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***FAREWELL  
TO THE  
SELF-EMPLOYED***

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*Deconstructing a Socioeconomic  
and Legal Solipsism*

**MARC LINDER**  
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## Legislative and Judicial Attitudes toward the Unemployed Self-Employed

Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power.<sup>1</sup>

### **Organized Labor's Struggle against Self-Employed Wage Cutters**

The tacit positive reevaluation that self-employment has undergone recently stands out most clearly when contrasted with the open hostility which it met with at the hands of unions in the 1930s and 1940s. Prompted by the vast unemployment of the Depression (and the fear of its resurgence after demobilization), the labor movement articulated that antagonism in the course of combating the spread of self-employment as a tool for cutting wages and undermining the conditions of employment. Unions acted on the belief that the self-employed were not a *tertium quid* poised between workers and capitalists. Instead, the unions' strategy was predicated on the assumptions that the self-employed were one or the other and that they had to be induced by trade union pressure to opt for their appropriate

class position. Where the self-employed wanted to be employers, the unions not only barred them from membership but in effect demanded that their operations be large enough to warrant a clear separation of capital from labor so that the employer would not compete with his employees by working with his own hands.<sup>2</sup> Where the self-employed had acquiesced in real employers' insistence that they work alone, unions requested that they become members and cease depressing union standards.<sup>3</sup>

More remarkable than the unions' position was its widespread judicial acceptance and vindication. In landmark litigation reaching several state supreme courts and the U.S. Supreme Court, the unions figured as defendants whose picketing--to protest the usurpation of union jobs under sub-union standards--the self-employed sought to enjoin. The disparate jurisprudences of labor injunctions, federalism, and free speech that shaped the judicial outcomes are of less interest here than the judges' attitudes toward the character of the conflict between the self-employed and the unions, which often was central to a determination as to whether the parties were engaged in a "labor dispute"--a finding that would have statutorily immunized the picketing.

A typical set of facts--and one reminiscent of the structure of much of today's proliferating self-employment --characterized the successful attempt by baking companies in New York City to compel their unionized employee-drivers to become so-called independent peddlers. The recent introduction of social security and unemployment insurance payroll taxes had prompted efforts by employers to eliminate these additional costs. As the U.S. Supreme Court found, "[t]he peddler system has serious disadvantages to the peddler himself" because his exclusion from the workers' compensation, unemployment insurance, and social security systems could lead to his (and his family's) becoming "a public charge."<sup>4</sup> The Court upheld the lawfulness of the union's picketing, which had been sparked by the latter's "alarm[] at the aggressive inroads of this kind of competition upon the employment and living standards of its members."<sup>5</sup>

Recent adjudications, in contrast, project a strikingly different perspective. Where, for example, taxicab companies have perpetrated essentially the same self-employment conversion scheme for precisely the same cost-cutting and anti-union reasons, prominent judges have cynically glorified the imaginary entrepreneurial characteristics of the involuntary self-employed.<sup>6</sup>

A half-century ago, even judges who sympathized with the self-employed<sup>7</sup> by upholding the injunction recognized that they were merely workers.<sup>8</sup> "The businessman-worker operating in an industry...in which he competes with organized workmen may likewise be subjected to the same means of persuasion as any other workman to join the union and conform to the conditions regulating union labor."<sup>9</sup> The enormous sea change in attitudes that has taken place in the last half-century becomes even more salient in the dissent in the same case, which involved a union that sought to enforce a closed shop for milk wagon drivers vis-à-vis two self-employed drivers who refused to hire employees. Reacting to the union's success in persuading the milk brokers to cease doing business with the plaintiffs, the dissenters were more than ready to acquiesce in the union's plan to compel the self-employed to choose between becoming capitalist employers and proletarianized:

[P]laintiffs...are simply being subjected to the vicissitous competition of free enterprise. Obviously, plaintiffs are not deprived of the right to work or to earn their living merely because in conducting their particular business they are faced with the practical alternative of employing union labor, of choosing another business in which to engage, or of continuing in the same line of work but in the employee status of union workers.<sup>10</sup>

In 1936, too, the Wisconsin Supreme Court displayed a remarkable lack of sympathy for a tile layer whom a union effectively deprived of a livelihood. By working "as a journeyman or a helper at a price and during hours that suit him individually and which are below the standard desired by the unions," his "method of conducting his business brings into the situation a direct attack by him upon the means

relied upon by the unions to protect their scale of wages, hours, and working conditions against the cutting of prices and lengthening of hours of work."<sup>11</sup>

This cavalier attitude toward the self-employed stands in sharp contrast to the solicitude embodied in contemporary state rhetoric for the welfare of the self-employed. Surprisingly, the Reagan-era enthusiasm for self-employment has been not so much a celebration of entrepreneurialism as the making a virtue of a necessity: self-employment as a refuge from unemployment. What has been lost is the insight that the unions and the judiciary developed in the 1930s and 1940s into self-employment as provoking an intra-working-class race to the bottom.

For many years, the only aspect of unemployment that caught the attention of analysts of self-employment was their interrelationship over the business cycle.<sup>12</sup> Specifically, researchers asked whether self-employment acted as a safety valve enabling unemployed employees to make an alternative living during periods of high unemployment.<sup>13</sup> As unemployment in the 1980s reached levels theretofore unprecedented during the postwar period,<sup>14</sup> national states in Europe and the United States intervened in ways that gave new contours to the relationship between unemployment and self-employment. In addition, even earlier, administrative agencies and courts, in adjudicating claims for unemployment insurance compensation, had displayed modes of understanding the structure of self-employment and its interaction with unemployment that transcended the conventional socioeconomic framework.

### **Self-Employment for the Poor: State-Sponsored Interpenetration of Unemployment and Self-Employment**

[W]e're convinced that there are thousands of people in the unemployment lines today...who are capable of becoming self-employed. ... If we cannot offer a decent job at a decent wage for everyone who wants one, the least we can do is offer them the opportunity to create their own.<sup>15</sup>

[A] person who previously engaged in crime might find entrepreneurial activities more suitable than wage employment. This might be especially true if one's wage work opportunities were in the secondary labor market. There is no authoritarian boss; one can set work rules, and there is risk. If one desires to work less than a 40-hour week, come to work drunk, or use inappropriate language, self-employed persons can do these things and not get fired. They may lose customers and hence income, but they can still retain their self-created job. Furthermore, it can be expected that the experience of greater control and independence associated with direct participation in the market will have a humanizing influence. ... It is incorrect to think that a self-employed person does not have a boss. The market is the boss. It is very exacting, but it is diffuse. Supervision, via the market, is diffuse.<sup>16</sup>

