

**THE
EMPLOYMENT
RELATIONSHIP
IN
ANGLO-AMERICAN
LAW**

A Historical Perspective

MARC LINDER

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Part III

**ECONOMIC DEPENDENCE
AND WORKPLACE CONTROL
IN THE
NINETEENTH CENTURY**

The Boundaries of the Working Class under Nineteenth-Century Protective Statutes

I. INTRODUCTION

The regimes established to protect manual workers against manifest overreaching by employers constituted the only statutory or adjudicatory contexts in which a rule, interpretation, or intent akin to the modern economic reality of dependence test of employment emerged before the twentieth century. In Britain this system primarily took the form of so-called truck acts designed to prohibit subsidiary exploitation through payment in goods or chits. In the United States, in addition to similar state laws prohibiting company stores and payment in scrip,¹ an array of statutes was enacted in the nineteenth century to facilitate and secure the payment of wages such as lien, corporate debt and bankruptcy, stockholder liability, pay-period, and hours laws.²

An important difference between the two countries lay in the fact that whereas in Britain a complex class dialectic resulted in segments of the ruling classes, advocating and securing passage of the truck laws on behalf of a disenfranchised working class that could not protect itself,³ in the United States the working classes themselves were the driving forces.⁴ Consequently, in Britain, with respect to legislation evincing a clear intent of Parliament, even the most ardent judicial proponents of the mid-nineteenth-century contractarian fiction of the wage relationship emphasized that the truck laws were a species of charitable acts requiring expansive "humanitarian" interpretation in order to give effect to the intended protection of the state's wards and charges.

In the United States, by contrast, the virulent or suppressed forms of class struggle that underlay the enactment of protective statutes generated a violent judicial counterattack. Thus in holding unconstitutional an 1881 Pennsylvania law providing for the payment of wages to laborers in iron mills at regular intervals and in lawful money, the Pennsylvania Supreme Court pontificated that:

it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal....⁶

II. THE BRITISH TRUCK ACTS⁷

Although the first general and single-purpose truck act was not passed until 1831, several laws, reaching back to the fifteenth century, prescribed payment "in lawful coin of the realm" to workers in certain manufactures.⁸ Although designed "to prevent the oppression of the labourers and workmen employed in the woollen, linen, fustian, cotton, and iron manufacture," these provisions were tacked on to statutes the primary purpose of which was to impose punishment (including public whipping) for embezzlement by such employees of the materials entrusted to them.⁹ Within these industries the statutes did not further define "the labourers and workmen employed," and no reported decisions appear to have drawn the boundaries of coverage.

In 1831 Parliament consolidated all the scattered truck acts¹⁰ in "An Act to prohibit the Payment in certain Trades, of Wages in Goods, or otherwise than in the current Coin of the Realm."¹¹ By its terms the act specified coverage of "Artificers, Workmen, Labourers, and other Persons employed in" a long list of manufacturing industries.¹² It also expressly excluded "any Domestic Servant or Servant in Husbandry."¹³ In its definitions section it declared that "for the Purposes of this Act, all Workmen, Labourers, and other Persons in any Manner engaged in the Performance of any Work, Employment, or Operation, of what Nature soever, in or about the several Trades and Occupations aforesaid, shall be and be deemed to be 'Artificers;' while "all Masters, Bailiffs, Foremen, Managers, Clerks, and other Persons engaged in the Hiring, Employment, or Superintendance of the Labour of any

such Artificers, shall be and be deemed to be 'Employers'...."¹⁴ The only relevant legislative history¹⁵ appears to be Lord Wynford's statement during the debates that although shirtbutton makers were in need of help, because they were not servants of manufacturers, they were not protected by the act.¹⁶

Toward the end of the century the statute was amended to become more general. The Truck Amendment Act of 1887¹⁷ incorporated by reference the definition of "workman" as defined in the Employers and Workmen Act, 1875, which included "any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,...has entered into or works under a contract with an employer, whether the contract...be a contract of service or a contract personally to execute any work or labour."¹⁸ The Truck Amendment Act then instructed the courts to construe the reach of the term "artificer" in the original act as including "workman."¹⁹

In the first important reported appellate litigation of the Truck Act,²⁰ the plaintiff was a subcontractor under the defendants, who had contracted to make a portion of a railway.²¹ The plaintiff contracted with the defendants to remove earth on a per-volume basis, engaging eight or nine men to work with him. In response to the plaintiff's action for debt for work and labor, the defendants pleaded a set-off for the value of the goods in which they had paid him. The plaintiff pleaded that as a laborer he came within the Act, which provided that in such wage actions the defendant was prohibited from claiming any reduction of the wage demand by reason of any goods paid as wages.²² Speaking for the Court of Exchequer, Baron Parke held that the Act applied only to those who contracted for their "personal services." Here the plaintiff was not in the least bound to work personally; rather, from the contract price he might "derive a profit, by the assistance and labour of others."²³ In a poignant characterization of an economic reality of working-class dependence and poverty test, Parke held that the Act's

object...is to protect such men as earn their bread by the sweat of their brow, and who are, for the most part, an unprovided class, and that it was not intended to have any application whatever to persons who take up work on a grand scale.²⁴

To this principle, which was a mode of drawing a boundary between "wage-slaves," who were deemed in need

of state-enforced protection, and fledgling entrepreneurs, who did not, the courts strictly adhered for the remainder of the century. Unlike some contemporary American courts,²⁵ even judges who were manifestly imbued with mid-Victorian contractarian ideology were constrained to acknowledge and give effect to the clear legislative intent of paternalism:

[T]he intention of the 1 & 2 W. 4, c. 37, was to afford protection to a class of persons not very able to protect themselves. The law does not often interfere to prevent persons who have attained their majority from contracting in any way they think proper. ... But occasionally there occur in the course of experience cases in which it is found desirable to depart from that general principle...: for instance, in the case of seamen, whose contracts are the subject of special legislative provisions,-- the law considering that particular class of men to be in a state of perpetual pupilage. The statute in question does not say that the restriction it imposes shall apply to all trades or employments; but it has been found that, in respect of some trades, the leaving the parties the unfettered right to contract in respect of labour in such way as they may choose, is replete with mischief.... The persons the act was meant to benefit are those who hire themselves to labour with their hands for daily or weekly wages. More people, no doubt, are comprehended within it than that; but it is that sort of people to whom the act was intended to apply. I do not think that it was at all designed for the protection of persons taking contracts for labour to be done by others,--persons who speculate upon the state of the labour market.²⁶

The issue that chiefly occupied the courts in interpreting coverage was on which side of the class divide they should locate workers who, to be sure, contracted to work with their own hands, but also hired others. In Weaver v. Floyd, the Court of Queen's Bench resolved this question in favor of the worker, who was employed in a coal pit on a tonnage basis by a contractor of the mine owner.²⁷ Since the agreement provided for the plaintiff to work personally, the court held the fact that he was at liberty to employ others to assist him not dispositive.²⁸ The following

year the Court of Common Pleas narrowed the scope of the protected class of workers by ruling that the worker must be contractually bound to be personally engaged: where a (labor) contractor primarily contracts to procure others to do the work, "the circumstance of his doing some portion of the work himself, does not bring him within the statute."²⁹

