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THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW

A Historical Perspective

MARC LINDER

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THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW

A Historical Perspective

MARC LINDER

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Marc Linder, "What is an Employee? Why It Does, But Should Not, Matter." Law & Inequality.



K SSS 1356 1757

My Lords.... I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve; and that this right to choose for himself constituted the main difference between a servant and a serf.

Nokes v. Doncaster Amalgamated Collieries, Ltd., [1940] A.C. 1014, 1026 (H.L.) (per Lord Atkin).

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Introduction

These historical studies arose in connection with litigation conducted on behalf of migrant farmworkers against farmers and others who had denied the existence of an employment relationship with them. That some courts and agencies took what seemed to be frivolous contentions seriously gave pause, especially when it turned out that the controversy was not confined to unskilled and low-wage agricultural workers. At that point it appeared appropriate to search for the socioeconomic and juridical origins of this dispute.

Two methodological caveats are in order here. First, not in spite of, but rather precisely because of, its "presentist" origins and definite political position, this book is a historical quest. historical material does not serve instrumentalist grist for the current policy mill; independent rather, it retains value unpreconceived story worth reconstructing preserving for its own sake--albeit one that might not have been told absent a practical purpose. Second, the analysis is primarily of the evolution of a legal doctrine that has assumed a life of its own. Although an effort is made to expose the rootedness of the development of statutory and common law in development of the political economy in Britain and the United States, specific doctrinal twists and turns are not shown or asserted to flow of necessity from material changes. To establish such a linkage convincingly would require the marshaling of thickly described concrete-local accounts of the disputes that gave rise to appellate litigation--a task that this book does not pretend to have undertaken.



a historically Part contains enriched theoretical overview that situates contemporary debate on the nature and scope of the employment relationship in the context of class structure. In Part II the origins of Anglo-American master-servant law are traced back to the repressive legislation characteristic of the late medieval and early capitalist periods in England. The evolution of the scope of the employment relationship is then followed in Part III in two nineteenth-century settings the jurisprudence of which created an enduring framework for discourse: laborprotective statutes on the one hand and common-law vicarious liability and fellow-servant rule cases on the other. The transition to and the structure of the modern employment relationship are the subject of Part IV, which focuses on the impact exerted on it by the vast expansion of the interventionist "social wage" in the form of the various components of the system of socioeconomic security.

Having originated in the harsh if not brutal of early environment English capitalism, the legislative and judicial definitions of "servant" or "employee" once served relatively transparent oppressive or paternalistic-eleemosynary The societal end underlying contemporary purposes. statutory use of these demarcational terms has, however, at least potentially, assumed a fundamentally different character--that of providing the kind of basic socioeconomic security that the members of a mature and wealthy polity can afford to claim as of The question that arises in this context is whether a jurisprudential discourse rooted in a statusdriven coercive regime is appropriate to the protective laws of the modern social welfare state, which condition their entitlements on the existence of an The tension between such a employment relationship. system of rights and the continuing traditional imperatives of the system of wage labor is reflected in the incoherence of modern efforts to conceptualize the scope of the protected class of workers as liberally as possible.

The "holding" of this book is that the distinction between employees and self-employed independent contractors, which is the threshold issue for determining whether an employment relationship exists, has become dysfunctional in the context of the labor-protective and social-welfare purposes to which it is currently put. Seen in this light, retention of a narrow, class-based scope of "coverage" is necessarily linked to an outdated conception of charitable welfare, which still threatens to stigmatize those it deems needy. Decommissioning the employee-independent



contractor distinction would not only remove this stigma, but also eliminate the considerable private and social costs (including uncertainty) associated with the administrative and judicial determination of employee status. As against these advantages, the chief drawback to the proposed approach is the possible redundancy stemming from incorporation into the basic security system of some who might not need its quarantees.

In devoting many hours over the years to discussing the issue of the employment relationship, Larry Norton has unfailingly wielded a very sharp Occam's razor with inexhaustible good cheer.

