums, or complying with other federal and state laws (xi).[2] As the most conspicuous group of marginalized workers whose vulnerability is rooted in a persistent massive oversupply of unskilled labor, migrant farmworkers are uniquely reliant on state intervention for the modicum of income and employment security that they have obtained. Moreover, contrary to the reviewer's suggestion, the primary problem they face in this regard is not adverse court decisions.[3] Rather, it is the power that employers have—and some use—unilaterally to impose unlawful terms on employees who are not—and perceive that they are not—in a position to risk contesting that power in the fields let alone the courts. The strongest laws and most favorable judicial opinions are of no help to workers who are too weak to vindicate those paper rights on a day-to-day basis."[4]

Because the law cannot help such workers, the author proposed alleviating the burden of overcoming the domination of particularly rapacious employers by giving workers "sufficient income security . . . [to] corrode the coercive character of the labor market" (241). Detaching this entitlement from the existence of an employer-employee relationship would both make moot these manipulative moves by employers and create a breathing space for vulnerable workers to organize themselves.[5] Although the proposal takes the form of a universal entitlement in order to avoid stigmatizing some recipients, the book states that "the empirical association of high skill, limited supply,

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[2]The text then refers the reader to another work by the author which offers greater detail about the specific problems of migrant farmworkers (xiii, n. 1). All parenthetical page references are to the reviewed book.

[3]The reviewer misleadingly stated that "American courts in the era of voodoo economics aid and abet employers to exclude wage-earners from benefits." Not only is this tendency not peculiar to the Reagan-appointed judiciary, but the book notes that it was a leader of the law and economics movement, Frank Easterbrook, who, in a concurrence, did something no liberal judge has ever had the courage to do—namely, to declare migrant farmworkers per se covered employees under the Fair Labor Standards Act (5, 25, n. 20). The reviewer went on to criticize the book for using "class bias" as an explanatory device "without complex investigations of how class works. . . ." Yet the citation refers to a tentative ("plausible") explanation, which, the author stresses, only "[s]ome of the American cases . . . support" (174). Moreover, the book programmatically disclaims any intent to show or even to assert that "specific doctrinal twists and turns . . . flow of necessity from material changes" (xi). The reviewer's apparent belief, on the other hand, that class bias as an explanation is a "truism" leaves unexplained how such a legal system could generate any legitimacy. Finally, the reviewer expressed disappointment at the author's failure to explain the difference in outcomes between courts in England and the United States with regard to nineteenth-century truck act cases. The short answer lies in the constitutional contrast between parliamentary supremacy and judicial review; the dispositive point in these cases—which do not support the reviewer's suggestion of generally "differing results on the two sides of the Atlantic"—lay not so much in the definition of covered employees as in the British judiciary's deference to the legislature's enactments (103–10). Because the book focuses centrally on the employee-independent contractor distinction, it does not purport to delve into comparative constitutional structures.

[4]See Marc Linder, "Petty-Bourgeois Pickle Pickers: An Agricultural Labor-Law Hoax Comes a Cropper," *Tulsa Law Journal*, 25 (1989), 242–43.

[5]See Marc Linder, "Paternalistic State Invervention: The Contradictions of the Legal Empowerment of Vulnerable Workers," *U.C. Davis Law Review* 23 (1990), 733–72.

and high wages with superior bargaining power" shows that the strongly unionized sector is not in need of such intervention (25, n. 21).

In short, far from being a "vision of socialism," the proposal is a very modest reform (keeping in mind that Milton Friedman has been a staunch advocate of the negative income tax!)[6] designed to bolster one segment of workers—albeit one that embraces occupations other than migrant farmworkers[7]—in the concrete circumstances of their labor market.

Thus instead of advocating a program of individualistic independence, the book's "'holding'. . . is that the distinction between employees and independent contractors—has become dysfunctional in the context of the labor-protective and social-welfare purposes to which it is currently put" (xii). And one of the reasons for this claim is precisely the illusion of independence of the independent contractors—a thesis that the author has been systematically advancing for the better part of two decades.[8]

Finally, contrary to the reviewer's claim, the book does not "transport into the dim past a distinction (between 'employee' and 'independent contractor') arguably relevant only in the modern economic world." It is not the author who has created "idealistic difficulties," but rather legislatures and courts that have insisted on reproducing these legal categories. The whole historical point of the book is that a distinction that the state has enforced for many centuries—going back to Roman law[9]—has undergone an unnoticed inversion: whereas once it served to mark off laborers for—and to exempt nonlaborers from—punishment under class legislation, during the last century legislators and judges have failed to design a more suitable role for it under a labor-welfare regime designed to protect workers. Hence "[t]he question that arises . . . is whether a jurisprudential discourse rooted in a status-driven coercive regime is appropriate to the protective laws of the modern social welfare state . . ." (xii). This question is merely one prominent aspect of a venerable debate in legal history concerning the relationship between unchanging legal forms and their dynamic content (22, n. 7).

Marc Linder

Visiting Associate Professor of Law
University of Iowa

Professor Holt chose not to respond.

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[6]See Marc Linder, "The Minimum Wage as Industrial Policy: A Forgotten Role," *Journal of Legislation*, 16 (1990), 171

[7]See, e.g., Marc Linder, "Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons," *University of Detroit Law Review*, 66 (1989), 555–602 (taxicab drivers); Marc Linder, "From Street Urchins to Little Merchants: The Juridical Transvaluation of Child Newspaper Carriers," *Temple Law Review*, 63 (1990), 829–64.

[8]Marc Linder, *Reification and the Consciousness of the Critics of Political Economy: Studies in the Development of Marx' Theory of Value* (Copenhagen: Rhodos, 1975), 151–75; Marc Linder, "Self-Employment as a Cyclical Escape from Unemployment: A Case Study of the Construction Industry in the United States During the Postwar Period," in *Research in the Sociology of Work: Peripheral Workers*, 2 (1983), 261–74; Marc Linder, *The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis* (Frankfurt/Main: Klostermann, 1987), 143 n. 173; Marc Linder and John Houghton, "Self-Employment and the Petty Bourgeoisie: Comment on Steinmetz and Wright," *American Journal of Sociology*, 96 (1990), 727–35. Other works by the author on this subject are referenced in the book (281).

[9]Just a few years ago, the Supreme Court of South Africa, in deciding whether an insurance agent was a covered "workman" or an excluded independent contractor under a workers' compensation statute, devoted many pages to a discussion of the distinction in Roman law. See *Smit* v. *Workmen's Compensation Comm'r*, 1979 (1) SA 52 (AD).