The Court of Queen's Bench upheld its rule in Weaver v. Floyd in a case involving so-called butty colliers, whose custom it was to join together as working colliers on a piece rate and to employ others in order to increase the output. They were sued by the mine owners for overpayments made in advances to them. The butty colliers defended on the grounds that as artificers within the Truck Act they owed nothing for wages received in the form of goods.³⁰ The court, speaking through Lord Campbell, C.J., found the case within the principle of Weaver--namely, that the act applies where the artificer is contractually bound to give his personal labor "even though he may be at liberty also to procure the labour of others."³¹ Although the court was clear that in concrete cases it might be difficult to determine whether a worker "is the foreman of a gang of artificers receiving their wages along with his own, perhaps getting a commission from them for doing so, or whether he is a contractor, speculating in the labour market, though working himself,"³² it found the following indicia decisive: weekly wages; service with notice of colliery's rules with respect to workmen; dismissal for absence and subsequent rehiring of one of the defendants; and the fact that the latter were bound to work personally.³³ As to this last point: "When once it is decided that this is the material point, it is important that we should not make nice distinctions in such a matter, as they must be acted on by illiterate persons."³⁴

Faced the very next year with precisely such "an illiterate laboring man," the Court of Queen's Bench retreated in deference to the construction of the act "by Judges of coordinate jurisdiction."³⁵ The plaintiff entered into a written agreement (which he signed with an X) to make as many bricks as the defendant required in the latter's brick field, with materials furnished by the latter and under his "direction." The plaintiff was to find the requisite labor.³⁶ A divided court stated that if the case had been one of first impression, it would have thought that the combination of the parties' contemplation, at the time of entering the contract, of the plaintiff's personally performing labor and his subsequent actual performance would bring him within the Act. But the majority felt constrained to adopt the more restrictive criterion of the Courts

of Exchequer and Common Pleas--namely, that the workman be absolutely bound by the contract to work with his own hands--despite its likelihood of excluding from the protection of the statute "many of that class who, the Legislature seems to have thought, required to be protected from the frauds of their employers in the payment of their wages."³⁷ On appeal, the Exchequer Chamber unanimously affirmed. In applying the aforementioned criterion to the facts, the judges assumed without discussion that the assistants could only have been the servants of the plaintiff-contractor and not of the defendant.³⁸ If this assumption was factually warranted,³⁹ then the decision may have been less harsh than it appears.

Butty colliers were the occasion for the Court of Exchequer's not only adhering to Ingram v. Barnes, but attaching even more rigid conditions to coverage. The miners, while employing others and working themselves, "were not allowed to leave the work, and go to work elsewhere" or "to underlet the work."⁴⁰ Without discussion, Pollock, C.B., announced that where the contract is not for labor but for the result of labor, the party, employing others, is not within the Act even if he does some of the work himself.⁴¹ This unanalyzed distinction between labor and the result of labor--not even rising to the level of sophistication achieved by the nineteenth-century respondeat superior cases--cannot support the weight of the holding, especially since it avoids all reference to the concrete facts of the employment relationships at issue. On the other hand, the fact that the four plaintiffs had entered into a formal legal partnership and had earned in excess of £1,200 in three years might indicate the presence of an independent enterprise, although this was clearly negated by the prohibition on their leaving to work elsewhere.⁴² This decision underscores the steady progression of the courts away from effectuating Parliament's humanitarian paternalism and toward the recrudescence of formalism.

This trend was interrupted in a case involving a worker who concededly employed no one. In Pillar v. Llynvi Coal & Iron Co., Ltd.,⁴³ the plaintiff was a tinman engaged by the defendant in a dual capacity: to make kettles at fixed prices with materials supplied by the defendant at varying prices; and to repair its buildings at day wages. The piece work he was at liberty to perform at home; and at times he worked for others. Like the other workmen employed by the defendant, the plaintiff was paid by check, which he took to the defendant's store, where he received one-fifth of the value in cash, the rest in goods. It was understood that a workman who failed to take the check

to the store would be discharged.⁴⁴ In adhering to the rule in Ingram v. Barnes, the Court of Common Pleas held that the abstract possibility of the plaintiff's getting others to do the piece work for him was outweighed by the following:

The manner in which the plaintiff was paid for piece-work was singular in this respect, that the plaintiff was limited to a fixed charge for the articles he made, whilst the company were not so limited in their charge for materials; but this circumstance, unfair as it apparently is to the labourer, helps to shew that the company were dealing with him as a workman under their control, rather than as an independent businessman.⁴⁵

But this reasoning represents the only substantive analysis of the employment relationship in any of the Truck Act cases. The ultimate reassertion of the formalist mode of adjudication emerged in an early twentieth-century case decided under the amended Act by the Court of King's Bench. The workers in Squire v. Midland Lace Company⁴⁶ were female lace clippers.⁴⁷ The defendant, like other lace factories, gave finished lace to women to remove superfluous threads and materials at home. From the fact that clippers did not work for any one company exclusively and worked at home, the trial court concluded that they "carr[ie]d on the business of clipping" and were "independent," with "the firms having no control whatsoever over them."⁴⁸ One of the women worked only as an outworker and did all the work by herself; the other woman was also a daytime factory payroll employee, who occasionally took work home with which her daughter helped her. The summons charged that the defendant had violated the Act by making deductions for damaged goods not pursuant to the contract required by the Act.⁴⁹

The Court of King's Bench felt itself precluded by the authority of Ingram v. Barnes from considering whether it might not give to the statutory definition "an interpretation sufficiently liberal to include these two persons as workwomen, entitled to the protection of the Truck Acts."⁵⁰ But the court dismissed the appeal reluctantly because the facts disclosed that the clippers were "evidently, as a class, wage-earning manual labourers, and not 'contractors' in the ordinary and popular sense, or persons who 'speculate on the state of the labour market'...."⁵¹ Although the court hoped that the law might be amended to extend its protection "to a class of workpeople practically indistinguishable from those

already within its provisions,"⁵² it had manifestly abandoned the economic reality of class poverty and dependence test, which underlay the Act and under which the clippers indisputably fell.⁵³

III. NINETEENTH-CENTURY LABOR-PROTECTIVE LEGISLATION IN THE UNITED STATES

Although the last quarter of the nineteenth century witnessed the enactment of anti-truck or scrip acts prohibiting the practice of company stores in a majority of states, adjudications focused on the constitutionality of the statutes rather than on the sweep of the scope of employee coverage.⁵⁴ Consequently, whereas in England the Truck Act achieved a central status as the piece of protective labor legislation that furnished the forum for the most extended analysis of the boundaries of the working class,⁵⁵ no single enactment occupied that position in the United States. Instead, a panoply of (largely state) laws regulating liens, attachment, garnishment, bankruptcy, insolvency, stockholder liability, railroad liability for acts of construction contractors, and pay-periods⁵⁶ instantiated the power of the working-class franchise in combination with petty bourgeois hostility to the burgeoning corporate entrepreneurial entities to resist multifarious forms of employer overreaching. From this historically specific constellation of class forces flowed the peculiar accent of the cases on the entrepreneurial aspects of contracting as defining the class of persons who were not in need of state policing of the procedures and substantive terms of their deals with other entrepreneurs.