NOTES

- 1. Linder, "Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the 'Law and Economics' Agency Doctrine," 15 N.Y.U. Rev. L. & Soc. Change 435 (1987).
- 2. As such this work differs from Yeazell's approach to the origins of class actions by virtue of the former's point of departure in the problematization of a contemporary socioeconomic and juridical relationship. See Stephen Yeazell, From Medieval Group Litigation to the Modern Class Action (1987).
- 3. Even such a radically anti-presentist historian as J.H. Hexter has conceded that:

I do not for a moment intend to imply that current dilemmas have not suggested problems for historical investigation. It is obvious that such dilemmas are among the numerous and entirely legitimate points of origin of historical study. The actual issue, however, has nothing to do with the point of origin of historical studies, but with the mode of treatment of historical problems.

- J.H. Hexter, "The Historian and His Day," in idem, Reappraisals in History 1, 8 n.2 (1963 [first published in Political Science Quarterly, June 1954]).
- 4. Effectuation of these unambiguous purposes may nevertheless have been difficult:

[T]he attempt to draw a sharp line between wage-earners and independent producers is for the early seventeenth century--and, indeed,



much later -- an anachronism. A wage-earning class was in process of formation, but it was not yet fully formed. In many, perhaps most, occupations, wage-labour was an occasional or rather expedient, subsidiary than unquestioned basis of economic organisation; nor is it always easy to distinguish the wage-contract from relations of another kind, for example between buyer and seller, creditor and debtor, or even landlord and tenant.

Tawney and Tawney, "An Occupational Census of the Seventeenth Century, " 5 Economic History Review No. 1, 25, 48 (1934).

- 5. As the International Labour Organisation recommended during World War II: social security protection should be extended to all workers, "whether wage-earning or self-employed, as well as to their dependants, that is to the whole working community considered as a unit from the point of view of the solidarity needed to combat social hazards." Perrin, "Reflections on Fifty Years of Social Security, " 99 Int'l Lab. Rev. 249, 259 Although it would not have eliminated the (1969).distinction between independent contractors employees, the Wagner-Murray-Dingell bill of 1943 and 1945 would have approached unified, universal coverage to a degree which the social security system in the United States has still not attained. 89 Congressional Record 5258-62 (June 3, 1943); 91 Congressional Record 4920-27 (May 24, 1945).
- 6. Ironically, the fact that the broader the definition of "servant," the more workers who became subject to the punitive laws, means that the incentive each party had to characterize the relationship was diametrically opposed to that prevailing under modern regimes of protective legislation. It is this type of employerclass biased statutory structure that led to the nineteenth-century spectacle of employees' claiming to be independent contractors in order to escape the harsh consequences of the law. Perhaps the most prominent current atavistic enactment that protects independent contractors to the exclusion of employees is the Copyright Act of 1976. "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author..." 17 U.S.C. The Act defines a "work made for § 201(b) (1977). hire" as either "a work prepared by an employee within the scope of his or her employment" or "a work specially ordered or commissioned" falling under nine 17 U.S.C. specified categories. § 101 (1977).



Although the courts of appeals are divided on the issue of the scope of protection afforded independent contractors under this provision, it is indisputable that the Act protects employers and independent contractors while disentitling employees. For an overview of the split among the circuits, see Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988), cert. granted, 57 U.S.L.W. 3333 (U.S. Nov. 11, 1988) (No. 88-293).

- An arresting example of state imposition protection on resistant entrepreneurs is the Federal Coal Mine Health and Safety Act of 1969, which defines the protected class of miners as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). This definition has been judicially interpreted to deprive an owner-operator--even in a mine with no "the right to employees--of himself expose unnecessary harm where Congress has otherwise directed." Marshall v. Kraynak, 457 F. Supp. 907, 909 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3rd Cir. 1979), cert. denied, 444 U.S. 10 (1980).
- 8. On the issue of universalism, see International Labour Office, 26th Sess.: Report IV(1): Social Security: Principles, and Problems Arising Out of the War, Part 1: Principles 15 (1944); Hugh Heclo, Modern Social Politics in Britain and Sweden (1975 [1974]); Jerry Cates, Insuring Inequality: Administrative Leadership in Social Security, 1935-54 (1983); Neil Gilbert, Capitalism and the Welfare State 47-88 (1983); Francis Castles, The Working Class and Welfare: Reflections on the Political Development of the Welfare State in Australia and New Zealand, 1890-1980, at 102-9 (1985). One objection to universal coverage is that, because it is not a pure transfer program--inasmuch as the non-needy wealthy receive some of the benefits--it is a drag on progressivity.