During the 1980s, arguably prompted by the Reagan administration's celebration of free enterprise and its simultaneous helplessness in the face of persistently high levels of unemployment, the state for the first time began to implement policies that treat self-employment both as a destination of the poor and unemployed and as a source of unemployment. This shift in program content reflected an arresting phenomenon during the 1970s: not only was the percentage of unemployed becoming self-employed greater than that among the employed, but the gap widened.<sup>17</sup> This unprecedented practical devaluation of self-employment now coexists--albeit irreconcilably and unconsciously--with the traditional rhetoric: "Let us empower a few more people to pursue the American dream."<sup>18</sup>

Congress has touted "legislation to remove impediments to economic independence faced by self-employed AFDC recipients" by permitting them to "work [their] way off public assistance by starting [their own] business."<sup>19</sup> The Displaced Homemakers Self-Sufficiency Assistance Act provides training in self-employment for those who had performed uncompensated work at home and lost their source of income support.<sup>20</sup> Such efforts are taking place within the context of a more grandiose plan for fostering "micro-enterprises" qua "self-employment for the poor."<sup>21</sup> With the spotlight on such "micro-enterprises" as "hawkers and street vendors," the campaign has gone global: a proposed Self-Sufficiency for the

Poor Act of 1987 would have extended the program to the Third World.<sup>22</sup>

At about the same time, Congress amended the Joint Training Partnership Act to include among the eligible dislocated workers those who "were self-employed (including farmers) and are unemployed as a result of general economic conditions in the community...or because of natural disasters."<sup>23</sup> The statutory and regulatory wording indicate that the self-employed were being treated like employees in the sense that only those who did not bring about their unemployment through their own fault would be covered.<sup>24</sup> This recognition that the self-employed do not live in a solipsistic world<sup>25</sup> but are instead subject to the same economic insecurities as other workers marks a further watershed in the gradual demolition of the misconceptualization. The eligibility of the self-employed, like other working poor, for the earned income credit<sup>26</sup> and food stamps<sup>27</sup> is further testimony to this approaching parity.

The 1980s also witnessed the first experiments in the United States with ushering the unemployed into self-employment. Although the British and French programs, which make unemployment insurance payments to unemployed persons starting their own business--thus exempting them from the rule that they be looking for employment--have been found wanting,<sup>28</sup> Congress in 1987 authorized pilot programs involving lump-sum payments.<sup>29</sup> Pertinent here are not the details of the design or implementation<sup>30</sup> but rather the fact itself of state acknowledgment of the essential equivalence and fungibility of employment and self-employment among dependent workers.

### **Judicial Treatment of the Unemployed, Paper Incorporated, Solo Self-Employed**

[A]mong all of the self-employed, those who form private corporations (in which they may be the only employee) are likely to be the most fully petty bourgeois in their class situation.<sup>31</sup>



The true lumpen-bourgeoisie...employ no workers at all: the proprietors and their family members do the work, frequently sweating themselves day and night. ... Here, at the bottom of the twentieth-century business world, lies the owner-operator who, in the classic image, is the independent man in the city.<sup>32</sup>

Whether the sole employee/stockholder of an incorporated business is deemed eligible for unemployment compensation may be a significant clue as to the societal evaluation of his or her status as a financially autonomous bourgeois or as a dependent worker. Arguably the most penetrating social analysis of this issue involved a case that arose in California in the 1970s.<sup>33</sup> The California Unemployment Insurance Appeals Board ("Board") determined that a cameraman-director who had received (\$1,428 in) unemployment insurance benefits during a six-month period was not entitled to these payments because he was the president and sole shareholder of his corporation. Before incorporating in 1969 on the advice of his lawyer in order to limit his personal liability, Jack Cooperman had been both a "sole proprietor" and a member of a film craft union.<sup>34</sup> Incorporation did not affect his operations in any way.<sup>35</sup>

The lower court judge, who ruled in Cooperman's favor, remarked at trial that "this is just a Mickey Mouse little corporation, it's an alter ego of this man, and he is just out there scratching around to get a little employment for himself. [H]is activities were directed solely toward his own self-employment."<sup>36</sup> In affirming the trial court ruling, the intermediate court of appeal emphasized that because the corporation (which had no assets) and Cooperman were identical, it would be unjust to deprive an unemployed person working in an erratic labor market of benefits "for the mere reason that he does business as a corporation rather than as a sole proprietor."<sup>37</sup> Its programmatic reasoning ran as follows:

In this modern age when an ever increasing number of people including professional people engaged in the rendition of personal services, incorporate themselves in order to continue to render personal services but in corporate form, such a distinction

between the sole proprietor and the incorporated proprietor would be palpably unjust and a denial of even-handed treatment.<sup>38</sup>

Because, the court continued, the public policy of the state of California is to stabilize purchasing power by means of a compulsory unemployment fund, "the figurehead title of president" should not thwart Cooperman's eligibility.<sup>39</sup>

The court appeared unfazed by and/or oblivious of the converse: that it was conferring unemployment benefits on an ineligible self-employed person "for the mere reason that he does business as a corporation rather than as a sole proprietor." Nowhere does the court suggest that the Board should countenance a tender of unemployment insurance taxes from sole proprietors<sup>40</sup> who would like a modicum of protection from the rigors of the market.<sup>41</sup>

Although little force may inhere in the logic of *Cooperman*,<sup>42</sup> the importance of the case lies in the judiciary's perception that such self-employed are de facto employees characterized by identically the same vulnerabilities and needs as covered workers.<sup>43</sup> To the extent that this judgment is accurate, it militates in favor of classifying the incorporated self-employed as employees and yet also against the cavalier presumption that BLS and BOC erred in reclassifying the incorporated self-employed as employees in 1967.<sup>44</sup>

### **Are the Self-Employed Subject to the Same Vicissitudes as Employees? Judicial Treatment of Unemployed Secondary Self-Employed Workers<sup>45</sup>**

As a general rule, self-employed workers are able to make arrangements for obtaining a mid-day meal. I regret that I cannot allow them the special cheese ration.<sup>46</sup>

As an instructive comparison, note may also be taken of the other chief pattern involving the claims of alleged self-employed to unemployment insurance benefits. This situation arises where the claims of employees who have become unemployed are denied or challenged on the ground

that in the interim they had been engaged in a secondary job as self-employed, which disqualifies them. In the future this constellation<sup>47</sup> may give rise to repeated litigation since these secondary self-employed are the fastest growing segment of the self-employed.<sup>48</sup> Their tenuous hold on independence was underscored by the Small Business Administration, which observed that their numbers quadrupled between 1979 and 1983 as employees sought to compensate for shorter hours and as employers sought to reduce costs by using "independent contractors" to avoid payroll taxes and union-related costs.<sup>49</sup> By 1989, 1,965,000 (or twenty-nine per cent) of the 6,767,000 wage and salary workers with second jobs reported themselves as self-employed in those jobs.<sup>50</sup>

At issue in these cases is the possibility that

where a person divides his *time and labor* between work for another and potentially profitable work for himself, as where, e.g., a factory worker also operates, say, a store, a farm or a work-shop, a suspension of work at the factory may not and probably does not expose him to the rigors of unemployment which the Law is designed to alleviate.<sup>51</sup>

The regimes adopted by the states vary widely.<sup>52</sup> The most restrictive approach embodies an automatic blanket disqualification for benefits for any period during which a worker is self-employed.<sup>53</sup> An intermediate rule has evolved in order to correct "a gross inequity against some partially self-employed individuals as against individuals who performed the same services for wages while in the employ of another."<sup>54</sup> It takes the form of an exception for workers who are self-employed "by reason of continued participation without substantial change during a period of unemployment in any activity including farming operations undertaken while customarily employed by an employer in full-time work...and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood."<sup>55</sup> The most expansive judicial interpretations of statutes that are silent on the status of unemployed workers who take up self-employment have rejected the position that "self-employment and unemployment are contradictory

terms."<sup>56</sup> Motivated by the desire to avoid the irrational result of "plac[ing] an unemployed individual who is unable to secure employment from a third-party in the position of having to remain completely idle or else entirely forego his claim,"<sup>57</sup> such courts have created parity between unemployed self-employeds and part-time employees.