A. Lien Laws

Adjudications under state lien laws,⁵⁷ which reach back to the end of the eighteenth century, form by far the largest source of legal discussion of employment status. Given the dual class origins and purposes of many state lien laws--that is, to aid workers and contractors--the class line drawing performed by the courts was inevitably colored by the specific intentions and language of the statutes they were called on to interpret.⁵⁸ Although courts generally felt constrained to construe lien laws broadly and liberally insofar as they were remedial schemes,⁵⁹ they drew conflicting conclusions from this canon.⁶⁰ Thus a Minnesota logging lien law was held not to be limited

to those who performed manual labor, but to apply to all--including contractors and subcontractors--who performed labor or services.⁶¹ Other state courts excluded contractors who did not perform labor themselves,⁶² while still others expressly adopted the rule of some English Truck Act cases that one who employed others and worked himself though not bound to do so was excluded.⁶³ While some courts excluded all contractors,⁶⁴ others protected them so long as they engaged in labor themselves.⁶⁵

Of greatest relevance in the present context is the fact that judges at times advanced a version of the economic reality of class poverty test to justify mutually exclusive definitions of class-based entitlements to protection.⁶⁶ Thus in construing a lien conferred on those doing labor in sowing or harvesting crops, one court defined the protected class as poor men who were dependent on their earnings and could ill afford to lose them or indulge in the uncertainties of litigation. Yet it held that a contractor might have a lien for his own labor.⁶⁷ The U.S. Supreme Court interpreted an 1833 "Act to secure to mechanics and others, payment for labor done, and materials furnished, in the erection of buildings in the District of Columbia" to exclude contractors because "[such] persons have an opportunity and are capable of obtaining their own securities."⁶⁸ In other words, it was not contractors' failure to exact real or personal security before work began that was the mischief at which the lien laws aimed,⁶⁹ but rather the vulnerability of the worker who knew nothing of the owner but was remitted to trusting to the security of the building he was constructing.⁷⁰ At the turn of the century the Maine Supreme Judicial Court insisted on the socioeconomic and moral importance of prohibiting class straddling in an argument that anticipated mid-twentieth-century protests against incorporation of the self-employed into the social security system. In rejecting the lien claims of logging contractors, the court held that:

When they labored themselves, it was not for wages, but to increase profits by saving wages. Had the enterprise proved profitable, they could, and undoubtedly would, have retained all the profits, however much in excess of the customary wages in such work, and would have allowed no rebate to the customers of the logs. Hence, if the enterprise has proved unprofitable, they should not and cannot repudiate their position as contractors and recover wages as

laborers.⁷¹

Just how far the pendulum had swung during the nineteenth century is nicely illustrated by a New York case from the 1830s involving a lien law that provided that every workman, mechanic, or other person erecting buildings in New York City under a written contract between the owner and builder, whether the work was performed as a journeyman, laborer, subcontractor, or otherwise, could make demand of the owner for his wages. Where a subcontractor absconded, the question for the court was whether a workman beyond those directly employed by the contractor had a lien.⁷² In ruling against the worker,⁷³ the court managed to combine its solicitude for the predicament of the impoverished working class with encouragement of the original accumulation of capital by aspiring entrants to the bourgeoisie. Since, it reasoned, imposing on the contractor liability for the wage debts of the subcontractors would injure the less prosperous mechanics by making it unsafe for the contractor to pay the subcontractors until the latter had proved that they had paid the workers in full, the subcontractors would then have to find other means in order to meet their payrolls--or else both they and the workers would have to wait until the subcontract had been performed to be paid.⁷⁴

Those, therefore, who wish to promote the true interests of the industrious classes, cannot desire a construction of the present statutes . . . the probable effect of which would be to suspend the payments of the daily pittance, which the journeyman frequently wants for the immediate use of him and his family; or to compel the great mass of industrious and enterprising mechanics in our cities, who have as yet acquired no capital and but little credit, to become the mere journeymen and day labourers of a few wealthy contractors, by placing them in a situation in which it will be impossible for them to obtain sub-contracts for a part of the work....⁷⁵

B. Bankruptcy and Corporate Insolvency Laws

In addition to the federal bankruptcy statute,⁷⁶ various states enacted corporate insolvency laws⁷⁷ conferring a preference on laborers' wages. In contrast to nineteenth-century English courts, which

interpreted the statutory language largely by reference to the indicia of worksite subordination,⁷⁸ the American courts joined to this criterion that of specific working-class impoverishment, vulnerability, and economic dependence.⁷⁹ Thus a New Jersey court held that the purpose of the state corporate insolvency act was to protect a class of persons who could not protect themselves against misfortune or fraud by employers.⁸⁰ And a New York court, in ruling that one who contracted for and engaged in the manual labor of sorting pickles on behalf of a corporation served precisely in the more subordinate humble capacities the legislature intended to protect:

To this end, the statute has preferred those who depend upon their daily work for the means of life to the dealers or independent contractors who take the chances of trade, or who extend credit in the ordinary risks of business...; in fine, to those who have, presumably, other means of subsistence or capital, or can protect themselves, or who, in any event, are not naturally dependent upon the solvency of one individual.⁸¹

C. Railroad Construction Contractor Acts

In order to cope with the myriad disputes that arose in connection with the use by railroads of (judgment-proof) contractors to build and repair their roads, tunnels, bridges, and so on, who often absconded without paying their workers while the companies protested that they were not in privity with the latter, statutes were passed conferring a right of action against the railroad on those who had performed labor in building the railroad by virtue of an⁸² agreement with the company or anyone acting for it. The principal interpretive issue under such laws, which in effect made the railroads debtors of last resort in⁸³ protecting the wages of their contractors' employees, involved the coverage of subcontractors of contractors, who were generally excluded if--as in the English Truck⁸⁴ Act cases--they in turn employed their own laborers. In seeking to find the dividing line between laboring and entrepreneurial activity, some courts adopted an economic reality of class poverty view according to which the protected laborers were "supposed to be poor, dependent on their wages."⁸⁵ Where courts held that the common laborer envisioned by the legislature was one who earned his daily bread by his toil and thus of necessity personally served,⁸⁶ they may well have been

articulating a correct nineteenth-century empirical class description of ownership of horse-teams and subemployment of other workers as marking off those who were not sufficiently dependent and vulnerable to warrant state intervention.⁸⁷

D. Wage Attachment and Garnishment Statutes

Since the purpose of the numerous laws enacted in the nineteenth century protecting wages from attachment or garnishment was to moderate the pauperization of working class families, they should have lent themselves to a class-oriented economic reality of poverty interpretation.⁸⁸ In large part, the courts did favor such a reading. Thus they emphasized that a servant was in inferior or menial service, poor, and relatively helpless,⁸⁹ while "wages" indicated "inconsiderable pay."⁹⁰ Consequently, although the exemption did not apply to the profits earned by a master carpenter on the workers he employed,⁹¹ where the work was dangerous and "[t]he miner is not a contractor who stands off and appropriates the profits of other men's labour, but...leads the way into the subterranean chamber...and performs the efficient labour with his own hands," even a skilled worker with subordinates was classified as a laborer.⁹² But in drawing the line at protecting the contracts of those who speculate on or profit from others' labor, a mid-century Pennsylvania Supreme Court held that expanding the term "labourer" to include contractors would:

prevent the actual labourer who earned the money, from attaching it to secure the wages of his labour and his reward, and save it for the contractor, who perhaps never rolled a stone from its bed, whose sweat never fell on the work,⁹³ and whose spade never entered the ground.

IV. CONCLUSION

In interpreting the scope of interventionist, remedial-humanitarian labor legislation, nineteenth-century Anglo-American courts by and large⁹⁴ adopted some variant of an economic reality of class poverty and/or dependence test. Rarely if ever did they have recourse to the relative skill-integration-control test. None deemed adaptation of the even more restrictive control test from vicarious liability cases appropriate. In light of the blatant class bias of

many appellate judges who audibly gritted their teeth while giving effect to the legislature's command to divert the spontaneous course of capital accumulation, it can come as no surprise that they did not seek out ways to create a built-in interpretive tendency toward an ever-expanding universe of protection.⁹⁵ But whether they could define the term or not, they knew the proletariat the legislature meant to protect when they saw one.

APPENDIX A: ENGLISH BANKRUPTCY ACTS

The major nineteenth-century English bankruptcy acts contained the following threshold coverage language.