Several socially and jurisprudentially arresting cases may illustrate social attitudes toward equalizing the legal protection of the two groups. In the first, a fifty-seven-year-old sheet metal worker who had been employed at a shipyard during World War II, suspecting that at the close of the war he would be laid off and have difficulty securing other employment, quit in August 1945 in order to devote himself fulltime to a roofing business that he had begun as a sideline while still an employee.<sup>58</sup> He earned about thirty-five dollars weekly--considerably less than the average gross weekly earnings of manufacturing workers<sup>59</sup> at the time--from August until November 1945, when he was forced to abandon his business as a result of a lack of materials. Three administrative adjudicators and a trial court sustained his entitlement to benefits on the ground that his separation from his roofing business, in which he was employed, was due to a lack of work and therefore involuntary. The trial court judge, noting that "[t]he most attractive feature of what we have been lately calling the American system of free enterprise is the liberty of choice open to all men," rejected the employer's position, *inter alia*, because it would mean "that an employe is without good cause who, faced by an imminent lay-off, seeks economic security without recourse to the compensation law."<sup>60</sup> The shipbuilding company, which was his base-year employer, contested the claim on the ground that once he left its employ, he was no longer an eligible employee but a disqualified independent contractor.<sup>61</sup>

The Supreme Court of Pennsylvania reversed on the ground that the statute was intended to protect those who become unemployed while working for wages--from which "class" those who "voluntarily removed themselves" "become independently engaged in a business of their own."<sup>62</sup> In

denying benefits to "an unemployed businessman,"<sup>63</sup> the court stressed that

[t]he law does not make Pennsylvania employers the insurers...of the private ventures of their employees. [I]f he "gambles" with his job as an employee in the hope of becoming a businessman and an employer himself he cannot expect to find that the "game" is one in which all the possible gains are to be his while the losses...are to be borne chiefly by his last employer. [S]ince he had renounced his status as a "wage earner" in order to become a "businessman" his failure in the latter role did not automatically restore him to the status of an "unemployed employee."<sup>64</sup>

The point here is not to analyze whether the court interpreted the state unemployment statute correctly<sup>65</sup> but simply to document the rigid class line that the court preferred to draw between employees and the self-employed, who were put on notice that they would have to take the bitter (insecurity) with the sweet (independence).<sup>66</sup>

A more recent case involved several employees of a motor corporation who, upon being laid off, pooled their resources to open a watch repair shop. For the two months of their unemployment each averaged less than a dollar per day in income.<sup>67</sup> Rejecting as a "cliche" that self-employment and unemployment were mutually exclusive, the Supreme Court of Michigan applied the test of "genuine attachment to the labor market," which served "to differentiate the business or professional man, who temporarily attaches himself to the industrial market, from the workman who seeks a temporary augmentation of funds in a period of lay-off."<sup>68</sup> This court, in other words, recognized a broad area of overlap within which workers remained protected employees despite transient shifts into proletarian activities unassociated with a capitalist employer.<sup>69</sup> Only at the other extreme, where small business owners or professionals sought to smuggle themselves into the state protective system, was the court prepared to draw the line excluding them from the working class.<sup>70</sup>

By far the most thought-provoking case in this series is *Slocum Straw Works v. Industrial Commission*,<sup>71</sup> a 1939 case in which the Supreme Court of Wisconsin interpreted a

provision in that state's unemployment compensation statute declaring ineligible for benefits workers who (1) were "customarily self-employed," (2) did not work at least fifteen hours per week for at least twenty weeks, (3) worked at their self-employment thirty or more weeks in the year preceding the termination, and (4) could return to that (or similar) self-employment after the termination.<sup>72</sup> The claimant, Marie Rybacki, was a married woman (living with her husband, child, and father in the father's house) who each year for ten years had had a highly paid job as a "highly skilled" straw hat sewing operator" from December to April at a seasonally operating factory and was then laid off.<sup>73</sup> The employer, having denied benefits on the ground that Rybacki "was self-employed as a housewife,"<sup>74</sup> appealed the initial contrary determination. The Appeal Tribunal of the Wisconsin Industrial Commission affirmed that determination on these grounds:

Since the reason for suspending benefits to one who is customarily self-employed is the probability of substantial income from such self-employment, it follows that such enterprise must be undertaken for profit. ...

These...principles would eliminate from consideration as self-employment certain services which practically everyone performs for himself with the idea of saving money, such as, gardening, laundering, repairing, cooking, housework, and other similar economy measures.

The performance of household duties by a housewife does not constitute self-employment within the meaning of section 108.04(5)(g). A household is not a business enterprise; rather, services in and about the household are primarily economy measures performed pursuant to a status as contrasted with services performed for gain in a business or contractual relationship.<sup>75</sup>

When the employer appealed the matter to the Circuit Court for Dane County, the socioeconomic stakes became manifest:

The situation of this employee obviously is of much importance to married women in Wisconsin industry. It is also of substantial concern to the industries themselves. As plaintiff says in its brief: "The trifling amount involved...would not warrant the

effort involved, but the application of the principle has become an important financial problem in this industry, which has made the case assume importance as a test case to judicially determine what is meant in the law by 'self-employment.'"<sup>76</sup>

The trial court was acutely aware of the fact that the employer's assertions--in particular, that Rybacki employed a maid to take care of the child and house while she worked for wages and that she failed to seek gainful employment from April to December<sup>77</sup>--

lend color to a belief that this particular woman, by virtue of her financial position, may not represent the most deserving case for unemployment compensation benefits. However, we must not lose sight of the general principle which will affect thousands of married women not so fortunately situated. There is a limit to which the law may individualize. Rules of general application must govern.<sup>78</sup>

In pursuit of justice in general and "deal[ing] with the average,"<sup>79</sup> the trial judge analyzed the employer's claim as arguing for a per se ban on benefits for married women, which might prompt employers to discriminate in hiring against men and unmarried women in order to avoid payment of benefits.<sup>80</sup> By the same token, the judge wondered aloud whether the logic of the employer's argument might not be applicable to "the reverse situation where the husband may be temporarily unemployed and is doing the chores around the home."<sup>81</sup> In order to avoid the palpably absurd result that virtually everyone with a home might be deemed self-employed and therefore ineligible for benefits, the judge stated that only where an unemployed person was "earn[ing] an economic subsistence, not in the employ of another" would he or she be "outside of the presumably needy class."<sup>82</sup> But where a wage-earning wife loses her paid employment, although "she unquestionably is doing things of value to her family...[h]er concentration upon household duties does not restore that earning power, does not add one cent to income."<sup>83</sup>

The Supreme Court of Wisconsin reversed all the administrative tribunals and the lower court and held that Rybacki was ineligible for benefits (in effect) because the

commodification of reproductive labor as embodied in the monetization of the wife/mother/daughter's labor when transferred to a hired domestic servant<sup>84</sup> disclosed the theretofore hidden value of her self-employment to the court.<sup>85</sup> "So far as the family unit is concerned, there is a monetary return from the services of the wife which results in a saving of the family income."<sup>86</sup> The court thus provided Marxists and feminists<sup>87</sup> with an object lesson in the statutory perversity that can result from recognizing reproductive labor as commensurable with employment<sup>88</sup>--an ironic outcome in light of the court's socioeconomically hollowed-out notion of self-employment<sup>89</sup> and superficial analysis of the proletarian character of the worker's attachment to the labor market.<sup>90</sup>

The logic of *Slocum Straw Works* found its counterpart in contemporaneous agency decisions involving men with farm ties. Upon becoming unemployed, one worker who owned a farm "[b]y his own energy and with his own labor...raised sufficient crops and earned enough from his farm to furnish his family with food."<sup>91</sup> Like Rybacki, this claimant hired a laborer to work on the farm while he had been employed. Because it was customary to pay farm laborers in the produce of the farm, the Pennsylvania Unemployment Compensation Board of Review ruled in 1938 that "[i]f the claimant were working for another farmer and received in kind enough foodstuffs to feed his family of six and a surplus to sell for over \$100 per year...he would be receiving substantial wages."<sup>92</sup>

That the principle underlying these cases is the hypothetical monetization of uncompensated labor (and/or the products thereof) becomes plain in a claim by a single man without relatives or even a home of his own. He was initially disqualified for benefits because he "received board and lodging in exchange for making himself useful" on a farm. But the Michigan Unemployment Compensation Commission reversed this determination in 1939 on the ground that because the farm was large enough to warrant the services of a hired laborer and no one was ever so employed there, "the claimant could not be said to have replaced another employee."<sup>93</sup>

Disqualification of the unemployed worker-farmer seems to make more intuitive sense than that of the housewife because only as to the former is it literally not the case that "the law of property...coerces him into wage-work under penalty of starvation."<sup>94</sup> Whereas ownership of the land (and the relevant equipment) makes the unemployed worker-farmer the mythical self-employed who, by controlling his inputs, "can produce food" and thus avoid "working for factory owners,"<sup>95</sup> the housewife merely has access to a businessman-husband who can afford to subsidize the opportunity cost of her paid employment (that is, the maid's wage).<sup>96</sup> Is the only relevant difference between the two the fact that the farmer secures subsistence directly--without exchange--while the housewife, by replacing the maid, releases money that can be spent on subsistence? That such a difference may not be significant is suggested by supposing that instead of taking care of a household, Rybacki had operated a beauty parlor (or provided day care) in her house (which she closed down entirely or hired another to operate from December to April in order to take advantage of the higher wages in the factory). Should she have been denied benefits had she refused to resume hairdressing? If she had no significant capital investment, would it make any less sense to require every unemployed person to try home hairdressing or similar personal-service self-employment?

Light may be shed on this question by two lines of cases. The first involved a barber who, after having been an employee, leased the barber shop and hired another barber to work there in his stead in exchange for three-quarters of the gross receipts; after paying an additional fifteen per cent in rent, the claimant allegedly earned fifty dollars per month, although he testified that he received no income. While looking for work as a hospital orderly, at which he had had more experience than as a barber, he did not want to fire his employee and to do the barbering himself "because he feels if the individual engaged as a barber needs the work, the claimant is also reluctant to sit around the shop and wait for business."<sup>97</sup> Benefits were denied on the ground that he was not unemployed because "he could work full time, if he

desired to do so" and thus "controll[ed] his own employment or lack of it."<sup>98</sup> Is it socioeconomically justifiable to penalize the self-selected loser at musical employment chairs? Since one of these two workers had to become unemployed,<sup>99</sup> what macroeconomic sense does it make to deprive the one who formally leased the shop of benefits?

Since the entitlement to unemployment insurance benefits is not means tested but only employment tested, an unemployed millionaire who can subsist on her interest or dividends would not be ineligible for benefits. Even if she were the passive owner of all the stock of a corporation but did not work there in any capacity, she would not be self-employed and hence would not be required to go through the motions of asking the corporation to give her a paying job in lieu of going on the dole. But apparently if she customarily cut others' hair in her house, her eligibility for benefits would be contingent on her prior unsuccessful effort to return to hairdressing.

The other line of cases is generated by a provision in the unemployment insurance statute of Iowa (and of several other states) disqualifying for benefits an unemployed person who "has failed, without good cause...to return to his customary self-employment (if any) when so directed by the commission."<sup>100</sup> Where it was not reasonable to return to customary self-employment because there was no market for such services and/or it promised no "reasonable return," the unemployed were dispensed from the requirement.<sup>101</sup> But perhaps the most tantalizing decisions have been made under the Iowa statute, which was amended in 1939 to include this unique definition:

An employee shall be deemed to be engaged in "his customary self-employment"...during the periods in which he customarily devotes the major portion of his working time and efforts: (1) to his individual enterprises and interests; or (2) to her duties as housewife; or (3) to attending classes and preparing his studies for any school or college.<sup>102</sup>

A literal reading of these two provisions suggests the following scenario: Upon applying for unemployment

benefits, a married woman is directed by the state agency to return to her duties as housewife. She states that although she is ready, willing, and able to accept new wage employment, she refuses to darn her husband's socks and prefers to spend her days at the public library reading George Eliot's novels. The agency then disqualifies her. In two cases decided in 1939, the Appeals Tribunal of the Iowa Unemployment Compensation Commission underwrote this logic. One claimant was let off the hook because relatives living in her house made it unnecessary for her to "remain at home to take care of the duties of a housewife."<sup>103</sup> The other had performed enough full-time work in the recent past to overcome the presumption that she had "customarily devoted the major portion of her time and efforts to attending to her duties as a housewife."<sup>104</sup> In other words, persistent dereliction of housewifely duty served as an exemption. The dramatic rise in labor force participation rates among married women during the past several decades may prove useful to them in Iowa--where these provisions are still in force.<sup>105</sup>

If the impoverished and exceedingly attenuated notion of self-employment in the unemployed housewife cases is placed in the context of the housewife as exploited<sup>106</sup> by one who does not employ her (namely, her husband and/or his employer),<sup>107</sup> the resulting structure strikingly confirms the illusory solipsistic character of self-employment.