1. An Act to amend the Laws relating to Bankrupts referred to the wages or salary of a "servant or clerk" not to exceed six months.⁹⁶ A very restricted scope of that language emerged from two cases decided together in 1831.⁹⁷ In disposing of the claims of coach makers paid on a piece rate and construction day laborers, the court ruled that although in strict etymology the distinction between "servant" and "workman" was that the former does anything and the latter particular work, "as society advanced, the varieties of service increased, and the word has been used in a more limited sense." Hence the legislature's intent not to use "servant" in the general sense was clear from the use of "clerk," which would otherwise be surplusage. It also accepted the defendants' argument that the protection of six months of wages identified the protected workers as house menials and not as weekly laborers, who would never be owed wages for such a term.⁹⁸

2. Under the more expansive language of the Bankrupt Law Consolidation Act, which referred to "the wages or labour of such labourer or workman" not exceeding 40s.,⁹⁹ a case arose involving mine workers (drawers), who worked under and were paid by colliers. The manager of the colliery testified that both the colliers and the drawers, whom he considered his servants, were under his control; he could and did discharge both and often hired drawers as laborers until colliers needed them. Yet the court held that there was no contract between the owner and the drawers to bring them within the act. The court was not motivated to view this alleged lack of privity, which, it concluded, would have precluded an action at law against the owner, less strictly under the protective preference of the bankruptcy act.¹⁰⁰

3. The Bankruptcy Act of 1869 fused the coverage

specifications of the two predecessor acts by preferring up to four months of wages or salary of a "clerk or servant," and up to two months "wages of any labourer or workman in the employment of the bankrupt."¹⁰¹ The first adjudication of this provision also involved a miner, but this time a so-called buttyman who paid drawers and others out of his gross piece wages. Again, the manager controlled the works, was empowered to dismiss anyone, and fixed the wages the buttyman paid the workmen. Like his subordinates, the buttyman was bound to work a regulated number of hours and could not leave without the manager's consent. The manager also conceded that the appellant and others were subject to the Master and Servant Act. Characterizing the Truck Act as not dispositive of the issue, the court held that the fact that the buttyman needed the assistance of others did not deprive him of claiming his money as wages. This was merely a hiring for labor, with the master to provide everything else.¹⁰² Although this decision was more expansive than similar Truck Act cases, it was not based on the economic reality of working-class poverty discourse characteristic of the contemporaneous American cases.

4. The same approach marked the interpretation of the Bankruptcy Act, which in pertinent part extended coverage to "[a]ll wages of any labourer or workman not exceeding fifty pounds, whether payable for time or piece-work, in respect of services rendered to the bankrupt during four months before the date of receiving order."¹⁰³ The appellant had been the bankrupt's general foreman and overseer of the former's brickmaking business until he was put on piece wages and became dischargeable at a week's notice. The owner could and did discharge the men working under the appellant, who was without means to pay those pressing him for their wages. The court held him to be a workman rather than a contractor because he did not enjoy the latter's privilege of selecting the workmen, and was subject to a week's notice.¹⁰⁴

5. An Act to amend the Law with respect to Preferential Payments in Bankruptcy, and in the winding-up of Companies included among the priorities two classes of workers: "All wages or salary of any clerk or servant in respect of services rendered...not exceeding fifty pounds";¹⁰⁵ and "[a]ll wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piece work."¹⁰⁶ Within the first class was found to fall an opera singer paid per performance.¹⁰⁷

NOTES

1. For an overview of the late-nineteenth-century American anti-truck state statutes, see Woodward, "Statutory Limitations of Freedom of Contract between Employer and Employé," 29 Am. L. Rev. 236, 245-46 (1895).

2. For an overview, see U.S. Department of Labor, Bureau of Labor Statistics, Wage-Payment Legislation in the United States (Bull. No. 229, 1917); U.S. Department of Labor, Bureau of Labor Statistics, Laws Relating to the Payment of Wages (Bull. No. 408, 1926).

3. "Its principal support came from major employers bent upon putting down their lesser rivals who were securing a cost advantage out of the truck system." George Hilton, The Truck System 105 (1961).

4. Given the fluid class society in the late eighteenth century, mechanics' lien laws, enacted to cover both journeymen and contractors, were "introduced, not so much for the benefit of the 'proletarian' as for representatives of the great middle class." Henry Farnam, Chapters in the History of Social Legislation in the United States to 1860, at 152 (1938).

5. This eleemosynary aura still surrounds plaintiffs' counsel's understanding as well as judicial interpretation of the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). But see Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177 (7th Cir. 1987) ("It is not easy, today, to accept such a description of a statute that appears...to bear hard on the poorest class of workers" [per Posner, J.]). But as Otto Kahn-Freund has observed of the truck acts in particular, precisely because the purpose of such protective legislation is to infuse law into a relation of command and subordination in order to limit the range of the worker's duty of obedience and to enlarge his range of freedom, where labor is weak, laws cannot enduringly modify the power relation between labor and management. Thus, for example, even the most efficient inspectors cannot achieve much where workers are afraid to complain. Legal norms unsupported by social sanctions--that is, by countervailing power of trade unions--are ineffective. Otto Kahn-Freund, Labour and the Law 6-8 (2d ed. 1977 [1972]). Since such statutes as FLSA and AWPA characteristically serve to protect atomized, impoverished, vulnerable, and desperate segments of the working class, his strictures fully apply to them. If these statutes have any non-patronizing and non-

paternalistic kernel, it must be that their beneficiaries are to be sheltered from what are considered the unacceptably uncivilized standards quasi-automatically generated by the lopsided existing power relationships and forces of supply and demand until the workers are in a position to confront their employers as self-confidently and efficaciously as other well-organized sectors of the working class. Where after decades enforcement is obviously Sisyphus labor, the time has come to consider whether vis-à-vis such impervious power and market structures new strategies are not required to free the encapsulated workers.

6. Godcharles v. Wigeman, 113 Pa. 431, 6 A. 354, 356 (1886). The extraordinarily restrictive and crabbed interpretation that courts afforded nineteenth-century eight-hours laws further illuminates the sea change that has taken place in the intervening century. In a case involving a federal law providing that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by the United States government, (15 Stat. 77 [1868]), the United States Supreme Court took as its point of departure the unshackling of market forces, which had been effected since the demise of the society to which the old English Statute of Artificers, etc., had been appropriate:

A different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen and of whatever degree of skill and at whatever price they think fit and, except for some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested.

United States v. Martin, 94 U.S. 400, 403 (1877). The Supreme Court thus felt justified in interpreting the statute as a mere direction by the principal, Congress, to its agent, the officers of the United States, prescribing the length of the workday "when no special agreement was made upon subject." Id. at 402. The "third party," the plaintiff-employee, therefore had no "interest" in the statute, which did not interfere with the aforementioned "theory" since it did not specify a wage for eight hours or more of work. Consequently, the court ruled that the statute did not preclude the employer and laborer from agreeing with each other as to the length of the workday. Although it was true