## NOTES

1. *International Bhd. of Teamsters, Local 309 v. Hanke*, 339 U.S. 470, 475 (1950) (per Frankfurter, J.).
2. *See, e.g., Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468 (1937), *aff'g Senn v. Tile Layers Protective Union, Local No. 5*, 222 Wis. 383, 268 N.W. 270 (1936); *Boro Park Sanitary Live Poultry Market, Inc. v. Heller*, 280 N.Y. 481, 21 N.E.2d 687 (1939); *Bautista v. Jones*, 25 Cal.2d 746, 155 P.2d 343 (1945).
3. *See, e.g., International Bhd. of Teamsters, Local 309 v. Hanke*, 339 U.S. 470 (1950), *aff'g Hanke v. International Bhd. of Teamsters, Local 309*, 33 Wash.2d 646, 207 P.2d 206 (1949).

4. *Bakery & Pastry Drivers & Helpers Local 802 of Teamsters v. Wohl*, 315 U.S. 769, 770-71 (1942).

5. *Id.* at 771.

6. *See, e.g., Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978). This case involved a complaint that the employer had committed an unfair labor practice by refusing to bargain with the union. For an extended critique, see Marc Linder, *Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555 (1989). *But see Fugazy Continental Corp.*, 231 N.L.R.B. 1344 (1977), *enforced*, 603 F.2d 214 (2d Cir. 1979) (drivers who had paid thousands of dollars for limousine franchises were employees).

7. Interestingly, the courts in these cases did not use the term *self-employed* until Justice Frankfurter did so at mid-century. *International Bhd. of Teamsters v. Hanke*, 339 U.S. at 476.

8. This is not to say that they did not also view them as entrepreneurs in the making. The dissent in *Senn* is a splendid example:

Business in contracting for such work as tile laying ordinarily begins with small beginnings, and if successful gradually extends to more considerable proportions. The plaintiff's road to success in such business is blocked, and the entry into such business is blocked to every worker by the requirement...[—]that no contractor shall work with his own hands...[— which] would foreclose every worker...from entering the contracting business unless he has or is able to procure capital otherwise not necessary for entry into and prosecution of the business to success. ... The practice upheld by the court is Un-American.

*Senn*, 268 N.W. at 275-76.

9. *Bautista v. Jones*, 155 P.2d at 345.

10. *Id.* at 357.

11. *Senn*, 268 N.W. at 272.

12. *See, e.g., John Bregger, Self-Employment in the United States*, MONTHLY LAB. REV., Jan. 1963, at 37; Robert Ray, *A Report on Self-Employed Americans in 1973*, *id.*, Jan. 1975, at 49; Linder, *Self-Employment as a Cyclical Escape from Unemployment*; Eugene Becker, *Self-Employed Workers: An Update to 1983*, MONTHLY LAB. REV., Mar. 1984, at 14; *Self-Employment in OECD Countries*, in OECD EMPLOYMENT OUTLOOK, Sept. 1986, at 43, 59-60.

13. By way of contrast, Adam Smith observed that "[i]n dear years...poor independent workmen frequently consume the little stocks with which they used to supply themselves with the materials of their work, and are obliged to become journeymen for their subsistence." SMITH, WEALTH OF NATIONS at 83.

14. See GÖRAN THERBORN, WHY SOME PEOPLES ARE MORE UNEMPLOYED THAN OTHERS: THE STRANGE PARADOX OF GROWTH AND UNEMPLOYMENT (1986).
15. 131 CONG. REC. E 1044 (Mar. 21, 1985) (Rep. Wyden, introducing the Self-Employment Opportunity Act of 1985).
16. STEVEN BALKIN, SELF-EMPLOYMENT FOR LOW-INCOME PEOPLE 3-4 (1989).
17. In 1971 5.43% of unemployed and 3.72% of wage workers shifted to self-employment; by 1980, the corresponding figures were 9.02% and 2.84%. EVANS & LEIGHTON, SELF-EMPLOYMENT SELECTION AND EARNINGS OVER THE LIFE CYCLE tab. 5.6 at 68.
18. 131 CONG. REC. E 1349 (Apr. 4, 1985) (Rep. Gebhardt, co-sponsor of the Self-Opportunity Act of 1985).
19. 136 CONG. REC. E 3131 (Oct. 4, 1990) (Rep. Kennelly).
20. Pub. L. No. 101-554, 104 Stat. 2751 (1990). See also U.S. DEP'T OF LABOR, FROM HOMEMAKING TO ENTREPRENEURSHIP: A READINESS TRAINING PROGRAM (1985).
21. *Self-Employment for the Poor: The Potential of Micro-Enterprise Credit Programs: Hearing Before the House Select Comm. on Hunger*, 100th Cong., 2d Sess. (1988).
22. *Micro-Enterprise Development Legislation: Hearing Before the Subcomm. on International Economic Trade and Policy of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 6, 4 (1988).
23. Joint Training Partnership Act Amendments of 1986, Pub. L. No. 99-496, § 11, 100 Stat. 1261, 1264 (1986) (codified at 29 U.S.C. § 1651(a)(1)(D) (Supp. 1991)).
24. The focus for employees was on layoffs and plant closures. 29 U.S.C. § 1651(a)(1)(A) and (B) (Supp. 1991). Among the self-employed, the prominent criterion was failure of their major suppliers or customers. 20 C.F.R. § 631.3(c) (1990). The original impetus for inclusion of the self-employed appears to have been concern for farmers. See S. REP. NO. 99-317, 99th Cong., 2d Sess. 5 (1986); H. REP. NO. 99-754, 99th Cong., 2d Sess. 9-11 (1986); 132 CONG. REC. H 5289-90 (Aug. 11, 1986) (Rep. Lightfoot).
25. *But see* ERIK WRIGHT, CLASS STRUCTURE AND INCOME DETERMINATION 104 (1979) ("Petty bourgeois income is self-earned income").
26. 26 U.S.C. § 32(c)(2)(A)(ii) (Supp. 1991) (earned income includes net earnings from self-employment); 26 C.F.R. § 1.43-2(c)(2)(iii [*sic*; should read ii]) (1991) (minus net loss).
27. Food Stamp Act of 1977, 7 U.S.C. § 2014(f)(1)(A) (Supp. 1991).

28. See, e.g., Marc Bendick, Jr. & Mary Egan, *Transfer Payment Diversion for Small Business Development: British and French Experience*, 40 *INDUS. & LAB. REL. REV.* 528 (1987); Report of the Subcomm. on the Foreign Experience of the Task Force on Economic Adjustment and Worker Dislocation, *Evaluation of Programs to Assist Displaced Workers in Foreign Industrialized Countries*, in *ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY: REPORT OF THE SECRETARY OF LABOR'S TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION* 24 (1986); Beatrice Reubens, *Unemployment Insurance in Western Europe: Responses to High Unemployment, 1973-1983*, in *UNEMPLOYMENT INSURANCE: THE SECOND HALF-CENTURY* 173, 196-97 (W. Hansen & J. Byers ed. 1990); ARONSON, *SELF-EMPLOYMENT* at 103.

29. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9152, 101 Stat. 1330, 1330-322 (1987).

30. See, e.g., BNA, *DAILY LAB. REP.*, Oct. 19, 1987, at A-12 (LEXIS); Peter Kilborn, *Novel Program for the Jobless Aims to Create Entrepreneurs*, *N.Y. Times*, May 16, 1990, at 1, col. 7 (nat. ed.); Glenn Rifkin, *From Unemployment, Into Self-Employment*, *id.*, Sept. 19, 1991, at C1, col. 4 (nat. ed.). Congress did not adopt an initiative to "address[] business community concerns over the use of unemployment insurance funds, to which they contribute, toward the start-up of potential competition," by prohibiting the use of the self-employment allowances for starting the business. See 133 *CONG. REC. S* 18,405 (Dec. 18, 1987) (Sen. Heinz). On the possibility that such subsidies are merely zero-sum games in which others are displaced, see ARONSON, *SELF-EMPLOYMENT* at 102.

31. Steinmetz & Wright, *Reply to Linder and Houghton* at 738. Mass incorporation by doctors and lawyers may account for the observation that those with graduate school educations are most likely to form incorporated businesses. See EVANS & LEIGHTON, *SELF-EMPLOYMENT* at 39. Aronson's (undocumented) claim--that "[t]he incorporated self-employed are more likely to include entrepreneurs in the classical sense. The majority are managers of small businesses," ARONSON, *SELF-EMPLOYMENT* at 43 n.2--would arguably be untenable if the employer-owners of substantial firms were ignored and the self-employed were restricted to solo workers.

32. C. WRIGHT MILLS, *WHITE COLLAR: THE AMERICAN MIDDLE CLASSES* 28-29 (1956 [1951]). The decline of these urban self-employed and their shift to employee status involves no massive shift in status system "but rather the replacement of low-income entrepreneurs (really 'disguised unemployed') by employees." LEBERGOTT, *MANPOWER IN ECONOMIC GROWTH* at 108-109.

33. *Cooperman v. California Unemployment Ins. App. Bd.*, 49 Cal. App. 3d 1, 122 Cal. Rptr. 127 (1975).

34. The opinion does not explain why Cooperman was not the employee of the entities for which he worked.

35. 49 Cal. App. 3d at 4-5, 122 Cal. Rptr. at 129.

36. 49 Cal. App. 3d at 5, n.2, 122 Cal. Rptr. at 130 n.2.

37. 49 Cal. App. 3d at 8, 122 Cal. Rptr. at 132.

38. 49 Cal. App. 3d at 6, 122 Cal. Rptr. at 132.

39. 49 Cal. App. 3d at 10, 122 Cal. Rptr. at 133.

40. Since 1963, however, California has permitted the self-employed to elect coverage under the disability benefit system of the state unemployment compensation statute. CAL. UNEMPL. INS. CODE § 708.5 (West 1986); *Simon v. Unemployment Insurance Appeals Bd.*, 193 Cal. App. 3d 1076, 238 Cal. Rptr. 589 (1987). To be sure, by 1986 only three per cent of the more than one million eligible self-employed in California so elected. See *Rising Use of Part-Time and Temporary Workers* at 133 (statement of R. Dillon) (an absolute decline since 1975). Yet the entrenchment of this partial and voluntary incorporation of the self-employed may have made it easier for the *Cooperman* court to treat the entitlement of the self-employed to benefits in such a cavalier manner. That statutory incorporation is, in any event, further evidence of the felt need for the assimilation of the self-employed to the status of dependent employees. Since 1953, moreover, California has been the only state to permit employers to elect coverage personally for themselves in the event of unemployment. CAL. UNEMP. INS. CODE § 708 (West Supp. 1991). Positing that "the true basis of the *Cooperman* decision consisted of the fact that the plaintiff's state of unemployment was a matter over which he had no control and one which was not the result of any deliberate decision to tailor the terms of his employment, and particularly his compensation, in such a way as to avail himself of unemployment compensation benefits to which he should not have been entitled," another court of appeal awarded benefits to the president of a small corporation who was a carpenter and employer. *Carlsen v. California Unemployment Ins. App. Bd.*, 64 Cal. App. 3d 577, 588, 134 Cal. Rptr. 581, 588 (1976).

41. On the contrary, the court denied the applicability of its ruling to a hypothetical case in which "an incorporator forms a corporation in order to obtain unemployment insurance benefits which he would not otherwise be entitled to." *Cooperman*, 49 Cal. App. 3d at 10, 122 Cal. Rptr. at 133. The Board had apparently conceded that *Cooperman's* self-incorporation was not motivated by the desire for benefits. Although *Cooperman's* payment of payroll taxes and claim for benefits show that he was certainly not unaware of this advantage of incorporation, possibly the Board wanted to avoid triggering a judicial ruling that would have forced it to engage in the doubtless very difficult task of proving such subjective intent in the future.

42. Although greater plausibility might attach to the view that it would be unjust to impose liability for payroll taxes on the sole employee-stockholder of a corporation who was in principle ineligible to receive benefits, a challenge to the constitutionality of such a regime has been rejected. *State v. Sherlock Auction & Realty, Inc.*, 235 Kan. 232, 678 P.2d 630 (1984).

43. The Supreme Court of Rhode Island adopted a similar position in a contemporaneous case involving a more technical issue. Agency administrators had denied benefits to a carpenter who was the principal stockholder and president of a corporation on the ground that his very effort to secure work for his company/himself, although unsuccessful and uncompensated (because neither corporation nor the claimant could pay for it), constituted the performance of services inconsistent with being totally unemployed. Without engaging in the expansive social theorizing of the *Cooperman* court, the Rhode Island judiciary refused to countenance an economically inefficient catch-22 that treated unemployed self-incorporated workers differently than traditional employees. *Dumont v. Hackett*, 390 A.2d 375 (R.I. 1978).

44. *See infra* ch. 6.

45. Inexplicably, Aronson asserts that "[s]ocial protection is the one area in which governments have recognized that the self-employed are subject to the same hazards as wage and salary workers. Failure of one's own business may mean a spell of unemployment as well as the loss of physical and financial capital." ARONSON, SELF-EMPLOYMENT at 109. Although he observes that public insurance for the self-employed against illness, disease, injury, and unemployment is "virtually nonexistent" in the United States, *id.* at 110, Aronson fails to document such government recognition.

46. 445 Parl. Deb., H.C. (5th ser.) 1441 (1947) (John Strachey, Minister of Food).