that some branches of labor--furnace, foundry, steam, and gas works--would render a worker permanently invalid if he worked more than eight hours daily, "[t]he government officer is not prohibited from knowing these facts." *Id.* at 403. Nor did the statute intend that the officer might not contract with "a consenting laborer" to work twelve hours outdoors in the summer. *Id.* at 404. As a result, the plaintiff's contract to work twelve hours for \$2.50 was, after he had understood that eight hours would not be accepted, "a voluntary and a reasonable one, by which he must now be bound." *Id.* In another action arising under a federal hours statute for government workers, the plaintiff sued the federal government for the wages owed him by a contractor who was delivering granite. The plaintiff's claim of government involvement was apparently largely based on an accounting arrangement by which the contractor furnished a government clerk with a list of the names and wages of his employees; the clerk then made the payroll and the workers signed, upon which the contractor was paid the wages plus 15 per cent. The court disposed of the case on the grounds that there was no privity between the parties: the payroll arrangement was designed to avoid fraud on the cost-plus contract. Almost as an afterthought, the court added that the fact that the contractor was subject to a \$100 per diem default provision was "incongruous with the idea of his being an agent and not a contractor." *United States v. Driscoll*, 96 U.S. 421, 423-24 (1878). Since the contractual default provision does create the presumption of financial responsibility on the part of the contractor, the outcome may be consistent with an economic reality of dependence approach, but the sparsely reported facts are not conclusive of this issue. At the end of the century, one state supreme court was even willing to rule that the grounds on which it could not imply a promise to pay for extra hours worked in a metal refining mill beyond eight were that the employee himself could not be permitted to gain from his participation in a violation of the statute. *Short v. Bullion-Beck & Champion Mining Co.*, 57 P. 720, 720-21 (Utah 1899). Only the dissent pointed out that the intention of the legislature was to protect employees whose lack of equality of bargaining power vis-à-vis an overpowering will caused them to conform to regulations detrimental to their health. *Id.* at 724-25. See also *Billingsley v. Board of Comm'rs of Marshall County*, 5 Kan. App. 435, 49 P. 329 (1897).

7. See generally George Hilton, The Truck System 63-118 (1961); P.S. Atiyah, The Rise and Fall of Freedom of Contract 533-37 (1979); 2 C.B. Labatt, The Law of Master and Servant 2249-63 (1913); Kahn-Freund, "The Tangle of the Truck Acts," 4 Industrial L. Rev. 2 (1949-50); J.P. Gonzalez Blanco, Protection of Wages 161-93 (1959).

8. 4 Edw. 4, c. 1, § 14 (1464) (clothiers prohibited from paying carders, spinsters, and all such other laborers in kind); 8 Eliz., c. 7, § 6 (1565); 14 Eliz., c. 12 (1572).

9. 1 Annae, stat. 2 c. 18, §§ 2-3 (1701). See also 12 Geo., c. 34, § 3 (1725); 13 Geo 2, c. 8, §§ 6, 8 (1740) (punishing enticees); 29 Geo 2, c. 33, § 3 (1756); 30 Geo. 2, c. 12, § 3 (1757).

10. They were repealed by 1 & 2 Will. 4, c. 36 (1831).

11. 1 & 2 Will. 4, c. 37 (1831).

12. Id. § 19.

13. Id. at § 20.

14. Id. at § 25.

15. The most extensive debate took place on Dec. 14, 1 Parl. Deb. H.C. (3d ser.) 1133-82 (1830); June 28, 4 Parl. Deb. H.L. (3d ser.) 407 (1831), and Sept. 12, 5 Parl. Deb. H.C. (3d ser.) 1357-64 (1831).

16. 6 Parl. Deb. H.C. (3d ser.) 465 (July 28, 1831).

17. 50 & 51 Vict., c. 46, § 2 (1887).

18. 38 & 39 Vict., c. 90, § 10 (1875). This provision excluded domestic and menial servants.

19. 50 & 51 Vict., c. 46, § 2. The Truck Act, 1896, 59 & 60 Vict., c. 44, introduced no definitional changes.

20. Some of the reported litigation may have been supported by the Anti-Truck Association founded in the 1840s to finance the prosecution of suits, which could cost up to £80. Hilton, Truck System at 121-23. An even greater obstacle to enforcement was the fact that bringing an action was certain to lead to discharge. Id. at 119-21. For contemporary assessment of the Act and of the pro-bourgeois attitudes of the justices of the peace, see Friedrich Engels, Die Lage der arbeitenden Klasse in England (1845), in: I:4 Marx-Engels Gesamtausgabe 173-75, 266-67 (1932).

21. Riley v. Warden, 2 Ex. 59, 154 Eng. Rep. 405 (1848).

22. 1 & 2 Will., 4, c. 37, § 5.

23. Riley v. Warden, 2 Ex. at 68.

24. Id. (emphasis added).

25. See, e.g., Jordan v. State, 51 Tex. Crim. 531, 103 S.W. 633, 636 (1907): "In this country the employé to-day may be the employer next year, and laws treating employés as subjects for such protective legislation belittle their intelligence, and reflect upon their standing as free citizens."

26. Sharman v. Sanders, 13 C.B. 166, 176, 138 Eng. Rep. 1161 (C.P. 1853) (emphasis added).

27. 21 L.J.Q.B. 151 (1852).

28. Id. at 152.

29. Sharman v. Sanders, 13 C.B. at 177. The outcome in the case may have been largely a function of the peculiar facts and overly aggressive argument by the plaintiff's counsel. The defendants, who carried on an ironworks, employed the plaintiff to load and unload and burn ironstone on a piece rate, with the former to provide the carts and horses. The defendants paid the plaintiff monthly, who in turn paid the workers weekly with tickets good only at the defendants' store, where they were required to take four-fifths of their wages in goods. The fact that the plaintiff apparently sued on his own behalf only, although he himself may have violated the Act vis-à-vis the workers, may have alienated the court. Had the workers sued the company, it is possible that the court would have found the latter to be the employer, especially since the plaintiff had neither physical nor liquid capital assets. By unnecessarily taking the position in oral argument that the statute was intended to afford protection to one who merely contracts for the performance of labor "by persons employed under his superintendence and inspection," id. at 174, counsel virtually predetermined the negative ruling. Even his alternative argument--namely, that "[i]t can be no objection that the plaintiff stood in the double capacity of employed and employer," id., at 175--was in its baldness untenable. Given the clear class intent of the legislation, such ambiguous class actors threatened to jeopardize the societally transparent binary structure that enabled even hostile appellate court judges to enforce protection with a good conscience on behalf of those "in a state of perpetual pupillage." Plaintiffs who treated their workers as they in turn had been treated by defendants could scarcely anticipate a favorable judicial reception.

30. Bowers v. Lovekin, 6 El. & Bl. 584, 584-85, 119 Eng. Rep. 982 (1856).

31. Id. at 590.

32. Id. at 592 (per Crompton, J.).

33. Id. at 587.

34. Id. at 591 (per Coleridge, J.).

35. Ingram v. Barnes, 7 El. & Bl. 115, 124, 125, 119 Eng. Rep. 1190 (1857).

36. Id. at 116-17.

37. Id. at 124-25. In dissent, Erle, J., set forth a dual critique: (1) that the Court of Exchequer had never ruled that the contract of hiring was required to contain an express stipulation that the party should serve personally; and (2) that the statute itself contains no such requirement. Instead, he proposed that the relevant criteria were whether personal labor was consistent with the contract and whether the party actually did substantial work. Id. at 125-32. The weakness of this position is that it would have failed to sustain the monolithic class division conceded by the case law by conferring protection on large working contractors.

38. Thus Cresswell, J., asserted without any reasoning that, had the assistants injured a third party, the plaintiff would have been liable (although the act took place on the defendant's property and under his direction).

39. Favoring its correctness are the facts that the contract contained forfeiture and damages provisions and that the plaintiff was a brickmaker. Id. at 116-17. Additional facts pertaining to the nature of the defendant's operations would be necessary in order to determine who was whose employee.

40. Sleeman v. Barrett, 2 H. & C. 934, 935, 159 Eng. Rep. 386 (1864).

41. Id. at 942-43.

42. Counsel for plaintiffs correctly pointed out that butty colliers were uniformly held to be within the non-protective purposes of 4 Geo. 4, c.34, which empowered justices of the peace to punish artificers for breaches of their contracts of service. Sleeman v. Barrett, 2 H. & C. at 941.

43. 38 L.J.N.S. (C.P.) 294 (1869).

44. Id.

45. Id. at 297.

46. [1905] 2 K.B. 448.

47. Technically the plaintiff was the factory inspector charged with enforcing the Act.

48. Id. at 449. Apposite are Judge Talbot Smith's sarcastic remarks on such control:

[A] typist is employed to type mailing stickers from a list of customers. Again the employer argues that he has no control over the way the work is done, meaning, presumably, that the typist can type the letters of the words she must copy in any order she chooses. ... [T]he typist on her machine undergoes no transformation into an independent businesswoman because her employer tells her that she can choose her own methods of working i.e., type with 2 fingers or ten.

Powell v. Employment Security Comm'n, 345 Mich. 455, 75 N.W.2d 874, 883, 886 (1956) (Smith, J., dissenting).

49. Squire v. Midland Lace Co., [1905] 2 K.B. at 449-50. The Truck Act, 1896, 59 & 60 Vict., c. 44, § 2.

50. Squire v. Midland Lace Co., [1905] 2 K.B. at 454.

51. Id. at 455.

52. Id.

53. Although they do not strictly come within the scope of the issue of employment status, two cases deserve special mention precisely because neither the defendant-masters nor the judges raised the issue. In Chawner v. Cummings, 8 Q.B. 311, 115 Eng. Rep. 893 (1846) the plaintiff worked for the defendant-middleman weaving gloves on a framework knitter; the defendant, in turn, rented the frames and machines from a master manufacturer, who also furnished the materials. From the plaintiff's piece earnings the defendant deducted, inter alia, rent for the frame and standing room. The plaintiff's claim that these deductions, which were part of a century-old custom in the trade, violated the Truck Act, was rejected by the Court of Queen's Bench. Lord Denman, C.J., reasoned that the deductions were not a payment at all but merely a mode of calculating the wage. If the plaintiff had owned the frame, and if he had been paid for its wear and tear, his net wages after amortization would have been the same. Id. at 323-24. When the same issue was brought before the Queen's Bench some years later, the defendant was a master manufacturer himself. After the court refused to overrule Chawner, the plaintiff appealed to the

Exchequer Chamber of the Queen's Bench, where an equally divided court affirmed. Archer v. James, 2 B. & S. 61, 121 Eng. Rep. 996 (1859 & 1861). The dissenters characterized the practice as a contrivance "by means of which the master makes the interest of his capital a first charge upon the labour of his workmen, instead of obtaining it from the consumer in the price of the article when sold...." Id. at 80. Even Bramwell, B., perhaps the most contractarian nineteenth-century English judge and a forerunner of the Law and Economics school, while denying that "there is any contrivance by which the wages of a particular trade can be permanently depressed below their natural price," conceded the opportunity to "harass and oppress, and practically defraud" workers. Id. at 102. Yet even he, who, citing Ricardo, stated that as soon as a laborer used a tool, he is a capitalist and "part of what he receives is the profit of his capital," id. at 95-96, did not venture to take the worker out of the act altogether on the grounds that his capital investment made him an independent contractor. Although the origins of frame renting are obscure, it may have arisen as an attempt on the part of owners to ensure an adequate capital return since the knitters could theoretically use the frames to produce for other employers. See Report of the Commission appointed to inquire into the Truck System, C. 326, 36 Parliamentary Papers xxxiii-xxxv (1871); F.A. Wells, The British Hosiery Trade 69-84, esp. at 74 (1935); Andrew Friedman, Industry and Labour 159-79 (1977). The scheme itself was ultimately prohibited by the Hosiery Manufacture (Wages) Act, 37 & 38 Vict., c.48, § 2 (1874). In late-nineteenth-century Massachusetts a statute designed to prevent employers of weavers from making wage deductions in the form of fines for imperfections was held unconstitutional. Commonwealth v. Perry, 155 Mass. 117, 28 N.E. 1126 (1891).

54. For an overview of the statutes and the case law, see 2 Labatt, The Law of Master and Servant 2249-63 (1913); Bureau of Labor Statistics, Wage-Payment Legislation in the United States 94-113 (Bull. No. 229, 1917).

55. On the English bankruptcy statutes, see infra Appendix A.

56. The-last named laws, which required weekly or biweekly wage payments, were restrictively interpreted to include only laborers or servants in the private sectors of manufacturing and mining. See, e.g., People ex rel. Valkenburgh v. Myers, 33 N.Y. 18 (Sup. Ct. 1890); Commonwealth v. Marsh, 14 Pa. Co. Ct. 369 (1894). For a more expansive interpretation in a

related area, see Boyd v. Gorman, 157 N.Y. 365, 52 N.E. 113 (1898) (a lawyer on retainer suing for quantum meruit does come within statute providing that no appeal shall be taken to Court of Appeal from judgment of affirmance in action to recover wages, salary, or compensation for services when appealed decision is unanimous unless question of law is certified). See generally, U.S. Department of Labor, Bureau of Labor Statistics, Wage-Payment Legislation in the United States 68-93 (Bull. No. 229, 1917).

57. The first lien law was enacted by Maryland in 1791 in connection with the construction of the city of Washington. See Samuel Phillips, A Treatise on the Laws of Mechanics' Liens on Real and Personal Property 10-15 (2d ed. 1883 [1882]); Henry Farnam, Chapters in the History of Social Legislation in the United States to 1860, at 153-54 (1938). On lien laws in general, see id. at 152-57.

58. Some lines were easier to draw than others. Thus a railroad construction contractor with 300 employees who was able to meet his payroll when the railroad did not pay him was deemed not to have been within the class of mechanics, laborers, and operatives the legislature meant to protect. Krakaner v. Locke, 6 Tex. Civ. App. 446, 25 S.W. 700 (1894), writ of error den.

59. See, e.g., Davis v. Alvord, 94 U.S. 545, 549 (1877); Flagstaff Silver Mining Co. of Utah v. Cullins, 104 U.S. 176, 177 (1881); Carver v. Bagley, 79 Minn. 114, 81 N.W. 757, 758 (1900).

60. The tension inherent in the cases presumably resulted at least in part from the fact that courts were being called upon to violate one of the underpinnings of capitalist accumulation and appropriation--namely, that the product produced by the labor of the wage laborer belongs to the capitalist. See 2 Wolfgang Däubler, Das Arbeitsrecht 57 (1979); Herz, "Der Rechtsgrund für den Eigentumserwerb am Arbeitsprodukt im Arbeitsvertrag," 74 Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts 1 (1924). A good example of the parade-of-horribles reaction to this potential contravention was provided by the New Hampshire Supreme Court in explaining what would be flushed through the floodgates if it gave underworkmen a lien on the owner's property. The ostensible doctrinal fulcrum of the decision was the supposed lack of privity between the worker hauling wood and the landowner; rather, the court held, privity of contract obtained only between the contractor and the owner and the contractor and the worker. Jacobs v.

Knapp, 50 N.H. 71, 76-77 (1870). But "privity" is at best legal shorthand for or a truncated argument about the nature of the relationship in question. Because the court was preoccupied with an outcome that would be "so radical, inconvenient, and so often...unjust," id. at 77, it merely asserted the lack of privity without ever analyzing the contextual factors that would have determined whether the relationship between the landowner and the worker was such as to create liability. But see Burgie v. Davis, 34 Ark. 179 (1879) (laborer of cropper has same lien rights against landlord as cropper even though she is not in privity of contract with him).