47. It is important to keep in mind the socioeconomic ambiguity inherent in self-employment as a secondary job. Although the classification may refer to an employee who takes up a second job 'on his own,' it also includes the self-employed who began waged work to supplement their income but whose own-account income has in the meantime become subsidiary. *See, e.g.,* Harriet Friedman, *World Market, State, and Family Farm: Social Bases of Household Production in the Era of Wage Labor*, 20 COMP. STUD. IN SOC'Y & HIST. 545, 563 (1978).

48. The secondary self-employed are not counted among the officially reported self-employed.

49. U.S. SMALL BUSINESS ADMINISTRATION, THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT 111-12 (1986).

50. Calculated according to data in John Stinson, Jr., *Multiple Jobholding Up Sharply in the 1980's*, MONTHLY LAB. REV., July 1990, at 3, tab. 4 at 7. Significantly, of these secondary self-employed, 30.0 per cent did all, and 61.8 per cent did some, of that work at home--by far the highest percentages in the nonagricultural sector. *Id.*, tab. 5 at 7. Apart from the large absolute increase, the most striking difference from the situation thirty years earlier is that fifty-seven per cent of the nonagricultural wage and salary workers with a secondary job as self-employed held that position in agriculture in 1958, whereas that figure had declined to twenty-three per cent by 1989.

Calculated according to data in *id.*, tab. 4 at 7; U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: LABOR FORCE tab. 1 at 2 (Ser. P-50, No. 88, Apr. 1959). Earlier data were similar; see *idem*, CURRENT POPULATION REPORTS: LABOR FORCE tab. 2 at 4 (Ser. P-50, No. 30, Mar. 13, 1951). Looked at from a different perspective, between 1956 and 1980, nonagricultural self-employment as a share of all nonagricultural secondary jobs almost doubled—from thirteen per cent in 1956 to twenty-five per cent in 1980, dropping again by 1989 to twenty-three per cent. Calculated according to data in 1 U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS DERIVED FROM THE CURRENT POPULATION SURVEY: A DATABOOK tab. C-18 at 725 (Bull. 2096, 1982); Stinson, *Multiple Jobholding*, tab. 4 at 7.

51. *Martin v. Unemployment Compensation Bd. of Rev.*, 174 Pa. Super. 412, 101 A.2d 421, 423 (1953).

52. For an overview of the case law, see *Unempl. Ins. Rep. (CCH)* ¶ 1901 at 4385 and ¶¶ 1901.20-.398.

53. See e.g., ALA. CODE § 25-4-78 (1990); *Miller v. Director, Ala. Dep't of Indus. Rel.*, 460 So.2d 1326 (Ala. 1984).

54. *Department of Lab. & Indus. v. Unemployment Compensation Bd. of Review*, 203 Pa. Super. 183, 199 A.2d 475, 477 (1964).

55. PA. STAT. ANN. tit. 43, § 802(h) (Purdon 1991). Much of the reported litigation under this provision has involved the issue of whether work not taken up until after the claimant became unemployed was (absolutely disqualifying) self-employment or wage employment, the income from which would merely be set off against benefits. For examples of the very restrictive adjudications, see *Unemployment Compensation Bd. of Review v. Kessler*, 365 A.2d 459 (Pa. Commw. 1976); *Pavlonis v. Commonwealth Unemployment Compensation Bd. of Review*, 426 A.2d 215 (Pa. Commw. 1981).

56. *Cumming v. District Unemployment Compensation Bd.*, 382 A.2d 1010, 1013 (D.C. 1978) (quoting board's position).

57. *Id.* at 1015.

58. *Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Bd. of Review*, 160 Pa. Super. 501, 52 A.2d 362, 263 (1947).

59. See THE MIDYEAR ECONOMIC REPORT OF THE PRESIDENT: TO THE CONGRESS, JULY 30, 1948, tab. 9 at 85 (1948) (\$44.39 in 1945).

60. *Sun Shipbuilding*, 52 A.2d at 365. The judge found that the employer had conceded that the employee would have been laid off in December anyway. *Id.* at 364 n.1.

61. 52 A.2d at 364. One puzzling point is that the worker filed his claim on August 30, 1945; *id.* Unless this is a misprint (his claim was allowed as of

Nov. 14), it is unclear how he could have been eligible for benefits while earning thirty-five dollars per week.

62. *Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Bd. of Review*, 358 Pa. 224, 56 A.2d 254, 259 (1948).

63. *Id.* at 261.

64. *Id.* at 260.

65. For an excellent critique of the opinion, see *Note, Unemployment Insurance--A Discussion of the Eligibility Requirements and the Voluntary Leaving Disqualification*, 17 GEO. WASH. L. REV. 447 (1949).

66. *See Mississippi Employment Security Comm'n v. Medlin*, 171 So.2d 496 (Miss. 1965).

67. *Bolles v. Appeal Bd. of the Mich. Employment Security Comm'n*, 361 Mich. 378, 105 N.W.2d 192 (1960).

68. *Id.* at 195. The opinion, written by Talbot Smith, a former law professor at Berkeley, who also wrote what is arguably the most mordant judicial critique of the so-called control test of employment in interpreting social legislation, is a rare judicial masterpiece of factual directness and lucid reasoning. *See Powell v. Appeal Bd. of Mich. Employment Sec. Comm'n*, 345 Mich. 455, 75 N.W.2d 874, 878-86 (1956) (Smith, J., dissenting).

69. An analogous jurisprudence has developed under the National Labor Relations Act. The National Labor Relations Board may order employers who have discriminatorily discharged employees to reinstate them with back pay. Such employees are then entitled to the difference between what they would have earned had they not been discharged and their actual interim earnings. Both the Board and the reviewing courts of appeal have ruled that for purposes of mitigating the loss of wages, "[s]elf-employment should be treated like any other interim employment." *Heinrich Motors, Inc., v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968). Even where the worker's profit from self-employment is not significant, he will not be deemed to have wilfully lost earnings. *F.E. Hazard, Ltd. v. Moffitt*, 303 N.L.R.B. No. 130, 1991-92 NLRB Dec. (CCH) ¶ 16,768. Since back pay may be awarded only where the interim earnings are less than what the employee's wages would have been, such self-employment must definitionally be sub-bourgeois.

70. *See, e.g., Phillips v. Unemployment Compensation Comm'n*, 323 Mich. 188, 35 N.W.2d 237 (1948) (lawyer in practice for forty-five years).

71. *Slocum Straw Works v. Industrial Comm'n*, 232 Wis. 71, 286 N.W. 593 (1939).

72. Wis. Stat. § 108.04(5)(g) (1937).

73. 2 Soc. Sec. Bd., Unemployment Compensation Interpretation Service: Benefit Series 348, 349 (965-Wis. Ct. D., Dane County Cir. Ct., Oct. 28, 1938). In 1937 Rybacki earned \$1.073 an hour—considerably in excess of the national average for manufacturing of \$0.624. THE MIDYEAR ECONOMIC REPORT OF THE PRESIDENT: TO THE CONGRESS, JULY 30, 1948, tab. 10 at 86 (1948).