61. Carver v. Bagley, 81 N.W. at 758. See also Shaw v. Bradley, 59 Mich. 199, 26 N.W. 331, 333 (1886). An earlier Minnesota logging lien law had been interpreted to protect only laborers for hire and not contractors. King v. Kelly, 25 Minn. 522 (1879).

62. See, e.g., Hoatz v. Patterson, 5 Watts & Serg. 536, 538 (1843); Savannah & Charleston Railroad Co. v Callahan, 49 Ga. 506 (1873); Hale v. Brown, 59 N.H. 551, 558 (1880); Kieldsen v. Wilson, 77 Mich. 45, 43 N.W. 1054, 1055 (1889).

63. See, e.g., Vane v. Newcombs, 132 U.S. 220, 234 (1889); Heard v. Crum, 73 Miss. 157, 18 So. 934, 935 (1895); Malcomson v. Wappoo Mills, 85 F. 907, 911 (C.C.D.S.C. 1898).

64. See, e.g., Littlefield v. Morrill, 97 Me. 505, 54 A. 1109, 1110 (1903).

65. See McElmurray v. Turner, 12 S.E. 359 (Ga. 1890) (sharecropper). Sometimes the lien was limited to the amount representing the contractor's personal labor; see, e.g., Mohr v. Clark, 19 P. 28 (Wash. 1888).

66. Even the rare mention in the lien law cases of control as a defining characteristic of the protected class of laborers, servants, and employees was coupled with the class-conscious instruction that the favored class was wholly dependent on its toil for subsistence while the non-favored class contracted for the employment of its capital. Campfield v. Lang, 25 F. 128, 131, 132 (C.C.E.D. Wis. 1885).

67. Mohr v. Clark, 19 P. 28 (Wash. 1888).

68. Winder v. Caldwell, 14 How. 434, 445 (1852).

69. Hoatz v. Patterson, 5 Watts & Serg. 536, 539 (1843).

70. Witman v. Walker, 9 Watts & Serg. 183, 187 (1845) (denying that contractor can stand in double character of contractor and mechanic).

71. Littlefield v. Morrill, 97 Me. 505, 54 A. 1109, 1110 (1903).

72. Wood v. Donaldson, 17 Wend. 550 (1837).

73. Who was himself to be sure an employing sub-subcontractor. Donaldson v. Wood, 22 Wend. 395, 397 (1839).

74. Donaldson v. Wood, 22 Wend. 395, 399 (1839).

75. Id. at 400.

76. As authorized by Art. I, § 8, cl. 4 of the Constitution, Congress enacted An Act to establish a uniform system of bankruptcy throughout the United States, Aug. 19, 1841, 5 Stat. 440, ch. 9. The preference provision (§ 5) of the Act stated that "any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of wages due to him for such labor, not exceeding twenty-five dollars." What an operative was appears not to have been litigated under the act, which was repealed on March 3, 1843, 5 Stat. 614, ch. 82. The Act of March 2, 1867, 14 Stat. 517, ch. 176, §§ 27-28, extended the coverage to the wages owed to an "operative, or clerk, or house servant" up to \$50 and for as long as six months. The act was repealed on June 7, 1878, 20 Stat. 99. The last nineteenth-century bankruptcy act, that of July 1, 1898, 30 Stat. 563, ch. 541, § 64, extended the protection to the "wages due to workmen, clerks, or servants."

77. A further expression of the populist hostility on the part of the working class and small entrepreneurs toward the perceived illegitimacy of incorporation was the enactment on the state level of laws providing for the liability of stockholders for the debts of the corporation owed to those who worked for it. By and large the cases were decided on the basis of indicia of control. See, e.g., Moyer v. Pennsylvania Slate Co., 71 Pa. 293, 298 (1872); Taylor v. Manwaring, 48 Mich. 171, 12 N.W. 28 (1882). But see Bristol v. Smith, 158 N.Y. 157, 53 N.E. 42, 43 (1899), which held that an attorney on retainer was not within Laws 1892 c. 688, § 54, which imposed personal liability on stockholders for debts to the corporation's employees for services. Rather, the court held, the statute in question should be seen as a continuation of other statutes designed to protect manual laborers, that is, those "employed in subordinate and humble capacities," into which "[t]he lawyer does not...descend."

78. See infra Appendix A.

79. See, e.g., In re Stryker, 158 N.Y. 526, 53 N.E. 525, 525-26 (1899) (term "wages" in state corporate insolvency statute "conveys the idea of subordinate occupation, which is not very remunerative..."). The chief exception involved so-called inside contractors. For a discussion of these workers, see Montgomery, "Workers' Control of Machine Production in the Nineteenth Century," 17 Labor History 489 (1976). In an early case interpreting an 1849 Pennsylvania act giving a preference to laborers' wages, the workers were skilled rollers, puddlers, heaters, and other master workmen in a rolling mill who hired helpers whom they paid out of their wages. The court ruled in their favor on the grounds that the owner impliedly authorized them to employ all necessary helpers. While warning against the conclusion that such a presumption would support an action at law against the owner, the court alluded to "the benefits of the special statute" as a sufficient distinguishing characteristic. Daniel Seider's Appeal, 46 Pa. 57, 58, 61 (1863). This reasoning should be contrasted with the opposite conclusion drawn in the English case of Ex parte Ball, 3 De G. M. & G. 155, 158-59 (1853), discussed infra Appendix A. In a later case involving inside contractors, to whom the defendant provided stock, rooms, and machinery to manufacture machine parts, and who employed their own laborers, it was held that they were not protected by an 1885 New York law preferring the wages of employees, operatives, and laborers of corporations. People v. Remington, 45 Hun 329 (App. Div. 1887), aff'd, 109 N.Y. 631, 16 N.E. 680 (1888); and People v. Remington, 6 N.Y.S. 796 (Sup. Ct. 1889). Although the headnote states that the court held against the workers, 45 Hun at 331, the opinion itself merely cites at length a New York railroad act and extracts from English Truck Act cases without any interpretation, id. at 339-41. Nevertheless, in rejecting the claims of an employee with a \$2,000 annual salary, the court noted that the statute "was designed to secure the prompt payment of the wages of a class of persons who, as a class, are dependent upon their earnings for the support of themselves and their families...." Id. at 343.

80. Lehigh Coal & Navigation Co. v. Central R.R. Co. of New Jersey, 29 N.J. Eq. 252, 254 (1878) (ruling against one who had a freight-forwarding business with own teams and drays). Emblematic of the dual purpose of such statutes was the court's reference to preventing persons whose labor is indispensable to the continuance of a business from abandoning it. Id. In other words, corporate capital needed the state to restrain it from

permitting the one-dimensional pursuit of profit to destabilize its labor force. The following year the same court bottomed inclusion within the act of a drayman with his own drays and horses exclusively on this latter policy (although the case can be distinguished on the grounds that the drayman worked almost exclusively for the company). Watson v. Watson Mfg. Co., 30 N.J. Eq. 588, 590-91 (1879).

81. Hopkins v. Cromwell, 89 A.D. 481, 85 N.Y.S. 839, 840 (1903). Similar reasoning underlay adjudication of a Pennsylvania intestate statute, Apr. 19, 1794, § 14, conferring a preference on the wages of servants. In expanding the interpretation of an earlier case (holding that the intended beneficiaries were domestic servants) to favor a barkeeper, the court referred to the legislature's "motives of compassion towards a class of people, whose situation in life is certainly not an enviable one, and whose poverty renders them not very well able to bear the loss of any part of the pittance they may have earned in servile employments." Boniface v. Scott, 3 Serg. & Rawl. 352, 353 (Pa. C.P. Allegheny Cty. 1817). In the earlier case, Ex parte Meason v. Adm. of Ashman, 5 Binn. 167, 177-79 (1812), the concurrence, seeing no reasonable ground of preference in the criterion of control, derived the entitlement from "the inferior humble sphere in which they move, and their dependence on their masters." Mid-twentieth-century federal courts have upheld the earlier discourse by defining the priority class in bankruptcy cases as including persons of menial position and low income who could not be expected to know their employers' credit standing, but were constrained to accept employment as it came. In re Paradise Catering Corp., 36 F. Supp. 974 (D. N.Y. 1941); In re Inland Waterways, 71 F. Supp. 134 (D. Minn. 1947), rev'd on other grounds, 164 F.2d 26 (8th Cir. 1947).

82. See, e.g., 1850 N.Y. Laws ch. 140: An Act to authorize the formation of railroad corporations, and to regulate the same:

As often as any contractor for the construction of any part of a railroad...shall be indebted to any laborer, for thirty or any less number of days performed in constructing said road, such laborer may give notice of such indebtedness to said company...; and said corporation shall thereupon become liable to pay such laborer the count so due him for such labor, and an action may be maintained against company therefor.

Id. § 12.

83. On the broader reach of these laws vis-à-vis stockholder liability laws, see Peck v. Brown, 39 Mich. 594, 598-99 (1878).

84. See, e.g., Hart v. Boston, Revere Beach & Lynn R.R. Co., 121 Mass. 510 (1877); Chicago & N. E. R.R. v. Sturgis, 44 Mich. 538, 7 N.W. 213 (1880); Tod v. Kentucky Union Ry. Co., 52 F. 241 (6th C.C.A. 1892). But see Warner v. Hudson River R.R. Co., 5 How. Pr. 454 (1851) (since statute is highly remedial and thus should be construed liberally, even one who works by a servant is a covered laborer). Where it could be assumed that at least some contractors might be financially potent, an alternative method of creating joint liability was the per se rule that a contractor was an owner for the purposes of the statute. See, e.g., Coal Mines Regulation Act, 1872, 35 & 36 Vict., c. 76, § 72 (1872).

85. Atcherson v. Troy and Boston R.R. Co., 6 Abb. Pr. (n.s.) 329, 337 (Ct. App. 1856) (holding that statute applied only to personal labor and not to payment for horse-teams and assistants).

86. See, e.g., Balch v. New York and Oswego Midland R.R. Co., 46 N.Y. 521, 524 (1871). See also Little Rock, H.S. and T. Ry. Co. v. Spencer, 65 Ark. 183, 47 S.W. 196 (1898).

87. Thus where the labor of a sub-subcontractor, who need not have personally worked, was intended to reduce expenses and increased the hoped-for profits of the contract, he was not deemed "[i]n the language of the business world, a laborer...." Rogers v. Dexter and P.R. Co., 85 Me. 372, 27 A. 257 (1893). A further argument, and one advanced repeatedly in the context of lien laws, insisted that giving "laborers and servants" their broadest possible interpretation would conflict with the legislative purpose of protecting the class of laborers since it would ultimately dilute protection. Aikin v. Wasson, 24 N.Y. 482 (1862).

88. The English counterpart, The Wages Attachment Abolition Act, 33 & 34 Vict., c. 30, § 1 (1870), which defined the protected class to include "servant, labourer, or workman," does not appear to have been relevantly adjudicated.

89. Epps v. Epps, 17 Ill. App. 196, 201 (1885).

90. South and N. Alabama R.R. Co. v. Falkner, 49 Ala. 115, 118 (1873).

91. Smith, Garnishee of Hipple, v. Brooke, 49 Pa. 147 (1865). See also Henderson v. Nott, 36 Neb. 154, 54 N.W. 87 (1893) (no exemption for one who contracts to furnish all help to make bricks at piece rate on employer's machines).

92. Pennsylvania Coal Co. v. Costello, 33 Pa. 241, 246 (1859). On the exemption of the wages of skilled piece-rate workers, see Adcock v. Smith, 37 S.W. 91 (Tenn. 1896); Prather v. Pantone, 54 S.E. 663 (Ga. 1903). See also Hamburger v. Corr, 157 Pa. 133, 27 A. 81 (1893) (commissions owed traveling salesman are exempt but those owed factor-broker are not because he has own employees); Stothart v. Melton, 43 S.E. 801 (Ga. 1903) (foreman exempt even though he controls his co-employees). Tatum v. Zachary, 12 S.E. 940 (Ga. 1891), held that even if the proprietor of a blacksmith shop was a day laborer, he received no wages from his customers as an employee, but was his own master and thus not exempt. Garnishing customers could have given rise to an interesting conflict between the application of the economic reality of dependence and economic reality of poverty tests. Although the blacksmith may have been economically no better off than a wage worker, in terms of the skill-integration-capital criteria he was clearly not dependent on any or even the totality of his customers. But unless his capital investment was significant (on which the opinion is silent), there would be no more reason (from today's perspective) to relegate him and his family to destitution than to exclude them from the social security system--unless the employing and employed classes were interested in enforcing a binary class system that would compel the non-employed self-employed either to take the consequences of proclaiming their financial independence or to submit to an employer.

93. Heebner v. Chave, 5 Pa. 115, 118 (1847).

94. A major exception, of course, being the American courts that struck such statutes down as unconstitutional.

95. A remarkable difference between labor-protective cases and commercial-statutory cases in this regard is instructive. The Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, §8 (1830), provided that "nothing in this act shall be deemed to protect any...common carrier for hire, from liability to answer for loss of injury to any goods or articles...arising from the felonious acts of any...servant in his or their employ." In an action arising under this statute, the defendant--railway subcontracted work to another entity the employee of

which stole the plaintiff's goods. The railway defended on the grounds that the third party carried on a distinct business--within the meaning of the vicarious liability cases--as a result of which the employee was not the railway's. In holding against the railway, Platt, B., stated that to construe the statute otherwise than as imposing liability on the company for any felony committed by anyone employed by it would permit it to let out every part of its business and thus acquire immunity. "It would be an exceedingly dangerous doctrine to hold, that these persons, who enjoy all the profits derived from the carriage of the goods, shall, by a sub-contractor unknown to the other party, get rid of their responsibility." Machu v. London & South-Western Ry. Co., 2 Ex. 415, 433, 154, Eng. Rep. 554 (1848). In no nineteenth-century labor case did the courts allude to the danger of permitting a profit-seeking and profit-making employer to acquire immunity by contracting out work.

96. 6 Geo. 4, c. 16, § 48 (1825).

97. Ex parte Grellier (In re Macneil), Mont. Bankr. Cas. 264 (1831); and Ex parte Crawfoot (In re Streather), Mont. Bankr. Cas. 270 (1831).

98. Id. at 275

99. 12 & 13 Vict., c. 106, § 169 (1849).

100. Ex parte Ball (In re Byrom), 3 De G. M. & G. 155, 156, 158-59, 43 Eng. Rep. 62 (1853).

101. 32 & 33 Vict., c. 71, § 32(2) (1869).

102. Ex parte Allsop (Re Disney), 32 L.T.N.S. (Bank.) 433, 434 (1875).

103. 46 & 47 Vict., c. 52, § 40(1)(c) (1883).

104. In re Field, 4 Morr. 63, 64-66 (1887).

105. 51 & 52 Vict., c. 62, § 1.--(1.) (b.) (1888).

106. 51 & 52 Vict., c. 62, § 1.--(1.) (c.) (1888).

107. In re The Winter German Opera (Ltd.), 33 L.T.R. 662 (Ch. 1907).