74. 2 Soc. Sec. Bd., Unemployment Compensation Interpretation Service: Benefit Series 346 (964-Wis. A, Decision of App. Tribunal, July 1938).

75. *Id.* at 347.

76. *Slocum Straw Works v. Industrial Comm'n of Wisconsin*, *id.* at 348-49 (965-Wis. Ct. D., Oct. 28, 1938).

77. *Id.* at 349. The Supreme Court made the case confusing by tendentiously neglecting to mention that the Commission contested these contentions.

78. *Id.*

79. *Id.* at 351.

80. *Id.* at 350.

81. *Id.*

82. *Id.* at 350, 351.

83. *Id.* at 351.

84. The Supreme Court neglected to disclose that the maid was Rybacki's sister-in-law. *Id.* at 351.

85. Why the court by the same logic did not regard her as the employee of her husband, who "pa[id] the bills for the support of the family," *id.* at 596, is unclear.

86. *Slocum Straw Works v. Industrial Comm'n*, 232 Wis. 71, 286 N.W. 593, 598 (1939).

87. *See, e.g., Nancy Folbre, The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, 16 SIGNS 463 (1991).

88. "Housewifery as a Business" was a not uncommon trope of early twentieth-century home economics. *See, e.g., LYDIA BALDERSTON, HOUSEWIFERY: A MANUAL AND TEXT BOOK ON PRACTICAL HOUSEKEEPING 1-20 (1919).*

89. The employer had argued in its brief that self-employment meant "Attending to one's own affairs." Comment, *Unemployment Compensation--"Self-Employment,"* 1940 WIS. L. REV. 147, 148 (citing Brief for appellant at 17).

90. Although the court did not articulate this character as a ground of its decision, it appeared impressed that:

Mrs. Rybacki testified "she used her earnings for extra expenses, clothing, movies, the baby, company and things like that." ... There is no suggestion...that Mrs. Rybacki was obliged to seek employment either for her support or as a contribution to the household expense. The testimony is...that this was amply provided for by her husband.

Slocum Straw Works, 286 N.W. at 595, 596. The court may therefore have tacitly assumed that in 'mixed marriages'--the husband was a capitalist employing several workers, *id.* at 595--in which the proletarian wife unnecessarily continued to work, she ceased being an "unemployed worker" on whom "[t]he burden of irregular employment...falls...with crushing force." 1931 Wis. Laws ch. 20, § 108.01(1) (Spec. Sess.).

91. 1 Soc. Sec. Bd., Unemployment Compensation Interpretation Service: Benefit Series 816, 816 (712-Pa. R, Pennsylvania Unemployment Compensation Bd. of Review, July 26, 1938).

92. *Id.* at 817.

93. 2 Unemployment Compensation Interpretation Service: Benefit Series 1466 (1763-Mich. A, Feb. 17, 1939).

94. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-73 (1923).

95. *Id.* at 473. Two Iowa cases involving laid-off miner-farmers decided the same day illustrate this point: the one who was able to feed his family was disqualified, whereas the one who was not was eligible. 3 Fed. Security Agency, Unemployment Compensation Interpretation Service: Benefits Series 320 (2543-Iowa A, Iowa Unemp. Comp. Comm'n, Decision of App. Tribunal, Aug. 21, 1939); *id.* at 323 (2544-Iowa R, Iowa Unemp. Comp. Comm'n, Decision of Comm'n, Aug. 21, 1939).

96. In fact, since Rybacki received such an above-average hourly wage, it is plausible that her earnings far exceeded the amount that she paid her sister-in-law.

97. U.S. Employment and Training Adm., Benefit Series Service--Unemployment Insurance TPU-415.15-71 (Hawaii B, No. 437-74, Decision of Referee, May 3, 1974) (Rep. 291-75, Aug. 1974).

98. *Id.*

99. Alternatively, they might have shared the work and both been eligible for partial unemployment benefits.

100. 1937 Iowa Acts ch. 4, § 5(c) at 516. The Social Security Board had recommended that the states not adopt such a requirement because it was not "feasible for the employment security agency to determine that a claimant should again take up some former self-employment." Instead, it suggested

as a more appropriate criterion whether she was unemployed or available for work. SOC. SEC. BD., UNEMPLOYMENT COMP. DIV., MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION 503-504 n. (Employment Security Memorandum No. 13, rev. Nov. 1942). For an overview of state statutes with such provisions in the 1940s, see SOC. SEC. BD., COMPARISON OF STATE UNEMPLOYMENT COMPENSATION LAWS AS OF DECEMBER 31, 1945, at 164-65 (Employment Security Memorandum No. 8, rev. Dec. 1945).

101. *See, e.g.*, 2 Fed. Security Agency, Unemployment Compensation Interpretation Service: Benefit Series 607 (1150-R.I. A, R.I. Unemp. Comp. Bd., Decision of Referee, Oct. 14, 1938); *id.* at 1480 (1772-R.I. A, R.I. Unemp. Comp. Bd., Decision of Referee, Feb. 22, 1939).

102. 1939 Iowa Acts ch. 64, § 2 at 93.

103. 3 Fed. Security Agency, Unemployment Compensation Interpretation Service: Benefit Series 53 (2862-Iowa A, Oct. 31, 1939).

104. *Id.* at 206 (2974-Iowa A, Oct. 14, 1939).

105. IOWA CODE § 96.5.3 and § 96.19.18 (1991). The phrase "to her duties as housewife" was changed to "to the employee's household duties." IOWA CODE § 96.19.18 (1985). The new wording was not the work of the legislature but rather that of the code editor, who "shall edit [the Code] in order that words which designate one gender will be changed to reflect both genders when the provisions of law apply to persons of both genders. The Code editor shall not make any substantive changes." IOWA CODE § 14.13.2(1991). If the legislature meant to treat housewives differently in 1939 and has never voted to eliminate that historical discriminatory intent, then, ironically, the code editor exceeded her authority. *See* Des Moines Register, July 31, 1991, at 9A, col. 1 (letter to editor).

106. *See, e.g.*, Herbert Gintis & Samuel Bowles, *Structure and Practice in the Labor Theory of Value*, REV. RADICAL POL. ECON., Winter 1981, at 1, 8-14; Nancy Folbre, *Exploitation Comes Home: A Critique of the Marxian Theory of Family Labour*, 6 CAMBRIDGE J. ECON. 317 (1982).

107. A few years after *Slocum*, a trial court in an apparently similar case ruled that "[t]he 'little woman' does not work for her husband. The male spouse is not her employer. She is not his employee." *Doughboy Mills, Inc. v. Industrial Comm'n* (Cir. Ct., Dane Cty., Aug. 7, 1944) (cited in 12 Unempl. Insur. Rep ¶ 1901.04 Wis. at 52,164 (CCH)).

